

National Assembly for Wales
Subordinate Legislation Committee

Report on the Subordinate Legislation
Provisions in the Proposed Red Meat
Industry (Wales) Measure

November 2009



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

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Subordinate Legislation Committee

The Subordinate Legislation Committee considers the technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports to the Assembly on whether it should pay special attention to the instrument or draft on any of the grounds set out in Standing Order 15.2. The Committee may also undertake policy scrutiny of Assembly Measures without questioning the policy itself.

Additionally, the Committee may report on the matters set out in Standing Order 15.3 or 15.6

Powers

The Subordinate Legislation Committee was established in June 2007. 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	Plaid Cymru	North Wales
Alun Davies	Labour	Mid and West Wales
Mike German	Welsh Liberal Democrats	South Wales East
William Graham	Welsh Conservatives	South Wales East
Joyce Watson	Labour	Mid and West Wales

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 the adoption of the principle that when Welsh Ministers seek powers to implement a significant change in policy through regulation, the affirmative procedure be adopted. **(page 6)**

Recommendation 2. The Committee recommends that the balance between matters dealt with on the face of the Measure (or an amending Measure) and those which may be dealt with by regulations or orders is redressed. Accordingly, the Henry VIII powers to amend this Measure by order contained in sections 3(3), 5(4) and 6(3) should be subject to a super-affirmative procedure requiring the laying before the Assembly of a consultation draft prior to the making of an order. This would reflect the importance of the provisions and provide an opportunity for substantial consultation and scrutiny before the Measure is amended. A recent example of this procedure can be found in the Education Measure recently approved by the Assembly. **(page 7)**

Recommendation 3. The Committee recommends that, similarly to the designation of persons who carry out a secondary activity under section 4(5) which is subject to an affirmative procedure, the designation of persons who carry out a primary activity under section 4(4), should also be subject to an affirmative procedure. **(page 8)**

Recommendation 4. The Committee recommends that the submission of returns under Section 8 should be dealt with by regulations, which would be subject to an appropriate Assembly procedure rather than by directions. **(page 8)**

Recommendation 5. The Committee recommends that the Welsh Government keeps under review the provisions of Section 60 of the Government of Wales Act 2006 and considers whether a more general executive competence, comparable to that of the Scottish Ministers, is needed. **(page 9)**

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Standing Orders

1. The Committee has the following powers under Standing Orders:
 - Standing Order 15.6 (ii) states that the Subordinate Legislation 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 on 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’.
2. The purpose of this report is to inform the Assembly’s Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

Consideration

3. On 11 November 2009 the Committee considered the Proposed Red Meat Industry (Wales) Measure and received evidence from the Minister for Rural Affairs, Elin Jones AM.

Background

4. The Welsh Government introduced the Proposed Red Meat Industry (Wales) Measure to the Assembly on 19 October 2009. The proposed Measure has been referred to the Legislation Committee No.3 to report by 18 December 2009.

5. The proposed Measure has significant powers for subordinate legislation to be made by Welsh Ministers. These are explained in Part 5 of the Explanatory Memorandum, which had been laid with the Proposed Measure, and in the Commentary on Sections that appears at the end of that Memorandum. Unlike previous Measures considered by the Assembly, the Measure does not amend existing Acts of Parliament, but instead contains a self-contained framework for the imposition of a levy in relation to the red meat industry.

Subordinate Legislation Making Powers and Procedures

6. The operative provisions may be summarised as follows –

7. **Section 2** sets out the objectives of the proposed Measure.

8. **Section 3** declares that Welsh Ministers may do anything that they consider appropriate to further the objectives set out in section 2. This follows the form of words used in section 60 of the Government of Wales Act 2006 in relation to the promotion of economic, social and environmental well-being and in section 61 of that Act in relation to the promotion of various aspects of the heritage of Wales. Subsection (2) permits Welsh Ministers to exercise any of the functions listed in Schedule 1 and to establish a reserve fund. However, subsection (3) permits Welsh Ministers to amend Schedule 1 by order. In accordance with the usual convention, this would be subject to the affirmative procedure.

9. **Section 4** permits Welsh Ministers to impose a levy to meet expenditure incurred in relation to the industry. The levy may be imposed on slaughterers, exporters, or persons who carry out a primary or secondary activity in respect of cattle sheep or pigs, if they are designated by Welsh Ministers. The designation would be by order, which would be subject to the negative procedure, save in the case of persons carrying out a secondary activity, when an affirmative procedure would apply.

10. **Section 5** provides that any levy on slaughterers or exporters must be calculated in accordance with Schedule 2. However, subsection (4) would permit Welsh Ministers, by order, to amend that Schedule. In accordance with the usual convention, this would be subject to the affirmative procedure. Subsection (3) would also permit Welsh

Ministers to make regulations about “procedures relating to the imposition, payment and collection of levies”.

11. **Section 6** would permit Welsh Ministers, by order, to make extensive provision about the imposition of a levy on persons carrying out a designated primary activity or a designated secondary activity, including making “any amendments to this Measure as appear necessary or expedient” (subsection (3)). In accordance with the usual convention, this would be subject to the affirmative procedure.

12. **Section 7** would permit Welsh Ministers to delegate any of their functions, other than making regulations, orders or directions.

13. **Section 8** deals with the making of returns and estimates, and includes the power for Welsh Ministers to give directions to require the submission of a return. It also provides for estimates to be made in the absence of a return, and also creates offences of failing to submit a return, and giving false or misleading information.

14. **Section 9** requires the keeping of records and their production.

15. **Section 10** permits Welsh Ministers to appoint an “appointed person” to assist with the implementation of the levy.

16. **Section 11** provides for a justice of the peace to issue a warrant to an appointed person in certain circumstances to enter premises, have access to documents and copy them or remove them. It also creates an offence of obstructing the exercise of those powers.

17. **Section 12** contains provisions relating to the commission of offences by bodies or partnerships.

18. **Section 13** specifies time limits for the bringing of proceedings under the Measure.

19. **Section 14** sets out definitions of terms used in the Measure.

20. **Section 15** provides for the Dissolution of the Welsh Levy Board, which was only established under the Natural Environment and Rural Communities Act 2006.

21. **Section 16** contains provisions regarding the giving of directions by Welsh Ministers under section 8.

22. **Section 17** contains the standard provisions regarding the making of orders and regulations. These include the power to make different provisions for different circumstances, to make general or specific provisions, and to make incidental, consequential and transitional provisions. It also specifies the procedure that applies to statutory instruments made under other sections of the Measure.

23. **Section 18** contains the usual power to commence the substantive provisions of the Measure by order of the Welsh Ministers, to which no Assembly procedure would apply.

24. **Section 19** sets out the short title of the Measure.

25. **Schedule 1** sets out the functions that Welsh Ministers may exercise, and may be amended by them by order made under section 3(3).

26. **Schedule 2** contains detailed provisions regarding the calculation and payment of the levy, and may be amended by the Welsh Ministers by order made under section 5(4).

Issues raised in evidence and recommendations of the Committee

27. The Committee is aware that the Proposed Red Meat Industry (Wales) Measure is expected and welcomed by the industry. The Committee appreciates the need for the proposed Measure; however the Members conclude that an incorrect balance has been struck between the use of the negative and affirmative procedures, particularly where the negative procedure would be used to form regulations that would implement changes in policy. As such, there are several cases in the proposed Measure where the Committee does not believe that a persuasive case has been made for use of the negative procedure. The Committee is concerned that allowing Welsh Ministers to accrue powers to make regulations subject to the negative procedure without there being a strong case for doing so, would provide insufficient opportunity for scrutiny on the part of the legislature.

Recommendation 1. The Committee recommends the adoption of the principle that when Welsh Ministers seek powers to implement

a significant change in policy through regulation, the affirmative procedure be adopted.

28. The Committee noted that the Proposed Measure contains extensive provision for subordinate legislation that will give Welsh Ministers the ability to amend a number of areas within the Measure in the future. These include the power to amend Schedule 1 by order made under section 3(3), and the power to amend Schedule 2 by order made under sections 5(4) or 6(3). These are so-called Henry VIII powers to amend primary legislation by secondary legislation. The power in section 6(3) goes so far as to permit Welsh Ministers to “make any amendments to this Measure as appear necessary or expedient ... in connection with any provisions made under subsection (2)”. The correctness of the balance between matters dealt with on the face of the Measure and those which may be dealt with by regulations or orders should be redressed.

Recommendation 2. The Committee recommends that the balance between matters dealt with on the face of the Measure (or an amending Measure) and those which may be dealt with by regulations or orders is redressed. Accordingly, the Henry VIII powers to amend this Measure by order contained in sections 3(3), 5(4) and 6(3) should be subject to a super-affirmative procedure requiring the laying before the Assembly of a consultation draft prior to the making of an order. This would reflect the importance of the provisions and provide an opportunity for substantial consultation and scrutiny before the Measure is amended. A recent example of this procedure can be found in the Education Measure recently approved by the Assembly.

29. Section 4 of the Measure deals with the designation of persons liable to the imposition of a levy. Those carrying out a primary activity may be designated by an order made under section 4(4), which would be subject to a negative procedure, whilst those carrying out a secondary activity would be designated by an order subject to an affirmative procedure. The Minister explained the different procedures as follows:

“...Currently the levy is charged on the producer and the slaughterer, but is collected by the slaughterer. The provisions

of the proposed Measure mean that the collection could be changed and undertaken either by the producer or a person involved in secondary activity, as I think it says, within the red meat sector. If it is collected by the producer rather than the slaughterer, then that does not financially affect the producer, in that the producer aid the levy anyway. Therefore we have decided that that is not a significant change, and only affects collection. Welsh Ministers could undertake that kind of change by statutory instrument subject to negative resolution. Any introduction of collection by a person involved in a secondary activity would require further scrutiny and debate, I believe, because it is completely new, and therefore any such Order would be subject to affirmative resolution...”

30. The Committee considers this distinction to be somewhat artificial, and is of the view that the affirmative procedure should be adopted for all such designation orders.

Recommendation 3. The Committee recommends that, similarly to the designation of persons who carry out a secondary activity under section 4(5) which is subject to an affirmative procedure, the designation of persons who carry out a primary activity under section 4(4), should also be subject to an affirmative procedure.

31. Section 8 gives Welsh Ministers the power to issue directions regarding the submission of returns. The Committee queried why those issues are to be dealt with by directions (which may constitute legislation not made by statutory instrument), rather than by regulations, which would be subject to an appropriate Assembly procedure.

Recommendation 4. The Committee recommends that the submission of returns under Section 8 should be dealt with by regulations, which would be subject to an appropriate Assembly procedure rather than by directions.

32. The Committee is content that, in accordance with normal legislative practice, no Assembly procedure should apply to commencement orders made under section 18(2).

33. Members also considered the very broad power contained in section 3(1) that would permit Welsh Ministers to “do anything that they consider appropriate to further the objectives” set out in section 2. The Minister and her officials explained that this should be considered in the context of those objectives. The more general context is referred to in paragraph 8 above. Section 60(4) of the Government of Wales Act 2006 provides that the power in that section includes power to enter into arrangements or agreements; to co-operate, facilitate or co-ordinate activities; to exercise functions on behalf of another person and to provide staff, goods, services or accommodation to any person.

34. The need for such general powers is a reflection of the Welsh devolution settlement. Section 53 of the Scotland Act 1998 provided a general transfer of prerogative and other executive functions, as well as those conferred on Ministers of the Crown under previous legislation, provided they came within devolved competence. Both Government of Wales Acts (section 58 of the 2006 Act), on the other hand, provided for the transfer of specific functions, initially to the National Assembly and now to Welsh Ministers. Accordingly, the general executive competence acquired by Scottish Ministers was not received by Welsh Ministers, so that general powers in specific enactments, such as sections 60 and 61 of the Government of Wales Act 2006 or section 3(1) of this Measure have to be relied upon for routine executive decisions for which no specific authority would be required in Scotland.

Recommendation 5. The Committee recommends that the Welsh Government keeps under review the provisions of Section 60 of the Government of Wales Act 2006 and considers whether a more general executive competence, comparable to that of the Scottish Ministers, is needed.

35. The Committee will consider this point further as part of its Inquiry into the Development of Schedule 5 of the Government of Wales Act 2006.

Witnesses

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at www.assemblywales.org

11 November 2009

Elin Jones AM	Minister for Rural Affairs, Welsh Government
Neil Howard	Head of Scheme Management, Welsh Government
Dorian Brunt	Legal Adviser, Welsh Government
