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Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref LF/CS/0053/12

David Melding AM
Chair,
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Ty Hywel
Cardiff Bay
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28th February 2012

Dear David.

Local Government Byelaws (Wales) Bill

During my recent appearance before the Constitutional and Legislative Affairs Committee, I undertook to provide further clarification of a number of issues of interest to the Committee. These are set out below.

Concurrent Powers of the Welsh Ministers and Secretary of State (Clause 7)

The Committee was interested in how these arrangements operate in practice.

Section 236(11) of the Local Government Act 1972 ("the 1972 Act") provides that the 'confirming authority' for a byelaw is the authority or person specified in the enactment under which the byelaw is made. If no authority or person is specified, the confirming authority is the Secretary of State. As a consequence of the establishment of the National Assembly for Wales, Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 ("the 1999 Order") provided that the functions of the Secretary of State under section 236(11) were exercisable by the National Assembly concurrently with the Secretary of State. Following enactment of the Government of Wales Act 2006, the concurrent functions of the National Assembly in this regard transferred to the Welsh Ministers by virtue of section 162 of, and paragraph 30 of schedule 11 to the GOWA 2006.

Clause 7(9) of the Bill is consistent with our policy approach of consolidating the existing byelaw provisions from the 1972 Act in this Bill and preserves the current position under the 1999 Order.

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

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It should be noted that the confirmation power is a concurrent power and not a joint 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.

Resolution of Opposing Views

The Committee asked about the process for resolving differing views between community councils and unitary authorities when the making of byelaws was being considered.

Although community councils' powers to make byelaws are more limited, both they and unitary authorities can make byelaws in their own right. However, the Committee will appreciate that community councils, as a group, vary considerably in terms of their resources, capability and ambition. In practice, therefore, there would be benefit in close collaboration between a community council and the unitary authority when seeking to tackle issues by way of a byelaw. This might be particularly so in relation to the enforcement of byelaws.

Similarly, where a unitary authority proposes a byelaw, it should work closely with the relevant community council for the area concerned.

The Bill provides for formal consultation with interested parties when a byelaw is being considered, prior to a final decision that a byelaw is the most appropriate means of addressing the issue causing concern. During this process, each party will have an opportunity to submit their views and to engage in the consultation exercise, making their case either way. However, ultimately, it will be for the legislating authority proposing a byelaw to weigh up all the views received and to decide how to proceed. I would of course expect a unitary authority to give appropriate weight to the views of community councils and vice versa when a community council is proposing a byelaw. I will make this clear in statutory guidance to be issued under clause 18 of the Bill.

We are, of course, promoting closer relations between unitary authorities and community councils in their area. This is in keeping with Part 2 of the Local Government (Wales) Measure 2009, for example, which placed a duty on unitary authorities, community councils and other key partners to collaborate in drawing up and delivering strategies for addressing the needs of their communities. This requires the building of consensus and could provide an opportunity for shared discussions of a range of approaches to tackling issues in communities, of which byelaws may be just one.

Fixed Penalties - Assembly Procedure for Subordinate Legislation

I said that I would provide further rationale for the choice of Assembly procedure relating to the powers of Welsh Ministers to specify a range for fixed penalties (negative procedure) and that for changing the default amount (affirmative procedure).

The Bill mirrors the provisions of section 237B of the Local Government Act 1972 in relation to the enforcement of byelaws in England, which in turn is consistent with similar provisions in the Clean Neighbourhoods and Environment Act 2005.

Clause 13 of the Bill enables a legislating authority to specify the amount of a fixed penalty and to specify different amounts of fixed penalty in relation to different byelaws.

If no amount is so specified, the default amount is £75. This is the reference point for regulations made by the Welsh Ministers as to the range of fixed penalties that may be set by legislating authorities pursuant to clause 13 of the Bill. As such, it seemed right that the amount should be on the face of the Bill.

The regulation making power at clause 13(3) is appropriate in this instance as the Welsh Ministers will be able to prescribe limits for fixed penalty notices to ensure consistency of approach across legislating authorities. This power would enable the Welsh Ministers, if appropriate, to prescribe different ranges for different types of byelaw. This level of detail provided for by way of regulations will enable the Welsh Ministers to react quickly to changing needs and is an appropriate use of a regulation making power.

The regulation making power will be subject to the negative resolution procedure as the regulations define the operational, technical and administrative detail regarding the amount of FPN. We take the view that this is appropriately dealt with by the negative resolution procedure as the regulations will add detail to the framework provided for on the face of the Bill. The negative procedure affords a sufficient degree of scrutiny of the regulations to the Assembly.

The Bill also makes provision at clause 13(5) for the Welsh Ministers to exercise an order making power to amend the sum of £75 currently provided for within the Bill by substituting a different amount. This allows the Welsh Ministers to make an order to change the default amount, if necessary, ensuring that the level remains in line with similar low-level offences. This provision ensures that the Bill is both reactive to changing future circumstances and also provides responsible legislation.

The affirmative procedure will ensure that there is an appropriate degree of scrutiny of the use of this power by the Welsh Ministers, given that the Order will amend this Act and may include supplementary amendments to other primary legislation. In addition, the affirmative procedure is appropriate as there may be significant interest in the exercise of this order making power as it provides for the Welsh Ministers to specify a default amount for the FPN. Therefore, we take the view that the affirmative procedure will allow for sufficient debate and scrutiny to be undertaken by the Assembly.

I trust this will assist the Committee's further deliberations.

Regards

Carl Sargeant