

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Your ref:
Our ref: PO/RB/CW

20 May 2015

Dear David

Environment (Wales) Bill – legislative competence

Further to my statement on the legislative competence in respect of the Environment (Wales) Bill, published on 11 May, I am writing to draw your attention to the factors I considered in reaching my view. This is because some of the issues which arose during my consideration of this Bill were not straightforward, and they may be of interest to your Committee during the Stage 1 inquiry.

There are 5 substantive issues which I wish to highlight. I have summarised the key points very briefly below:

1. Secretary of State consents

In my view, although the Bill is mostly within the legislative competence of the Assembly, sections 6, 11(2) and 21 are currently outside that competence. These sections require the consent of the Secretary of State, pursuant to Part 2 of Schedule 7 to GoWA, and that consent has not yet been forthcoming.

Croesewir gohebiaeth yn y Gymraeg a'r Saesneg/We welcome correspondence in both English and Welsh



This is consistent with the way I have previously interpreted section 110(3) of the Government of Wales Act 2006 (GoWA), as requiring me to reflect whether the Bill would be within competence if it were passed as drafted when introduced. A Bill can be introduced whether or not my view is that it would be within competence.

In contrast, under GoWA a Bill cannot be introduced unless the Member in charge states that it is within competence. It appears that the Minister for Natural Resources, as the Member in charge of the Bill, has relied on a different interpretation of GoWA which has enabled him to state that, in his view, all of the Bill's provisions would be within competence.

2. Whether all of the provisions "relate to" a subject in Schedule 7 of GoWA

Section 6 of the Bill places a duty on public authorities, when carrying out their functions in Wales, to do so in a way that aims to maintain and enhance biodiversity. The duty will apply to – amongst others – bodies such as Police and Crime Commissioners and sewerage undertakers. The Assembly would not have general competence to legislate in respect of these bodies: the police, crime (in general) and sewerage are not included in subjects in Schedule 7. On the other hand, they are not listed as exceptions in Schedule 7 either. I am satisfied, in the light of the Supreme Court judgment on the Agricultural Sector (Wales) Bill, that section 6 is within competence, in so far as it affects these bodies, because the purpose of this section is to maintain and improve biodiversity in Wales; and "biodiversity" is a subject within Schedule 7.

Section 57 of the Bill requires sellers to give money received from the sale of carrier bags (less deductions) to a charitable purpose, beyond the environment-related purposes which the Welsh Ministers can currently specify, to be prescribed in regulations. This could include charitable purposes which would be outside the competence of the Assembly. I am content that this section is within competence because it is appropriate to make the charging provision effective. Moreover, the Bill itself does not oblige or indeed empower sellers to apply their proceeds to charities that are outside the Assembly's competence. The Assembly will, however, have to scrutinise the regulations specifying the relevant charitable purposes with particular care to ensure that they are wholly within competence.



3. Whether any provisions fall within any of the exceptions set out in Part 1 of Schedule 7 of GoWA

The biodiversity duty in section 6 described above also applies to bodies which are mentioned specifically as exceptions from competence in Schedule 7, such as the Industrial Development Advisory Board, the Health and Safety Executive, Research Councils and the Post Office. I am satisfied that this section is within competence because the purpose of section 6 is to protect and improve biodiversity; it is not to affect the excepted bodies in any other way, and the duty applies only “in so far as consistent with the proper exercise of [the body’s other] functions”. I note that the Scottish Parliament has enacted a very similar provision in section 1 of the Nature Conservation (Scotland) Act 2004, and that this has not (to date) been challenged, despite the Scottish Parliament’s competence being subject to specific reservations for Research Councils, the Industrial Development Advisory Board and the Health and Safety Executive.

Section 35 of the Bill bears the title ‘Welsh emissions from international aviation and shipping’. Schedule 7 to GOWA includes exceptions for ‘Aviation, air transport, airports and aerodromes’, ‘Shipping’ and ‘Technical and safety standards of vessels’. I am content that section 35 does not fall within these exceptions, because it is clear that there is no attempt to legislate substantively on the excepted topics. The section merely clarifies how such emissions are to count as Welsh emissions.

Section 55 of the Bill gives the Welsh Ministers powers to make regulations about charges for carrier bags. Schedule 7 to GOWA includes an exception for “Consumer protection, including the sale and supply of goods to consumers”. In my view, this exception applies to the sale and supply of goods only to the extent of forming part of the concept of “consumer protection”, and therefore it does not apply in this case. Although the Bill deals with the sale and supply of carrier bags, its purpose is not to protect consumers, nor is that its effect.

4. Whether any provisions apply other than in relation to Wales

There is no requirement in sections 54 and 55 for a seller of goods obliged to charge for carrier bags to be located in Wales. However, the obligation to charge will apply only where the item is bought in Wales or delivered to someone in Wales, and the provisions are appropriate for making the rest of



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the carrier bag provisions effective. Therefore I am content that these sections would be within competence.

5. Whether any provisions extend beyond England and Wales

Paragraph 2(3) of Schedule 2 of the Bill repeals a provision in existing legislation which extends to Scotland. I am content that the provision would be interpreted by the courts as being within competence, because section 154 of GOWA provides that, in case of doubt, Assembly Acts must be interpreted as narrowly as is required to bring them within competence. However, I am concerned that claiming to repeal a provision that will continue to apply in Scotland is not a very clear way to legislate. This is likely to be a recurring problem as Assembly Acts continue to diverge from UK Acts of Parliament.

This is a very short summary of the issues. If you would like further information and advice on these, or any of the other competence tests I applied to the Bill, the officials supporting your inquiry will be pleased to assist.

I am writing in similar terms to the Chair of the Environment and Sustainability Committee, and copying this to the Member in charge of the Bill.

Dame Rosemary Butler AM
Presiding Officer

cc Carl Sargeant AM, Minister for Natural Resources