

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Report on the Local Government
Byelaws (Wales) Bill

March 2012



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Constitutional and Legislative Affairs Committee

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

Constitutional and Legislative Affairs Committee

Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Order 21. The Committee may consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Committee membership

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
David Melding (Chair)	Deputy Presiding Officer (Welsh Conservatives)	South Wales Central
Suzy Davies	Welsh Conservatives	South Wales West
Julie James	Labour	Swansea West
Eluned Parrott	Welsh Liberal Democrats	South Wales Central
Simon Thomas	Plaid Cymru	Mid and West Wales

Contents

The Committee’s Role	5
The Local Government Byelaws (Wales) Bill	5
Background	5
The Bill	6
Committee consideration	6
Detailed provisions	7
Section 2	7
Section 3	8
Sections 4 and 5	8
Section 6	9
Section 7	9
Section 8	11
Section 9	11
Section 10	12
Section 11	12
Section 12 and 13	13
Section 14	15
Section 15	15
Section 16	15
Section 17	16
Section 18	16
Section 19 and 20	17
Section 21	17
Section 22 and 23	18
Witnesses	19
List of written evidence	20

The Committee's Role

1. The Constitutional and Legislative Affairs Committee's ("the Committee") remit is to carry out the functions of the responsible committee set out in Standing Order 21¹ and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in the Standing Orders.
3. The Committee also considers and report on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

The Local Government Byelaws (Wales) Bill

Background

4. On 28 November 2011 the Minister for Local Government and Communities, Carl Sargeant AM introduced The Local Government Byelaws (Wales) Bill ("the Bill"). The Bill was assigned to the Communities, Equality and Local Government Committee for stage 1 scrutiny with a reporting deadline of 30 March 2012.
5. The Constitutional and Legislative Affairs Committee considered the Bill at its meeting on 16 January 2012 and agreed to scrutinise it further as it contained a number of powers to make subordinate legislation.
6. The Minister for Local Government and Communities, Carl Sargeant attended the Committee's meeting on Monday 6 February 2012 accompanied by officials. The Minister's oral evidence was supplemented by additional written information provided on 20 February 2012.

¹ Standing Orders of the Fourth Assembly - National Assembly for Wales

The Bill

7. The purpose of the Bill is to give effect to:

“...the Welsh Government’s proposals to simplify procedures for making and enforcing local authority byelaws. The Bill introduces an alternative procedure for local authorities to follow in making a number of byelaws. For these byelaws, the Bill requires authorities to consult locally before making a byelaw and removes the requirement for confirmation by the Welsh Ministers. The proposed Bill also provides an optional alternative, and more efficient, means of enforcement through fixed penalty notices. Finally, the Bill also recasts and consolidates existing byelaw provisions in sections 235 to 238 of the Local Government Act 1972. This is a step towards the development of a Welsh Statute Book and makes the key legislative provisions relating to making, confirming and enforcing byelaws in Wales accessible in a single enactment.”²

8. Despite its short title, the subject-matter of the Bill is not limited to local authority (including National Park Authority) byelaws but extends to byelaws made by the Countryside Council for Wales.

9. The Bill makes a significant change to the procedure for making local authority byelaws under a number of different enactments, dispensing with the present need for Ministerial confirmation. Alternative safeguards are provided by imposing requirements for formal consultation and publicity before such byelaws can be made.

10. The Bill also sets out to codify provisions relating to the making, confirmation (where applicable) and enforcement of byelaws by local authorities (including National Park authorities) and the Countryside Council for Wales. These provisions include ones extending to Wales provisions enabling byelaws to be enforced by fixed penalty notices, which are already available in England.

Committee consideration

11. The Committee noted that delegated powers contained in the Bill in fact already exist, and the policy underpinning the Bill is the simplification of the procedure for making and revoking byelaws and enhancing the enforcement procedures applicable to them.

² Explanatory Memorandum to Local Government Byelaws (Wales) Bill (as introduced).

12. The role of the Committee under Standing Order 21.7 is limited to “the appropriateness of provisions ... that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.” The Committee is aware that ‘making’ does not include confirmation under the byelaw procedures. Thus, whilst this report summarises the provisions of the Bill generally by way of background, the recommendations are made only in respect of provisions which were of direct concern to the Committee.

13. Nevertheless, the Committee, in the exercise of its role of considering legislative matters of a general nature under Standing Order 21.7(v), explored whether the Bill achieves its stated objective of consolidating relevant provisions and whether a greater degree of consolidation could have been achieved.

Our View

14. We are content that there is generally an appropriate balance between the level of detail on the face of the Bill and the subordinate legislative powers granted to the Welsh Ministers.

15. The Committee accepted the Minister’s explanation that consolidating the old byelaw-making powers on the face of the Bill “would not have been practical”³ and is content with the issue being dealt with in Schedules.

Detailed provisions

16. The Bill begins with a section (**section 1**) that makes no substantive provision but rather provides an overview of the provisions made by the following sections.

Section 2

17. This section of the Bill confers on county and county borough councils in Wales a general power to make byelaws for the “good rule and government” of their areas and for the suppression of nuisances. This re-enacts the power currently to be found in section 235 of the Local Government Act 1972. The phrase “good rule and government” dates back at least as far as the Municipal Corporations Act 1882. At present, the breadth of the power is mitigated by the need for ministerial confirmation, with which the Bill will dispense. However,

³ Record of Proceedings (RoP) (CLA) – 6 February 2012 – paragraph 6

section 2(2) of the Bill provides that the power under section 2 may not be used to make provision made, or which may be made, by or under any other enactment. The scope of the power is therefore much more circumscribed than would have appeared at first sight.

Section 3

18. Section 3 defines “legislating authorities”, to whose byelaws the remaining provisions of the Bill, dealing with procedures for making, confirming and enforcing byelaws, apply. Legislating authorities include not only county and county borough councils but also community councils, National Park Authorities and the Countryside Council for Wales. All legislating authorities are authorities whose functions relate (with minor incidental exceptions) only to Wales.

Sections 4 and 5

19. Section 4 provides a general power for legislating authorities to revoke or amend their own byelaws (where no other such power exists) while Section 5 provides **a power for Welsh Ministers, by order**, to revoke byelaws made by legislating authorities if they think they have become obsolete.

Our View

20. We are generally content with the provisions in sections 4 and 5 of the Bill (section 4 acknowledges the powers of legislative bodies to revoke obsolete byelaws while section 5 gives the Welsh Ministers a fall-back power which we were told was in case there is a byelaw in place of which an individual local authority does not have ownership and therefore cannot revoke itself). Nevertheless, the use of a more positive expression than “Welsh Ministers ...think is obsolete” would be clearer.

21. We have arrived at this conclusion on the basis of the Minister’s assurance that local byelaws to be created by local authorities will only be revoked by those authorities:

“...Bye-laws are a local process. That is why we have created the powers for local bye-laws to be created by a local authority or a lead authority and to be revoked by that authority. ... I do not intend that future Welsh Ministers or I will be able to override a

local decision as a result of the legislation that we have created. ...”⁴

22. We are also content that the fall-back power to revoke obsolete byelaws will be used by Ministers only when they are asked to do so, in which case it would be necessary to do so through an Assembly procedure:

“...When a local authority wishes to revoke a bye-law, if that process is not subject to the Minister’s confirmation, then it will just get on with it. However, if the Minister is requested to revoke an obsolete bye-law, there is an Assembly procedure attached to that, in that the Minister will make the revocation through an Order, which would be subject to the negative Assembly procedure...”⁵

There is nevertheless a case for requiring consultation, either by a requesting authority, or by the Minister, before this power is exercised.

Section 6

23. This establishes a new procedure for the making of byelaws by legislating authorities under various enactments (set out in Part 1 of Schedule 1, and including byelaws made under section 1 of the Bill itself) free from the need for ministerial confirmation. **The Schedule may be amended by order under section 9, e.g. to add further byelaw-making powers to which the section 6 procedure is to apply.**

Our View

24. The Committee is content with the power to add further byelaw making powers to section 6 instead of setting them out on the face of the Bill as this provides flexibility when further suitable powers are identified..

Section 7

25. Section 7 lays down procedures for the confirmation of byelaws and applies to all byelaws made by legislating authorities and which

⁴ RoP (CLA) – 6 February 2012 – paragraph 11

⁵ RoP (CLA) – 6 February 2012 – paragraph 18

require confirmation, other than byelaws to which similar procedures already apply under the enactment conferring the power to make the byelaws.

26. Section 7 also contains provisions dealing with the identity of the confirming authority, which is either to be the authority specified in the enactment conferring the byelaw-making power or, if no authority is specified, the Welsh Ministers. Subsection (9) provides that where the Welsh Ministers are, as a result, the confirming authority, their functions “are to be exercisable concurrently with the Secretary of State”. In relation to this the Minister explained:

“...Under normal practice, with regard to the relationship with the Secretary of State, that application would come to a Welsh Minister. However, subject to a non-devolved function being raised in a bye-law that is obsolete, it would be only right for the Secretary of State to be involved in the process, which is why that status quo has remained in taking this process forward...”⁶

27. In later correspondence, the Minister explained further that:

“The concurrent confirmation power under the 1999 Order⁷ reflects the view that there may be byelaw powers that deal with non-devolved areas which are outside the expertise of Welsh Government officials and are, in practice, and as is appropriate, confirmed by the relevant Secretary of State.

It should be noted that the confirmation power is a concurrent power and not a join power. In other words, either the Welsh Ministers or the Secretary of State can exercise the power in the appropriate circumstances.

Since the 1999 Order, in practice, requests for confirmation of byelaws under devolved powers are considered by the Welsh Ministers. Accordingly, the concurrent confirmation power is a prudent provision in the event that any such powers are identified at a future point.”⁸

⁶ RoP (CLA) – 6 February 2012 – paragraph 23

⁷ National Assembly for Wales (Transfer of Functions) Order 1999 – SI672/1999

⁸ Committee Paper - CLA(4)-05-12(p5)

Our View

28. We are content with the Minister's explanation and, if a confirming authority has not been specified, that the Welsh Ministers will become the confirming authority and will deal with the issues concurrently with the Secretary of State.

Section 8

29. This section deals with a number of technical matters relating to the formalities for making byelaws, the commencement of their provisions and their publication.

Section 9

30. **Section 9 permits Welsh Ministers, by order, to amend Part 1 of Schedule 1** (amending the list of enactments under which, or the authorities by which, byelaws may be made without confirmation).

31. Explaining the need for this provision the Minister told us:

“[35]...I think that it offers enough flexibility for local authorities. These are often about very local issues of nuisance and so on that they need to deal with. Subject to there being a lack of existing provision, this is an opportunity for local authorities to deal with an issue. ... the powers to make those changes are subject to affirmative resolution, so there is a fall-back position. ... this more streamlined approach will help the process of the creation of bye-laws...”⁹

and later:

“... This gives us sufficient flexibility for an authority to make a local determination and for us ... to adapt quickly to changing circumstances...”¹⁰

Our View

32. We are content for the Minister to have the power under section 9 to amend Schedule 1, which adds or takes away from the list of byelaws that do not require Welsh ministerial confirmation. We note

⁹ RoP (CLA) – 6 February 2012 – paragraph 35

¹⁰ Ibid –paragraph 41

that this will be subject to the affirmative procedure as is appropriate for a power that allows the primary legislation to be amended.

33. Sections 10 to 17 deal with enforcement issues.

Section 10

34. This section prescribes the maximum penalty for breaches of any byelaw made by any of the authorities to which the Bill relates. This maximum penalty is set at level 2 on the standard scale (£500) unless the enactment that confers the power to make the byelaw provides otherwise.

Section 11

35. Section 11 enables a byelaw made under the power conferred by section 2 to provide for the seizure and (on conviction of an offence of breach of a byelaw) forfeiture of property. This is the general power to make byelaws for the “good rule and government” of their areas and for the suppression of nuisances. By virtue of Schedule 1, such byelaws do not require ministerial confirmation.

Our View

36. Article 1 of Protocol 1 to the European Convention on Human Rights protects the peaceful enjoyment of possessions, but subject to the right of the state to enforce laws necessary to control the use of property in accordance with the general interest. Article 6 entitles the citizen to a fair hearing before an independent and impartial tribunal if his or her civil rights are in question- e.g. the right to property.

37. Read literally, section 11 might be seen as authorising the forfeiture of property (which may not of course belong to the person from whom it was confiscated) in an arbitrary way.

38. The “reading down” provision in section 154 of the Government of Wales Act 2006 is however, relevant. This provides that provisions in Acts of the Assembly are, if possible, to be read as narrowly as is required for them to be within the legislative competence of the Assembly. An authority making byelaws under this power, or a confirming authority considering whether to confirm them, would itself be required to act in accordance with article 6 and Protocol 1

article 1. In other words, it is legitimate to read section 11 as only authorising provision which respects Convention Rights to be made.

Section 12 and 13

39. **Section 12** empowers persons authorised to do so by the authority who made byelaws of certain descriptions (i.e. those specified in Part 2 of Schedule 1) to provide a person with the option of paying a fixed penalty (within the limits imposed by **section 13**) instead, and lays down the necessary procedures. If no amount is specified by the legislating authority, the sum is £75.

40. Welsh Ministers may make regulations to limit the range of penalties that may be imposed and by order vary the default sum of £75. They may also (under section 12(13) prescribe conditions to be satisfied by a person before a community council may authorise that person for the purpose of giving fixed penalty notices. This might, for example, include requirements to be of good character, or to attend specified training courses.

41. The Committee queried how the default sum of £75 was arrived at and why the maximum or minimum limit on the range of fixed penalties that may be imposed was not set out on the face of the Bill. The Committee also queried why regulations specifying the fixed penalty amount's range will be subject to the negative procedure while Orders changing the default amount of the fixed penalty from £75 will be subject to the affirmative procedure.

42. Clarifying the reason for the amount of the default payment, the Minister explained:

"... the default payment ... comes from section 237B of the Local Government Act 1972 ... also a default penalty under the Clean Neighbourhoods and Environment Act 2005....We believe that it is a reasonable starting point and one that local authorities recognise currently..."¹¹

43. Regarding the range within which a fixed penalty must fall the Minister explained that:

"In terms of the range and the scope to move the default payment, that will be subject to consultation, and about need;

¹¹ RoP (CLA) - 6 February 2012 - paragraph 63

that is, what are we creating the bye-law for, and what are we creating the fixed penalty for? There are unknowns around that, as I would not even like to hazard a guess as to what a bye-law may or may not consist of, but it would be about whether the £75 default penalty is appropriate or not. There has to be some consultation around the process, about what the maximum and minimum limits would be, to give a framework for authorities delivering bye-laws to work within.”¹²

44. In further written evidence¹³ the Minister further clarified the approach taken to the range of penalties and the default penalty.

45. The Committee also noted that community councils may need additional authorisation for the purpose of giving fixed penalty notices and queried the difference in approach. The Minister explained that this was to provide both flexibility and support for community councils who in many instances would have limited resources available:

“We recognise that there are some very small community councils and the ability to apply and enforce bye-laws could be more onerous for a parish council. That is why we have tried not to place an extra burden on those councils. We have mirrored the Local Government Act 1972 provision in terms of support for parish councils. I believe that it is a strengthening provision, enabling them to work with other leading authorities to deliver a local bye-law. So, if we look at it the other way around, we see that it enables parish councils to deliver bye-laws through a different method, without it being too onerous.”¹⁴

46. In addition, in his further written evidence the Minister clarified arrangements for resolution of opposing views between community councils and other authorities in relation to byelaws.

Our View

47. We are uneasy that the approach being taken in regard to penalties is somewhat inconsistent. It would perhaps be better to set out the initial range of potential penalties on the face of the Bill and subsequently make it amendable by statutory instrument in the same

¹² RoP (CLA) – 6 February 2012 – paragraph 64

¹³ Committee Paper - CLA(4)-05-12(p5)

¹⁴ RoP (CLA) – 6 February 2012 – paragraph 44

way that the default penalty is specified in section 13(2) and is subsequently amendable by order.

48. Although we do not have any serious concerns on this point, we hope that the Minister will note our views and reconsider the approach taken.

Section 14

49. This Section is necessary to make the fixed penalty regime effective. It requires a person to whom an authorised officer wishes to give a fixed penalty notice to provide a name and address and makes it a criminal offence to fail to do so (without reasonable excuse) or to provide incorrect information. The offence would be punishable by a fine not exceeding level 3 on the standard scale (£1,000).

50. A requirement to disclose one's name and address clearly engages Article 8 of the European Convention (Right for respect for private...life etc.). Interference by a public authority with the exercise of that is only permissible if it is necessary in a democratic society in the interests ofpublic safetythe economic well-being of the country...the prevention of disorder or crime ...the protection of health or morals ...or for the protection of the rights and freedoms of others (etc.). It must also be proportionate to the public interest being protected.

Section 15

51. Section 15 requires authorities to have regard to the desirability of using fixed penalty receipts for the purpose of combating a nuisance for the prevention of which a byelaw was made by the authority. As paragraph 59 of the Explanatory Memorandum (page 47) explains, it need not be used towards combating the nuisance that the relevant byelaw is concerned with.

Section 16

52. This **provides Welsh Ministers with a power to amend Part 2 of Schedule 1 by order**. Part 2 sets out the byelaws in relation to which fixed penalties may be issued.

Our View

53. The Committee is satisfied that the provision in Section 16 is necessary and the circumstances in which it can be used are clearly defined.

Section 17

54. Section 17 enables the power in relation to the imposition of fixed penalties to be exercised by Community Support Officers.

Section 18

55. This empowers Welsh Ministers to give statutory guidance to authorities about procedures and enforcement.

56. The Committee noted that the Guidance to be issued under this section is not to be subject to any Assembly scrutiny procedure and queried whether, given the importance of the guidance for the creation of byelaws, it should be subject to some form of approval Assembly.

57. The Minister explained:

“We are not trying to create something that has not been established before, in terms of the executive functions of Welsh Ministers in issuing guidance. That is not new; it is the usual practice. It is a duty of Government to provide such guidance and to create law. The element of scrutiny and debate around what that guidance could or should be, from an Assembly perspective, is interesting, and through this consultation period, I would be interested to see how we could further engage Members in terms of some of the guidance that we may wish to issue. However, I would point to what I said earlier about this being custom and practice: the executive function of Ministers is, and has always been, to issue statutory guidance. If there is a broader, more inclusive way that Members are trying to impress upon me, I will see if there is an opportunity for that during this process of the bye-laws.”¹⁵

¹⁵ RoP (CLA) – 6 February 2012 – paragraph 106

Our View

58. The Committee is content with the Minister's explanation and with the balance of issues regarding procedures and enforcement set out in statutory guidance and on the face of the Bill. However, the aspects on which guidance may be issued does appear to be unduly restrictive. It might be of assistance to legislating authorities, for example, if Ministers were able to issue guidance on the meaning of difficult concepts such as "good rule and government" and "obsolete".

Section 19 and 20

59. Section 19 contains provisions regarding the provision of certified copies of byelaws.

60. Section 20 (which introduces Schedule 2) makes consequential amendments to Acts of Parliament, for example by making it clear that section 235 of the Local Government Act 1972 will henceforward apply only to local authorities in England.

Section 21

61. This Section lays down the Assembly procedure which is to apply to regulations and orders made by Welsh Ministers under the Bill and enables them to contain incidental, consequential, transitional or supplemental provision, including, in the case of those amending the Schedules, provision amending, repealing or revoking enactments. Orders under section 9 (amending the list of enactments under which, or the authorities by which, byelaws may be made without confirmation), section 13(5) (varying the default fixed penalty of £75) and 16 (amending the list of enactments under which, or the authorities by which, byelaws may lead to fixed penalties) would be subject to an affirmative procedure. Simple commencement orders would be subject to no procedure. All others would be subject to a negative procedure, including revocation orders under section 5(1).

Our View

62. The Committee is satisfied that the correct balance of scrutiny arrangements has been specified in the Bill and that an Assembly procedure would apply in relation to the revocation of byelaws by Welsh Ministers.

Section 22 and 23

63. Section 22 provides for the Act to be brought into force by commencement order. Section 23 establishes the short title of the Act.

Witnesses

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

6 February 2012

Carl Sergeant AM Minister for Local Government and
Communities, Welsh Government

*Supported by the
following officials:*

Mr Stephen Phipps Ethics and Regulation Team, Welsh
Government

Ms Louise Gibson Legal Advisor, Welsh Government

List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at www.assemblywales.org

<i>Paper</i>	<i>Reference</i>
Local Government By-Laws Bill (as introduced)	CLA(4)-01-12 (p1)
Explanatory Memorandum to the Local Government By-Laws Bill (as introduced)	CLA(4)-01-12 (p2)
Additional information from the Minister for Local Government and Communities – Letter dated 20 February	CLA(4)-05-12(p5)