

Constitutional and Legislative
Affairs Committee
**Report on the Public Health
(Wales) Bill**

February 2017



National Assembly for Wales
Constitutional and Legislative Affairs Committee

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The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Current Committee membership:



Huw Irranca-Davies AM (Chair)
Welsh Labour
Ogmore



Dafydd Elis-Thomas AM
Independent
Dwyfor Meirionnydd



Nathan Gill AM
Independent
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West



David Melding AM
Welsh Conservative
South Wales Central

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01. Introduction

The Committee's remit

1. The remit of the **Constitutional and Legislative Affairs Committee** (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced in the National Assembly our approach is to consider:
 - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 7 November 2016, the Minister for Social Services and Public Health (the Minister) introduced the **Public Health (Wales) Bill** (the Bill) and accompanying **Explanatory Memorandum**.³
4. The Assembly's **Business Committee** referred the Bill to the **Health, Social Care and Sport Committee** on 11 October 2016 and, on 1 November 2016, set a deadline of 10 February 2017 for reporting on its general principles.
5. On 7 November 2016, we received a copy of a **letter to Dai Lloyd AM, Chair of the Health, Social Care and Sport Committee** from the Minister enclosing information on the policy intent⁴ for the delegated powers in the Bill.
6. We considered the Bill at our meeting on **21 November 2016**, taking evidence from the Minister and two Welsh Government officials. Following that meeting, we **wrote to the Minister on 13 December 2016** to seek further information. The Minister **responded on 12 January 2017**.

Background

7. The Explanatory Memorandum accompanying the Bill states that:

“The Public Health (Wales) Bill (‘the Bill’) utilises legislation as a mechanism for improving and protecting the health and well-being of the population of Wales. It comprises a set of provisions in discrete areas of public health policy.

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, September 2016

² Functions under Standing Order 21.8 are the responsibility of the **External Affairs and Additional Legislation Committee**

³ Welsh Government, *Public Health (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, November 2016

⁴ Welsh Government, *Public Health (Wales) Bill, Statement of Policy Intent for Subordinate Legislation*, November 2016

While a number of the issues addressed in the Bill are already well established, the Bill also responds to new and emerging health challenges. Taken together the provisions are intended to have a cumulative positive benefit for the population of Wales and seek to put in place conditions which are conducive to good health, in which harms to health can be prevented.”⁵

8. The Bill proposes to introduce changes that:

- re-state restrictions on smoking in enclosed and substantially enclosed public and work places, and give Welsh Ministers a regulation-making power to extend the restrictions on smoking to additional premises or vehicles;
- place restrictions on smoking in school grounds, hospital grounds and public playgrounds;
- provide for the creation of a national register of retailers of tobacco and nicotine products;
- provide Welsh Ministers with a regulation-making power to add to the offences which contribute to a Restricted Premises Order (RPO) in Wales;
- prohibit the handing over of tobacco and/or nicotine products to a person under the age of 18;
- provide for the creation of a mandatory licensing scheme for practitioners and businesses carrying out ‘special procedures’, namely acupuncture, body piercing, electrolysis and tattooing;
- introduce a prohibition on the intimate piercing of persons under the age of 16 years;
- require Welsh Ministers to make regulations to require public bodies to carry out health impact assessments in specified circumstances;
- change the arrangements for determining applications for entry onto the pharmaceutical list of health boards (LHBs), to a system based on the pharmaceutical needs of local communities;
- require local authorities to prepare a local strategy to plan how they will meet the needs of their communities for accessing toilet facilities for public use; and
- enable a ‘food authority’ under the *Food Hygiene Rating (Wales) Act 2013* to retain fixed penalty receipts resulting from offences under that Act, for the purpose of enforcing the food hygiene rating scheme.⁶

9. The Bill mainly reintroduces the provisions of the *Public Health (Wales) Bill* which was introduced on 8 June 2015 and subsequently rejected by the Fourth Assembly at Stage 4 on 16 March 2016. The only substantial difference between the Fourth Assembly Bill that was agreed at Stage 3 and this Bill is the removal of the restriction on the use of e-cigarettes in places such as hospitals, schools, shops, food establishments and on school and public transport.

10. Our predecessor Committee **reported** on the Fourth Assembly Bill in November 2015. It made nine recommendations to the then Minister for Health and Social Services, of which seven were accepted. The then Minister subsequently tabled amendments to give effect to these seven

⁵ *Explanatory Memorandum*, paragraphs 1 and 2

⁶ *Explanatory Memorandum*, paragraph 3

recommendations at Stage 2 and these were agreed to by the Fourth Assembly's Health and Social Care Committee.

02. Legislative competence

11. The Explanatory Memorandum states that the National Assembly has the legislative competence to make the provisions in the Bill by virtue of Part 1 of Schedule 7 to the *Government of Wales Act 2006*, specifically:

- Paragraph 9: Health and Health Services;
- Paragraph 12: Local Government; and
- Paragraph 15: Social Welfare.

12. It also states:

“Part 2 of the Bill contains provisions which remove pre-commencement functions of a Minister of the Crown. Those provisions will be within the Assembly’s legislative competence if the Secretary of State consents to the provisions under Part 3 of Schedule 7 to GOWA 2006. Discussions with the UK Government are ongoing with a view to obtaining that consent. The Welsh Government anticipates that discussions on consent issues will be concluded during Stage 1.”

13. The Explanatory Memorandum indicates that the *Human Rights Acts 1998, Equality Act 2010 and ECHR* have been considered by the Welsh Government as part of its equality impact assessment.⁸ It also indicates that the Welsh Government has conducted an analysis of the Bill against the ECHR - in particular Articles 1, 8 and 14 - and found the balance struck falls within the margin of discretion afforded to Member States in this respect.⁹

14. The Explanatory Memorandum also indicates that the Welsh Government has had regard to the *Rights of Children and Young Persons (Wales) Measure 2011* and states that “the importance of protecting the health of children, and preventing future health harms, is a common theme” across many of the Bill’s provisions.¹⁰

15. In terms of the legislative competence available to make the Bill, the Minister told us she was satisfied that the “Bill falls within the competence of the National Assembly for Wales”, noting that the relevant Crown’s consents from the Secretary of State had now been received.¹¹

16. We asked the Minister whether any provisions of the Bill would be outside competence if the *Wales Bill* was in place now.¹² In her response, the Minister stated that all Bills that have completed Stage 1 scrutiny by April 2018 will be able to continue to Stage 4 under the current conferred powers model.¹³ She added that she was hopeful that the Bill would receive Royal Assent, or at least have completed Stage 1 scrutiny, before the Wales Bill has effect.¹⁴

⁷ Explanatory Memorandum, paragraph 7

⁸ Explanatory Memorandum, paragraph 901

⁹ Explanatory Memorandum, paragraphs 905 - 915

¹⁰ Explanatory Memorandum, paragraphs 916 - 923

¹¹ CLA Committee, 21 November 2016, RoP [7–8]

¹² The Wales Bill has subsequently received Royal Assent and is now the *Wales Act 2017*.

¹³ CLA Committee, 21 November 2016, RoP [17]

¹⁴ CLA Committee, 21 November 2016, RoP [14]

17. In her letter dated 12 January 2017, the Minister told us:

“The Wales Bill will not have an impact on our ability to enforce the provisions in the Public Health (Wales) Bill because the Public Health (Wales) Bill contains its own subordinate legislation enabling and enforcement provisions. The new reserved powers model in the Wales Bill will not remove or repeal enabling and enforcement powers contained within the Public Health (Wales) Bill.

Turning to the Committee’s question as to whether any provisions in the Public Health (Wales) Bill would be outside the Assembly’s legislative competence if the Wales Bill was in place now, I am content that none would be ... Health is currently a devolved matter under the Government of Wales Act 2006, and it remains as such under the Wales Bill.

I am content that if the Wales Bill were to be in place now, the Public Health (Wales) Bill would be within the Assembly’s legislative competence.”

18. When asked whether there had been any changes at all to the Bill on issues of human rights as a result of changes to the Fourth Assembly Bill, the Minister replied that no changes had been made.¹⁵

Our view

19. We note that no issues have been raised with the Minister by the UK Government regarding the National Assembly’s ability to make this legislation under Schedule 7 to the Government of Wales Act 2006.

20. In so doing, we also note the Secretary of State has now provided the consents referred to as being needed in the Llywydd’s (Presiding Officer’s) Statement of Legislative Competence.

21. We note the Minister’s comments regarding human rights. We acknowledge that the Explanatory Memorandum covers the consideration given to the impact of the Bill on human rights. Based on our predecessor Committee’s consideration of the Fourth Assembly Public Health (Wales) Bill and the Minister’s confirmation that no changes have been made on issues of human rights, we are satisfied that these matters have been appropriately considered.

22. Nevertheless, we do have some concerns regarding the training of enforcement authorities so that they are fully aware of their human rights obligations (in particular with regard to Article 8 and Article 1 of Protocol 1 of the ECHR). We highlight these concerns in paragraphs 39 to 48.

23. The Minister’s letter states that if the Wales Bill were to be in place now, the Public Health (Wales) Bill would be within the Assembly’s legislative competence. We note the Bill’s Explanatory Memorandum states that intimate piercing is not automatically a sexual or criminal offence under the Sexual Offences Act 2003.¹⁶ However, if section 92 is creating or modifying a sexual offence, then it may be outside the Assembly’s legislative competence under the powers given to the National Assembly under the Wales Act 2017.¹⁷ Given that the Explanatory Memorandum (at paragraphs 147 to 151) refers to the sexual element of intimate piercing, we consider that section 92 is creating a

¹⁵ CLA Committee, 21 November 2016, RoP [55–56]

¹⁶ Explanatory Memorandum, paragraph 147

¹⁷ Since the Minister’s letter of 12 January 2017, the Wales Bill has received Royal Assent.

sexual offence and may therefore be outside the Assembly's legislative competence under the reserved powers model.

24. We make this observation not to cast doubt on the validity of the Welsh Government's Bill or whether it is currently within the Assembly's legislative competence, but as part of our intention to monitor the impact of the new devolution settlement on the ability of the National Assembly to make coherent law for Wales in the future.

03. General observations

25. As previously noted, the Bill covers the same policy area as the previous Public Health (Wales) Bill which reached Stage 4 in the Fourth Assembly. The Minister highlighted the differences between both Bills, saying:

“...we are reintroducing the Bill to the Assembly, as it was after the amending stages, without the provisions regarding the restriction of the use of nicotine-inhaling devices in some public places ... that step was taken in order to build consensus around the Assembly for the remaining provisions of the Bill, and ... in order to realise the benefits to public health that are contained within it.”¹⁸

26. We asked the Minister where the changes to the Bill were explained in the accompanying Explanatory Memorandum. The Minister informed us:

“The explanatory memorandum, which we published alongside the introduction of the Bill, is an entirely new document to reflect the changes that took place during the amending stages of the Bill. Previous sections in it, referring to the use of nicotine-inhaling devices in public places, have been removed from the explanatory memorandum and there are new sections that have been added throughout, reflecting the changes that were made at Stage 3. For example, the most substantive of these relates to the provisions regarding smoking on school grounds, hospital grounds and public playgrounds and those relating to the health impact assessments, which were also added at Stage 3. It’s also been updated throughout to refer to recent policy developments, and updated data and statistics have come to our attention since the last version of the explanatory memorandum as well.”¹⁹

27. We asked the Minister whether the Bill adds or removes powers to make subordinate legislation compared to the Fourth Assembly Bill. She told us:

“The only changes that relate to the powers to make subordinate legislation are those that were made through the amending stages, as the Bill proceeded through the last Assembly. So, those powers relating to the restriction of the use of nicotine-inhaling devices have been removed and new powers have been added with regard to the addition of regulation-making powers relating to health impact assessments. So, those are the changes that have taken place.”²⁰

28. The Minister confirmed that this was the reason for the overall reduction in the number of regulation making powers in the Bill.²¹

29. We were informed by the Minister that any changes to the Bill were made to make it more coherent; this included some minor changes in wording to improve the clarity and consistency of the

¹⁸ CLA Committee, **21 November 2016**, RoP [21]

¹⁹ CLA Committee, **21 November 2016**, RoP [23]

²⁰ CLA Committee, **21 November 2016**, RoP [26]

²¹ CLA Committee, **21 November 2016**, RoP [28]

Bill. She went on to highlight some of the changes which have taken place since Stage 4 of the Fourth Assembly Bill, such as:

- removing the ability to enter a dwelling to determine if any smoke-free signage offences are being committed in order for a more proportionate approach to the rights of the homeowner under article 8 of the ECHR (part 2);
- giving special focus to health impact assessments by giving it its own part (part 5); and
- realigning dates with local authority election cycles with regard to provisions for local toilet strategies (part 7).²²

30. The Minister confirmed that all amendments which were agreed by the Fourth Assembly had been retained in the Bill, excluding those which related to provisions regarding nicotine-inhaling devices.²³

Our view

31. We note the Minister’s explanations on how the Bill differs to that which was considered in the Fourth Assembly.

32. However, we consider it unsatisfactory that the Explanatory Memorandum did not compare the Bill introduced into the National Assembly with the Bill rejected in the Fourth Assembly. In our view, that would have been a more transparent approach.

²² CLA Committee, 21 November 2016, RoP [30-32]

²³ CLA Committee, 21 November 2016, RoP [34]

04. Observations on specific powers to make subordinate legislation

Background

- 34.** The Bill includes 64 powers permitting the Welsh Ministers to make subordinate legislation (mainly in the form of regulations). The rationale for the use of these powers and for the parliamentary procedure attached to them is contained in Chapter 5 of the Welsh Government’s Explanatory Memorandum.
- 35.** Of the 64 powers to make subordinate legislation:
- 28 are subject to the affirmative procedure;
 - 34 are subject to the negative procedure;
 - 1 is subject to the negative or affirmative procedure dependent on the judgement of Welsh Ministers’; and
 - 1 has no procedure as it is applicable to commencement orders.
- 36.** The Bill also includes two powers to issue guidance and one power for county, county borough and community councils to make byelaws.
- 37.** Our scrutiny session focused on those powers of most interest to us and our consideration below considers the specific matters that we wish to draw to the attention of the National Assembly.

Section 15 – Enforcement authorities

- 38.** Section 15 of the Bill places a duty on enforcement authorities to enforce the smoke-free provisions in Chapter 1 of the Bill and enables the Welsh Ministers to designate persons (or descriptions of persons) as enforcement authorities. County and county borough councils in Wales are currently designated to enforce the smoke-free provision of the *Health Act 2006*.
- 39.** However, the Bill does not require the Welsh Ministers to designate local authorities. This issue was raised by our predecessor Committee who queried whether it would be desirable for other public bodies, voluntary organisations or private companies to be designated as enforcement officers. The then Minister indicated that public authorities would be the enforcement authorities under the Bill but didn’t table an amendment to this effect at Stages 2 or 3.
- 40.** We asked the current Minister why she had also followed this approach. She told us that she had done so because “the First Minister gave a commitment to not make any substantive changes to the Bill”²⁴ but added:

“However, I have asked officials to look at identifying all potential public enforcement bodies, with a view to potentially introducing amendments at the next stage.”²⁵

- 41.** She went on to say:

²⁴ CLA Committee, **21 November 2016**, RoP [59]

²⁵ CLA Committee, **21 November 2016**, RoP [59]

“I would imagine that enforcement authorities would be public authorities, which is why I’ve asked officials to compile a comprehensive list that we could look at introducing in terms of amendments at Stage 2.”²⁶

42. Following the meeting **we wrote to the Minister** to seek clarification on her intention to table an amendment at Stage 2 to state that public authorities will be the enforcement authorities.

43. In her **letter of 12 January 2017**, the Minister told us that she needed to be satisfied “that this course of action would not preclude other appropriate enforcement authorities from being designated, if required.”. She added that as a result of further work, it was her intention to bring forward an amendment at Stage 2 to meet the recommendation of our predecessor Committee.

44. During the meeting we also sought reassurances that the variety of public authorities that could act as enforcement authorities would receive an appropriate level of human rights training. The Minister said that there is a communications plan for the Bill and that:

“we would be very keen to ensure that that anybody who has a duty under the Act is fully aware of what that duty is and how they should go about undertaking their work in the context of that duty.”²⁷

45. An accompanying Welsh Government official expanded on these points, saying:

“...local authorities are going to be one of the main enforcement authorities ... and they’re already very familiar with their obligations under the Human Rights Act 1998. They are bound by it, pursuant to section 6. So, they’re well versed in the duties that are placed upon them.”²⁸

Our View

46. We welcome the Minister’s confirmation that she will table an amendment at Stage 2 to clearly state on the face of the Bill that public authorities will be the enforcement authorities.

47. Despite the Minister’s assurances that a communication plan for the Bill would ensure the enforcement authorities would be aware of their human rights obligations under the ***Human Rights Act 1998*** we are concerned this wouldn’t go far enough to instil the obligations and rigour such a role would entail. One approach, for example, maybe to include a provision that imposes a duty on the Welsh Ministers to issue guidance to enforcement authorities on how they should exercise powers of entry under the Bill, including, in particular, having regard to human rights. Such guidance would assist in the training of enforcement authorities and could reinforce for example the Article 8 right to respect for the home.

Recommendation 1. We recommend that the Minister should table an amendment to the Bill to include a provision that ensures enforcement authorities are fully aware of their human rights obligations, perhaps for example through the issue of guidance.

²⁶ CLA Committee, **21 November 2016**, RoP [61]

²⁷ CLA Committee, **21 November 2016**, RoP [64]

²⁸ CLA Committee, **21 November 2016**, RoP [65]

Section 73 - Fees

48. Section 73 of the Bill provides a local authority with the ability to charge a fee to the holder of a special procedure licence or a premises or vehicle approval.

49. The Explanatory Memorandum states:

“Regulations may make provision about the way in which a local authority is to determine the amount of the fee charged, having regard to the costs incurred or expected to be incurred by the authority in connection with this Part, as well as the way the fee is paid, repaid or recovered if unpaid.”²⁹

50. The statement of policy intent says:

“Section 73 provides a local authority with the ability to charge a fee to the holder of a special procedure licence or a premises or vehicle approval. This fee may be applied either periodically or otherwise for as long as the licence/approval has effect.

Section 73 also gives the local authority the power to determine the amount of a fee charged, having regard to the costs incurred or expected to be incurred by the authority in connection with Part 3.

Regulations made under 73(4) may make provision about the way in which a local authority is to determine the amount of the fee. Regulations made under 73(5) may also make provision for the way the fee is paid; repayment of a fee (or proportion of it) in cases of overpayment; and recovery of a fee due to an authority and unpaid.”³⁰

51. Following the judgment of the Court of Justice of the European Union on the issue of licensing fees in the Hemming case (**Case C-316/15**) we asked the Minister if the Bill complies with the EU Services Directive. She was content that the Bill will comply as it “only allows for the fee to be charged on the basis of the administrative costs for the licence”,³¹ adding “there’s a provision later on in the Bill to add other costs, but this very much fits in with the ruling.”³²

52. An accompanying Welsh Government official clarified that the Bill was drafted to ensure it would be compliant with the services directive whatever the outcome of the Hemming case, noting:

“So, there’s a very important distinction here, in that in Hemming, the power that they were talking about allows the local authority to charge an applicant a fee. Basically, in Hemming, what they said was that at the time of application, an applicant can only be charged an amount for the administration costs—so, the amount of actually processing the application itself. The big distinction here is that, in section 73 of the Bill, it’s not the applicant who is charged the fee. They are already a licence holder by the time they’re charged that additional

²⁹ Explanatory Memorandum, Annex 1 – Explanatory notes, paragraph 141

³⁰ Welsh Government, **Public Health (Wales) Bill, Statement of Policy Intent for Subordinate Legislation**, November 2016, page 45

³¹ CLA Committee, **21 November 2016**, RoP [76]

³² CLA Committee, **21 November 2016**, RoP [76]

amount, so it doesn't actually fall within the remit of the services directive, and we're content that it, therefore, fits with Hemming."³³

Our view

53. We note the Minister's approach to drafting this part of the Bill to ensure that it would comply with the EU Services Directive regardless of the outcome of the Hemming case.

Section 90 – Power to add or remove special procedures

54. Section 90(1) of the Bill enables Welsh Ministers to amend, by regulations subject to the affirmative procedure, the list of special procedures listed in section 54. Subsection 90(5) states:

"Regulations under this section may make amendments to this Part that are consequential upon the amendment to section 54 effected by the regulations."

55. We asked the Minister to clarify the intention of the provision. She told us:

"... it allows Ministers on a future date to define a new procedure that may be added to the list and it's important that the definition is there ... for reasons of clarity so that people understand what the Bill entails and what is exactly covered under the Bill. So, it is about giving Ministers the flexibility in future to add new definitions to the Bill, but also to ensure that the Bill keeps step with changing trends and changing fashions, because there are things perhaps that might occur in terms of special procedures in future that actually aren't popular now or just things that we haven't even thought of and people don't do now. So, it's about giving the Bill the flexibility to be futureproofed."³⁴

56. Following the meeting **we wrote to the Minister** to seek clarification as to what 'consequential' means in the context of subsection 90(5). **Her response** stated:

"Section 90(1) allows Welsh Ministers to make regulations to add or remove special procedures from the list of procedures which are captured by the licensing system. ... For example, if a new special procedure were to be added to the list, we would need to define it and that definition would best be placed in the interpretation section. Section 90(5) allows for this type of consequential amendment to be made to Part 3 of the Bill by way of regulations, subject to the affirmative procedure. It therefore provides a very narrow regulation-making power which helps to ensure the legal framework is future-proofed and able to respond to an industry which is continually evolving."

Our view

57. We welcome the Minister's confirmation that the consequential power in section 90(5) of the Bill is a "very narrow regulation-making power". We agree that it is a very narrow power.

58. In our view, this interpretation of "consequential" does not apply just to this particular Minister's use of the power under this particular Bill – it also applies to the use of consequential powers by any Welsh Minister (past, present and future), whether under this Bill or any other primary

³³ CLA Committee, **21 November 2016**, RoP [77]

³⁴ CLA Committee, **21 November 2016**, RoP [74]

legislation. As such, we will be monitoring the use of consequential powers by the Welsh Ministers during the Fifth Assembly.

59. We also welcome the application of the affirmative procedure to this consequential power, given that it can be used to amend primary legislation.