Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:

Video Conference via Zoom

Meeting date: 17 October 2022

Meeting time: 13.30

For further information contact:

P Gareth Williams

Committee Clerk

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1 Introductions, apologies, substitutions and declarations of interest

(13.30)

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

(13.30 – 13.35) (Pages 1 – 2)

Attached Documents:

LJC(6)-26-22 – Paper 1 – Draft report

Made Negative Resolution Instruments

2.1 **SL(6)265 – The Building (Amendment) (Wales) (No. 2) Regulations 2022**

3 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3

(13.35 – 13.40)

Affirmative Resolution Instruments

3.1 **SL(6)260 – The Marine, Fisheries and Aquaculture (Financial Assistance) Scheme (Wales) Regulations 2022**

(Pages 3 – 7)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-26-22 – Paper 2 – Draft report

4 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3 – previously considered

(13.40 – 13.45)

4.1 **SL(6)242 – The Renting Homes (Wales) Act 2016 (Consequential Amendments) Regulations 2022**

(Pages 8 – 12)

Attached Documents:

LJC(6)-26-22 – Paper 3 – Letter from the Minister for Climate Change, 7 October 2022

LJC(6)-26-22 – Paper 4 – Report

4.2 **SL(6)266 – The Town and Country Planning (General Permitted Development etc.) (Amendment) (Wales) Order 2022**

(Pages 13 – 16)

Attached Documents:

LJC(6)-26-22 – Paper 5 – Report

LJC(6)-26-22 – Paper 6 – Welsh Government response

5 Inter-Institutional Relations Agreement

(13.45 – 13.50)

5.1 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: Control of Mercury (Amendment) (EU Exit) Regulations 2022

(Pages 17 - 18)

Attached Documents:

LJC(6)-26-22 - Paper 7 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 10 October 2022

5.2 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Biocidal Products (Health and Safety) (Amendment) Regulations 2022

(Pages 19 - 20)

Attached Documents:

LJC(6)-26-22 - Paper 8 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 10 October 2022

6 Papers to note

(13.50 - 13.55)

6.1 Correspondence from the Counsel General and Minister for the Constitution: Electoral administration and reform White Paper

(Page 21)

Attached Documents:

LJC(6)-26-22 - Paper 9 - Letter from the Counsel General and Minister for the Constitution, 11 October 2022

6.2 Correspondence from the Finance Committee to the Counsel General and Minister for the Constitution: Historic Environment (Wales) Bill

(Pages 22 - 23)

Attached Documents:

LJC(6)-26-22 - Paper 10 - Letter from the Finance Committee to the Counsel General and Minister for the Constitution, 13 October 2022

7 Motion under Standing Order 17.42 to resolve to exclude the public from the remainder of the meeting

(13.55)

8 Legislative Consent Memorandum on the Northern Ireland Protocol Bill

(13.55 - 14.15) (Pages 24 - 53)

Legislative Consent Memorandum: Northern Ireland Protocol Bill

Attached Documents:

LJC(6)-26-22 - Paper 11 - Legal advice note

LJC(6)-26-22 - Paper 12 - Briefing

9 Legislative Consent Memoranda (Memorandum No. 1 and Memorandum No. 2) on the Procurement Bill: Draft report

(14.15 - 14.30) (Pages 54 - 75)

Attached Documents:

LJC(6)-26-22 - Paper 13 - Draft report

10 Legislative Consent Memorandum on the Trade (Australia and New Zealand) Bill: Draft report

(14.30 - 14.45) (Pages 76 - 94)

Attached Documents:

LJC(6)-26-22 - Paper 14 - Draft report

LJC(6)-26-22 - Paper 15 - Letter from the Minister for Economy, 25 August 2022

LJC(6)-26-22 - Paper 16 - Letter to the Minister for Economy, 28 July 2022

11 House of Lords European Affairs Committee: Inquiry into the future UK-EU relationship

(14.45 - 14.55) (Pages 95 - 102)

Attached Documents:

LJC(6)-26-22 - Paper 17 - Draft response

12 Historic Environment (Wales) Bill: Consideration of correspondence

(14.55 - 15.00) (Pages 103 - 112)

Attached Documents:

LJC(6)-26-22 - Paper 18 - Correspondence from Country Land and Business Association, 7 October 2022

LJC(6)-26-22 - Paper 19 - Correspondence to stakeholders, 15 July 2022

Statutory Instruments with Clear Reports
17 October 2022

SL(6)265 – The Building (Amendment) (Wales) (No. 2) Regulations 2022

Procedure: Made Negative

These Regulations amend the Building Regulations 2010 ("the Building Regulations") to apply requirements relating to on-site electricity generation systems and provide for the commissioning of on-site electricity, in non-domestic buildings from 29 March 2023.

These Regulations also amend the transitional provisions of the Building Regulations (Amendment) (Wales) Regulations 2022 ("the 2022 Amendment Regulations"). The amendments:

- provide for sites that have complied with previous transitional provisions (such as those contained in the Building (Amendment) (Wales) Regulations 2014) to be excluded from the new requirements contained in Parts 2 and 3 of the 2022 Amendment Regulations;
- correct an error so that the transitional provisions only apply to building regulation applications received prior to the coming into force date; and
- correct an error so that the transitional provisions are not applicable to regulations 14 and 17 of the 2022 Amendment Regulations, which update the company names of pressure testing for the air tightness of buildings and authorised competent person scheme operators.

These Regulations are part of a package of measures. The Welsh Government propose to deliver other changes through non-legislative means in the form of changes to Approved Documents (approved and issued under section 6 of the Building Act 1984, for the purpose of providing practical guidance with respect to the requirements of any provision of building regulations) and the national calculation methodology.

Parent Act: The Building Act 1984
Date Made: 26 September 2022
Date Laid: 28 September 2022
Coming into force: in accordance with regulation 1(3)

SL(6)260 - The Marine, Fisheries and Aquaculture (Financial Assistance) Scheme (Wales) Regulations 2022

Background and Purpose

The Marine, Fisheries and Aquaculture (Financial Assistance) Scheme (Wales) Regulations 2022 ("these Regulations") are made by the Welsh Ministers, in exercise of the powers conferred on them by paragraph 2 of Schedule 6 to the Fisheries Act 2020 ("the 2020 Act").

These Regulations establish a Scheme for the giving of grants and making of loans by the Welsh Ministers. Paragraph 2(1) of Schedule 6 to the 2020 Act specifies the purposes for which financial assistance can be given.

Part 1 of these Regulations contains general introductory provisions. Part 2 provides for the establishment of the Scheme. Part 3 constitutes the Scheme and makes provision for the payment of grants and the making of loans by the Welsh Ministers. The Welsh Ministers may pay grants or make loans in respect of the activities listed in the Schedule to these Regulations.

These Regulations set out the basis on which the Welsh Ministers may pay grants and make loans, and lays down a procedure for applications. Payment of a grant or loan is dependent on the Welsh Ministers being satisfied as to the expenditure incurred, or to be incurred, and as to compliance with any conditions of approval.

These Regulations also provide that payment of a grant or loan is conditional on the applicant retaining relevant records and notifying the Welsh Ministers of any material change in circumstances. The Welsh Ministers have the ability to vary, suspend and revoke the approval of an application for a grant or loan and may, by notice, require the repayment of a grant or loan if certain conditions are not satisfied (with any sums outstanding ultimately recoverable as a civil debt).

Representations may be made in respect of decisions relating to applications for grants and loans, and notices of variation, suspension and revocations. The Welsh Ministers must notify the applicant of their decision following such representations.

These Regulations confer an enforcement function on marine enforcement officers appointed by the Welsh Ministers under the Marine and Coastal Access Act 2009 ("the 2009 Act"). The function is for the enforcement of any potential offences committed in relation to an application for a grant or loan under the Scheme (for example, an offence under the Fraud Act 2006). Relevant enforcement powers for marine enforcement officers under Part 8 of the 2009 Act are also applied for the purposes of this function.

Procedure

Draft Affirmative

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

In the definition of "marine enforcement officer", there is a clear difference between both language texts as the English text refers to "section 235(1)(a)", whereas the Welsh text refers to "section 235(1)".

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

The definition of "marine enforcement officer" in regulation 14(3) is stated to have the same meaning as section 235(1)(a) of the Marine and Coastal Access Act 2009. However, section 235(1)(a) defines the term by reference to, "any person appointed as such an officer by the MMO". The Explanatory Note states, "These Regulations confer an enforcement function on marine enforcement officers appointed by the Welsh Ministers under the Marine and Coastal Access Act 2009 (c. 23)." As such, it would appear the correct reference in regulation 14(3) should be to section 235(1)(b) of the Marine and Coastal Access Act 2009, which defines the term by reference to, "any person appointed as such an officer by the Welsh Ministers".

However, taken together with reporting point 1, it is unclear whether the policy intention was to capture all marine enforcement officers as defined by section 235(1), or simply those designated by the Welsh Ministers under section 235(1)(b). If the intention was to capture all, then the Welsh text referred to in reporting point 1 is correct and the English text should be corrected accordingly.

3. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In the English text of regulation 14(3), the defined terms should both be followed by the corresponding Welsh definitions in brackets and italics as it is a list of definitions, and vice versa in the Welsh text (see Writing Laws for Wales ("WLW") 4.15(6)).

4. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In the second paragraph of the preamble, it is incorrect to cite the provision that sets out the procedure which these Regulations should follow, "and paragraph 2(8) of Schedule 6 to" (see Statutory Instrument Practice ("SIP") 3.11.22). Normally, only the provisions that require any conditions to be fulfilled are cited in these additional paragraphs of the preamble, such as the requirement to lay in draft before the Senedd, namely, "In accordance with section 51(4)(c) of" (see SIP 3.11.28).

In addition, only the provision that requires an instrument to be laid in draft is usually cited in the headnote at the top of the page in affirmative statutory instruments, and so it will correspond with those cited in the fulfilment of conditions paragraph in the preamble. But in these Regulations, the provisions cited in the headnote differ from those cited in the second paragraph of the preamble, due to the unnecessary citing of the provision that only sets out the procedure in the preamble.

5. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

In regulation 7(1)(b) and regulation 9, in the Welsh text, the word "determine(d)" has been translated as "a bennir" in both places where it occurs. In this regard, it is true that "a bennir" is a phrase that can be used to convey the meaning of "determine(d)" in the Welsh text of bilingual legislation, depending on the context. However, "a bennir" has already been defined as meaning "specified" in regulation 2. There is no signpost in the definition of "specified"/ "a bennir" to alert the reader that the term may bear a different meaning in any particular provisions of these Regulations (signposting "specific cases or exceptions") (see WLW 5.3(2)). Neither has a different word such as "a benderfynir" been used in the Welsh text which could have distinguished "determine(d)" from "specified". Therefore, the reader of the Welsh text may be misled that "a bennir" is referring to the defined term "specified" rather than "determine(d)" in regulation 7(1)(b) and regulation 9.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

6. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

In It is noted that the Explanatory Memorandum states that a Regulatory Impact Assessment has not been carried out because:

> *"An RIA has not been prepared for this instrument because it is not regarded as a significant change of policy. Having left the EU, the legislation that administered financial assistance in accordance with the EMFF is no longer operable. This instrument allows for comparable assistance to be provided outside the EU. Practical amendments to the policy are therefore mainly due to the change in constitutional and legislative context and to improve provision of financial assistance."*

And:

> *"As the scheme created by this instrument is intended to be flexible, any specific assessment of costs, benefits or the impacts of those costs or benefits would be conjecture and not rational or based on evidence."*

However, the Explanatory Memorandum also explains that the Scheme created by these Regulations *"delivers substantial continuity with previous funding schemes but allows greater flexibility in how the scheme is managed in the longer term (outside the EU's regulatory framework)"*, whilst allowing *"the Welsh Ministers to continue to fund certain activities to invest in the marine, fisheries and aquaculture sectors in Wales and provide financial assistance to further the Wellbeing Goals under the Wellbeing of Future Generations Act 2015."*

Paragraph 3.2 of the *Welsh Ministers' regulatory impact assessment code for subordinate legislation* ("the Code") sets out various exceptions to carrying out a regulatory impact assessment, and the only one that may be considered relevant is:

> *"Where factual amendments are being made to update subordinate legislation and which do not alter the policy (or its impact) in any significant way or how it is applied in a given situation".*

However, these Regulations and the accompanying Explanatory Memorandum taken together suggest that the new Scheme constitutes more than routine or factual amendments, and it is not clear that any of the other exceptions otherwise apply. Further, bearing in mind the potential charge on Consolidated fund, and the fact there is a ready comparator in the previous EMFF Scheme as to likely take up, it is unclear why it was not possible to generate a forecast as to the likely cost of the Scheme.

The Welsh Government is asked to confirm which exception under the Code applies to the decision not to produce a regulatory impact assessment.

7. Standing Order 21.3(i) – that it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment

It is noted that the Scheme under these Regulations is made by the Welsh Ministers and will impose a charge on the Consolidated Fund.

8. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

No formal consultation has been undertaken for these Regulations and the following from the Explanatory Memorandum is noted in this regard:

> *"The Brexit and Our Seas consultation which ran from 1 May 2019 to 21 August 2019 contained specific questions on funding arrangements post EU exit. A summary of responses was published on 14 September 2020."*

And:

> *"The Welsh Government has established a Funding Policy Stakeholder Advisory Group to engage with the sector, to inform spending decisions and to evaluate the effectiveness of interventions."*

Welsh Government response

A Welsh Government response is required in relation to reporting points 1 to 6.

Legal Advisers
Legislation, Justice and Constitution Committee
11 October 2022

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/JJ/2385/22

Huw Irranca-Davies MS
Chair, Legislation, Justice & Constitution Committee
Senedd Cymru
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7 October 2022

Dear Huw,

I am writing in relation to the draft (affirmative) Renting Homes (Wales) Act 2016 (Consequential Amendments) Regulations 2022 (the Regulations).

The Regulations were originally laid on 21 June. In light of the points raised by the Committee in the draft report, the Regulations were withdrawn and a revised version laid on 15 July.

Following the Committee's helpful draft report on the revised Regulations, the Government will again withdraw and lay a further revised set of Regulations that take into account the Committee's comments. The revised Regulations will be laid by the 11 October to enable the Committee and external stakeholders as much time as possible to consider the draft before they are debated in Plenary on 8 November, ahead of 1 December implementation date.

I hope this is helpful.

Yours sincerely

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

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SL(6)242 – The Renting Homes (Wales) Act 2016 (Consequential Amendments) Regulations 2022

Background and Purpose

These Regulations make amendments to primary legislation in consequence of the provisions of the Renting Homes (Wales) Act 2016 ("the 2016 Act").

Generally, these amendments either:

(a) ensure that existing provision in primary legislation continues to have appropriate effect by referencing the relevant occupation contracts alongside references to existing types of tenancies or by including the terminology used in the 2016 Act; or
(b) where the provisions of the 2016 Act are intended to replace elements of existing law or the existing law is incompatible with that set out in the 2016 Act, by disapplying that law.

The Explanatory Memorandum to these Regulations states that these amendments are necessary to implement the 2016 Act, provide coherence and clarity, and ensure consistency of the law.

A draft of these Regulations was laid before the Senedd on 21 June 2022 but subsequently withdrawn on 11 July 2022, following the report of this Committee. An amended version of the draft Regulations was laid before the Senedd on 15 July 2022.

Procedure

Draft Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following 7 points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 16(2) inserts the wording "in England" after "dwelling-house" in section 1(1) of the Housing Act 1988. However, the phrase "dwelling-house" appears in two instances in section 1(1) and it is not clear if the wording "in England" should be inserted after one or both of those instances.

This point was previously reported in relation to the earlier draft of these Regulations. In its response of 18 July 2022, the Welsh Government explained that the Regulations had been withdrawn and corrected, including in relation to this specific point. However, it appears that this point has not been rectified.

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 18(5)(c)(iv), reference is made to "the Renting Homes (Wales) Act **2106**" (emphasis added). This should instead refer to "the Renting Homes (Wales) Act **2016**" (emphasis added).

3. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

Regulation 18(5)(i)(i) omits and inserts wording into paragraph 12(2) of Schedule 10 of the Local Government and Housing Act 1989. However, from the wording of the amendment, it is not clear that the inserted wording substitutes the omitted wording. It does not necessarily follow that new text will be inserted in the same place as old text which has been omitted.

Following the Welsh Government's own drafting guidelines in "Writing Laws for Wales", the amendment could have been drafted as "for "*[omitted text]*" substitute "*[new text]*"".

4. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

Regulation 25(9) omits certain wording from section 143E of the Housing Act 1996 ("the 1996 Act"). It appears that paragraph 9(b) of Schedule 29 to the Coronavirus Act 2020 (as amended) ("the 2020 Act") only required that those provisions *be read* in the way suggested by regulation 25(9), rather than inserting the wording that regulation 25(9) seeks to omit. Regardless, that provision of the 2020 Act expired on 25 March 2022. Clarification is sought as to why regulation 25(9) has been considered necessary.

5. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 29(3) inserts references to contract-holders alongside tenants in two places in section 153 of the Housing and Regeneration Act 2008. There is a third reference to tenants in subsection (7) which has not been amended. Subsection (3), which is amended, requires the Regulator of Social Housing to make arrangements for bringing certain proposals to the attention of its tenants. As subsection (7) requires the Regulator of Social Housing to also make arrangements for bringing agreed proposals to the attention of its tenants, it would appear that subsection (7) also requires amendment to require agreed proposals to the attention of its contract-holders.

6. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 32(3) amends the Energy Act 2011 to exclude a property where the landlord is a community landlord from what is a "domestic private rented property" under section 42 of that Act. The existing provision refers to registered social landlords. As the definition of community landlord under section 9 of the 2016 Act includes additional bodies such as local authorities, it appears that the provision is extended to bodies other than registered social landlords. Clarification is sought as to whether this is the intention of the amendment.

7. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 34, in the Welsh text, the numbering is incorrect on from paragraphs (8) to (12) which are numbered incorrectly as paragraphs (7) to (11).

In addition, in the Welsh text, the earlier correctly numbered paragraph (7) is incorrectly indented right as regards its formatting, along with sub-paragraphs (a) and (b) of that paragraph. Sub-paragraphs (c) and (d) of that paragraph (7) have also been incorrectly numbered as a further pair of sub-paragraphs (a) and (d) in that paragraph.

Merits Scrutiny

The following 3 points are identified for reporting under Standing Order 21.3 in respect of this instrument.

8. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

Regulation 1 provides that various parts of regulation 25 are stated to come into force once section 120 of, and various paragraphs of Schedule 8 to, the Housing and Planning Act 2016 come into force. Neither the Explanatory Memorandum nor the Explanatory Notes give any indication as to when these provisions are expected to be brought into force.

This point was previously reported in relation to the earlier draft of these Regulations. In its response of 18 July 2022, the Welsh Government explained that it does not have any information about when the relevant provisions of the Housing and Planning Act 2016 will be brought into force.

9. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

In reviewing these amendments, the Committee notes that in several instances the Welsh Government does not appear to have adhered to its own drafting guidelines, as set out in "Writing Laws for Wales". The Committee encourages the Welsh Government to adhere to its own standards when drafting legislation.

10. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

No consultation has been carried out in relation to these Regulations. The Explanatory Memorandum to the Regulations notes that:

> *"No formal consultation has taken place as these Regulations make only consequential technical amendments."*

Welsh Government response

A Welsh Government response is required in relation to points 1-7 above only.

Committee Consideration

The Committee considered the instrument at its meeting on 26 September 2022 and reports to the Senedd in line with the reporting points above.

SL(6)266 – The Town and Country Planning (General Permitted Development etc.) (Amendment) (Wales) Order 2022

Background and Purpose

The Town and Country Planning (General Permitted Development) Order 1995 (the "GPDO"), as amended, allows some development to be undertaken, within certain parameters, without the need to submit a planning application. This is known as "permitted development".

The Town and Country Planning (General Permitted Development etc.) (Amendment) (Wales) Order 2022 ("the 2022 Order") amends the GPDO. The effects of such amendments include:

- permitting local planning authorities and the Welsh Ministers to direct that any particular development permitted under article 3 of the GPDO is not to apply in relation to a specified area;
- introducing a new Schedule 2A. Schedule 2A sets out new procedures which must be followed in making, varying or withdrawing any direction that is made under article 4(1) of the GPDO. In addition, Schedule 2A introduces two types of direction that can be made: a direction with immediate effect and a direction without immediate effect;
- removing the requirement for the Welsh Ministers to confirm an article 4 direction, instead requiring, in most cases, the local planning authority to give notice to the Welsh Ministers following confirmation of a direction.
- amending Part 3 (changes of use) of Schedule 2 to the GPDO by inserting two new classes, Class I and Class J.

    - Class I introduces a number of new permitted development rights for unlimited changes of use, including mixed uses, between use Class C3 (Dwellinghouses, used as sole or main residences); use Class C5 (Dwellinghouses, used otherwise than as sole or main residences) and use Class C6 (Short-term lets). The permitted development is subject to limitations.

    - Class J introduces a number of new permitted development rights from use as a betting office to use within Class A1 (shops); or Class A2 (financial and professional services); or mixed use of either Class A1 or Class A2, plus a single flat. Class J also permits a change of use from a mixed use as a betting office and a single flat to use within Class A1 or Class A2, or a mixed use of either Class A1 or Class A2, plus a single flat, and to use as a betting office. The permitted development is subject to limitations.

The 2022 Order also amends the Town and Country Planning (Compensation) (Wales) (No.2)

Regulations 2014 (SI 2014/2693 (W.268)) ("the 2014 Regulations") by adding a new class of development into the list of permitted development rights for which compensation on withdrawal of the right is limited in various ways provided in the 2014 Regulations. Minor amendments are also made to the 2014 Regulations.

Procedure

Negative.

The Order was made by the Welsh Ministers before it was laid before the Senedd. The Senedd can annul the Order within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date it was laid before the Senedd.

Technical Scrutiny

The following two points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Article 2(4) inserts a new Schedule 2A into the GPDO. Paragraph 1(12) of the new Schedule 2A states that a local planning authority may, by making a subsequent direction, withdraw any direction made by it under Article 4(1) of the GPDO. Paragraph 1(14) of the new Schedule 2A goes on to state that where the local planning authority makes a direction under paragraph 1(12), paragraphs 1(1) to 1(11) of Schedule 2A will apply (subject to an exception not directly relevant to this reporting point).

Paragraphs 1(1) to 1(11) of Schedule 2A set out various requirements that must be followed when a direction is made under Article 4(1) of the GPDO. It is not clear which of these requirements must still be followed when a direction is made under paragraph 1(12) of Schedule 2A. The wording of paragraph 1(14) indicates that all of the requirements in paragraphs 1(1) to 1(11) will apply, but this does not appear to be viable in practice. For example, paragraph 1(4)(c) of the new Schedule 2A requires that a notice which is given of a direction must state that the direction is given under Article 4(1), but this would not be the case if the notice relates to a direction made under paragraph 1(12). The Welsh Government is therefore asked to explain how applying paragraphs 1(1) to 1(11) of the new Schedule 2A to directions made under paragraph 1(12) will work in practice.

2. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

In article 2(2), the opening words in the English text state "**For** article 4-" but the corresponding Welsh text is translated as meaning "**In** article 4". "For" is normally used when describing which provision or words are to be substituted. However, it is actually describing the location of where the amendments will be inserted and should be "In".

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 10 October 2022 and reports to the Senedd in line with the reporting points above.

Government Response: The Town and Country Planning (General Permitted Development etc.) (Amendment) (Wales) Order 2022

Technical Scrutiny point 1:

Paragraph 1(12) of the new Schedule 2A allows a Local Planning Authority to withdraw an existing direction made by it under article 4(1) of the GPDO.

Paragraph 1(14) requires the Local Planning Authority to follow the same process and requirements when withdrawing an article 4(1) direction as when an article 4 direction is made. The reason for this is the Welsh Government wants to ensure that any individual affected by the subsequent direction is properly notified; that the notice accurately describes the development and area affected and importantly that the correct and full period of time is allowed for representations to be made.

However, it is accepted that the wording in paragraph 1(4)(c) could be clearer. In practice we would expect any notice to identify the powers under which the direction was made, as well as identifying the existing article 4 direction that was being withdrawn. We will take the opportunity to clarify this at the earliest available opportunity.

Technical Scrutiny point 2:

This reporting point is noted and accepted. The Welsh Government is exploring whether this may be corrected with a correction slip.

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair,
Legislation, Justice and Constitution Committee
Senedd Cymru

Huw.Irranca-Davies@senedd.wales

10 October 2022

Dear Huw,

I wish to inform the LJC Committee of the intention to consent to the UK Government making and laying Control of Mercury (Amendment) (EU Exit) Regulations 2022 by 19 October 2022.

I have received a letter from the former Minister for State for Farming, Fisheries and Food requesting consent to these Regulations. The Regulations will be made by the Secretary of State for Environment, Food and Rural Affairs, in exercise of the powers conferred by the European Union (Withdrawal) Act 2018. The provisions in the Regulations intersect with devolved policy and will apply to Wales. The provisions could have been made by Welsh Ministers in exercise of our powers conferred by the European Union (Withdrawal) Act 2018. The Regulations will extend to England, Scotland and Wales and a similar request for consent has been sent to Scottish Ministers.

The SI amends the heading in Annex 2 to the retained Commission Implementing Decision (EU) 2017/2287 to replace a reference to "a Member State" with a reference to "Great Britain".

The Statutory Instrument (SI) is subject to the negative procedure and is due to be laid before Parliament on 19 October 2022.

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The Welsh Government's general principle is the law relating to devolved matters should be made and amended in Wales. On this occasion, it is considered appropriate for the substance of the amendments to apply to Wales as there is no policy divergence between the Welsh and UK Government on this matter. This ensures a coherent and consistent statute book with the regulations being accessible in a single instrument. I consider legislating separately for Wales would be neither the most appropriate way to give effect to the necessary changes, nor a prudent use of Welsh Government resources given other important priorities.

Regards,

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair,
Legislation, Justice and Constitution Committee
Senedd Cymru

huw.Irranca-Davies@senedd.wales

10 October 2022

Dear Huw,

I am writing to inform the Committee of the intention to consent to the UK Government making and laying The Biocidal Products (Health and Safety) (Amendment) Regulations 2022 by 18 October 2022.

My predecessor received a letter from Chloe Smith MP, previous Minister of State for Disabled People, Health and Wellbeing asking for consent to these Regulations. The Regulations intersect with devolved policy and will apply to Wales. The Regulations will extend to England, Scotland and Wales and a similar request for consent has been sent to Scottish Ministers.

The Regulations will be made in exercise of the powers conferred by section 8(1) and paragraph 21 of Schedule 7 of the European (Withdrawal) Act 2018.

Biocidal products must be authorised by the Health and Safety Executive who act as the competent authority on behalf of Welsh Ministers. The amendments will impose new legal deadlines for the authorisation of biocidal products whilst processing a backlog of applications. By temporarily extending the deadline for five years, pre-existing authorised biocidal products can remain on the market until authorised under the Great Britain Biocidal Product Regulations. The Statutory Instrument is subject to the affirmative procedure and is due to be laid before Parliament on 18 October 2022 with a commencement date of 31 December 2022.

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Although the Welsh Government's general principle is that the law relating to devolved matters should be made and amended in Wales, on this occasion, it is considered appropriate for the substance of the amendments to apply to Wales as the Regulations are technical in nature and contain no change of policy. There is, therefore, no policy divergence between the Welsh and UK Government in this matter. This ensures a coherent and consistent statute book with the regulations being accessible in a single instrument. I consider that legislating separately for Wales would be neither the most appropriate way to give effect to the necessary changes nor a prudent use of Welsh Government resources given other important priorities.

Welsh Government are core members of the Biocides Delivery Board (BDB) which is part of the governance structures for the Chemicals and Pesticides Common Framework. The proposed legislative amendments have been discussed and approved by the BDB.

These Regulations do not have implications for the Programme for Government. Authorising biocidal products supports the majority of well-being goals of "a healthier Wales" and a 'resilient Wales' together with associated impacts on the goal of "a globally responsible Wales" where products harmful to human or nonhuman life are properly regulated.

I have written similarly to Llyr Gruffydd MS, the Chair of the Climate Change, Environment and Infrastructure Committee.

Yours sincerely,

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref 11/10/2022

Huw Irranca-Davies MS, Chair
Legislation, Justice and Constitution Committee
SeneddLJC@senedd.wales

cc. David Rees MS, Chair, Llywydd's Committee

11 October 2022

Dear Huw,

I am writing to inform you that today I published a White Paper setting out an ambitious long-term agenda for modernising electoral administration. A link to the publication is attached: https://gov.wales/electoral-administration-and-reform-white-paper.

In this Senedd term, it will contribute to the delivery of our Programme for Government commitment to reduce the democratic deficit in local government. It will also support the delivery of our Senedd reform commitments by providing for the modernised administration of reformed Senedd elections in 2026.

The paper includes a mixture of non-legislative propositions to promote engagement in elections and make standing for election safer and more straight forward, legislative proposals to modernise the administration of elections, improve the conduct of electoral and community reviews for local government and consolidate electoral law, and longer-term propositions for electoral reform to support Welsh democracy.

If you would wish to receive more information about the White Paper my officials are available to provide a technical briefing for the Committee.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

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Mick Antoniw MS
Counsel General and Minister for the Constitution

13 October 2022

Dear Mick

The Historic Environment (Wales) Bill

Thank you for the additional information that you provided the Legislation, Justice and Constitution Committee (LJC Committee) in relation to the financial implications of the Historic Environment (Wales) Bill (the Bill).

As you will be aware, it is standard practice for the Finance Committee (the Committee) to consider the financial implications of all bills introduced into the Senedd. However, given that the Bill is a consolidation bill which is subject to distinct procedures, the Committee has taken a different approach to scrutinising this piece of legislation. That is because, in accordance with Standing Order 26C.9(vii), the explanatory memorandum accompanying the bill has confirmed that provisions within it give rise to no additional significant expenditure payable from the Welsh Consolidated Fund.

Following our initial consideration of the Bill shortly after its introduction on 7 July, we wrote to LJC Committee asking if they could consider the financial implications of the Bill as part of its scrutiny work. This was because the question of whether the Bill gives rise to significant costs is intrinsically linked to the LJC Committee's consideration of whether the proposal could continue as a consolidation bill or not.

We are grateful to them for sharing with us both their letter and your response. They build on the helpful analysis of additional expenditure already outlined in part 2 of the Explanatory Memorandum and, taken together, we are satisfied with the details provided and believe that the estimates are thorough and robust.

We appreciate you adopting this transparent approach and expect that costs are presented in a similar way in future to allow the Finance Committee to consider the financial implications of future consolidation bills, if it wishes to do so.

Yours sincerely,

Peredur Owen Griffiths
Chair of the Finance Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

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Vaughan Gething AS/MS
Gweinidog yr Economi
Minister for Economy

Llywodraeth Cymru
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25 August 2022

Dear Huw and Mark

Thank you for your letter of 28 July requesting clarification of a number of points regarding the Welsh Government's Legislative Consent Memorandum (the Memorandum) on the Trade (Australia and New Zealand) Bill (the TANZ Bill). I have responded to each of your questions below.

1. **What changes would the Welsh Government need to see made to the Bill in order to be able to recommend that the Senedd give its consent to the Bill?**

   The Welsh Government would like to see equivalent powers included in the TANZ Bill, but at the very least would need concurrent plus powers (i.e., concurrent powers with a statutory requirement for UK Government Ministers to seek consent from Welsh Ministers before they use these powers to legislate in a devolved area) being included in the TANZ Bill before we could recommend the Senedd give its consent to the TANZ Bill.

2. **Could you indicate whether you have received a response to your letter to the UK Government of 16 May and, if so, whether a copy or details of the response can be shared with the Committees?**

   I have not received a response to my letter dated 16 May.

3. **Could you clarify whether discussions are ongoing with the UK Government with regard to amendments being tabled to the Bill which address your concerns?**

   The UK Government have not offered any further discussions with regard to any amendments. Second Reading of the TANZ Bill in the House of Commons is scheduled to take place on 6 September. UK Government have indicated that they are currently considering how to proceed in light of our concerns.

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4. **Have you engaged the new intergovernmental relations arrangements to resolve matters of concern?**

   I repeated my concerns about the TANZ Bill in a bi-lateral meeting with the Minister of State for Trade Policy, Penny Mordaunt MP, on 24 May. I am now awaiting further information from UK Government on how it intends to address our concerns.

5. **Could you outline your views in relation to the suitability and necessity of the regulation making powers in clause 1 of the Bill enabling the UK Government to make regulations reflecting the content of the FTAs as they may be amended in the future, meaning that such powers could be used to a currently unknown effect at a later date?**

   I believe it is helpful to be able to use the power in clause 1 to reflect future amendments to the content of the Free Trade Agreements (FTAs). The power itself is limited to making regulations in connection with the procurement chapters of the FTAs so it is not a power to reflect changes across the entire Agreements. Given the nature and scope of what is covered by procurement chapters in FTAs generally, as well as in these chapters in particular, I believe there is very little prospect that the power could be used in unexpected or wholly unforeseeable ways. In light of this I consider the power is a suitable and useful addition to the TANZ Bill.

6. **Under what circumstances would you accept the inclusion of concurrent-plus regulation making powers in the Bill?**

   The elements of the TANZ Bill that require the Senedd's consent relate to the powers needed to implement the procurement chapters of the UK-Australia and UK-New Zealand FTAs. The scope of these powers is relatively narrow, and the changes needed to implement both agreements were discussed at length between UKG and Welsh Government officials before they were agreed in negotiations. Because of the scope of the powers, and because sufficient engagement regarding the legislative changes needed to implement proposed procurement provisions had taken pace during the trade negotiations, I would be willing to accept the inclusion of concurrent-plus regulation making powers in the TANZ Bill if the UKG were to remain unwilling to grant equivalent powers.

7. **We are concerned that the approach taken to the use of concurrent powers in this Bill risks setting a precedent for future legislation for future trade agreements. Can you confirm whether any discussions have taken place with the UK Government in this regard?**

   I share these concerns and am also concerned with the increased use of concurrent powers in UK Bills. My officials have made this clear to UK Government officials at every meeting held with UK Government officials. I have also made this view clear at a Ministerial level. With regard to legislation for future trade agreements, other than the Procurement Bill, there has been no discussion as yet on what approach UK Government might take for any required legislation. However, we have been clear that any future legislation containing concurrent powers would receive a similar response.

8. Can you indicate whether you consider that clause 4 and Schedule 2 paragraph 4 of the Bill require the consent of the Senedd?

To the extent that paragraph 4 of Schedule 2 relates to the other provisions of the TANZ Bill which require Senedd consent I consider that it too requires the consent of the Senedd.
Clause 4 is different. It is a technical provision which does not encode substantive policy choices, it is concerned with how the TANZ Bill works rather than what the law contains and for this reason we do not as a matter of practice generally include these kinds of clauses within Legislative Consent Memoranda.

9. Can you confirm whether there are any indirect financial implications for the Welsh Government, the Senedd or Wales arising from the Bill?

Having considered the TANZ Bill we do not believe that there are any indirect financial implications for the Welsh Government, the Senedd or Wales arising from the TANZ Bill. Although the TANZ Bill is needed to implement the UKs trade deals with Australia and New Zealand, which may more broadly have indirect implications for producers and consumers in Wales, the devolved elements of the TANZ Bill relate to the powers needed to implement the procurement chapters of the deals. We do not believe these specific provisions on procurement will have any financial implications.

10. This legislation is time-critical and you have said that there is insufficient time available to bring forward an equivalent Bill in the Senedd. What were the barriers to introducing an Emergency Bill, which would have overcome the inclusion of concurrent powers in the Bill?

The Department for International Trade initially believed that Second Reading of the TANZ Bill in the House of Commons would take place before summer recess and that the TANZ Bill would need to progress quickly once the UK Houses of Parliament reconvened. This is because the legislation needs to be in place in order for both trade deals to enter into force. Therefore, we did not believe that there was sufficient time available for us to bring forward an Emergency Bill, or that this would be a proportionate approach given the scope of the provisions in the legislation.

A Senedd bill would not of itself overcome the inclusion of concurrent powers in the TANZ Bill. A Senedd bill could give Welsh Ministers powers to implement in Wales, and so there would be no need for the TANZ Bill to do so; but a Senedd bill could not prevent the TANZ Bill giving powers to UK Ministers to implement legislative changes in Wales. If that is what the UK Parliament decided to do, the end result would be concurrent powers, albeit contained in different Acts.

11. Paragraph 10 of the Memorandum states that the Bill is to be repealed by an order under the Procurement Bill but that does not appear to be the case. Please can you therefore clarify the process by which the Bill will be repealed and whether there is any role for the Welsh Government and the Senedd?

Clause 107(1) and paragraph 3 of Schedule 11 to the Procurement Bill as introduced contain provisions to repeal the TANZ Bill. Paragraph 1 of Schedule 11 to the Procurement Bill as introduced contains provision to repeal the changes to the Government of Wales Act 2006 that the TANZ Bill makes. I am not aware of any role for the Welsh Government or the Senedd in the repeal of the TANZ Bill.

Yours sincerely,

Vaughan Gething AS/MS
Gweinidog yr Economi
Minister for Economy

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
Legislation, Justice and Constitution Committee

Y Pwyllgor Cyfrifon Cyhoeddus a Gweinyddiaeth Gyhoeddus
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Vaughan Gething MS
Minister for Economy

28 July 2022

Dear Vaughan

Legislative Consent: UK Government's Trade (Australia and New Zealand) Bill

At our respective meetings on the 6 July and 11 July, we considered the Welsh Government's Legislative Consent Memorandum (the Memorandum) on the Trade (Australia and New Zealand) Bill (the Bill). The Committees agreed that we should write to you seeking clarification on a number of matters. We would be grateful for a response from you by 5 September 2022 to the following questions:

1. What changes would the Welsh Government need to see made to the Bill in order to be able to recommend that the Senedd give its consent to the Bill?

2. Could you indicate whether you have received a response to your letter to the UK Government of 16 May and, if so, whether a copy or details of the response can be shared with the Committees?

3. Could you clarify whether discussions are ongoing with the UK Government with regard to amendments being tabled to the Bill which address your concerns?

4. Have you engaged the new intergovernmental relations arrangements to resolve matters of concern?

5. Could you outline your views in relation to the suitability and necessity of the regulation making powers in clause 1 of the Bill enabling the UK Government to make regulations reflecting the content of the FTAs as they may be amended in the future, meaning that such powers could be used to a currently unknown effect at a later date?

6. Under what circumstances would you accept the inclusion of concurrent-plus regulation making powers in the Bill?

7. We are concerned that the approach taken to the use of concurrent powers in this Bill risks setting a precedent for future legislation for future trade agreements. Can you confirm whether any discussions have taken place with the UK Government in this regard?

8. Can you indicate whether you consider that clause 4 and Schedule 2 paragraph 4 of the Bill require the consent of the Senedd?

9. Can you confirm whether there are any indirect financial implications for the Welsh Government, the Senedd or Wales arising from the Bill?

10. This legislation is time-critical and you have said that there is insufficient time available to bring forward an equivalent Bill in the Senedd. What were the barriers to introducing an Emergency Bill, which would have overcome the inclusion of concurrent powers in the Bill?

11. Paragraph 10 of the Memorandum states that the Bill is to be repealed by an order under the Procurement Bill but that does not appear to be the case. Please can you therefore clarify the process by which the Bill will be repealed and whether there is any role for the Welsh Government and the Senedd?

Yours sincerely,

Mark Isherwood
Chair, Public Accounts and Public Administration Committee

Huw Irranca-Davies
Chair, Legislation, Justice and Constitution Committee

Agenda Item 11

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Response

Historic Environment (Wales) [consolidation] Bill

Response to the Legislation, Justice and Constitution Committee

Date: 7 October 2022

The CLA and the historic environment

1. The CLA's c3,000 members in Wales manage at least a quarter of Welsh heritage. As by far the biggest stakeholder group of those (charitable, commercial, private, and public) who manage or own heritage, we are one of the half-dozen key stakeholders in the heritage field. The CLA believes strongly in effective and proportionate heritage protection.

2. The CLA's heritage adviser was a member of the Task & Finish Group set up by Cadw as a sounding board on this Bill, and has therefore discussed the Bill with Cadw in some depth. He was previously a member of the External Review Group which advised Welsh Government on the 2012-18 Historic Environment Review, and the CLA therefore contributed to detailed discussions on both the Bill which became the Historic Environment (Wales) Act 2016, and the new Welsh Government/Cadw policy and guidance published in 2016-18.

The Historic Environment (Wales) consolidation Bill

3. We respond to the Committee's suggested questions as follows:

i. "the scope of the consolidation is appropriate"

4. Yes.

ii. "the relevant enactments have been included within the consolidation"

5. Yes.

iii. "the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent allowed by Standing Order 26C.2"

6. Yes (but see question iv below).

iv. "the Bill consolidates the law clearly and consistently"

7. Yes, we feel that (subject to the points below) this has been done well. The previous legislation had become a forest of hard-to-navigate amendments, and the new Bill is undoubtedly a great improvement. It is also in Welsh as well as English.

8. At the same time, this has not been a costless exercise: comparing the Bill to the legislation it replaces, or reading the tables of origins and destinations, shows that this involved not just a simple cutting-and-pasting exercise, but an enormous amount of complex editorial work, and we know that the Bill team, including in Cadw, has had to put a great number of hours into this.

9. We do have a number of comments, some very significant, which are set out in the remainder of this response:

'Conservation' and 'preservation': the need to update the legislation

10. The primary issue is that there is a fundamental (though we understand unintended) conflict between long-established Welsh Government policy and the text of the Bill.

11. Since 2011, Welsh Government historic environment policy has been based on 'conservation', defined in its *Conservation Principles* as "the careful management of change". That policy was adopted after extensive public consultation, and has been followed through ever since, notably in the major suite of Cadw guidance published in 2016-18.

12. The problem is that although the consolidation Bill adopts this 'conservation' approach initially in its Overview, all subsequent sections (especially the core "duties to preserve") still use a legacy term from the decades-old Westminster legislation, 'preservation'. That term is emphasised, and seemingly endorsed, because it occurs repeatedly in the Bill.

13. This is a fundamental problem, not a semantic point, because these two terms represent wholly different approaches to heritage. Much of the history of heritage protection over recent decades, both internationally and in Wales, has been the move from 'preservation' to 'conservation'. That has happened because 'conservation' protects heritage much better: to remain valued and viable, heritage needs to be changed from time to time, and the 'conservation' approach looks thoroughly at what matters about the building, and at change to it, so as to arrive at the best outcomes. In contrast, 'preservation', with its inbuilt presumption against change, tends to generate and maximise uncertainty and conflict; and the obstacles it creates to change make heritage less attractive, less viable, and less usable, which is not good for its survival.

14. Putting this core point into Wellbeing of Future Generations Act terms, the 'conservation' approach directly aligns with the Act's Resilient Wales Goal, "the capacity to adapt to change". 'Preservation', and the current Bill's "duties to preserve", do not.

15. The conflict between the two terms would also of course be likely to confuse everyone using the new Act.

16. We have been told by the Counsel General and Minister for the Constitution that Welsh Government's policy of 'conservation' has not changed, but also that standing order 26C prevents the new Bill's terminology being updated to align with it.

17. If that is correct, it is clearly important that Welsh Government (i) uses a clause in a subsequent policy Bill to make this change as soon as possible, so that the new Act will from then use the term 'conservation'; and (ii) in the meantime, mitigates the problem by clarifying, in Bill communications and in the key policy document TAN 24, firstly that 'conservation' remains Welsh Government policy, and secondly that where the term 'preservation' is used in the legislation it should be interpreted as not conflicting with that 'conservation' approach.

18. We suggest therefore that your Committee should make those recommendations to Welsh Government. It would be regrettable if, after all the hard work put into the consolidation Bill, the resulting legislation is fundamentally incompatible with long-established Welsh Government policy. Making it compatible would as above not involve any change in approach or policy: 'conservation' is well-established policy, set out extensively in Welsh Government guidance, on which there were about 10 public consultations between 2010 and 2018.

Technical changes to the Bill

19. We understand that the Bill is not yet finalised, and that changes to it can still be made where there is a good reason to do that, provided of course that these do not conflict with Standing Order 26. There are several places (all of which we have discussed with Cadw) where we feel your Committee should recommend that this should be done:

Section 20 – compensation for modification or revocation of SMC

20. Modification or revocation of Scheduled Monument Consent (SMC) is potentially a very serious matter – you could spend months or years and thousands of pounds getting consent, and then see it suddenly revoked.

21. A vital practical check on that is compensation. There is compensation, but this section and the two accompanying schedules are unintentionally misleading because, detached from the compensation provision, they give the impression that SMC can be modified or revoked without compensation.

22. The solution is a small tweak to the Bill: Section 20 already cross-refers to Schedules 4 and 6; it should also cross-refer to the compensation provisions several pages further on in section 24 (eg by simply adding to subsection (3) "…the compensation provisions in section 24 shall apply…"). This is just signposting; it does not change the legislation or the policy. Alternatively, section 24 could be moved up to immediately follow section 20, as for Listed Building Consent (LBC) (see section 108 re compensation, which immediately follows section 107).

Section 76 (5) – what is covered by listing

23. We welcome the Bill's clarification and solution in section 76(5) of what was the '1969 problem', though this is only a problem in small minority of cases.

24. The Bill text should also address a greater problem, the vagueness of 1990 Act section 1(5), which is misleading in implying that non-ancillary structures can be covered by listing when it is clear from 35 years of case law that they are not. The case law establishes that an attached structure, or an unattached structure within the curtilage of a listed building, is only covered by its listing if it is ancillary to it. This goes back at least to *Debenhams* in the House of Lords in 1987, and has been endorsed consistently and repeatedly in numerous subsequent cases, including most recently by the Court of Appeal in 2021 in *Blackbushe Airport* ("…in order to be treated as if it were part of the listed building, a freestanding structure within the curtilage must also be ancillary to that building" [paragraph 110]). This is long-established case law, set in the House of Lords (now the Supreme Court) and endorsed repeatedly by courts including the Court of Appeal, and thus most unlikely to change.

25. This point has already been clarified in the Bill's Explanatory Notes, but it would reduce confusion if the clarification was also brought into the text of the Bill itself. That simply requires the word 'ancillary' to be inserted before the word 'structure' in section 76 (5) (a), and in 76 (5) (b). That is not a change of policy; its effect is just, in the words of Standing Order 26C, to "clarify the application or effect of the existing law". Historic England uses similar wording in its 2021 Advice note on Listed Building Consent (paragraph 26): "The listing of a building applies protection not only to the building, both inside and out, but also to pre-1948 ancillary structures within its curtilage, and to ancillary objects or structures fixed to the building".

Section 90 (4) – applying for LBC should require an 'assessment', not 'statement'

26. During the Historic Environment Review, its External Review Group had a careful policy discussion about information requirements. It was then decided that (i)

applicants should be required to produce proper analysis of heritage significance and impact, to be called Heritage Impact Assessments, and (ii) in recognition of the resource implications of that for applicants, the requirement for Design & Access Statements (D&ASs) added little and should be scrapped for LBC applications (except for major development). That was implemented via Regulations, but was not reflected in the 1990 Act, and is not yet fully reflected in the Bill, which uses the term "statement", and implies that D&ASs are required though they usually are not.

27. This suggests two logistically-small but important tweaks to the Bill. Firstly, the words 'statement about' in 90(4) (and in 90(5)(a)) should be replaced by 'assessment of…'. That would be consistent with the term 'Heritage Impact Assessment', which is what the Regulations require. Much more importantly, the term "assessment" was deliberately chosen so as to make it clearer that the applicant needs to provide genuine analysis of the building's significance, and of the impact of the proposals on that significance, because evidence suggested that the term 'statement' led most applicants to provide flannel which merely described the building and/or its history and/or the proposals, and did not substantively consider significance or impact.

28. This is not a minor point, because an applicant needs to understand significance and impact to develop a competent application. If the applicant has not done that, the proposals and application are unlikely to be competent. Local planning authorities do not have the resource to do this themselves, and even if they did, that would come undesirably late in the process, after the proposals have been fixed by the applicant. Given that there are thousands of LBC applications each year, the local authority (and private) resource wasted by less-than-competent proposals and applications is damaging. This word change, in addition to making the statute consistent with current policy, therefore has substantial real-world benefits.

29. Secondly, 90 4(b) needs slight change because it does not apply to all LBC applications, only to the minority which still require D&ASs (and in those cases this will not be 'either or both').

Section 147 – 'preservation notices' and protecting buildings or monuments at risk

30. 'Preservation notices' have been carried forward from the 2016 Act, but have never been implemented. They are unlikely to be implemented because they would be very harmful to listed building protection, and it would be better if – like Areas of Archaeological Importance – they were removed from the Bill.

31. Cadw's guidance *Managing listed buildings at risk in Wales* correctly diagnoses the problem of heritage at risk as one primarily of use and economics, and in some cases ownership. As it says, the solution is a viable long-term use, because a building which is not used, viable, and relevant is unlikely to be put (or kept) in repair.

32. In contrast, the traditional approach to heritage at risk mis-diagnosed the problem as one solely of disrepair, soluble merely by telling local authorities to use a toolkit of aggressive statutory repair powers. That has not worked, because those powers are complex, ineffective, and often disproportionate, so LPAs do not use them, or focus them on the wrong targets, or fail. Even if the building was somehow repaired, without a viable use it would inevitably fall back into disrepair. Either a failure to act, or poorly-targeted action, damage both individual historic assets and the reputation of the whole heritage protection system. 'Preservation notices' would make this worse, by making it even riskier for any rescuing purchaser to acquire a building at risk, a dangerous change. A report for Welsh Government concluded that there were extremely few cases where 'preservation notices' might make any effective contribution, and that other approaches were preferable (*Advice to inform the development of preservation notices for listed buildings*, Arcadis and Holland Heritage, 2017, section 4.7).

33. The solution is thus in two parts. The first, good advice based on a correct diagnosis of the problem, already largely exists in the Cadw guidance. Properly used, this provides solutions for heritage already at risk, and (more importantly) encourages prevention through viable use, so that buildings do not become at risk.

34. Secondly, in a small minority of often-prominent cases it is clear that there is a use and a viable solution, and repairing purchasers, but the owner is refusing to implement this. In these specific situations, the power to change ownership may need to be used, more assertively and effectively than now. It is not realistic to expect local authority staff to do that, and it needs to be organised centrally, potentially by a specific expert attached to Cadw. This would require only limited resource, and a few successful cases, effectively publicised, would much reduce the problem. If Welsh Government wishes to solve this, it should act on these lines. 'Preservation notices' would make the situation worse, have not been implemented, for that reason, and should – like Areas of Archaeological Importance – be removed from the Bill.

Schedule 8 – modifying/revoking LBC
Schedule 10 – orders terminating listed building partnership agreements

35. In both these schedules, it would be highly desirable to include written representations as an option as well as a hearing, as elsewhere. While some aggrieved owners may want public hearings, others will feel intimidated by them, and (because there is usually a feeling that they require barristers and solicitors to be instructed) the costs for all parties are usually considerably higher.

For further information please contact:

Jonathan Thompson
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Policy director, CLA Cymru
Email: [redacted]

CLA reference (for internal use only):

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
–
Legislation, Justice and Constitution Committee

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15 July 2022

Dear colleague,

Scrutiny of the first Welsh Consolidation Bill – the Historic Environment (Wales) Bill

You may be aware that the Welsh Government has recently introduced to the Senedd the first Welsh Consolidation Bill – the Historic Environment (Wales) Bill (the Bill). Further details about the scrutiny process for Consolidation Bills are set out in Standing Order 26C and the Llywydd's guidance to support the operation of Standing Order 26C.

The Legislation, Justice and Constitution Committee's remit includes consideration of all Consolidation Bills introduced to the Senedd, and we have just begun our scrutiny of the Bill.

On Monday 11 July, we took evidence from Mick Antoniw MS, the Counsel General and Minister for the Constitution, and drafters from the Welsh Government's Office of Legislative Counsel. A recording of the session, along with a verbatim transcript, are available on our webpages.

The Committee has until 16 December 2022 to complete its initial consideration of the Bill. The Committee has agreed to scrutinise the Bill in line with Standing Order 26C.17, in that we will consider whether:

i. we are satisfied that the scope of the consolidation is appropriate;

ii. we are satisfied that the relevant enactments have been included within the consolidation;

iii. the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent allowed by Standing Order 26C.2;

iv. the Bill consolidates the law clearly and consistently.

The Committee will also consider any other matter we believe is relevant to Standing Order 26C.

We are contacting you to offer you the opportunity to give us your views on the Bill and would welcome your thoughts on this consolidation exercise. You may have been contacted because of your potential interest/role as regards the historic environment in Wales; because of your potential interest/role in improving the accessibility of Welsh law; or because of your work with the Welsh Government as it undertook the consolidation exercise in advance of the introduction of the Bill.

In providing your views, we would ask that you structure your response as per the four points set out above.

In carrying out our scrutiny of the Bill, we must be mindful of the purpose of a consolidation exercise. A Consolidation Bill cannot reform the law or introduce new policy – it may only consolidate existing law (as set out in Standing Order 26C.2). As the responsible committee, we draw to your attention that we should not recommend any changes to the Bill that would amount to reforming the law as it would take the Bill outside the scope of a consolidation exercise.

In order for your views to inform our scrutiny of the Bill in the autumn term, we would be grateful to receive any response you wish to provide by 6 September.

We have set aside some time in our work programme in the autumn term to hear, in person, from those whose written evidence may warrant further discussion. As such, we would be grateful if you would note 24 October 2022 as the date on which such evidence sessions may be arranged.

We look forward to hearing your views.

Yours sincerely,

Huw Irranca-Davies
Chair

Providing Written Evidence

The Senedd has two official languages, Welsh and English.

In line with the Senedd's Official Languages Scheme the Committee requests that documents or written responses to consultations intended for publication or use in Senedd proceedings are submitted bilingually. When documents or written responses are not submitted bilingually, we will publish in the language submitted, stating that it has been received in that language only.

We expect other organisations to implement their own standards or schemes and to comply with their statutory obligation.

Please see guidance for those providing evidence for committees.

Disclosure of information

Please ensure that you have considered the Senedd's policy on disclosure of information before submitting information to the Committee.