

# **WELSH ASSEMBLY GOVERNMENT MEMORANDUM ON FRAMEWORK PROVISIONS FOR THE NATIONAL ASSEMBLY FOR WALES**

## **Introduction**

1. This memorandum sets out the background and context relevant to the provisions in Part 9 of the Marine and Coastal Access Bill conferring legislative competence on the National Assembly for Wales in relation to public access to, and routes for, the coast of Wales.

## **Background**

2. Part 3 of the Government of Wales Act 2006 (c.32) (“the Act”) gives the National Assembly for Wales the power to pass legislation known as Assembly Measures. Assembly Measures will be able to make any provision that could be made by an Act of Parliament with respect to those matters, subject to the restrictions contained in the Act.
3. The Assembly may pass Measures in relation to the “matters” which are listed in 20 “fields” in Part 1 of Schedule 5 to the Act. Additions to the Assembly’s legislative competence are made by adding new matters to the Fields in Part 1 of Schedule 5. The Act includes a power to add new matters by Order in Council. Acts of the UK Parliament may also add to the Assembly’s legislative competence by inserting matters into Part 1 of Schedule 5 to the Act. Such provisions are referred to as “framework powers”.
4. The proposed powers in the Bill would grant the Assembly law-making powers by adding two matters to Field 16 (sport and recreation).

## **Context**

5. Current approach in Wales The Welsh Assembly Government is committed to improving public access to the coast of Wales, and in particular, to creating a new All Wales Coast Path by 2012. This is being taken forward under the Coastal Access Improvement Programme via new investment in path infrastructure, including new circular routes at the coast. The programme also includes specific provision for horse-riders, cyclists and for disabled people and is being progressed primarily under powers available under the Highways Act 1980. £1.5 million was made available for the programme in its first year (2007/8) and this has been increased to £2 million in the current financial year, with a particular focus on the All Wales Coast Path. The funding is being channelled via the Countryside Council for Wales (CCW) to the coastal local authorities to support the ‘on the ground’ improvements.
6. Current limitations on coastal access Analysis by the CCW has revealed that the public has access to 60% of the Welsh coastline (utilising public

rights of way, National Trust land and other publicly owned land at the coast as well as some land designated as access land under the Countryside and Rights of Way Act 2000). However the quality and extent of this access varies considerably with access often being limited to a right to pass and re-pass along a narrow coastal path, without any right of access to adjacent land for the wider purpose of open air recreation.

7. It is also apparent that many believe they already have a right of access to the foreshore, including beaches in Wales, although this is generally not the case. Some 70% of the foreshore in Wales is owned by the Crown Estate and while they generally allow public access to this land, this is not a public right. The other 30% is in private ownership.
8. The Coastal Access Improvement Programme will further improve public access to the Welsh coast, especially through the eventual completion of the All Wales Coast Path. The programme is not designed, however, to clarify the extent of public access rights to land at the coast, nor to create additional areas of coastal land for public access for the purpose of open air recreation.

#### Proposed powers for England

9. The Bill contains new provisions to secure improved public access to the English coast. The key elements include a duty on the Secretary of State and on Natural England to secure one or more long-distance routes for the English coast, as well as a margin of land along the length of the English coast for the purposes of public enjoyment. The Bill will amend existing legislation to provide for the establishment of one or more long-distance routes and for the designation of a “coastal margin” to which the public would have a right of access for the purposes of enjoyment by them in conjunction with that route or otherwise, subject to the exclusion of any areas falling within specified categories (“excepted land”). The descriptions of land in England which will be “coastal margin” will be specified in subordinate legislation. Such land may include, for example, land over which the English coastal route passes, land adjacent to that route, and beaches, cliffs, rocks and dunes and other land (primarily though not exclusively) to the seaward side of the coastal route.

#### Position in Wales

10. These powers could have some potential application to Wales but they have been designed specifically for England rather than for Wales. Wales starts from a different position, in that the Coastal Access Improvement Programme is already underway and the All Wales Coast Path is under construction. The existing programme relies primarily on voluntary access agreements and has the support of stakeholders, including very importantly landowners at the coast. While the Welsh Assembly Government wishes to have a coherent legislative framework for coastal access in Wales, covering both the equivalent of the long-distance route(s) and access to coastal land for the purpose of open air recreation, it is

important to it that any legislative provision should complement and build upon the current programme. This would involve full consultation with stakeholders as to how the provisions envisaged for England would need to be adapted to meet Welsh requirements and circumstances. The timing of any legislation would also need to be determined according to Welsh priorities and circumstances.

11. For these reasons the Welsh Assembly Government does not wish to include detailed provision in the Bill regarding coastal access in Wales. However, it does foresee a need for future legislation in Wales, not least to help address the limitations outlined in paragraph 10 above. The existing powers of the Welsh Ministers under Section 3 of the Countryside and Rights of Way Act 2000 (which enable them to make an Order applying the access provisions in Part 1 of that Act to coastal land) are neither attractive nor suitable for the same reasons the UK Government has identified – i.e. their lack of flexibility to deal with the complex situation at the coast and inability to provide a continuous route around the coast. However, neither the National Assembly for Wales nor the Welsh Ministers have other powers available to them which are suitable to create permanent new or improved rights for the public to access the coast of Wales. The framework powers included in the Bill are designed to address this by providing a full range of legislative powers to support and complement current work, for example by enabling provision to be made for public access to land adjacent to the coastal path.
12. The Welsh Assembly Government has identified the following key principles which it would want to guide further developments:
  - a. to ensure that any new legislative provisions complement and add value to the work undertaken on the Assembly Government's Coastal Access Improvement Programme and in providing greater clarity for the public on their access rights at the coast;
  - b. to aim to maximise the potential benefits for public access while minimising any detrimental impact on landowners, farmers and other private and commercial interests at the coast;
  - c. to keep to a minimum the impact of any agreed new provisions on coastal access on arable land and other actively farmed land at the coast;
  - d. to develop and implement any agreed new framework provisions on coastal access in a way which encourages clarity as to the rights conferred.
13. If the framework powers are enacted, the Welsh Assembly Government would propose, as the next step, to ask CCW to investigate how a statutory approach to coastal access might work in practice in Wales, while maximising the investment under the Coastal Access Improvement Programme and securing stakeholder and public support. It would then consult widely on the proposed approach before devising an Assembly Measure or Measures covering the preferred approach. In this way the Welsh Assembly Government would be able to bring forward legislation

developed to meet Welsh needs, reflecting input from the people and organisations concerned and subject to full scrutiny by the National Assembly for Wales. This would not be possible without the framework powers in the Bill..

### **Scope of the proposed powers**

14. The Bill contains provisions which will confer legislative competence upon the National Assembly for Wales in relation to two areas: firstly, the establishment and maintenance of one or more routes for the coast to enable the public to make recreational journeys, and secondly, the securing of public access to 'relevant land' for the purposes of open-air recreation. Land will be 'relevant land' if it is land at the coast, can be used for the purposes of open-air recreation in association with land at the coast, or can be used for the purposes of open-air recreation in association with the coastal route or routes. This legislative competence will be conferred by means of the insertion of two new matters into Field 16 (sport and recreation) of Part 1 of Schedule 5 of the Government of Wales Act 2006.
15. Depending on the approach taken, and the outcome of any public consultation, a Measure relating to one or both of the above areas might need to include provisions in relation to:
  - a. the designation of descriptions of 'relevant land' to which the public would have a right of access for the purpose of open-air recreation;
  - b. the nature of that right of access and the conditions under which that right may be exercised;
  - c. designation of descriptions of 'relevant land' which are excepted from the right of access (including any conditions that apply in relation to those descriptions of land);
  - d. exclusions or restrictions to the right of access (for example, for nature conservation, animal welfare, public health and safety, land management, defence or national security reasons);
  - e. the means of access to land to which the above right of access, or other rights of access apply, or over which a coastal route passes, and boundaries to such land;
  - f. the dedication of land as land to which the right of access applies;
  - g. the establishment and maintenance of a route or routes for the coast to enable the public to make recreational journeys other than by mechanically propelled vehicles (except permitted journeys by qualifying invalid carriages);
  - h. the realignment, diversion or closure of the route or routes (for example in response to coastal erosion or the effects of climate change);
  - i. ancillary provision in relation to the right of access and the route or routes (including provision in relation to liabilities that might arise, the making of byelaws in relation to the access land, the appointment of wardens, the erection, maintenance and removal of signs and notices, and the funding of works);

- j. the estuarial and upstream waters up to the first public foot crossing which are to be treated as forming part of the sea for the purposes of the right of access and the route or routes;
  - k. the islands (or descriptions of islands) whose coastlines are to be treated as forming part of the coast for purposes relating to the right of access and the long distance route or routes.
16. The Bill provides for the English coastal access provisions to be binding on the Crown: for consistency, any provisions in equivalent Assembly legislation would similarly be able to bind the Crown. However, it is not the Assembly Government's intention that any Assembly Measure should alter, or permit the alteration of, the position with regard to access to land used for purposes within the responsibility of the UK Government without the agreement of the relevant Secretary of State. In this context, land at the coast used for railways, airports, ports, docks, telecommunications, gas, electricity and for military purposes is particularly relevant.

### **Geographical limits**

17. Section 94 of the 2006 Act provides that a provision of an Assembly Measure is outside the Assembly's legislative competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales. Any Measure made under these framework powers would therefore make provision in relation to Wales only.

### **Minister of the Crown functions**

18. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter or remove the functions of a Minister of the Crown without the consent of the relevant Secretary of State (and may not create new Minister of the Crown functions at all). Should any future proposals for Assembly Measures impact on Minister of the Crown functions, the appropriate UK Government Departments would first be consulted and their agreement obtained before any change to, or modification of, those functions could be made.
19. For example, under section 28 of the Countryside and Rights of Way Act 2000, the Secretary of State may issue a direction excluding or restricting the public right of access under section 2(1) of that Act to any land in the

interests of defence or national security. No Assembly Measure could contain provision to alter or remove (or allow alteration or removal of) the Secretary of State's power of direction under section 28 without the prior consent of the UK Government.

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Welsh Assembly Government