

National Assembly for Wales
Constitutional Affairs Committee

Report on the Proposed Waste (Wales)
Measure

June 2010



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Constitutional Affairs Committee

The Constitutional Affairs Committee must consider and report on any of the matters set out in Standing Order 15.2 and may consider and report on any of the matters set out in Standing Orders 15.3, and 15.6.

Powers

The Constitutional Affairs Committee was established in June 2007 (as the Subordinate Legislation Committee). Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 15. These are available at www.assemblywales.org.

Committee membership

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
Janet Ryder (Chair)	Plaid Cymru/the Party of Wales	North Wales
Alun Davies	Labour	Mid and West Wales
Mike German	Welsh Liberal Democrats	South Wales East
William Graham	Welsh Conservatives	South Wales East
Rhodri Morgan	Labour	Cardiff West

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The Committee's Recommendations

The Committee's recommendations to the Welsh Government are listed below, in the order that they appear in this Report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

Recommendation 1. The Committee recommends that, given the potential impact of sections 3-6 on local authority service delivery, section 8 should include a provision to consult with local authorities on the development of guidance on sections 3-6. **(page 11)**

Recommendation 2. The Committee recommends that the Minister brings forward a suitable mechanism to ensure that there is no ambiguity surrounding the level of penalty which may be imposed for breaches of regulations made under section 12 and 13. **(page 13)**

The Committee's Role

1. The Constitutional Affairs Committee may consider and report on the following matters under the National Assembly's Standing Orders:

- Standing Order 15.6 (ii) states that the Constitutional Affairs Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measuresthat grant powers to make subordinate legislation to the Welsh Ministers'
- Whilst it is not part of the Committee's remit to comment in the merits of the proposal which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on 'any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers' Consideration

The Proposed Measure

2. The Welsh Government introduced the Proposed Waste (Wales) Measure on 22 February 2010. It was then referred to Legislation Committee No.4 to report on stage 1 consideration by 25 June 2010. The stated intent of the proposed Measure is to make provision to reduce the amount of waste and litter in Wales.

Scope and Intent

3. The proposed Measure enables Welsh Ministers to make regulations requiring retailers to apply the net proceeds of revenues raised from the sale of single use carrier bags to specific environmental purposes or bodies. It also sets statutory targets for local authorities for the percentage of municipal waste to be recycled, prepared for re-use and composted and provides that local authorities will be liable to penalties in the event that they fail to meet these targets. There are also provisions that would enable the Welsh Ministers to ban or restrict the disposal of specified types of waste in landfill and to establish Site Waste Management Plans (SWMP) in relation to construction and demolition works in Wales.

Subordinate Legislation Provisions

4. The proposed Measure contains the following powers for the making of subordinate legislation:-

Part 1: Single Use Carrier Bags

5. Regulations that the Welsh Ministers plan to make in 2011 under the Climate Change Act 2008, will oblige retailers to charge a minimum amount for single use carrier bags. Section 1 of the Waste (Wales) Measure 2010 will amend Schedule 6 to the Climate Change Act and give the Welsh Ministers the power, by regulation, to require retailers to pay the net receipts from the charge to specified bodies or for specific purposes.

6. In line with the procedure for making regulations for the charge itself under the Climate Change Act 2008, the **first regulations** to be made under this section are to be made under the **affirmative** procedure. **Thereafter**, the **negative** procedure will be used.

7. **Section 77(4)** of the Climate Change Act also provides for a range of other regulations to be made under the **affirmative** procedure. These include regulations which:

- impose or provide for the imposition of new civil sanctions;
- increase the amount or maximum amount of a monetary penalty or change the basis on which such an amount or maximum is to be determined
- amend or repeal a provision of an enactment contained in primary legislation are subject to the affirmative procedure.

8. Otherwise, regulations made under Schedule 6 to the Climate Change Act 2008 will be subject to the negative procedure.

Part 2: Waste targets

9. **Section 3 (4)** of the proposed Measure provides the Welsh Ministers with a power to amend, by order, the table provided under subsection (3) in relation to the recycling, preparation for re-use and composting targets and the target financial years in which they apply. The Explanatory Memorandum states that the **affirmative** procedure is to be utilised given the potential impact on local authorities in the event of the targets being amended.

10. **Section 3 (6)** gives the Welsh Ministers the power to make provision by order to establish whether waste is recycled; prepared for re-use; or composted for the purposes of the targets under this section. The Explanatory Memorandum states that the **negative** procedure is appropriate given that this is a technical issue.

11. **Section 3 (8) (c)** confers on the Welsh Ministers a power to specify by Order other waste that may be included in the definition of local authority municipal waste for the targets under section. The Explanatory Memorandum states that this is a technical issue and consequently the **negative** procedure is appropriate

12. **Section 4** provides the Welsh Ministers with a power to make regulations to specify other waste targets, in addition to those set out under section 3, relating to the prevention, reduction, collection, management, treatment or disposal of waste. The Welsh Ministers may also specify performance indicators in order to measure a local authority's achievement of any targets set under section 4. The section also provides the Welsh Ministers with a power to impose financial penalties on local authorities in the event that a waste target is not met.

13. These powers are concerned with the establishment of other statutory waste targets, which would be legally binding on local authorities consequently the Assembly Government considers that the regulations should be subject to the **affirmative** resolution procedure.

14. **Section 5** provides the Welsh Ministers with a power to make provision by regulations about monitoring and auditing compliance with targets The Explanatory Memorandum states that these are considered to be technical issues involving the monitoring and compliance of the targets. The **negative** procedure is therefore considered to be appropriate.

15. **Section 5 (1) (g)** provides the Welsh Ministers with the power to make provision by regulations to impose liability on a local authority to pay a penalty if it fails to comply with any requirement of the regulations made under section 5.

16. As the power potentially enables the Welsh Ministers to impose additional financial burdens on local authorities for failure to comply with regulations about monitoring and auditing compliance with the targets, it is proposed that the procedure for making the regulations is

affirmative. This is consistent with the powers contained under section 6 (see below) which enables the Welsh Ministers to make regulations about penalties.

17. **Section 6 (2)** provides the Welsh Ministers with a regulation-making power to impose penalties on local authorities for failure to meet the recycling, preparation for re-use and composting targets under section 3 or other waste targets under section 4. This includes the power to specify the amount of penalty, rules for calculating the amount of penalty and other aspects in relation to the penalty regime.

18. As the powers potentially enable the Welsh Ministers to impose additional financial burdens on local authorities for failure to meet the targets, the Explanatory Memorandum states that the **affirmative** resolution procedure is appropriate.

Part 3: Landfill

19. **Section 9 (1)** provides the Welsh Ministers with the power by regulations to make provision for and in connection with prohibiting or otherwise regulating the deposit of specified kinds of waste in landfill sites in Wales.

20. **Section 10** specifies that the power to make regulations in section 9 includes a power to provide for civil sanctions in respect of offences created under section 9.

21. The Explanatory Memorandum states that given the breadth of the power being sought and the importance of the provisions that will be made by subordinate legislation, which may potentially lead to banning or restricting certain materials from landfill, it is proposed that the **affirmative** resolution procedure is used.

Part 4: Site Waste Management Plans

22. **Section 12 (1)** provides a power for the Welsh Ministers to make regulations to require persons of a specified description to prepare plans for the management and disposal of waste created in the course of specified works in Wales involving construction and demolition. The regulations can also require those obliged to make the plans to adhere to them. Subsection (2) sets out the types of provisions which may be made by the regulations and subsection (3) enables the regulations to apply to projects by reference to cost or other factors.

This section essentially re-enacts section 54 of the Clean Neighbourhoods and Environment Act 2005 which is itself amended so as to apply to England only.

23. **Section 13** provides the Welsh Ministers with a power to make regulations in relation to offences and penalties for breaches of the requirements established in regulations made under section 12.

24. A project is currently underway to provide a cost-benefit analysis and Regulatory Impact Assessment in relation to Site Waste Management Plans (SWMPs). A consultation document with draft regulations and the completed Regulatory Impact Assessment is likely to be issued for public consultation later in 2010. Any fees and charging scheme for SWMPs therefore needs to reflect the decisions taken in relation to SWMPs more generally in light of the outcomes of the above policy development. The broad nature of the power contained in the proposed Measure is therefore deemed appropriate in light of these circumstances.

25. The **negative** procedure is proposed as being consistent with the existing powers contained under the Clean Neighbourhoods and Environment Act 2005.

Part 5: Consultation

26. Section 7 provides that prior to making an order or regulations under section 3 (recycling, preparation for re-use and composting targets) or regulations under sections 4 (waste targets), 5 (monitoring and auditing compliance with targets), or 6 (penalties), the Welsh Ministers are required to consult the Environment Agency, each local authority and such other persons as they consider appropriate.

27. A similar requirement applies by virtue of section 11 to section 9 (prohibition of deposit of waste in a landfill). Prior to making regulations under section 9 the Welsh Ministers must first consult the environment Agency, each local authority, such persons appearing to them to be representative of the interests of persons liable to be subject to duties under the regulations as they consider appropriate and such other persons as they consider appropriate.

28. Section 7(2) and 11(2) provide that consultation undertaken before the passing of the Measure has effect as if undertaken after that passing.

Issues arising from evidence and recommendations of the Committee

29. The Committee considered the Proposed Waste (Wales) Measure on 20 May 2010 and received written and oral evidence from the Minister for Environment, Sustainability and Housing, Jane Davidson AM.

General Principles of the Proposed Measure

30. Subject to the views below, and in relation to the subordinate legislation provisions it contains, the Committee sees no reason why the National Assembly should not agree to the general principles of the Proposed Measure.

Regulatory Powers

31. Having considered the Minister's evidence, the Committee believes that the balance between the powers on the face of the Measure and in regulations is correct: the Committee considers it appropriate that Welsh Ministers will have extensive powers to make regulations and issue guidance at a later date (rather than greater detail to be provided on the face of the proposed Measure).

32. In relation to single use carrier bags, the Committee is content that bringing forward sections 1-2 of the proposed Measure before the draft regulations are issued imposing the charge on single use carrier bags under the Climate Change Act 2008 does not significantly restrict the scrutiny of these sections.

Consultation

33. The Committee agrees that the consultation arrangements for sections 7 (1) and 11 (1) are appropriate.

34. Having considered the evidence, the Committee recommends that, given the potential impact of sections 3-6 on local authority service delivery, Section 8 should include a provision to consult with local authorities on the development of guidance on sections 3-6.

Recommendation 1: The Committee recommends that, given the potential impact of sections 3-6 on local authority service delivery,

section 8 should include a provision to consult with local authorities on the development of guidance on sections 3-6.

35. The Committee agrees that there is no need for a specific provision under section 13 requiring Welsh Ministers to consult with those affected prior to the introduction of regulations as it is planned to follow the existing powers under section 54 of the Clean Neighbourhoods and Environment Act 2005 in relation to site waste management plans as closely as possible.

Sections 1-2 Single Use Carrier Bags

36. The Committee is content with the use of the affirmative resolution procedure for the first set of regulations made under section 1 of the proposed Measure and with the use of the negative resolution procedure for subsequent legislation.

Sections 9-11 Landfill Bans

37. The Committee agrees that it is appropriate for the Welsh Government to obtain powers to introduce civil sanctions under sections 9 and 10 of the proposed Measure.

Sections 12-14 Site Waste Management Plans

38. The Committee is content with the use of the negative resolution procedure for regulations introduced under sections 12-13 as the power is consistent with the existing powers contained in the Clean Neighbourhoods and Environment Act 2005.

39. We note that sections 12 and 13 essentially amount to a restatement of the law as found in the Clean Neighbourhoods and Environment Act 2005 and that this Act currently confers on the Welsh Ministers a power to make regulations relating to Site Waste Management Plans. We further note that this power is unfettered in relation to the penalty which may be imposed for breach of the regulations. We are advised that in the case of an unmodified restatement of existing law that the general restriction relating to the imposition of penalties contained in the Government of Wales Act 2006 (Schedule 5, Part 2, paragraph 2) will not apply.

40. In the interests of transparency and to assist those who will be subject to and those who will enforce the regulations, which may be

made under sections 12 and 13, we consider that there should be no ambiguity surrounding the level of penalty which may be imposed.

Recommendation 2. The Committee recommends that the Minister brings forward a suitable mechanism to ensure that there is no ambiguity surrounding the level of penalty which may be imposed for breaches of regulations made under section 12 and 13.

The Regulatory Impact Assessment and Timing of Legislation

41. The Committee is satisfied that the Welsh Government has undertaken an assessment as to the cumulative impact of the different legislative and regulatory proposals contained in this proposed Measure on those affected by its contents: the regulatory impact assessments that accompany the proposed Measure include a cost-benefit analysis for each of the four areas contained in the proposed Measure and include the impact of the legislation on the relevant sectors; the draft regulations will be subject to public consultation and accompanied by detailed regulatory impact assessments.

42. The Committee is content with the consultation on the delivery plan for the main pieces of legislation to be introduced under the Welsh Government's waste policy.

Witnesses

The following witnesses provided oral evidence to the Committee on 20 May 2010. A transcript of the session can be viewed in full at www.assemblywales.org

20 May 2010

Jane Davidson AM	Minister for Environment, Sustainability and Housing, Welsh Government
Prys Davies	Legislation Manager, Department of Environment, Sustainability and Housing, Welsh Government
Elisabeth Jones	Deputy Director of Legal Services, Welsh Government

List of written evidence

The Committee considered the following written evidence. All written evidence can be viewed in full at www.assemblywales.org

<i>Document</i>	<i>Reference</i>
Proposed Waste (Wales) Measure	CA(3)-14-10(p6)
Explanatory Memorandum	CA(3)-14-10(p7)
Legal Advisers' Report	CA(3)-14-10(p8)
Letter from the Chair to the Minister and response	CA(3)-14-10(p9) &(10)