

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Bil Senedd ac Etholiadau (Cymru)

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Senedd and Elections (Wales) Bill

CLA(5) SE10
Ymateb gan Capital Law

Evidence from Capital Law

The Bill would introduce several key electoral changes to the Welsh political landscape but, as a law firm, one in particular caught our attention – that which introduces a regulation-making power to implement Law Commission (“**Commission**”) recommendations (at Section 36).

1. Overall benefits

Generally, we support this introduction. The hope is that it will:

- work towards streamlining the current laws relating to electoral arrangements into one consistent framework¹²
- standardise those arrangements across the four parts of the UK (unless there is good reason not to do so)³
- make electoral laws modern, simple and fit for purpose,⁴ and
- enable Welsh Ministers to make orders to ensure election administration is done in a compliant manner with the recommendations of the Commission.

Introducing this subordinate legislation-making power will give Ministers the ability to consider recommendations from the Commission in the past, present and future – and not simply the interim recommendations from its 2016 review.⁵

¹ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage->

² [jsxou24uy7q/uploads/2016/02/electoral_law_interim_report.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-jsxou24uy7q/uploads/2016/02/electoral_law_interim_report.pdf) (at para 2.7 onwards).

³ <http://www.assembly.wales/laid%20documents/pri-ld12142-em/pri-ld12142-em-e.pdf> (at para 231).

⁴ See footnote 1 (at para 1.15 onwards).

⁵ See footnote 2 (at paras 236 – 237).

As noted by the Explanatory Memorandum to the Bill⁶, the UK Government – owing to Brexit preoccupancy – has not yet responded to the Commission’s recommendations. As such, the Commission could publish a revised report in future – the Ministers’ power to make these orders may well prove useful, therefore, if such recommendations are revised/ published, and any subsequent implementation could be done in a timely manner.

2. Reservations

We did wonder whether there was a need to introduce this power, given that Ministers do have, in theory, an existing similar power (under the Government of Wales Act 2006) to implement any Commission recommendations.

However, we tend to agree with the findings in the Bill’s Explanatory Memorandum⁶ that having this additional subordinate power in place:

- (a) Furthers the importance of the Commission’s role in policy change. After all, the Commission’s purpose, as an independent body, is to keep the laws of England *and Wales* under review with a view of “*systematic development and reform*”⁷ of such laws. The Section 36 power will enable the Commission to fulfil its role as an independent regulatory body, as well as providing Welsh Ministers with a statutory vehicle to comply with any Commission recommendations.
- (b) Consequently strengthens and encourages the reciprocal relationship between the Commission proposals and the Assembly’s ministerial powers.
- (c) Ensures that *all* devolved electoral arrangements are covered by this power (and not just those concerning Assembly Members, as is the case under current law).

Equally, the costs which would be incurred by waiting for satisfactory primary legislation to be passed would far exceed the more limited costs incurred in deferring power to the Welsh Ministers to do so now.⁸ We therefore agree that this is a cheaper/ more time-efficient alternative.

⁶ See footnote 2 (at paras 231 – 233). ⁶ See footnote 2 (at para 240).

⁷

<https://www.legislation.gov.uk/ukpga/1965/22/section/3> ⁸ See footnote 2 (at para 640).

On the other hand, we share the concerns of Keith Bush QC⁸⁹ of the apparent *carte blanche* right for Ministers to make these orders – query whether any important changes to electoral law (beyond those which are merely technical/ administrative) should be open to full legislative scrutiny?

Despite this, we're somewhat reassured by the intended protections in place¹⁰, in that the power:

- can only be used within limit, in relation to the Commission's recommendations on rationalising electoral law (and not to amend any other key primary legislation), and
- is subject to the normal affirmative procedure (meaning that, before Ministers can exercise this power, the Assembly will need to pass a resolution approving the draft order).

3. Welsh language impact

Finally, being an organic Welsh firm, we welcome the anticipated benefit of this part of the Bill on the Welsh language. As the current law in this area is available only in English, implementing this Bill (which would be published in both English and Welsh) is only likely to further the status and awareness of the Welsh language.¹¹

⁸ <http://www.senedd.assembly.wales/documents/s86532/CLA5-11-19%20-%20Paper%2047.html?CT=2> (at para

9).

¹⁰ See footnote 2 (at para 71).

¹¹ See footnote 2 (at para 911).