



## **Wales Environment Link response to the Subordinate Legislation Committee - Inquiry into the scrutiny of subordinate legislation and delegated powers**

**September 2008**

Wales Environment Link (WEL) is a network of environmental and countryside Non-Governmental Organisations in Wales, most of whom have an all-Wales remit. WEL is officially designated the intermediary body between the government and the environmental NGO sector in Wales. Its vision is to increase the effectiveness of the environmental sector in its ability to protect and improve the environment through facilitating and articulating the voice of the sector.

Wales Environment Link is grateful for the opportunity to contribute to this important inquiry into the preparation and making of subordinate legislation and the conferral of delegated powers on Welsh Ministers in UK Bills. We have focussed on section 2 and 3 of the consultation.

### **2. Additional considerations relating to statutory instruments implementing European Union directives:**

- the effectiveness and transparency of the Welsh Assembly Government's transposition procedures;
- the extent to which the Welsh Assembly Government can and does tailor the implementing regulations to the needs of Wales in view of the parameters set by European directives.

The examples we are aware of in Wales, have not varied significantly from the England regulations. This has not been a problem where the drafting of the English regulations has been adequate, as there is often little scope for alternative approaches when transposing the Directives. However, it is noticeable that Wales has failed to grasp opportunities to progress its sustainable development commitment in legislation for example when implementing the Strategic Environmental Assessment (SEA) Directive. The Scottish Executive used this opportunity and chose to implement this in a more detailed way, whereas Wales chose to take a light touch approach, which we found disappointing.

### **3. Scrutiny of Bills of the UK Parliament which have an impact on Wales:**

- the procedures in place to make transparent the implications of UK Bills on areas of devolved competency and the powers of Welsh Ministers;
- how decisions are taken with respect to conferring delegated powers on Welsh Ministers, agreeing the applicable procedures or conferring framework powers (powers to make Assembly Measures) within Bills;
- liaison between the Welsh Assembly Government and the UK government in relation to UK Bills;

- how to ensure effective and timely consideration of UK Bills by the Committee.

The liaison between the Welsh Assembly Government (WAG) and the UK Government is not clear. This is of concern to us for two reasons

1. Transparency in relations would help civil society understand and engage with the making of legislation
2. If we have governments in Westminster and Cardiff Bay of different political parties then there is considerable scope for the legislative programme for Wales to be frustrated or inadequately addressed in UK Acts.

The Committee needs to be engaging with Bills as early as possible in the draft stage.

We are concerned that the subordinate legislation to implement UK Acts of Parliament is not being brought in a timely fashion, leaving Wales with a legislative deficit compared with England and potentially gaps in powers. Whilst implementation arrangements and structures are often included in Acts of Parliament relating to England, simple framework clauses in effect say 'and Wales can implement this as it sees fit'. In many cases the WAG has not engaged with stakeholders to start discussions on how the equivalent legislation would be put into practice in Wales and so the Act is made and simply lies on the statute without being implemented in Wales. This seems to be a growing problem with legislation originating in Westminster that has less political momentum behind it in Wales to ensure it is progressed into implementation in Wales. Non Governmental Organisations (NGOs) and the interested parties who have campaigned for the legislation at Westminster, often do not have the resources to start a new campaign targeted on the implementation at the Senedd.

#### Long delays in implementation - Experience with the Commons Act (2006)

The Commons Act 2006 has a number of framework clauses relating to Wales which allow the Assembly to make regulations to update the registers and improve the management of common land in Wales. Apparently due to limited resources, the WAG has focused on bringing in only some parts of the Act in Wales, however Part 2 of the Act has yet to be progressed and this is the main substantive part which would facilitate the better management of commons.

WAG has yet to start in engaging with stakeholders over the nature of the structures and regulations that would implement Part 2 and we understand that WAG do not intend to start consulting on this until 2010 at the earliest. The effect of this is that the majority of common land in Wales will continue to find it hard to be accepted into agri-environment schemes - a key source of income for many marginal farms in Wales. It also means that the Assembly will find it hard to meet its Environment Strategy targets to secure favourable condition on nationally important protected wildlife sites by 2015.

#### Timeliness and ensuring Wales has comprehensive powers - Experience with the UK Marine Bill

The development of the UK Marine Bill is being led by Defra. Wales Environment Link (WEL) has provided input at various key stages of the Bill's development, particularly those highlighted in bold text below.

- May 2005 – UK Government commitment to Draft Marine Bill in legislative programme for 2005/6 Parliamentary session.
- **March 2006 – Consultation on a Marine Bill**
- **March 2007 – Consultation on a Marine Bill White Paper**
- **April 2008 – publication of draft Marine Bill for public consultation and pre-legislative scrutiny**
- May 2008 - publication of draft legislative programme for 2008/9 Parliamentary session, including commitment to Marine Bill

The draft Marine Bill - published in April 2008 - was accompanied by a policy paper and a set of explanatory notes, as well as an Impact Assessment. Most of the provisions in the draft Bill applied to Wales, with powers being conferred on Welsh Ministers as they are upon the Secretary of State. These included powers to prepare Marine Plans and designate Marine Conservation Zones. In general, the draft Bill contained little prescription about how these powers should be used (either by Welsh Ministers or Secretaries of State). Scotland and Northern Ireland were largely excluded from the provisions of the draft Bill - the devolved administrations in these countries are to bring forward separate marine legislation.

As well as public consultation, the draft Marine Bill was subject to pre-legislative scrutiny by a Joint Committee of MPs and Peers. The Joint Committee called for written evidence, and held eight oral evidence sessions over five weeks before reporting to the UK Government on 30 July. WEL gave evidence to the Committee<sup>1</sup> as well as providing a consultation response to WAG and Defra.

The NAW Sustainability Committee held one evidence session on the draft Marine Bill (on 4 June), with the Environment Minister Jane Davidson, who is responsible for the Bill in Wales.

WEL welcomed the opportunity to input to all of the above processes. However, we were concerned that there was relatively little scrutiny of how the draft Bill will affect Wales, for a number of reasons:

- Little information is available yet about how the powers given to Welsh Ministers in the Marine Bill will be implemented. In contrast, a large amount of information is available about the structures that the UK Government will put in place to deliver its new powers. This has made it difficult for stakeholders in Wales to fully assess the implications of the new legislation, and - crucially in respect of the draft Bill - how the legislation itself may need to be redrafted.
- There appeared to be a low level of understanding among members of the Westminster Joint Committee that scrutinised the draft Bill of its importance for Wales. For example, committee member Mr Charles Walker MP said in the penultimate oral evidence session "... am I right in thinking that this Bill applies to the whole of the UK or will it be down to the Welsh Assembly and the Scottish Parliament to bring forward their own recommendations?". This may be due to differences between the devolution settlements for Wales, Scotland and Northern Ireland, and a failure by some to fully understand that unlike in the other two countries, the primary marine legislation for Wales will come directly from the UK Marine Bill. This perhaps explains why the majority of the Committee's 96 recommendations focused on the UK Government, with few referring specifically to WAG.
- The draft Bill was not given high priority for scrutiny within the Senedd with the Sustainability Committee using only about forty minutes of a scheduled hour long evidence session to question the Minister about it. Evidence was not invited from the public. Prior to the setting of a date for the session, concern was expressed that the timescale for the Sustainability Committee's to report and the Minister to respond would extend beyond the window of opportunity for amendments to be made to the draft Bill. In the event, the Committee provided recommendations directly to the Joint Committee inquiry at Westminster as written evidence, but there is no evidence that these recommendations were given particular consideration (possibly in part due, again, to a mismatch in timeframes).
- WEL would have liked to see input from a range of witnesses, to enable Committee members to gain an understanding of stakeholders' concerns, and question the Minister in relation to these. The Committee may then have been in a stronger position both to make

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<sup>1</sup> In addition to WEL supplying written evidence, a WEL representative was included on a panel of NGOs invited to give oral evidence under the banner of Wildlife and Countryside Link.

recommendations directly to Westminster as to how the UK legislation should be strengthened in relation to Wales, and to encourage the Minister to secure amendments to the draft Bill through negotiations with UK Government.

WEL's main concerns, given the points above, are twofold:

- Potential shortfalls in the draft provisions for Wales, a key concern for stakeholders such as ourselves, are not challenged or championed effectively by any group - i.e. there is inadequate pre-legislative scrutiny for Wales. Wales therefore risks missing the opportunity that the draft Bill stage offers to ensure that the legislation is as complete and robust as it should be; once the legislation is published in full, securing amendments is likely to be more difficult.
- Potential long delays in the implementation of aspects of the legislation in Wales, compared to implementation in England. As there has been relatively little consideration of implementation specifically in Wales - either by the Assembly or by stakeholders there could be considerable delay before the appropriate structures are identified and, perhaps more crucially, the necessary resources are identified and secured. This experience has been highlighted by the Commons Act 2006, as mentioned earlier in this response.

WEL is aware that the Assembly Committees have packed agendas, and it is unsurprising that scrutiny of draft UK Bills is not given the highest priority. In addition, we note that the publication of draft Bills for pre-legislative scrutiny is new as a general practice adopted by UK Government. However, the scrutiny of draft Bills offers an opportunity to ensure that gaps or issues are addressed prior to publication of full UK Bills (by which stage it can be more difficult to secure amendments). It is important to ensure that, where UK Bills provide duties and powers for Welsh Ministers they are the right ones, and that sufficient recognition is given to the role of the Assembly which will ultimately hold Welsh Ministers to account.

Therefore, we would urge the Committee to consider how the opportunity presented by the publication of draft Bills can be effectively harnessed by the Assembly. We would recommend a formalised procedure for the relevant Assembly committee to review impacts of UK legislation at the draft stage, taking evidence from stakeholders, and input directly into Westminster pre-legislative scrutiny. This would mean a departure from the standard timescales for the Committees to report, and ministers to respond. It would also require an agreement to be established with the UK Parliament, so that the importance of evidence gathered by the Assembly Committees can be adequately recognised.

The following WEL members support this response:

Butterfly Conservation Wales  
Cymdeithas Eryri Snowdonia Society  
Keep Wales Tidy  
Open Spaces Society  
Ramblers Cymru  
RSPB Cymru  
Sustrans Cymru  
Wildlife Trusts Wales  
WWF Cymru