

David Rees AM  
Chair  
Health and Social Care Committee  
National Assembly for Wales  
Ty Hywel  
Cardiff Bay  
Cardiff  
CF99 1NA

23 June 2015

*Dear David*

### **Public Health (Wales) Bill – legislative competence**

Further to my statement on the legislative competence in respect of the Public Health (Wales) Bill, published on 8 June, I am writing to draw your attention to the Secretary of State consent and human rights issues I took into account in reaching my view. The issues in relation to human rights are not straightforward and they will require careful consideration during Stage 1. Furthermore, as I explain below, careful consideration by the Assembly, and its Committees, is in itself an important factor in reassuring the courts that human rights have been fully respected, and, therefore, that the Bill is within competence.

### **Provisions requiring Secretary of State consent**

In my view, although the Bill is mostly within the legislative competence of the Assembly, sections 4(7), 5(6), and 11(7) and paragraphs 6 and 9 of Schedule 1 would not be within competence. This is because these provisions require the consent of the Secretary of State, pursuant to Part 2 of Schedule 7 of the Government of Wales Act 2006 (GoWA), to bring them within the Assembly's competence and this necessary consent has not been obtained at this time.

This is consistent with the way I have previously interpreted section 110(3) of GoWA, as requiring me to reflect whether the Bill would be within competence if it were passed as drafted when introduced. You will be aware that GoWA does not debar a Bill from being introduced even if my view is that it would not be within competence.

The Member in charge of a Bill also has to form a view as to whether the Bill is within competence. In contrast to the position regarding my own view, section 110(2) of GoWA does debar introduction where that Member does not positively state that the Bill would be within competence.

As I understand it, the Minister for Health and Social Services, as the Member in charge of the Bill, has relied on a different interpretation of the GoWA, which has enabled him to state that, in his view, all of the Bill's provisions "would be" within competence, in the sense that they would be if the necessary consents were received by the time the Bill was passed.

## **Human rights**

### Background

Under Section 108(6)(c) of GoWA, a provision of a Bill is outside the Assembly's competence if it is incompatible with the European Convention on Human Rights.

Part 2, Chapter 1 of the Bill contains provisions that make enclosed and substantially enclosed public premises and shared workplaces smoke-free. These are referred to as 'smoke-free premises'. In this context, 'smoke-free' means that smoking and the use of nicotine inhaling devices (commonly known as 'electronic cigarettes') is banned, unless the premises are exempted by regulations made under section 10 of the Bill.

In terms of workplaces, section 6 of the Bill provides as follows.

Workplaces have to be smoke-free. For these purposes, "workplace" means a place:

- where more than one person works (whether at the same time or not);  
or
- where only one person works but is somewhere that the public may have access to.

Where only part of the premises is a workplace, only that part has to be smoke-free. And if part of the workplace is not enclosed or substantially enclosed, that part does not have to be smoke-free either.

But all workplaces have to be smoke-free all of the time – i.e. even outside working hours – except for workplaces that are also dwellings (homes) or within dwellings (section 6(5) of the Bill). In that situation, the workplace does not have to be smoke-free when it is not being used as a place of work.

Section 6(5) raises competing human rights between:

- (a) smokers whose homes are also workplaces; and
- (b) workers who are employed at such workplaces and who wish to have their health protected from smoke (“workers”).

To be within competence, the Bill has to strike the balance between these rights in a way that is “proportionate” to the legitimate aim of protecting public health, in the context of a person’s private home. Both these rights are protected by Article 8 of the European Convention on Human Rights and thus by the Human Rights Act 1998.

We sought a specialist opinion from a leading human rights barrister on whether the Bill does strike this balance appropriately. She advised that the Assembly would have a wide discretion when balancing the Article 8 rights of these different groups of individuals. (This discretion is often called the “margin of appreciation”). However, she stressed that the courts will be much more likely to respect that discretion if the Assembly has carefully considered where to strike the balance, on the basis of relevant evidence. This is consistent with what the majority of the Supreme Court said in the recent judgment in the *Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* case.

Given:

- (a) that the impact on workers is likely to fall within the margin of appreciation of the Assembly (subject to medical evidence); and
- (b) the way the Bill balances the rights of smokers;

I concluded that section 6(5) of the Bill would be within competence.

#### (a) Workers’ rights

A highly relevant matter for the Assembly to consider, when balancing the rights of smokers and non-smokers in the context of employment in the smoker’s home, is the effects of third-hand smoke and residual vapours from NIDs, respectively. I believe it would be helpful for your Committee to take medical evidence, during Stage 1, on these matters.

The fact that a worker has a degree of choice as to where to work can be taken into account by the Assembly in its considerations as to the balance of rights.

(b) Rights of smokers who, in their own home, employ others

Limiting what people can do in their home is a significant infringement of their enjoyment of that space, especially when it can result in a criminal penalty. The Bill extends the right of to smoke in a home that is also used as a workplace, by allowing the resident to smoke even in the parts that are used as a workplace, provided that this is outside working hours.

However, if you take account of the present position under secondary legislation, the Bill balances out this move in favour of smokers by further restricting the right to smoke in other parts of the home.

This is a very short summary of the issues. If you would like further information and advice on these, or any of the other competence tests I applied to the Bill, the officials supporting your inquiry will be pleased to assist.

I am writing in similar terms to the Chair of Constitutional and Legislative Affairs Committee and I am copying this letter to the First Minister and to the Member in charge of the Bill.

A handwritten signature in black ink that reads "Rosemary Butler". The signature is written in a cursive, flowing style.

**Dame Rosemary Butler AM,  
Presiding Officer**