

**Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Constitutional and Legislative Affairs Committee**

Cynulliad
Cenedlaethol
Cymru
National
Assembly for
Wales



Alun Davies AM
Minister for Natural Resources and Food
Welsh Government
5th Floor
Tŷ Hywel
Cardiff Bay

3 February 2014

Dear Minister

1. I am writing in connection with the Welsh Government's White Paper, *Towards the Sustainable Management of Wales' Natural Resources: Consultation on proposals for an Environment Bill*, which was issued last year.

2. As you are aware, we have been taking a keen interest in the way in which the Welsh Government has been drafting its legislation and it was with this in mind that we considered the White Paper at our meeting on 20 January.

3. We note that the consultation proposes two possible powers for Welsh Ministers to amend Acts of Parliament and the Assembly by way of secondary legislation:

- (i) proposal NRM11, option 1, which would enable the Welsh Ministers to make specific changes, by means of a super affirmative procedure, to existing legislation in certain circumstances but to limit these changes to the primary legislation listed in Schedule 2 to the *Natural Resources Body for Wales (Functions) Order 2013*.
- (ii) proposal SM4, which would give Welsh Ministers the power to amend a Water Act, by Order, in certain circumstances including if they are

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satisfied that it will make it easier to consolidate one or more Water Acts.

4. Also, paragraph 3.44 suggests that the two proposals may be combined so that wider environmental legislation could be amended by Welsh Ministers (proposal NRM11, option 2).
5. We also note, with some concern, that the White Paper states that “it is not currently known when and how Welsh Ministers might use the enabling powers set out in NRM11” (paragraph 3.50) and that it makes a similar statement in respect of the power set out in SM4 (paragraph 5.48).
6. Within the consultation document, there is reference to both proposal NRM11 and SM4 being used as a pre-consolidation exercise, although it is unclear what such an exercise entails and what its’ purpose would be.
7. As you will be aware the term “Henry VIII” power is commonly used to refer to powers such as NRM11 and SM4 that would enable secondary legislation to amend primary legislation.
8. While the appropriateness of Henry VIII powers in Welsh Government Bills has not arisen as a major issue within the Assembly to date, the issue has however been considered by the UK Parliament during the passage of a number of Bills.
9. For example, the issue was considered by the House of Lords Constitution Committee in its report on the Public Bodies Bill (which gave power to the Welsh Ministers to make the Orders that established Natural Resources Wales and gave it its functions). It commented that Henry VIII powers remain a:

“constitutional oddity. That is: they are pushing at the boundaries of the constitutional principle that only Parliament may amend or repeal primary legislation..... Where the further use of such powers is proposed in a Bill, we have argued that the powers must be clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight.”

10. In relation to the Orders proposed by the Public Bodies Bill, the Constitution Committee stated:

“The Government has not made out the case as to why the vast range and number of statutory bodies affected by this Bill should be abolished, merged or modified by force only of ministerial order, rather than by ordinary legislative amendment and debate in Parliament. As we have said, and as is axiomatic, the ordinary constitutional position in the United Kingdom is that primary legislation is amended or repealed only by Parliament. Further, it is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective. While we acknowledge that exceptions are permitted ... we have also sought to ensure that such exceptions are used only where the need for them is clearly set out and justified. As we have said, the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.”

11. We have also considered the wider issue of the balance between what is included on the face of the Bill and what is provided for in regulations, both in our 3rd Assembly report, *Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years*, and more recently in a number of reports on Bills introduced by the Welsh Government in the 4th Assembly. In our reports, we have made a number of recommendations about the need to avoid framework legislation.

12. As there is no draft Bill at present, it would be difficult to provide any comment on the appropriateness of the powers you propose. However, we are concerned that Welsh Ministers do not currently know how and when they might use some of the powers that are being consulted upon.

13. We are therefore writing to provide advance warning that we intend to use a similar test as Parliament for judging the appropriateness of Henry VIII powers in the Environment Bill, i.e. that they must be limited, exercisable only for specific purposes, and subject to adequate Assembly oversight. On that basis, we believe that the proposal we refer to in paragraph 4 (NRM11, option 2) would fall foul of the test on the basis of its breadth to amend any environmental legislation, while those we refer to in paragraph 3 (NRM11,

option 1 and SM4) would need to be considered carefully once the detail is known.

14. As with other Bills introduced in the 4th Assembly, we will also consider carefully the balance the Environment Bill achieves between what is contained on its face and what is left to subordinate legislation. As indicated above, we are unlikely to comment favourably on a Bill that has a framework structure because it reduces the level of Assembly scrutiny of legislative proposals.

15. I am copying this letter to Lord Elis-Thomas AM, Chair of the Environment and Sustainability Committee.

Yours sincerely

A handwritten signature in black ink that reads "David Melding". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

David Melding AM
Chair

Alun Davies AC / AM
Y Gweinidog Cyfoeth Naturiol a Bwyd
Minister for Natural Resources and Food



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref LF/AD-/0150/14

David Melding AM
Chair of the Constitutional and
Legislative Affairs Committee
Ty Hywel
Cardiff Bay



March 2014

Environment Bill Proposals

Thank you for your correspondence dated 3 February 2014 and interest in our White Paper consulting on proposals for an Environment Bill.

In relation to the points you raise we are in the process of analysing the consultation responses and I would highlight that proposals for inclusion in the draft Bill are not finalised - the consultation on the White Paper being a key part of the development of the Bill. The responses will inform further development of our proposals and the drafting of the Bill and I intend to issue a consultation summary report later this Spring.

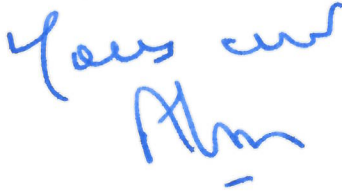
There are two possible powers outlined in the White Paper for Welsh Ministers to amend Acts of Parliament and the Assembly by way of secondary legislation. NRM11 sets out a proposal for a power to effect changes to the primary legislative framework that governs the management of natural resources in certain circumstances. An additional proposal (SM4) would provide Welsh Ministers with the power to amend a Water Act, by Order, in certain circumstances, including if they are satisfied that it will make it easier to consolidate one or more Water Acts.

If taken forward, I would offer reassurance that the intention is for the powers to have limited and very specific scope to effect changes to the primary legislative framework that governs the management of natural resources. This would only apply in very specific circumstances and to specific legislation - that is where it can be demonstrated that the current law is contrary to the definition, purpose and objectives of the framework for integrated natural resource management and where all other means of addressing those issues have been actioned. Any such amendments would also have to ensure continued compliance with EU

obligations. A misconception was raised at the Environment and Sustainability Committee on 12 December that this is a general power that will enable the consolidation of Environmental legislation through secondary legislation – this is not the case and my officials will clarify the intention and limited scope of the power.

In considering the proposals, I am mindful of both the need to have a legal framework that is flexible enough to be more responsive to changing circumstances, but also that there is clarity and clear democratic accountability.

I am copying this response to Lord Elis-Thomas, Chair of the Environment and Sustainability Committee.



Alun Davies AC / AM
Y Gweinidog Cyfoeth Naturiol a Bwyd
Minister for Natural Resources and Food