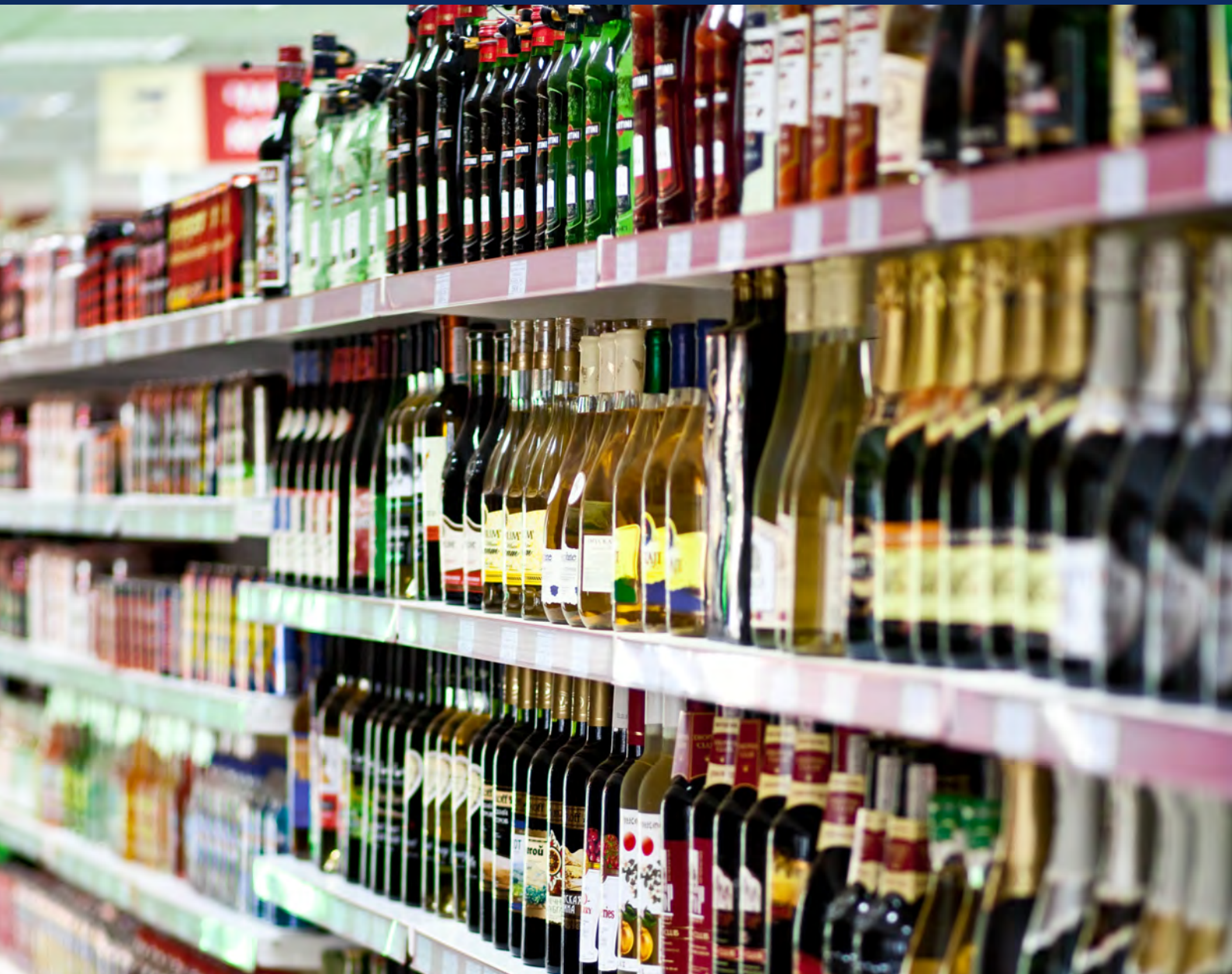


Report on the Public Health (Minimum Price for Alcohol) (Wales) Bill

March 2018



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Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCLA@assembly.wales**

Twitter: **@SeneddCLA**

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March 2018



About the Committee

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 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.

Committee Chair:



Mick Antoniw AM

Welsh Labour
Pontypridd

Current Committee membership:



Mandy Jones AM

UKIP Wales
North Wales



Dai Lloyd AM

Plaid Cymru
South Wales West



David Melding AM

Welsh Conservatives
South Wales Central

The following Member was also a member of the Committee during the scrutiny of the Bill



Nathan Gill AM

UKIP Wales
North Wales

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Recommendation 2. We recommend that the Cabinet Secretary should table amendments to the Bill, placing a duty on the Welsh Ministers to issue guidance about the exercise of all powers and duties under the Bill, and to ensure that the Bill includes appropriate duties to have regard to that guidance. Page 13

Recommendation 3. We recommend that an amendment should be tabled to place the minimum unit price of alcohol on the face of the Bill. Page 16

Recommendation 4. In conjunction with recommendation 3, we recommend that any future change to the minimum unit price of alcohol in section 1 of the Bill should be achieved by the use of a superaffirmative procedure. Page 16

Recommendation 5. We recommend that the Cabinet Secretary justifies during the Stage 1 debate:

- the inclusion of illustrative examples of calculations of the applicable minimum price of alcohol on the face of the Bill, and
- explains how he will avoid the potential for confusion caused where the figure used in the illustrative example differs from that included either on the face of the Bill (our preference) or in regulations. Page 21

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1. 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 the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 23 October 2017, Rebecca Evans AM, the Minister for Social Services and Public Health (the Minister) introduced the Public Health (Minimum Price for Alcohol (Wales) Bill³ (the Bill) and accompanying Explanatory Memorandum.⁴ The First Minister authorised Vaughan Gething AM, Cabinet Secretary for Health and

¹ National Assembly for Wales, **Standing Orders of the National Assembly for Wales**, October 2017

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

³ Available on the **Bill page**

⁴ Welsh Government, **Public Health (Minimum Price for Alcohol (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes**, October 2017

Social Services (the Cabinet Secretary), as the new Member in Charge of the Bill, from 9 November 2017.⁵

4. The National Assembly's Business Committee referred the Bill to the Health Social Care and Sport Committee on 3 October 2017, and on 10 October 2017 set a deadline of 16 February 2018 for reporting on its general principles.⁶ The reporting deadline was subsequently extended to 2 March by the Business Committee at the request of the Chair of the Health and Social Services Committee.⁷

5. On 23 October 2017, we received a copy of a letter⁸ from the Minister enclosing the Statement of Policy Intent.⁹

6. We considered the Bill at our meeting on 27 November 2017, taking evidence from the Cabinet Secretary and three Welsh Government officials.

Background

7. According to the Welsh Government's Explanatory Memorandum:

“The ultimate objective of the Bill is to tackle alcohol-related harm, including alcohol-attributable hospital admissions and alcohol-related deaths in Wales, by reducing alcohol consumption in harmful and hazardous drinkers. In particular, the Bill is targeted at protecting the health of harmful and hazardous drinkers (including young people) who tend to consume greater quantities of low-cost and high-alcohol content products.”¹⁰

8. The Explanatory Memorandum also notes that the Bill “gives effect to the Welsh Government's determination to provide a legislative basis for addressing

⁵ **Letter from Rt Hon Carwyn Jones AM, First Minister to the Llywydd, Member in Charge, Government Bills**, 9 November 2017

⁶ Business Committee, **Report on the timetable for consideration of the Public Health (Minimum Price for Alcohol) (Wales) Bill**, October 2017

⁷ Business Committee, **Revised timetable for consideration of the Public Health (Minimum Price for Alcohol) (Wales) Bill**, January 2018

⁸ Letter from Rebecca Evans AM, Minister for Social Services and Public Health to Dai Lloyd AM, Chair of Health, Social Care and Sport Committee, **Public Health (Minimum Price for Alcohol) (Wales) Bill**, 23 October 2017

⁹ Welsh Government, **Public Health (Minimum Price for Alcohol) (Wales) Bill. Statement of Policy Intent for Subordinate Legislation to be made under this Bill**, October 2017

¹⁰ Explanatory Memorandum, paragraph 14

some of the longstanding and specific health concerns around the effect of excess alcohol consumption in Wales”.¹¹

9. The Bill provides for a minimum price for the sale and supply of alcohol in Wales by certain persons and makes it an offence for alcohol to be sold or supplied below that price.

10. Specifically, the Bill:

- sets out the formula for calculating the applicable minimum price for alcohol, by multiplying the percentage strength of the alcohol, its volume and the minimum unit price (MUP) (section 1);
- creates a power for the Welsh Ministers to make regulations to specify the MUP (section 1);
- creates an offence for an alcohol retailer to supply alcohol, or to authorise the supply of alcohol, from qualifying premises in Wales, to a person in Wales, at a selling price below the minimum price for alcohol (section 2);
- lays down rules relevant to determining the applicable MUP in relation to alcohol supplied through a variety of special offers (sections 5-7);
- establishes a local authority-led enforcement regime with powers to bring prosecutions (sections 10-12); and
- creates powers of entry for authorised officers of a local authority (sections 13-16), an offence of obstructing an authorised officer (section 18) and the power to issue fixed penalty notices (section 9).

11. The Explanatory Memorandum also identifies how the Bill fits into the Welsh Government’s wider policy objectives:

“This Bill, in common with the Public Health (Wales) Act 2017, seeks to build on commitments in the Welsh Government’s Programme for Government Taking Wales Forward and responds to important public health challenges in Wales. The approach taken in the Bill complements the approach outlined in the Wellbeing of Future Generations (Wales) Act 2015, which positions principles such as

¹¹ Explanatory Memorandum, paragraph 1

sustainability, prevention and early intervention at the centre of public services in Wales.”¹²

12. The introduction of the Bill followed a consultation exercise on a draft Public Health (Minimum Price for Alcohol) (Wales) Bill in 2015.¹³

¹² Explanatory Memorandum, paragraph 12

¹³ Welsh Government Consultation Document, ***Draft Public Health (Minimum Price for Alcohol) (Wales) Bill and Explanatory Memorandum***, 15 July 2017

2. Legislative competence

13. The Explanatory Memorandum indicates that the National Assembly has the legislative competence to make the provisions in the Bill by virtue of section 108 and Part 1 of Schedule 7 to the *Government of Wales Act 2006*, specifically:

- Paragraph 9: Health and health services;
- Paragraph 12: Local government;
- Paragraph 15: Social welfare.¹⁴

14. The Bill is similar in purpose to a Bill introduced in and subsequently passed by the Scottish Parliament. However, the Scottish legislation was subject to a legal challenge led by the Scotch Whisky Association. The main basis for the challenge was that minimum pricing may contravene EU law by adversely affecting trade and the free movement of goods. On 15 November 2017, the UK Supreme Court unanimously held that the *Alcohol (Minimum Pricing) (Scotland) Act 2012* did not breach EU law, that minimum pricing is appropriately targeted, lawful and proportionate and so was within the competence of the Scottish Parliament.

15. The Cabinet Secretary told us he believed the Bill is within the National Assembly's competence, a point he felt was reinforced by the Supreme Court judgment on the Scottish legislation.¹⁵ He also advised that the UK Government had not "raised any substantial concerns about competence with the current framework that we're operating under".¹⁶ However, he added that while currently within the National Assembly's competence, the Welsh Government believes that this position "is likely to change with the passage of the Wales Act 2017".¹⁷

16. The consideration of human rights is a requirement when assessing legislative competence by virtue of section 108(6) of the *Government of Wales Act 2006*.

17. The Explanatory Memorandum to the Bill states that the Welsh Government "is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (the ECHR)".¹⁸ It also states that:

¹⁴ Explanatory Memorandum, paragraphs 8 and 9

¹⁵ Constitutional and Legislative Affairs Committee (CLA Committee), 27 November 2017, RoP [11]

¹⁶ CLA Committee), 27 November 2017, RoP [11]

¹⁷ CLA Committee), 27 November 2017, RoP [15]

¹⁸ Explanatory Memorandum, paragraph 418

“In terms of the enforcement regime proposed by the Bill, the Welsh Government is also satisfied that it is also either compatible with the ECHR (specifically, Articles 6, 8 and Article 1 of Protocol 1) or is capable of being exercised in a manner that is so compatible. The Welsh Government considers that the proposed enforcement regime would achieve a fair and proportionate balance between the protection of the rights of those affected by those powers of entry, and the effectiveness of the enforcement of the proposed regime.”¹⁹

18. In terms of human rights issues associated with the Bill, the Cabinet Secretary told us:

“We think it’s human rights compliant. The human rights that are engaged are not absolute rights, and the European Court has accepted that as well. So, this is going back to the Supreme Court judgment: is this a proportionate means of achieving a legitimate aim and within the latitude afforded to states and legislatures? And the Supreme Court definitively said, ‘Yes, it is.’”²⁰

19. We pursued the issue of human rights in the context of section 16 of the Bill, which, under subsection (1), enables authorised officers entering premises under sections 13, 14 and 15 to take “such other persons as the officer consider appropriate”. In particular, we sought clarification about the breadth of this phrase and how the Cabinet Secretary would ensure that it is not abused and used in a way that would not be thought proportionate. He told us:

“Well, it’s a similar phrasing to some of that used in the recent Public Health (Wales) Act 2017, as it now is, and there’s something here about understanding that there’s an understood enforcement regime. We’re not going to create an entirely separate regime with a new body; these are local authorities exercising their powers, well understood, and they will already have relationships with all of the premises that we’re talking about. I think that’s important, and it shouldn’t be a surprise, therefore, in the way they would go about their duties, because off-licences and licensed premises understand this already, and they engage with them on a regular basis already. So, I don’t think there’s any mischief or mystery here. We’re trying to set out the most simple regime that is consistent with our most recent piece of legislation as well.”²¹

¹⁹ Explanatory Memorandum, paragraph 421

²⁰ CLA Committee, 27 November 2017, RoP [94]

²¹ CLA Committee, 27 November 2017, RoP [96]

20. We asked why the word “appropriate” was used in section 16(1) rather than “necessary”, particularly as its meaning is not qualified in any way. The Cabinet Secretary explained that:

“... this comes back to what barriers and bars you want to set for enforcement action to take place. It’s the same formulation we’ve used in the public health Act about how enforcement powers are to be exercised in practice, and it still sets a bar for the officer to act within. They’ve still got to exercise their powers within a proportionate and legitimate manner. So, I’m quite comfortable with what is appropriate.”²²

21. When pushed on the issue of “appropriate” not being qualified, he said:

“... it’s still got to be how they exercise their powers under the Act, and appropriate to the way in which they exercise their powers of enforcement, and that’s the point. So, it’s directly relevant to how they exercise the enforcement powers...”²³

22. A Welsh Government official added that the Police and Criminal Evidence Act 1984 (PACE) Code B “provides for a number of requirements, one of which would be that an officer entering would have to introduce themselves and anyone they have with them”,²⁴ and said:

“... they’d be using that same legislation [correction: framework] to govern the trading standards and other regulatory functions that they currently undertake, so, as this Bill is kind of linked in very much to that for its enforcement and implementation, we don’t envisage there would be an issue with that, but we would pick up the issue of guidance and training in the bespoke guidance that we’ll issue.”²⁵

Our view

23. We note that no issues have been raised with the Cabinet Secretary regarding the National Assembly’s ability to make this legislation under section 108 and Schedule 7 to the *Government of Wales Act 2006* (as currently in force).

24. We also note that human rights are engaged as outlined in the Explanatory Memorandum and in the evidence provided by the Cabinet Secretary.

²² CLA Committee, 27 November 2017, RoP [99]

²³ CLA Committee, 27 November 2017, RoP [101]

²⁴ CLA Committee, 27 November 2017, RoP [105]

²⁵ CLA Committee, 27 November 2017, RoP [107]

25. We note that the Police and Criminal Evidence Act 1984 (PACE) Code B requires an officer entering premises to introduce themselves and anyone they have with them. We note that under section 16(2) of the Bill, the officer must inform the occupier of the officer's name. We see no reason why such a requirement should not apply to "such other persons" as the officer takes into the premises under section 16(1).

26. We note the Cabinet Secretary's comments that the Bill contains similar phrasing to some of that used in the *Public Health (Wales) Act 2017*. In our *Report on the Public Health (Wales) Bill*²⁶, we expressed concerns about the training of enforcement authorities. Those concerns about training apply equally to this Bill.

27. We note that bespoke guidance will be issued in respect of the Bill and accordingly powers of entry. This being the case, we believe that there should be a duty placed on the officer to have regard to guidance issued by the Welsh Government.

Recommendation 1. We recommend that the Cabinet Secretary should table an amendment to section 16 of the Bill to require the occupier to be informed of the names of persons accompanying an officer when entering premises.

Recommendation 2. We recommend that the Cabinet Secretary should table amendments to the Bill, placing a duty on the Welsh Ministers to issue guidance about the exercise of all powers and duties under the Bill, and to ensure that the Bill includes appropriate duties to have regard to that guidance.

28. The guidance would have to cover powers of entry under the Bill. We believe this approach would allow the Welsh Ministers to issue up-to-date and tailored guidance.

²⁶ Constitutional and Legislative Affairs Committee, *Report on the Public Health (Wales) Bill*, February 2017

3. General observations

Balance between what is on the face of the Bill and what is left to subordinate legislation

29. We asked the Cabinet Secretary how he had decided what to put on the face of the Bill and what to leave to subordinate legislation. He explained that the Welsh Government had “deliberately drawn up a short Bill” and added:

“There’s also the balance of what is better explained either in a memorandum or in regulations. For example, we made a deliberate choice, unlike [correction: like] in Scotland, to keep the price itself off the face of the Bill...

... but then there’s a choice here about something where you would expect that, over time, if this regime is to be successful and take account of evidence and understand whether (a) the evidence you had about the initial setting of the level still makes sense a period of time afterwards, and if we put that on the face of the Bill, we’d have to pass primary legislation to change it, or to take a regulation-making power for Ministers to be able to change the face of the Bill, which legislators in almost all Parliaments have an issue with and don’t like the Government taking power to change the face of a Bill.”²⁷

30. The Cabinet Secretary also highlighted that the regulation-making power (contained in section 1(2)) was subject to the affirmative procedure “so Members positively have to vote for it as well”.²⁸

31. The Cabinet Secretary explained why section 1(3) of the Bill uses an example of £0.50p to illustrate how the minimum price for alcohol would be calculated:

“The reason why 50p is mentioned on the face of the Bill is that there are examples of how to calculate the price rather than the setting of the price. And, actually, that would remain the same whether the ultimate minimum unit price was 60p or 35p. You’d still go through the same formula to arrive at the answer as to what the minimum unit [correction: delete ‘unit’] price should be. So, that’s an illustrative point on the face of the Bill to show how it’s calculated, rather than the choice that we made about where it’s most effective to pitch the

²⁷ CLA Committee, 27 November 2017, RoP [26 and 28]

²⁸ CLA Committee, 27 November 2017, RoP [28]

minimum unit price at the start point and then subsequently thereafter.”²⁹

32. He acknowledged that the Welsh Government had thought about putting the minimum unit price on the face of the Bill, saying:

“... there was some consideration about it, because, actually, it’s still the challenge of how you then change the face of the Bill, and I’m acutely well aware that legislatures typically don’t like Ministers reserving powers for themselves to change what is on the face of legislation.”³⁰

Our view

33. The minimum unit price for alcohol is fundamental component of the Bill yet it is to be set using a regulation-making power subject to the affirmative procedure, rather than appearing on the face of the Bill.

34. We have some concerns with the approach adopted and repeat here the arguments we put to the Cabinet Secretary in our evidence session.

35. By putting the MUP in regulations, it would mean that no Assembly Member could table an amendment to the Bill, for example, to set a higher price to capture a much broader group of drinkers. Such drinkers while they may not have addiction or dependency problems, could be consuming alcohol at a level that would have a health impact. The only option available to Assembly Members would be to accept or reject the MUP set out in regulations because they cannot be amended. As such, the approach adopted restricts the power of the legislature.

36. Also, it strikes us as strange that as the Bill is currently drafted, Assembly Members would have the right to amend the MUP figure used in an illustrative calculation but not the actual MUP to be in force in law.

37. We believe that it would be much better to place the MUP on the face of the Bill and to provide the Welsh Ministers with a power to amend that figure using regulations subject to a superaffirmative procedure.

38. In our view, this would lead to a much more thorough debate on the central principle of this Bill, which is what the minimum unit price for alcohol should be.

39. In reaching this view we note the comments of the Cabinet Secretary regarding the amendments of primary legislation by secondary legislation, so

²⁹ CLA Committee, 27 November 2017, RoP [37]

³⁰ CLA Committee, 27 November 2017, RoP [46]

called “Henry VIII powers”. This committee and its predecessor have consistently expressed concern at the excessive use of Henry VIII powers and the application of the negative procedure to such powers.

40. We have accepted that there are circumstances where the use of Henry VIII powers, while not ideal, represents a sensible and appropriate compromise, particularly where the use of primary legislation to make changes to existing Acts would be unduly excessive. However, such powers should always be subject to the affirmative procedure as a minimum.

41. We therefore do not consider it appropriate to argue that significant matters of public policy should be consigned to regulation-making powers because there may be a need to change policy in the future and legislatures do not like primary legislation being amended using subordinate legislation to effect such changes.

42. Whether a matter appears on the face of the Bill should be determined by its policy significance rather than whether it may (or may not) need to change in the future.

Recommendation 3. We recommend that an amendment should be tabled to place the minimum unit price of alcohol on the face of the Bill.

Recommendation 4. In conjunction with recommendation 3, we recommend that any future change to the minimum unit price of alcohol in section 1 of the Bill should be achieved by the use of a superaffirmative procedure.

43. Placing the MUP on the face of the Bill may also help alleviate any confusion potentially caused by having a MUP within an illustrative example on the face of the Bill that is different from the MUP contained in regulations. We consider the use of illustrative examples on the face of the Bill in Chapter 4.

Clarity of language used in the Bill

44. We explored the use of some of the wording in the Bill, for example the use of “adduced” in section 2(3) and “immaterial” in section 2(4), as well as the phrase “and related expressions are to be construed accordingly” in section 3(1).

45. The Cabinet Secretary said this is :

“... about what your view is on how legislation should be drafted. The word ‘adduced’ is quite common use for lawyers and for courts, it’s got certainty around it, and that’s part of the challenge about who you’re writing the legislation for. I don’t think it really affects the operation of the regime. I think that people who are subject to the law, retailers, will

understand perfectly what the law requires of them. I actually think the word ‘immaterial’ is pretty common and easy to understand. I don’t quite understand the need to simplify that ...

... courts understand perfectly what it is to adduce evidence. It’s not that unusual a term when you’re coming to actually enforcing and making the powers real.”³¹

and

“...this is actually about trying to provide certainty; so, not just about the common phraseology for adducing in legislation, but also it’s directly linked to the Licensing Act 2003 as well. We want to have certainty between the two different pieces of legislation.

When it comes to ‘related expressions to be construed accordingly’, this is actually the way in which you talk about the supply of alcohol. So, alcohol to be supplied, that has been supplied So, we’re trying not to have to redefine every single time that there’s slight variation in how ‘the supply of alcohol’ is used in the Bill. And I don’t think that makes it unclear or inaccessible, to be fair ...”³²

Our view

46. We note the Cabinet Secretary’s comments. We agree about the need for law to provide legal certainty. However, clarity must be provided to those affected by the legislation, not just for the courts.

47. We note that the Welsh Government is seeking to modernise its approach to making legislation and in many respects we welcome the approach being adopted. However, we believe its desire to modernise should also cover some of the language used in drafting legislation. That said, we recognise that this may be simpler said than done and there may be sound reasons for a particular approach adopted and the use of more legally-based language.

³¹ CLA Committee, 27 November 2017, RoP [67]

³² CLA Committee, 27 November 2017, RoP [72-73]

4. Specific observations including powers to make subordinate legislation

Background

48. The Bill contains twenty-nine sections and a Schedule (which makes further provision about fixed penalties).

49. Our focus has been on some of the specific sections of the Bill that provide powers to make subordinate legislation and one section that makes use of a sunset provision.

50. The Bill delegates 7 powers for the Welsh Ministers to make subordinate legislation. Of these:

- 5 are subject to the affirmative procedure;
- 2 are subject to negative procedure;
- 1 has no procedure – the power to make commencement orders.³³

Section 1 – Minimum price for alcohol

51. Section 1(1) sets out a formula to calculate the minimum selling price for alcohol. The formula is:

$$M \times S \times V$$

where, M is the MUP, S is the strength of the alcohol, expressed as a cardinal number (so for instance if the strength is 5%, the relevant cardinal number will be 5) and V is the volume of alcohol in litres.

52. Section 1(1)(a) provides that the MUP will be specified in regulations. The regulations are subject to the affirmative procedure (as set out in section 26(2)(a).)

53. Section 1(2) provides for rounding to the nearest whole penny, while section 1(3) provides an example of the calculation for the minimum price of a bottle wine, using a MUP of £0.50.

54. In respect of setting the MUP by means of regulations, the Explanatory Memorandum states:

³³ Explanatory Memorandum, Chapter 5

“It is considered appropriate to delegate the power to specify the MUP for which alcohol is to be supplied in Wales to the Welsh Ministers for reasons of flexibility, timeliness and accuracy. Doing so will ensure that Welsh Ministers are able to review and set the price considered most appropriate at the relevant time, subject to the approval of the National Assembly. The Welsh Government believes that this strikes a correct and proportionate balance between the acknowledged significance of the issue and the ability and flexibility to most effectively respond to any relevant change in economic and social circumstances.”³⁴

55. The Explanatory Memorandum also states that the affirmative procedure is to be used:

“Given its impact on stakeholders and the wider public, it is considered appropriate that the MUP for alcohol to be supplied in Wales will not be set or amended without full consideration and the opportunity for debate.”³⁵

56. We asked the Cabinet Secretary what consideration had been given to using the superaffirmative procedure for the regulation-making power. He replied:

“... I still think that the affirmative procedure that allows the legislature to have a vote and for the Government to have to bring its case is the right way to go about it. Others will, of course, have their view, but I’m perfectly content that this is the right way to proceed.”³⁶

Our view

57. We consider that the Cabinet Secretary has not adequately explained why the affirmative procedure would be a better option than a superaffirmative procedure given the fundamental importance of the MUP to the policy objective of the Bill. However, we re-iterate our view, (expressed in recommendation 3), that the MUP should appear on the face of the Bill and that any future change to the value of the MUP should be achieved via a superaffirmative procedure (recommendation 4).

³⁴ Explanatory Memorandum, Chapter 5, page 57

³⁵ Explanatory Memorandum, Chapter 5, page 57

³⁶ CLA Committee, 27 November 2017, RoP [51]

Section 5 – Special offers: multi-buys of alcohol

Section 6 – Special offers: supply of alcohol with goods and services

Section 7 – Special offers: supplementary

58. Sections 5 – 7 set out the rules relevant to determining the applicable minimum price in relation to alcohol supplied through a variety of special offers.

59. As with section 1, sections 5 and 6 include illustrative examples of text on the face of the Bill, accompanied by explanatory text and further examples in the body of the Explanatory Memorandum.

60. However, no such illustrative example occurs on the face of the Bill in section 7 or in the Explanatory Notes. We explored the reasons for the approach adopted with the Cabinet Secretary. He said:

“To try and make clear the point that you raised at the start about worked examples of how you would work out the minimum price, I think that’s helpful because that is the essential point and purpose. Whereas, in terms of the supplementary parts of it, we actually think that that might be helpful explained further on, and I don’t think that’s actually that complex, to be honest. I don’t think we really need to have an extra part on the Bill there. Like I said, I think this is really quite clear: what we’re doing and why, and how we want to go about it, and the calculation of the minimum price, are there for all to see.”³⁷

61. When we asked about the legislative status of the provisions or whether they were just descriptive, the Cabinet Secretary said:

“They’re illustrative, to show how we would go about using the powers set out in the Bill. So, we illustrate how the minimum unit [correction: delete ‘unit’] price would be calculated by reference to the price, the strength and the volume, and we then illustrate what that would look like. Again, I think that the examples themselves are pretty clear, actually ... I think there’s clarity in the way that’s been set out here, which, again, should make it clear for anyone—a lawyer or not.”³⁸

³⁷ CLA Committee, 27 November 2017, RoP [63]

³⁸ CLA Committee, 27 November 2017, RoP [75]

Our view

62. While we can see the merit of including illustrative examples of calculations of the applicable minimum price of alcohol on the face of the Bill, we believe it may prove confusing if the MUP is contained in regulations, while a value is used in an illustrative example, which may or may not be the same as the MUP contained in the regulations.

63. Equally, if our recommendation 3 is accepted, it would be confusing if the MUP is different from the value used in the illustrative example.

64. It is also unclear why no illustrative example is included in respect of section 7, either on the face of the Bill or within the Explanatory Notes.

65. We do not believe that the Cabinet Secretary has explained with sufficient clarity why it is necessary to place illustrative examples of calculations of the applicable minimum price on the face of the Bill, rather than simply including them in the Explanatory Notes or in guidance. Using guidance, and updating it as required, would ensure that there was a consistent approach between the actual MUP and the figure used in illustrative examples.

Recommendation 5. We recommend that the Cabinet Secretary justifies during the Stage 1 debate:

- the inclusion of illustrative examples of calculations of the applicable minimum price of alcohol on the face of the Bill, and
- explains how he will avoid the potential for confusion caused where the figure used in the illustrative example differs from that included either on the face of the Bill (our preference) or in regulations.

Section 22 – Duration of minimum pricing provisions

66. Section 22 of the Bill makes it an offence for an alcohol retailer to supply alcohol, or to authorise the supply of alcohol, at a selling price below the applicable minimum price. Section 21 provides that the Welsh Ministers must lay before the National Assembly a report on the operation and effect of the legislation at the end of a five year period, beginning with the day on which the offence under section 2 of supplying alcohol below the minimum price comes into force.

67. Section 22(1) provides for the minimum pricing regime established by the Bill to cease to have effect 6 years from the date on which the section 2 offence

comes into force, unless the Welsh Ministers make regulations under section 22(2), before the regime ceases to have effect, providing otherwise.³⁹

68. Section 22(2) provides that the Welsh Ministers cannot make regulations to this effect until at least 5 years after the section 2 offence comes into force. If no such regulations are made by the end of 6 years, the minimum pricing provisions are repealed. If regulations are made, the minimum pricing provisions will continue indefinitely, unless repealed by a subsequent Act.⁴⁰

69. The regulations made under Section 22(2) are subject to the affirmative procedure because:

“The minimum pricing provisions will be introduced by an Assembly Act. For this reason as well as the significance of allowing them to continue, the affirmative procedure and the opportunity it provides for consideration and debate by the Assembly, is considered appropriate.”⁴¹

70. Section 22(3) provides that if the minimum pricing provisions are repealed after 6 years, the Welsh Ministers may, by regulations, make “any necessary or expedient provision” as a result of that fact.

71. The Statement of Policy Intent states that:

“This would include any transitional, transitory or saving provision. So for instance, if before the repeal of the minimum pricing provisions another Act cross-referred to them, this power could be used to remove that reference.”⁴²

and:

“The regulations will ensure that a repeal of the minimum pricing provisions would take effect appropriately. For example, to ensure fairness to those affected by the proposed minimum pricing regime by making any transitional, transitory or saving provision that might be considered necessary or expedient at that point.”⁴³

³⁹ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 66

⁴⁰ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraphs 66-67

⁴¹ Explanatory Memorandum, Chapter 5, page 58

⁴² Statement of Policy Intent, page 6

⁴³ Statement of Policy Intent, page 6

72. The Explanatory Memorandum states that:

“Delegated powers are suitable for giving Welsh Ministers the flexibility of making any supplementary, incidental or consequential provision and any transitory, transitional or saving provision, if they consider it necessary or expedient in this context.”⁴⁴

73. The Regulations under section 22(3) are subject to the affirmative procedure because “this power includes the power to amend enactments including Acts of Parliament and Measures or Acts of the National Assembly”.⁴⁵

74. We asked the Cabinet Secretary about the use of a sunset clause. He said:

“There’s something about testing the period of time over which a review should take place. So, it’s linked to a five-year review on the operation of minimum unit pricing after it’s introduced. So, there’s an opportunity to review transparently and to make available to the public, and not just legislators, the initial impact of the piece of legislation on public health, and then to require the Government to make a choice about whether the regime should continue, because we’ll have some evidence about the impact, about whether there are any adverse consequences at that juncture.”⁴⁶

Our view

75. We are content with the use of a sunset clause for this Bill and as set out in section 22.

76. However, we note that section 22(3) refers to regulations that may make such provision as may be “necessary or expedient” in consequence of the repeal under section 22(1). If a Bill was to be repealed, then in our view the power to make “necessary” changes would be sufficient.

Recommendation 6. We recommend that the Cabinet Secretary should table an amendment to the Bill to delete the words “or expedient” from section 22(3).

⁴⁴ Explanatory Memorandum, Chapter 5, page 59

⁴⁵ Explanatory Memorandum, Chapter 5, pages 58-59

⁴⁶ CLA Committee, 27 November 2017, RoP [53]