

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

Report on the Tax Collection and Management (Wales) Bill

November 2015

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership:



David Melding (Chair)
Welsh Conservatives
South Wales Central



Alun Davies
Welsh Labour
Blaenau Gwent



Suzy Davies
Welsh Conservatives
South Wales West



William Powell
Welsh Liberal Democrats
Mid and West Wales



Dafydd Elis-Thomas
Plaid Cymru
Dwyfor Meirionnydd



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The Committee's Recommendations

Recommendation 1. We recommend that the Minister should table an amendment to section 3 of the Bill so that any changes to the membership of the WRA are made by the affirmative procedure.

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Recommendation 2. We recommend that the Welsh Government should table an amendment to the Bill to apply the affirmative procedure to the regulations made under section 4 relating to disqualification of membership of the WRA.

(Page 13)

Recommendation 3. We recommend that the Minister should table amendments to section 26 so that the affirmative procedure applies to changes in the planning periods for the WRA.

(Page 14)

Recommendation 4. We recommend that the Minister should table amendments to section 186 so that the affirmative procedure applies to the power to make consequential provisions.

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1. Introduction

Committee Remit

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the 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 Standing Order 21.
3. The Committee also considers and reports 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.

Introduction and consideration of the Bill

4. On 13 July 2015, the Minister for Finance and Government Business, Jane Hutt AM (“the Minister”) introduced the Tax Collection and Management (Wales) Bill (“the Bill”), accompanying Explanatory Memorandum¹ and Statement of Policy Intent.
5. The Assembly’s Business Committee referred the Bill to the Finance Committee to consider and report on the general principles of the Bill, setting a deadline of 27 November 2015.
6. We considered the Bill on 28 September 2015, taking evidence from the Minister.

¹ Welsh Government, *Tax Collection and Management (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, 13 July 2015

2. Background

Purpose of the Bill

7. The Explanatory Memorandum states that this is the first of three anticipated bills to establish devolved tax arrangements in Wales. The Bill will be followed by tax-specific legislation in order to establish two new Welsh taxes – Land Transaction Tax and Landfill Disposals Tax. It adds that the provisions in the Bill will need to be considered as part of the wider legislative package.²

8. The Explanatory Memorandum states that the purpose of the Bill is to “put in place the legal framework necessary for the future collection and management of devolved taxes in Wales”.³

“In particular, the Bill provides for:

- the establishment of the Welsh Revenue Authority (WRA) whose main function will be the collection and management of devolved taxes;
- the conferral of appropriate powers and duties on WRA (and corresponding duties and rights on taxpayers and others) in relation to the submission of tax returns and the carrying out of enquiries and assessments so as to enable WRA to identify and collect the appropriate amount of devolved tax from taxpayers;
- comprehensive civil investigation and enforcement powers, including powers allowing WRA to require information and documents and to access and inspect premises and other property;
- duties on taxpayers to pay penalties and interest in certain circumstances;
- rights for taxpayers to request internal reviews of certain WRA decisions and to appeal to the First Tier Tribunal against such decisions; and
- the conferral of criminal enforcement powers on WRA.”⁴

² Explanatory Memorandum para 1

³ Explanatory Memorandum para 2

3. Legislative Competence

Explanatory Memorandum

9. The Explanatory Memorandum states that that the National Assembly has legislative competence under the following headings in Part 1 of Schedule 7 to the *Government of Wales Act 2006*:

14 Public Administration

16A Taxation⁵

10. Heading 16A was inserted into the *Government of Wales Act 2006* by the *Wales Act 2014*.⁶

11. The Explanatory Memorandum also highlights that Part 4A of *Government of Wales Act 2006* provides the Assembly with competence to make provisions for the appointment of staff of a body established for the collection and management of devolved taxes as civil servants.⁷

Evidence from the Minister on legislative competence

12. The Minister told us that she was satisfied that the Bill was fully within the Assembly's legislative competence.⁸

Consideration of human rights

13. There are a number of sections within the Bill where we wanted to satisfy ourselves that the Minister had fully considered the impact on human rights.

14. We were particularly concerned to explore sections 17 (Permitted disclosures) and 170 (Appealable decisions); and Part 9 (Investigation of Criminal Offences). We explored these with the Minister.

15. Section 17(1) sets out the circumstances in which it is permissible to disclose protected taxpayer information. Section 17(2) provides that the Welsh Ministers may by regulations amend subsection (1).

⁴ Explanatory Memorandum para 2

⁵ Explanatory Memorandum para 5

⁶ Explanatory Memorandum para 8

⁷ Explanatory Memorandum para 7

⁸ Constitutional and Legislative Affairs ("CLA") Committee, 28 September 2015, RoP [5]

16. Section 170 sets out the decisions by the WRA that are appealable and those that are not.

17. Part 9 of the Bill is concerned with the investigation of criminal offences.

Evidence from the Minister on human rights considerations

18. The Minister told us that:

“...I’ve received advice on compatibility with the European convention on human rights, and I’m satisfied the Bill is compatible.”⁹

19. The Explanatory Memorandum states that the affirmative procedure will apply to any regulations made under section 17 because it:

“Relates to the offence of the wrongful disclosure of protected taxpayer information and the limited circumstances in which such information is disclosable, which could have a significant impact on taxpayers’ human rights.”¹⁰

20. The Minister told us that provisions were in line with the current UK and Scottish legislation.¹¹ Welsh Government officials highlighted that the provisions within the Bill went further than existing UK legislation. This was to provide further clarity than that which is in the existing legislation.¹²

21. The Minister confirmed that section 170 was compliant with the European Convention on Human Rights (ECHR).¹³

22. In relation to Part 9 we explored with the Minister whether the regulation making powers would allow Welsh Ministers to create new investigatory powers, for which there could be further human rights considerations.

⁹ CLA Committee, 28 September 2015, RoP [25]

¹⁰ Explanatory Memorandum, Chapter 5, Table A, Page 23

¹¹ CLA Committee, 28 September 2015, RoP [25]

¹² CLA Committee, 28 September 2015, RoP [26]

¹³ CLA Committee, 28 September 2015, RoP [70]

23. Welsh Government officials confirmed to us that this wouldn't be the case:

“That wouldn't be possible with the set-up that we have because section 183 will amend the Police and Criminal Evidence Act and it will allow the Welsh Ministers to apply whichever of the powers are set out in that Act to WRA officers. So, they'll be plugging in to a familiar, consistent framework for criminal investigation powers that already operates throughout England and Wales, which is ECHR-proof, and it goes with codes, for example, that say how things should operate. So, it's basically plugging in to something that already exists and that people know and are familiar with, rather than building something completely new in this Act.”¹⁴

Our View

24. We note the Minister's view of the Assembly's ability to pass this legislation.

25. We are content that the Welsh Government has sought to ensure compliance with the European Convention on Human Rights.

¹⁴ CLA Committee, 28 September 2015, RoP [81]

4. General observations

26. This is the last Bill we are expecting to consider in this Assembly. It is therefore extremely disappointing that this Bill contains examples of what we consider to be poor legislative practice and which we have been highlighting to the Welsh Government continually during this Assembly.

27. There are a number of places within the Bill in which the Government proposes to use the negative procedure to amend primary legislation. We will deal with each of the individual sections in the next chapter.

28. However, we would like to emphasise the broader, basic point which applies to all legislation introduced by the Welsh Government. The affirmative procedure should be applied where primary legislation will be amended. This enables the whole Assembly to consider and vote on the proposed changes. As primary legislation is subject to a four-stage scrutiny process, which involves all Members, any change to primary legislation made by regulation should also be considered by the whole Assembly, and therefore subject to the affirmative procedure.

29. For reasons that are not clear, the Welsh Government does not always seem to accept this principle and regularly proposes using the negative procedure to amend primary legislation, in those cases that it considers to be 'technical' or 'administrative'. As the decision on whether a matter is technical or administrative is a subjective one, we continue to call upon the Welsh Government to accept our much clearer basic principle.

30. We are not persuaded by the argument that it causes any delay to the passing of the regulations to apply the affirmative procedure if they truly are administrative and / or technical. We strongly believe that it is for the legislature to make this decision not the executive.

31. We have written to the First Minister on this important matter,¹⁵ and we expect to return to it in our legacy work.

¹⁵ CLA Committee: [Correspondence from the Chair to the First Minister](#), October 2015

5. Powers to make subordinate legislation

Background

32. The Bill contains 27 Regulation and Order-making powers for the Welsh Ministers, five of which are subject to the affirmative procedure. There is one power of direction which is subject to no procedure.

33. Broadly speaking, we believe the balance between primary and secondary legislation is correct. We therefore have restricted our observations to those sections which we have specific comments and recommendations.

Part 2 – The Welsh Revenue Authority

Section 3 – Membership

34. Section 3 specifies the membership of the Welsh Revenue Authority (WRA). Section 3(3) provides Welsh Ministers with the power to amend the number of members of the WRA by negative procedure. This would involve the amendment of primary legislation, and as noted in the previous chapter, the Committee feels that any amendment of primary legislation should be done via the affirmative procedure.

Evidence from the Minister

35. The Minister told us that as the power was only to be used for ‘administrative purposes’ that the negative procedure was appropriate.¹⁶

Our view

36. The current provision provides for between 6 and 12 members, which is already quite broad. As we have made extremely clear we believe strongly that any changes to primary legislation should be made through the affirmative procedure.

Recommendation 1: We recommend that the Minister should table an amendment to section 3 of the Bill so that any changes to the membership of the WRA are made by the affirmative procedure.

¹⁶ CLA Committee, 28 September 2015, RoP [15]

Section 4 – Disqualification for appointment as non-executive member

37. Section 4 sets out the offices that disqualify a person from being a non-executive member of the WRA. Section 4(k) provides that the Welsh Ministers may through regulations prescribe additional holders of an office, or members or members of staff of a body that may be disqualified. The negative procedure applies because the additional offices that disqualify a person ‘may be updated from time to time’.¹⁷

Evidence from the Minister

38. When we questioned the Minister on whether the negative procedure was appropriate, her response seemed contradictory. She said:

“This is really only going to be used, this power if we should add in that way to a list, as that would be a significant change of circumstance. I think, in the overall legislative scheme, this would be a relatively minor amendment.”¹⁸

Our view

39. In our view, something is either significant or minor, it cannot be both.

40. As we reported on the Historic Environment (Wales) Bill¹⁹ we believe that the act of disqualification is an important matter which warrants consideration by the Assembly.

41. We therefore believe that these regulations should be subject to the affirmative procedure.

Recommendation 2: We recommend that the Welsh Government should table an amendment to the Bill to apply the affirmative procedure to the regulations made under section 4 relating to disqualification of membership of the WRA.

¹⁷ Explanatory Memorandum page 23

¹⁸ CLA Committee, 28 September 2015, RoP [17]

¹⁹ CLA Committee, [Report on the Historic Environment \(Wales\) Bill](#), October 2015

Section 26 – Corporate Plan

42. Section 26 provides that the WRA must prepare a corporate plan. Welsh Ministers are given a regulation making power to specify the length of the first planning period. Each period after the first planning period is set out in the Bill as three years. Section 26(8) provides that the Welsh Ministers may by regulations substitute for this three year period as they consider appropriate. The negative procedure applies because it ‘prescribes an administrative matter’.²⁰

Evidence from the Minister

43. When we questioned the Minister on the rationale for applying the negative procedure to an order which would amend primary legislation, she told us it would only be used if there was “a very strong rationale” for amending it. She added:

“So, we believe that the negative procedure is appropriate because, whilst primary legislation will be amended, the power does relate to an administrative matter...”²¹

Our view

44. We believe that adjusting the length of a corporate planning period is a significant issue that merits Assembly scrutiny and should therefore be subject to the affirmative procedure.

45. Additionally, as we have already stated, we do not accept the argument that the negative procedure is appropriate if the matter is ‘administrative’. If you are amending primary legislation, the affirmative procedure should apply.

Recommendation 3: We recommend that the Minister should table amendments to section 26 so that the affirmative procedure applies to changes in the planning periods for the WRA.

²⁰ Explanatory Memorandum, page 24

²¹ CLA Committee, 28 September 2015, RoP [30]

Part 10 – Final Provisions

Section 186 – Power to make consequential etc. provision

46. Section 186 enables Welsh Ministers to amend any enactment by way of regulations made using the negative procedure.

Evidence from the Minister

47. The Minister told us that the negative procedure applied because:

“...it would only be used for matters like making changes to other legislation needed as a consequence of the provision of this Bill, or to deal with any unforeseen details that arise out of implementation of the new system.....but it’s very limited, how this power could be used.”²²

48. Welsh Government officials went on to add that as it won’t make any substantial change to legislation, and that it was getting the appropriate level of scrutiny at this stage. Therefore the affirmative procedure didn’t need to apply.²³

49. In further correspondence with the Committee, the Minister reiterated her view that the limited scope of the provision meant that the negative procedure was appropriate.²⁴

50. She also highlighted that the Explanatory Memorandum was inaccurate in relation to this provision, and that this would be amended after Stage 2.²⁵

Our view

51. Consistent with our general principles, we believe the affirmative procedure should apply to any powers which could amend primary legislation. As these provisions could be used to amend primary legislation, we believe that the affirmative procedure should apply.

²² CLA Committee, 28 September 2015, RoP [91]

²³ CLA Committee, 28 September 2015, RoP [96]

²⁴ CLA Committee, 19 October 2015, [CLA\(4\)-26-15 Paper 5 - Letter from the Minister for Finance and Government Business regarding the Tax Collection and Management \(Wales\) Bill](#)

²⁵ CLA Committee, 19 October 2015, [CLA\(4\)-26-15 Paper 5 - Letter from the Minister for Finance and Government Business regarding the Tax Collection and Management \(Wales\) Bill](#)

Recommendation 4: We recommend that the Minister should table amendments to section 186 so that the affirmative procedure applies to the power to make consequential provisions.