

# Agenda – Legislation, Justice and Constitution Committee

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Meeting Venue:	For further information contact:
Video Conference via Zoom	P Gareth Williams
Meeting date: 24 October 2022	Committee Clerk
Meeting time: 13.30	0300 200 6565
	<a href="mailto:SeneddLJC@senedd.wales">SeneddLJC@senedd.wales</a>

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## 1 Introductions, apologies, substitutions and declarations of interest

(13.30)

## 2 Instruments previously considered for sifting and now subject to scrutiny under Standing Orders 21.2 and 21.3

(13.30 – 13.35)

### 2.1 SL(6)267 – The Marketing of Seeds and Plant Propagating Material (Wales) (Amendment) (EU Exit) Regulations 2022

(Pages 1 – 2)

[Regulations](#)

[Explanatory Memorandum](#)

Attached Documents:

LJC(6)-27-22 – Paper 1 – Draft report

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

(13.35 – 13.40)

(Page 3)

Attached Documents:

LJC(6)-27-22 – Paper 2 – Draft report

Made Negative Resolution Instruments



**3.1 SL(6)269 – The Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022**

(Page 4)

Attached Documents:

LJC(6)-27-22 – Paper 3 – Written Statement by the Minister for Finance and Local Government, 7 October 2022

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

(13.40 – 13.45)

**Made Affirmative Resolution Instruments**

**4.1 SL(6)268 – The Land Transaction Tax (Tax Bands and Tax Rates) (Wales) (Amendment) Regulations 2022**

(Pages 5 – 6)

[Regulations](#)

[Explanatory Memorandum](#)

Attached Documents:

LJC(6)-27-22 – Paper 4 – Draft report

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

(13.45 – 13.50)

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

(Pages 7 – 12)

Attached Documents:

LJC(6)-27-22 – Paper 5 – Report

LJC(6)-27-22 – Paper 6 – Welsh Government response

## **6 Written Statements under Standing Order 30C**

(13.50 – 13.55)

### **6.1 WS–30C(6)012 – The Biocidal Products (Health and Safety) (Amendment) Regulations 2022**

(Pages 13 – 14)

Attached Documents:

LJC(6)–27–22 – Paper 7 – Written Statement by the Minister for Rural Affairs and North Wales, and Trefnydd, 19 October 2022

LJC(6)–27–22 – Paper 8 – Commentary

### **6.2 WS–30C(6)013 – The Control of Mercury (Amendment) (EU Exit) Regulations 2022**

(Page 15)

Attached Documents:

LJC(6)–27–22 – Paper 9 – Written Statement by the Minister for Rural Affairs and North Wales, and Trefnydd, 20 October 2022

LJC(6)–27–22 – Paper 10 – Commentary

## **7 Inter–Institutional Relations Agreement**

(13.55 – 14.00)

### **7.1 Correspondence from the Minister for Rural Affairs and North Wales, and Trefnydd: The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022**

(Pages 16 – 19)

Attached Documents:

LJC(6)–27–22 – Paper 11 – Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 18 October 2022

### **7.2 Correspondence from the Minister for Finance and Local Government: Finance: Interministerial Standing Committee**

(Page 20)

Attached Documents:

LJC(6)-27-22 – Paper 12 – Letter from the Minister for Finance and Local Government, 19 October 2022

## **8 Papers to note**

(14.00 – 14.05)

### **8.1 Correspondence from the House of Lords Secondary Legislation Scrutiny Committee: Losing Impact: why the Government's impact assessment system is failing Parliament and the public**

(Pages 21 – 56)

Attached Documents:

LJC(6)-27-22 – Paper 13 – Letter from the House of Lords Secondary Legislation Scrutiny Committee, 10 October 2022

LJC(6)-27-22 – Paper 14 – Report by the House of Lords Secondary Legislation Scrutiny Committee, October 2022

## **9 Motion to elect a temporary Chair under Standing Order 17.22 for the Committee meeting on 7 November**

(14.05)

## **10 Motion under Standing Order 17.42 to resolve to exclude the public from the remainder of the meeting**

(14.05)

## **11 Legislative Consent Memoranda (Memorandum No. 1 and Memorandum No. 2) on the Social Housing (Regulation) Bill**

(14.05 – 14.15)

(Pages 57 – 65)

[Legislative Consent Memorandum: Social Housing \(Regulation\) Bill](#)

[Supplementary Legislative Consent Memorandum: Social Housing \(Regulation\) Bill](#)

Attached Documents:

LJC(6)-27-22 – Paper 15 – Legal advice note

**12 Legislative Consent Memorandum on the Levelling-up and Regeneration Bill**

(14.15 – 14.25)

(Pages 66 – 71)

[Legislative Consent Memorandum: Levelling-up and Regeneration Bill](#)

Attached Documents:

LJC(6)-27-22 – Paper 16 – Legal advice note

LJC(6)-27-22 – Paper 17 – Written Statement by the Minister for Climate Change, 28 September 2022

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

(14.25 – 14.30)

(To Follow)

Attached Documents:

LJC(6)-27-22 – Paper 18 – Draft report

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

(14.30 – 14.35)

(To Follow)

Attached Documents:

LJC(6)-27-22 – Paper 19 – Draft report

**15 Legislative Consent Memorandum on the Northern Ireland Protocol Bill: Draft report**

(14.35 – 14.55)

(To Follow)

Attached Documents:

LJC(6)-27-22 – Paper 20 – Draft report

## **16 Social Partnership and Public Procurement (Wales) Bill: Draft report**

(14.55 – 15.10)

(Pages 72 – 99)

Attached Documents:

LJC(6)-27-22 – Paper 21 – Draft report

LJC(6)-27-22 – Paper 22 – Letter from the Deputy Minister for Social Partnership, 14 October 2022

LJC(6)-27-22 – Paper 23 – Letter to the Deputy Minister for Social Partnership, 22 September 2022

LJC(6)-27-22 – Paper 24 – Letter from the Deputy Minister for Social Partnership to the Equality and Social Justice Committee, 13 June 2022

## **17 Historic Environment (Wales) Bill: Consideration of correspondence**

(15.10 – 15.20)

(Pages 100 – 153)

Attached Documents:

LJC(6)-27-22 – Paper 25 – Letter from the Counsel General and Minister for Constitution, 17 October 2022

LJC(6)-27-22 – Paper 26 – Letter to the Counsel General and Minister for Constitution, 20 September 2022

LJC(6)-27-22 – Paper 27 – Letter from the Deputy Welsh Language Commissioner, 17 October 2022 [Welsh only]

LJC(6)-27-22 – Paper 28 – Letter from the Deputy Welsh Language Commissioner, 17 October 2022 [English translation by the Senedd Commission]

## **18 Legislative Consent Memorandum on the Energy Prices Bill**

(15.20 – 15.30)

(Pages 154 – 155)

[Legislative Consent Memorandum: Energy Prices Bill](#)

Attached Documents:

LJC(6)-27-22 – Paper 29 – Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 18 October 2022

## **19 Intergovernmental relations**

(15.30 – 15.40)

(To Follow)

Attached Documents:

LJC(6)-27-22 – Paper 30 – Draft letter

## **SL(6)267 – The Marketing of Seeds and Plant Propagating Material (Wales) (Amendment) (EU Exit) Regulations 2022**

### **Background and Purpose**

These Regulations make operability amendments to the Seed Marketing (Wales) Regulations 2012 and the Marketing of Fruit Plant and Propagating Material (Wales) Regulations 2017.

The Welsh Government explains in its Explanatory Memorandum that these amendments are “required as a result of the UK’s Exit from the European Union” and that they “amend secondary legislation relating to the marketing of seed and fruit planting material to correct operability deficiencies that were not accounted for in earlier amending instruments.”

### **Procedure**

Negative

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were 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(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements**

In regulation 1, in the English version, the Regulations are titled the “Marketing of Seeds and Plant Propagating Material **(Wales) (Amendment)** (EU Exit) Regulations 2022” (emphasis added). However, in regulation 1 of the Welsh version of the Regulations, the Regulations are titled “Rheoliadau Marchnata Hadau a Deunyddiau Lluosogi Planhigion **(Diwygio) (Cymru)** (Ymadael â’r UE) 2022” (emphasis added).

It is unclear why “(Wales)” and “(Amendment)”, and “(Cymru)” and “(Diwygio)”, appear in a different order when comparing both versions of the Regulations. Given that these Regulations amend Welsh SIs, as opposed to UK SIs, the order in the English version would appear to be appropriate.

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



In regulation 2(2)(a)(i), in the Welsh version of the Regulations, the closing quotation marks are missing after "...*quarantine pest*")" and prior to "rhodder". Without those closing quotation marks, it may not be clear where the text to be substituted ends, which has a consequence as to the effect of the regulation.

Different approaches are also taken in the English and Welsh versions of the Regulations to the use of quotation marks in regulation 2(2)(a)(i) and (iii). When substituting text, the English version includes the quotation marks preceding the defined term in paragraph A1 of Schedule 2 to the Seed Marketing (Wales) Regulations 2012 (in both the substituted and new text), whilst the Welsh text does not include those preceding quotation marks.

## Merits Scrutiny

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

### **3. 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**

A draft of these Regulations was laid before the Senedd for sifting under paragraph 4 of Schedule 7 to the European Union (Withdrawal) Act 2018, in accordance with Standing Order 27.9A. The Committee considered that draft on 26 September 2022 and agreed that the negative procedure was the appropriate procedure for these Regulations.

### **4. 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**

A formal consultation has not been undertaken in respect of these Regulations. In this regard, the following from the Explanatory Memorandum is noted:

*"As the Regulations provide a limited amendment, affecting a small number of individuals and does not reflect a change in the Welsh Government's policy, a formal public consultation did not take place."*

## Welsh Government response

A Welsh Government response is required in relation to reporting points 1 and 2 only.

### Legal Advisers

Legislation, Justice and Constitution Committee

14 October 2022



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

—  
Welsh Parliament

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Legislation, Justice and Constitution Committee

## Statutory Instruments with Clear Reports 24 October 2022

### **SL(6)269 – The Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022**

#### **Procedure: Made Negative**

These Regulations specify the circumstances in which two or more hereditaments, whether occupied or unoccupied, must be treated as one hereditament for the purposes of determining an owner's or occupier's non-domestic rating liability.

These Regulations also set out the circumstances in which two or more hereditaments are to be considered as contiguous with each other.

Regulation 2 makes provision for occupied hereditaments. Regulation 3 makes provision for unoccupied hereditaments and Regulation 4 makes provision in respect of the contiguity condition. Regulation 5 sets out the circumstances in which two hereditaments will be considered to be contiguous.

**Parent Act:** Local Government Finance Act 1988

**Date Made:** 6 October 2022

**Date Laid:** 7 October 2022

**Coming into force date:** 1 March 2023





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## WRITTEN STATEMENT BY THE WELSH GOVERNMENT

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<b>TITLE</b>	<b>The Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022</b>
<b>DATE</b>	<b>07 October 2022</b>
<b>BY</b>	<b>Rebecca Evans MS, Minister for Finance and Local Government</b>

Today I am publishing a summary of responses to the technical consultation on a draft of the *Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022* ('the Regulations'). I am also confirming that the Regulations, as drafted and consulted upon, have been made and will come into force on 1 April 2023.

Between 9 March and 1 June 2022, the Welsh Government [consulted](#) on a proposal to make secondary legislation which would clarify the circumstances in which two or more units of property should be treated as one within the non-domestic rates system, in time for the start of the 2023 rating list. On 24 June 2022, I published a summary of responses to that consultation and [announced](#) that regulations would be prepared to implement the proposal as consulted upon.

A technical consultation on draft Regulations to implement the proposal ran from 4 August to 16 September 2022. It asked for views on the clarity of the Regulations and for any other comments about them. Following the consultation, no changes to the drafting of the Regulations are required.

A summary of responses to the technical consultation is available at:

<https://gov.wales/draft-non-domestic-rating-property-common-occupation-wales-regulations-2022>

## **SL(6)268 – The Land Transaction Tax (Tax Bands and Tax Rates) (Wales) (Amendment) Regulations 2022**

### **Background and Purpose**

These Regulations amend the Land Transaction Tax (Tax Bands and Tax Rates) (Wales) Regulations 2018 so as to insert revised tax bands and percentage tax rates for residential property transactions.

The table below sets out the revised bands and rates:

<b><i>Tax band</i></b>	<b><i>Relevant consideration</i></b>	<b><i>Percentage tax rate</i></b>
Zero rate band	Not more than £225,000	0%
First tax band	More than £225,000 but not more than £400,000	6%
Second tax band	More than £400,000 but not more than £750,000	7.5%
Third tax band	More than £750,000 but not more than £1,500,000	10%
Fourth tax band	More than £1,500,000	12%

These Regulations also provide that where the effective date for a transaction falls on or after 10 October 2022, but contracts were exchanged or substantial performance of that contract took place prior to 10 October 2022, the buyer may elect to apply the relevant tax bands and percentage tax rates that were in place before the changes came into force (subject to certain exceptions).

### **Procedure**

Made Affirmative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd must approve the Regulations within 28 days (excluding any days when the Senedd is dissolved or in recess for more than four days) of the date they were made for them to continue to have effect.

### **Technical Scrutiny**

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

### **Merits Scrutiny**

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument:



**1. 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.**

Section 25 of the Tax Collection and Management (Wales) Act 2016 provides that the Welsh Revenue Authority must pay amounts collected in the exercise of its functions into the Welsh Consolidated Fund.

These Regulations revise tax bands and percentage tax rates for residential property transactions subject to Land Transaction Tax collected by the Welsh Revenue Authority.

### **Welsh Government response**

A Welsh Government response is not required.

#### **Legal Advisers**

**Legislation, Justice and Constitution Committee**

**17 October 2022**



Senedd Cymru

**Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad**

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Welsh Parliament

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**Legislation, Justice and Constitution Committee**

## **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.

## Committee Consideration

The Committee considered the instrument at its meeting on 17 October 2022 and reports to the Senedd in line with the reporting points above.



## **Marine, Fisheries and Aquaculture (Financial Assistance) Scheme (Wales) Regulations 2022**

We note the points raised by the Legislation, Justice and Constitution Committee in the draft report and have withdrawn the draft Marine, Fisheries and Aquaculture (Financial Assistance) Scheme (Wales) Regulations 2022 in order to consider these points further.



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**WRITTEN STATEMENT  
BY  
THE WELSH GOVERNMENT**

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<b>TITLE</b>	<b>The Biocidal Products (Health and Safety) (Amendment) Regulations 2022</b>
<b>DATE</b>	<b>19 October 2022</b>
<b>BY</b>	<b>Lesley Griffiths MS, Minister for Rural Affairs and North Wales, and Trefnydd</b>

Members of the Senedd will wish to be aware that we are giving consent to the Secretary of State exercising a subordinate legislation-making power in a devolved area in relation to Wales.

Agreement was sought by Chloe Smith MP, Minister of State for Disabled People, Health and Work to make a Statutory Instrument (SI) titled the Biocidal Products (Health and Safety) (Amendment) Regulations 2022 to apply in relation to Great Britain.

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

The SI amends Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning making available on the market and use of biocidal products to impose new deadlines within which certain actions must be taken by the competent authority in relation to an application for the authorisation of a biocidal product.

The regulations were laid before Parliament on 18 October and come into force on 31 December 2022.

**Any impact the SI may have on the Senedd's legislative competence and/or the Welsh Ministers' executive competence**

Members will wish to note that the Regulations do not transfer any functions to the Secretary of State.

## **The purpose of the amendments**

Biocidal products are used to protect people and animals, preserve goods, stop pests like insects or rodents and control viruses, bacteria and fungi through a chemical or biological action. Biocidal products are required by the Great Britain Biocidal Product Regulations (GB BPR) to have an authorisation grant from the Health and Safety Executive (HSE) within a fixed period from a defined trigger point. Biocidal products are also required to be removed from the market if authorisations are not granted within 3 years of the last active substance being authorised.

To allow biocidal products to remain on the market legally, the Regulations place a temporary extension on legal deadlines by which affected biocidal product authorisation applications are required to be processed by HSE. The Regulations ensure biocidal products can continue to be placed on the market and used until they are authorised under the GB BPR. As a result, these Regulations will ensure biocidal products are properly regulated and support the operation of the GB BPR.

The Regulations and accompanying Explanatory Memorandum, setting out the detail of the provenance, purpose and effect of the amendments is available here:

<http://www.legislation.gov.uk/id/ukdsi/2022/9780348239683>

## **Why consent has been given**

Consent has been given for the UK Government to make these corrections in relation to, and on behalf of, Wales for reasons of efficiency, expediency and to preserve the interconnected nature of the GB biocidal regime by temporarily extending the authorisation of biocidal products deadline across GB. The amendments have been considered fully and the changes are technical in nature and contain no diversion of policy.



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**WRITTEN STATEMENT  
BY  
THE WELSH GOVERNMENT**

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**TITLE**            **The Control of Mercury (Amendment) (EU Exit) Regulations 2022**

**DATE**            **20 October 2022**

**Lesley Griffiths AS/MS**

**BY**                **Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd  
Minister for Rural Affairs and North Wales, and Trefnydd**

Members of the Senedd will wish to be aware we are giving consent to the Secretary of State for Environment, Food and Rural Affairs exercising a subordinate legislation-making power in a devolved area in relation to Wales.

Agreement was sought by the former Minister of State for Farming, Fisheries and Food to make a Statutory Instrument (SI) titled The Control of Mercury (Amendment) (EU Exit) Regulations 2022 to apply in relation to Great Britain.

The regulations were laid before Parliament on 19 October by the Secretary of State for Environment, Food and Rural Affairs in exercise of powers conferred by the European Union (Withdrawal) Act 2018.

The SI amends a 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 Welsh Government’s general principle is the law relating to devolved matters should be made and amended in Wales. However, 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. Additionally, these regulations make changes which are minor and technical in nature.



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref: MA/LG/2595/22

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

[huw.Irranca-Davies@senedd.wales](mailto:huw.Irranca-Davies@senedd.wales)

18 October 2022

Dear Huw,

## **RE: The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022**

I wish to inform the Committee that I have granted consent for the Secretary of State to exercise a delegated legislative power in a devolved area in relation to Wales. The former Minister of State for Farming, Fisheries and Food, Victoria Prentis MP, requested consent to make The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022. These Regulations will apply in relation to Wales, England and Scotland with the exception of regulations 24 and 25, which apply in England only. The statutory instrument will be made under section 8 of the European Union (Withdrawal) Act 2018 and be subject to the draft affirmative procedure.

The Regulations propose amendments to retained direct EU law relating to official controls and animal and plant health, to ensure that the laws operate effectively following the withdrawal of the United Kingdom from the European Union. Please see Annex A for details of amendments.

It is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence. However, in certain circumstances there are benefits in working collaboratively with the UK Government and other devolved administrations where there is a clear rationale for doing so.

On this occasion, I am giving my consent to these Regulations, which make corrections and address operability matters in relation to, and on behalf of, Wales for reasons of efficiency and expediency, and to ensure consistency and coherence of the statute book. I do so whilst reserving the ability to diverge in future as per our devolved competence.

Bae Caerdydd • Cardiff Bay  
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[Correspondence.Lesley.Griffiths@gov.wales](mailto:Correspondence.Lesley.Griffiths@gov.wales)

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

This instrument addresses minor EU exit related deficiencies, further deficiencies not anticipated at the time of withdrawal from the EU and ensures the functioning of a GB-wide import regime. It would therefore seem appropriate to exercise these functions jointly as they need to work for the whole of the UK, or Great Britain (where there is freedom of movement), to ensure there are common standards and to minimise disruptions to traders, local authorities, and inspection agencies alike.

I am copying this letter to the Counsel General and Minister for the Constitution, Minister for Climate Change and the Chair for the Economy, Trade and Rural Affairs Committee.

Regards,

A handwritten signature in black ink that reads "Lesley Griffiths". The signature is written in a cursive style with a large, sweeping flourish at the end.

**Lesley Griffiths AS/MS**

Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd  
Minister for Rural Affairs and North Wales, and Trefnydd

## Annex A

### Part 2 of the statutory instrument:

- **Amendment of Regulation (EU) No 2016/2031 - Penalties** These provisions relate to the creation of offences and set down rules on appropriate penalties relating to plant pests and diseases and reinstates Article 108 of the Plant Health Regulations.

### Part 3:

- **Amendment of Article 3 and Article 4 of the Official Controls Regulation (OCR)/ Regulation (EU) No 2017/625** to designate the 'Appropriate Authority' as a potential 'Competent Authority' more clearly.
- **Amendment to Article 48 of the OCR** amends OCR to enable the appropriate authority to adopt delegated acts to establish quantities under Article 48(g).
- **Amendment to Article 115 of the OCR** relates to contingency plans for food and feed by the 'Competent Authorities' or 'Appropriate Authority' and aims to remove reference to Article 55(1) of the General Food Law Regulations 178/2002 which was previously revoked.
- **Amendment to Article 128 of the OCR** relates to the powers of the 'Appropriate Authority' to make regulations to protect the biosecurity of GB if there is an outbreak in a third country.
- **Amendment to Article 139 of the OCR** aims to address a deficiency in the current OCR legislation by providing the 'Appropriate Authority' with the power to create penalties for non-compliance with the OCR and relevant supporting legislation.
- **Amendment to Article 150 of the OCR** extends the transitional periods provided for in that Article during which Directive 96/23/EC, which sets out the requirements for submission of up-to-date information regarding national residue monitoring programmes from trading partners approved to import products of animal origin into Great Britain, continues to apply.
- **Amendment to Annex 6 of the OCR** corrects an oversight in bringing high risk food and feed (HRFNAO) within the scope of the Transitional Staging Period as it was originally omitted in error.
- **Amendment to Annex 6 of the OCR** also allows for the Transitional Staging Period to be amended independently from changing the end date.

### Part 4:

- **Amendment of Regulation (EC) No. 999/2001 - The prevention, control and eradication of transmissible spongiform encephalopathies.** Regulation 16 of the proposed 2022 Regulations amends legislation relating to the prevention, control, and eradication of certain transmissible spongiform encephalopathies (TSEs) to ensure the legislation continues to operate effectively in Great Britain.
- **Amendment to Annex 2 to Commission Decision 2007/777/EC and Amendment of Annex 1 to Commission Regulation (EC) No 119/2009,** which are missed consequential amendments that are required now that the Import of Animals and Animal Products and Approved Countries (Amendment) Regulations 2022 has removed information in third country lists from legislation.
- **Amendment of Annex 1 to Commission Regulation (EC) No 798/2008** to remove Belarus from the list of approved trading partners for poultry meat.
- **Amendments to retained Regulation (EC) No. 1/2005 on the protection of animals during transport and related operations.** Regulation 17 makes corrections to Regulation 1/2005 to ensure obligations of Annex II are applicable. Annex II of Regulation 1/2005 sets out the obligations of transporters, organisers, and keepers in relation to journey logs and export, import and transit journeys of livestock and

unregistered horses from or via GB regardless of the purpose of the journey, where the journey is over 8 hours.

- **Amendment of Commission Implementing Regulation (EU) No 2020/625.** The purpose of this amendment is to ensure the transitional provision in Article 3 of Regulation 2020/625 (relating to the import of sesamum seeds) applies in relation to any imports which may enter GB which fall within the scope of that provision.

#### Part 5:

- **Amendment of the Plant Varieties and Seeds Act 1964: England and Wales** address a policy gap that has been identified within the 1964 Act in relation to a lack of regulation making powers in respect of fruit, vegetable, and ornamental planting material.

#### Part 6:

- **Amendment to Regulation 38 of The Trade in Animals and Related Products Regulation (TARP) England.** The TARP amendment deals with the ability to charge fees for border checks on animal related goods and will also require an amendment to TARP Wales - this deficiency will be corrected in a regulation made by the Welsh Ministers.
- **Amendment to regulation 2 of the Animal Health (Miscellaneous Fees) (England) Regulations 2018.** An amendment is being made to update the definition of third country.

# Agenda Item 7.2

Rebecca Evans AS/MS  
Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government



Llywodraeth Cymru  
Welsh Government

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

19 October 2022

Dear Huw,

I am writing to inform you a meeting of the Finance: Interministerial Standing Committee (F:ISC) will take place on 20 October.

The focus of the meeting will be on the current economic and fiscal crisis. Ahead of the Chancellor's Medium Term Fiscal Plan on 31 October, I will be seeking assurances in regard to support for vulnerable households and businesses. This includes ensuring previous commitments by the UK Government to uplift benefits in line with inflation are honoured.

I will be emphasising the impact of inflation, pay and other costs on public services and that the priority must be to ensure public services are protected. Additional support should be funded by targeting the excess profits of the energy and banking sectors.

I will also be pressing the UK Government to provide the capital stimulus required to boost economic growth, including investment in green energy and decarbonisation to improve our energy security for the future and to tackle the climate emergency.

Discussions will continue from the last meeting on improvements to strengthen processes to provide greater end of year certainty supported by appropriate budget flexibilities, with devolved governments setting out proposals for a way forward.

Given the need to focus on the current economic and fiscal crisis, the agreed action from the last meeting to discuss replacement EU funding will be postponed to the December meeting.

I will report to the Committee on the outcome of the meeting.

Yours sincerely,

**Rebecca Evans AS/MS**  
Y Gweinidog Cyllid a Llywodraeth Leol  
Minister for Finance and Local Government

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

**Back Page 20**  
We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.



10 October 2022

## **Losing Impact: why the Government's impact assessment system is failing Parliament and the public**

The SLSC has, for some time, been concerned at the way the Government has come to ignore, downplay or bypass the existing scrutiny safeguards which aim to ensure that Parliament has the necessary information provided in a timely fashion to enable it to undertake its critical function of holding the Government to account.

In this our latest Report, '*Losing Impact*', the Secondary Legislation Scrutiny Committee focuses on the decline in the quality of Impact Assessments (IAs) – which are essential documents if Parliament is to understand the full implications of government policy. It is true that in the past two years the system has undergone the dual challenges of Brexit and the pandemic. While for emergency legislation some pragmatic relaxations in the system could, to an extent, be justified, it is in the Government's 'business as usual' legislation that we have found some of the worst cases; and, more worryingly, we are still finding them.

Using examples from our weekly scrutiny of secondary legislation, this new Report illustrates the problems we are finding in the provision of IAs, and suggests some remedies: a simpler process, reviewed earlier with proper tracking and enforcement.

Our concern is not just about 'paperwork' – IA information should play a key role in the policy formulation process, so providing a firm evidence base that helps demonstrate that the legislation is targeted at the right groups and in the most cost-effective way. Delays in publishing an IA deprives those affected as well as those in Parliament of an opportunity to challenge the Government's assumptions and point out unforeseen consequences.

Even when good quality IAs are produced we have noted very variable practice in following them up through Post-Implementation Reviews – we remain surprised just how few amending Regulations presented to us for scrutiny are the result of this type of 'good housekeeping' evaluation. That is a wasted opportunity.

We heard evidence that the difference between the good and the bad IAs is within departments and not between them, so we raise questions about the role of departments' SI Ministers. We also find that the current approach, which leaves departments to regulate themselves, results in too many instruments being laid with IAs "to follow" sometimes months after the legislation has taken effect. That is wholly unsatisfactory.

This is the latest in a series of reports produced by the Secondary Legislation Scrutiny Committee (SLSC) and our sister Committee the Delegated Powers and Regulatory Reform Committee (DPRRC) drawing attention to the growing imbalance in power between Parliament (both Houses) and the Government.

In part, this shift in relative power is the result of an increasing use of skeleton primary legislation which leaves the detail of policy – which is what is really of importance to us all – to unamendable secondary legislation. The titles of the first two Reports, produced last November, ‘Government by Diktat’ (SLSC) and ‘Democracy Denied’ (DPRRC) says it all.

I hope that this report – and indeed our other reports – will give you food for thought.

Yours sincerely

Robin Hodgson

**Lord Hodgson of Astley Abbotts CBE**

*Chair of the Secondary Legislation Scrutiny Committee*



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

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12th Report of Session 2022–23

**Losing Impact:  
why the  
Government's  
impact assessment  
system is failing  
Parliament and the  
public**

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Ordered to be printed 6 September 2022 and published 10 October 2022

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Published by the Authority of the House of Lords

### *Secondary Legislation Scrutiny Committee*

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

### *Members*

[Baroness Bakewell of Hardington Mandeville](#)

[Lord De Mauley](#)

[Lord German](#)

[Viscount Hanworth](#)

[Lord Hodgson of Astley Abbotts](#) (Chair)

[Lord Hutton of Furness](#)

[The Earl of Lindsay](#)

[Lord Lisvane](#)

[Lord Powell of Bayswater](#)

[Lord Rowlands](#)

[Baroness Watkins of Tavistock](#)

### *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

### *Publications*

The Committee's Reports are published on the internet at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

### *Committee Staff*

The staff of the Committee are Christine Salmon Percival (Clerk), Sarah Jones (Clerk), Philipp Mende (Adviser), Jane White (Adviser) and Emily Pughe (Committee Operations Officer).

### *Further Information*

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

### *Contacts*

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is [hlseclegscrutiny@parliament.uk](mailto:hlseclegscrutiny@parliament.uk).

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## EXECUTIVE SUMMARY

In 2017, we noted that there had been some improvement in the quality of Impact Assessments (IA) provided with secondary legislation. Unfortunately, this improvement has not survived the dual challenges of Brexit and the pandemic, during which time the speed of legislating meant that corners were cut. We had hoped that the return to more normal working would provide an opportunity not just to reinstate the previous IA system but to improve it: this has not happened.

Relaxations in the assessment of the impacts of Brexit and pandemic legislation could, to some extent, be justified as proportionate and pragmatic in a difficult situation, but that excuse has never applied to ‘business as usual’ legislation and yet this is where we have found some of the worst examples of IA practice. What particularly worries us is that we are still finding them.

An IA should not just be treated as an item on a ‘to do’ list but be an integral part of the policy formulation process. Used properly it should analyse different options for achieving the policy goal, act as a focus for external comment during the consultation stage, and gradually guide the policy maker towards the most efficient and cost-effective solution to the problem identified. **One of our major concerns is that IAs which are published late, or that appear to have been scrambled together at the last minute to justify a decision already taken, may undermine the quality of the policy choices that underpin the legislation.** (paras 26–32)

We are not unsympathetic to the burdens on policy makers and question whether the IA process has become too technical, focusing on complex economic forecasts rather than options analysis. **We have some suggestions on how it might be streamlined and simplified to make it more user-friendly.** (paras 33–36 and 50–55)

When done properly, an IA is a thorough and useful document, not least because it has a different emphasis to an Explanatory Memorandum and can illuminate other aspects of the policy our scrutiny and Parliament may wish to explore. We acknowledge that many IAs are done well, but the number done badly, or worse that are simply not available to the House alongside the legislation, has increased. Our attempts to quantify this have been frustrated by the lack of any central tracking of either the requirement to produce an IA initially or to review its accuracy after five years. **The IA rule book is good but it is ineffective if no one imposes discipline when its provisions are not followed.** (paras 41–49 and 57–62)

As a result, this report is based on our scrutiny of the hundreds of statutory instruments laid before Parliament every year, and on oral evidence with key players in the IA process who appear to share and confirm our concerns. We identify these areas of weakness in the current system in the expectation that the Government’s current review of the Better Regulation Framework will address them promptly.

Providing Parliament with poor quality impact information or only providing the information after the scrutiny process is over is another example of the transfer of power from Parliament to the Executive that we highlighted in *Government by Diktat*. Parliament’s legitimate role is to challenge the actions of

the Executive. **If Parliament is to perform its critical function of holding the Government to account, it is of paramount importance that the two Houses are given complete and comprehensive information about the basis on which policy choices are made and the reasons why alternative options have been rejected. We cannot perform that role without the right information at the right time.**



# Losing Impact: why the Government's impact assessment system is failing Parliament and the public

## CHAPTER 1: INTRODUCTION

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1. This Committee has been scrutinising the policy aspects of secondary legislation since its inception in 2003. During that time, we have developed standards for the supporting information that should accompany secondary legislation when it is laid before Parliament. These standards have been endorsed repeatedly during debates in the House and are set out both in our guidance to departments<sup>1</sup> and in Cabinet Office guidance.<sup>2</sup>
2. In relation to the consideration of the effects of the legislation, the standard is that:
  - **every Explanatory Memorandum (EM) should include “impact information”** (that is, an explanation of the costs and benefits of the legislative change proposed that is proportionate to the instrument's effect); and
  - **for more significant instruments, whether in terms of cost or policy, an Impact Assessment (IA)<sup>3</sup> should be prepared and should be published on the same day that the instrument is laid before Parliament.**
3. Better Regulation Executive (BRE) guidance states that an IA should include an options analysis, “identifying the rationale for government intervention, the different policy options (including the non-regulatory ones) and quantifying expected costs and benefits” (see paragraph 14 below).<sup>4</sup> It states that a preliminary version of the IA should be included with any consultation exercise so that those affected can comment and, for example, identify any unintended consequences or cheaper alternative solutions.
4. In our end of year report for session 2017–19, we acknowledged an improvement in the provision of impact information:

“We are pleased to note that the majority of the EMs that we see now have an adequate summary of the effects of the legislation. Some, like the Department of Transport, have taken to attaching the Regulatory

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1 Secondary Legislation Scrutiny Committee (SLSC), *Guidance for Departments Laying Instruments*: <https://committees.parliament.uk/publications/28455/documents/171063/default/>.

2 Government Skills and Curriculum Unit, ‘Making sense of Parliament, virtually’: <https://www.gov.uk/government/news/making-sense-of-parliament-virtually> [accessed 25 July 2022].

3 In this report the term Impact Assessment (IA) is used for the formal document produced and independently verified for instruments with a net annual cost above £5 million. “Impact information” is used to indicate the information that should be in every EM and for a simple instrument may comprise just a couple of sentences.

4 Department for Business, Energy and Industrial Strategy (BEIS), *Better Regulation Framework* (March 2020) para 1.2.4: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916918/better-regulation-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf) [accessed 25 July 2022].

Triage Assessment<sup>5</sup> that they prepare to demonstrate why they do not need to produce a full IA. Even where there are no financial effects, those preparing the EMs are getting better at explaining their reasoning rather than hiding behind the bald statement “no Impact Assessment is necessary”.<sup>6</sup>

5. Unfortunately, the exceptional volume of statutory instruments (SIs)<sup>7</sup> caused by Brexit and then the pandemic undermined that progress. We have acknowledged the achievement of officials in producing the necessary legislation at speed, but there has been a noticeable reduction in the quality of the associated documentation. As a result, our scrutiny task has been made more difficult and, in turn, the ability of Parliament to hold the Government to account diminished.
6. In November 2021, we published a report entitled *Government by Diktat: A call to return power to Parliament*<sup>8</sup> in which, amongst other things, we set out our concerns about the quality of secondary legislation and supporting information including the dearth of impact information for pandemic legislation.
7. This review goes wider. It has been prompted by departments’ failure to provide IAs for a number of significant SIs covering a range of policy areas. We have, in our regular scrutiny work, commented on each instrument individually, but concern over the developing trend has led us to consider more generally the growing gap between the Government’s stated policy on IAs and what is actually provided.
8. For this inquiry, we have taken evidence from those involved in the production of IAs: Christopher Carr (Director of the BRE); Stephen Gibson (Chair) and Andrew Williams-Fry (Member) of the Regulatory Policy Committee (RPC); the Lord President and Leader of the House of Commons, the Rt Hon. Mark Spencer MP, in his role as Chairman of the Parliamentary Business and Legislation (PBL) Committee; and Lord Callanan, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy (BEIS), in his role as Minister responsible for the Better Regulation initiative who was accompanied by Ms Sarah Montgomery, Deputy Director, Policy and Delivery, BRE.<sup>9</sup> We are grateful for their assistance.

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5 Also known as a “*De minimis*” assessment – a simplified version of an IA used to prove that the policy is below the threshold for a full IA. See for example, HM Treasury, ‘De minimis assessment’: [https://assets.publishing.service.gov.uk/media/62c46d57d3bf7f2ffaa4a9b9/proposed\\_neg\\_DMA\\_Fin\\_Serv\\_misc\\_amend\\_EU\\_Exit\\_regs.pdf](https://assets.publishing.service.gov.uk/media/62c46d57d3bf7f2ffaa4a9b9/proposed_neg_DMA_Fin_Serv_misc_amend_EU_Exit_regs.pdf) [accessed 25 July 2022].

6 SLSC, *26th Report* (Session 2017–19, HL Paper 125), paras 39–42.

7 Our remit is wider than just Statutory Instruments and also includes most statutory codes, rules, and instruments subject to the negative or affirmative resolution, but SI is used here as a shorthand for that list.

8 SLSC, *Government by Diktat: A call to return power to Parliament* (20th Report, Session 2021–22, HL Paper 105).

9 SLSC, ‘Oral Evidence Transcripts’: <https://committees.parliament.uk/work/6620/quality-of-impact-assessments/publications/oral-evidence/>. The written evidence from Mr Spencer is in Appendix 2 to this report. References to evidence in the text are footnoted with the relevant name and question number, for example [Q 7](#) (Sarah Montgomery).

## CHAPTER 2: GOVERNMENT POLICY—THE BETTER REGULATION CYCLE

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### Background to Better Regulation

9. The five principles of Better Regulation were established in 1997.<sup>10</sup> They require that any policy intervention and its enforcement should be:
- transparent,
  - accountable,
  - proportionate,
  - consistent, and
  - targeted only at cases where action is needed.

These principles have been applied by successive governments and Lord Callanan confirmed that they are still used today.<sup>11</sup>

10. The Better Regulation Framework uses these principles to encourage departments, when formulating policy, to consider a wide range of options for achieving the desired outcome, not just legislation. Associated guidance reminds officials to analyse proposals rigorously, avoid unnecessary costs, look out for unintended consequences, and ensure that the intervention is likely to be effective. For SIs imposing significant costs, departments demonstrate that they have followed this process by producing an IA.
11. According to the BRE guidance, the IA should evolve as the policy evolves: a “consultation-stage” version should be included with any consultation exercise for public comment, and a “final-stage” IA should accompany any request for collective agreement from the Cabinet and be published alongside the SI on the National Archive’s website<sup>12</sup> when the instrument is eventually laid before Parliament.
12. Originally, it was Government policy that an IA was required for any instrument with an impact on business or the voluntary sector of over £1 million net per annum but this threshold was raised to £5 million in 2017 to aid the management of Brexit legislation.<sup>13</sup>
13. The five principles were enshrined in law in section 2 of the Legislative and Regulatory Reform Act 2006. The Small Business, Enterprise and Employment Act 2015 (“the 2015 Act”) further formalised the process by placing a duty on regulators to assess the economic impact of their interventions according to the format and methodology set out in guidance by the Secretary of State. It also requires the assessment to be verified by an independent body,<sup>14</sup> currently the Regulatory Policy Committee (RPC), which judges whether an IA is “fit for purpose” using a traffic light system

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10 Better Regulation Task Force, *Principles of Good Regulation* (2003): <https://www.rqia.org.uk/RQIA/media/RQIA/Resources/Better-Regulation-Task-Force-Principles-of-Good-Regulation.pdf> [accessed 28 July 2022].

11 [Q 1](#) (Lord Callanan).

12 The National Archives, ‘Legislation.gov.uk’: <https://www.legislation.gov.uk/ukxi> [accessed 28 July 2022].

13 SLSC, *15th Report* (Session 2017–19, HL Paper 59), Appendix 2.

14 Small Business, Enterprise and Employment Act 2015, [section 24A and 25](#).

where “green” meets the required standard and “red” has significant weaknesses. The RPC can also “call in” measures deemed to be below the £5 million per annum threshold to check that analytical methods and exclusions have been applied correctly.

### Role of the BRE

14. The Better Regulation Executive (BRE) within BEIS leads across government on better regulation policy and is responsible for embedding its precepts into departmental policymaking. This includes operating a Better Regulation Unit within each department and issuing guidance to departmental officials on how to operate the Better Regulation Framework, the latest version of which was published in March 2020.<sup>15</sup>
15. The BRE guidance explains the key requirements as follows:
  - “This guidance sets out a general threshold for independent scrutiny of Regulatory Impact Assessments (RIAs) and Post Implementation Reviews (PIRs) where the equivalent annual net direct cost to business (EANDCB) is greater than ±£5m. For measures below this threshold, Departments should undertake proportionate cost-benefit analysis to inform decision-making, as well as demonstrating that the impact of a measure is below the ± £5m EANDCB threshold.” (Introduction)
  - “All correspondence seeking collective agreement to a regulatory measure should continue to include an IA rated “fit for purpose” by the RPC, except where the impact on business is below the threshold for independent scrutiny.” (Introduction)
  - “A regulatory impact assessment (RIA) is a tool used to inform policy decision-making. It is based on the ROAMEF policy cycle [Rationale, Objectives, Appraisal, Monitoring, Evaluation, Feedback] and uses cost-benefit analysis, as set out in the Green Book,<sup>16</sup> to ensure good practice in developing policy based on robust evidence ... A RIA summarises the rationale for government intervention, the different policy options (including non-regulatory options) and the impacts of the intervention, as well as quantifying expected costs and benefits.” (paragraphs 1.2.2–4)
16. A key element of the ROAMEF policy cycle is evaluation and feedback, so that lessons can be learned, and subsequent legislation be made more effective. Sections 28–30 of the 2015 Act place a duty on ministers to conduct a *Post-Implementation Review* (PIR) of qualifying legislation (using the same £5 million per annum threshold). Ministers must publish a review within five years of the commencement of the legislation which must also be validated by the RPC.
17. The IA procedure, supported by the independent check by the RPC, is well-established and clear (albeit quite technical and complex to apply) and

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15 BEIS, *Better Regulation Framework* (March 2020): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916918/better-regulation-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf) [accessed 28 July 2022].

16 A standardised methodology on how to appraise and evaluate policies, projects and programmes is set out in HM Treasury guidance. HM Treasury, *The Green Book Central Government Guidance on Appraisal and Evaluation* (2020): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1063330/Green\\_Book\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063330/Green_Book_2022.pdf) [accessed 28 July 2022].

ensures consistent measurement across government, accountability and transparency.

18. **Our concern is that the number of qualifying instruments which have not followed the IA procedure has increased and, given that no sanctions appear to be applied where a department fails to comply, there would seem to be little incentive for departments to improve.**
19. We therefore welcome the fact that, in July 2021, the BRE published a consultation document about legislating in the post-Brexit period.<sup>17</sup> It asked how the UK's future framework for new regulation can encourage the right design of interventions and suggested how the impacts of regulation should be measured and scrutinised in the future. (Our response to that consultation is set out in Appendix 3.)
20. The BRE's analysis of the consultation responses has recently been published.<sup>17</sup> We note that respondents strongly supported validation of options assessments at an earlier stage and maintaining independent verification of IAs but did not support any proposals to reduce IA content. It therefore seems an opportune moment to set out some of our own concerns about the Government's provision of impact information.

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<sup>17</sup> BEIS, 'Consultation outcome Reforming the framework for better regulation' (22 July 2021): <https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation> [accessed 28 July 2022].

### CHAPTER 3: WHAT ARE THE PROBLEMS? PRINCIPAL CONCERNS WITH IMPACT ASSESSMENTS

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21. In this chapter we set out our principal concerns based on our scrutiny of hundreds of SIs each year. We make reference throughout to the five principles of Better Regulation to illustrate where we think the current system is falling short of those precepts.

#### Missing IAs

22. We have found that an increased number of instruments which require an IA have been laid before Parliament without one. In a report in October 2021, we published correspondence in which we drew to the attention of the responsible Minister, Paul Scully MP, the following examples:<sup>18</sup>
- HM Treasury: Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (IA was awaiting sign-off by the RPC at the time).
  - Department for Digital, Culture, Media and Sport: draft Code of Practice for Online Services on Age Appropriate Design (IA was promised before the Code had passed through Parliament).
  - BEIS: draft Product Safety and Metrology etc. (Amendment etc.) (UK(NI) Indication) (EU Exit) Regulations 2020 (promise of publication of regulatory triage assessment “later this year”).
23. Mr Scully replied that it “remains the responsibility of individual departments to produce a proportionate assessment of the impacts of their policy proposals” but said that the Government “will always strive to ensure that there is sufficiently robust analysis to support the decision-making that underpins regulation”. He continued: “I will ask my officials to take additional steps to reinforce this message, by writing to departments to remind them of the requirements and asking them to commit to meeting them”.<sup>19</sup>
24. More than six months later, we have found no discernible improvement:
- Department for Levelling Up, Housing and Communities (DLUHC): failed to complete an IA for the draft Private Parking Code of Practice (because the department had incorrectly assumed that only statutory instruments required an IA).<sup>20</sup>
  - Department for Transport: published the IA on the Motor Vehicle (Driving Licences) (Amendment) (No. 5) Regulations 2021 six months after they had been laid and four months after the Regulations had come into effect (because of a lack of data).<sup>21</sup>
  - BEIS: laid the Draft Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 without an IA (“not yet finalised” to be published “shortly, ahead of debates”).<sup>22</sup>

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18 SLSC, *14th Report* (Session 2021–22, HL Paper 76).

19 *Ibid.*, Appendix 1.

20 SLSC, *32nd Report* (Session 2021–22, HL Paper 171).

21 SLSC, *37th Report* (Session 2021–22, HL Paper 197), Appendix 2.

22 SLSC, *5th Report* (Session 2022–23, HL Paper 28).

25. IAs provided months after the instrument has come into effect are no use for scrutiny purposes. Other examples include:
- DLUHC: the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 came into effect on 31 August 2020 and the IA was published in March 2021.
  - Department of Health and Social Care:
    - Regulations imposing the compulsory vaccination of care home staff<sup>23</sup> were laid on 22 June 2021, we took oral evidence from the Minister on 13 July 2021 about the lack of an IA, which was finally published on 9 November 2021.
    - Further legislation extending the vaccination requirement to all NHS staff<sup>24</sup> was laid on 9 November 2021, its IA was submitted for independent validation to the RPC on 15 November, which subsequently rated several sections as unfit for purpose.<sup>25</sup>
26. This is not just about ‘paperwork’—late laying of an IA raises important concerns:
- **Parliamentary scrutiny:** we endeavour to report on an instrument about two weeks after laying. We often have questions about what other policy options were considered or costs, which is information that should be included in an IA. Without this information, the Committee and Parliament are unable to scrutinise an instrument effectively. Furthermore, given that IAs tend to be substantial documents, laying an IA shortly before a debate may be of limited value.
  - **Opportunity for wider challenge:** publishing an IA at the same time as the instrument gives those affected an opportunity to challenge the Government’s assumptions. For example, the Home Office recently revoked legislation to licence a chemical that could also be used as a drug: it had believed only 65 firms used the substance, but an industry body subsequently told them it was closer to 7,500 firms and the system envisaged would, therefore, not work.<sup>26</sup>
  - **Policy development:** most important of all, the IA should inform policy development and evolve with it (see paragraphs 10–11 above). If an IA is not available when an instrument is laid, then we are led to the conclusion that the information was not available or used when the policy was being formulated.

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23 [The Health and Social Care Act 2008 \(Regulated Activities\) \(Amendment\) \(Coronavirus\) Regulations 2021](#).

24 [The Health and Social Care Act 2008 \(Regulated Activities\) \(Amendment\) \(Coronavirus\) \(No. 2\) Regulations 2021](#).

25 Regulatory Policy Committee, *The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) [No. 2] Regulations 2021 - COVID-19 Vaccination as a Condition of Deployment in Health and Care providers* (November 2021): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1039496/2021-11-29-RPC-DHSC-5132\\_1\\_-\\_VCOD2\\_Health\\_and\\_Care\\_settings\\_002.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039496/2021-11-29-RPC-DHSC-5132_1_-_VCOD2_Health_and_Care_settings_002.pdf) [accessed 28 July 2022].

26 Misuse of Drugs (Amendment) (Revocation) (England, Wales and Scotland) Regulations 2022 ([SI 2022/559](#)). SLSC, *4th Report* (Session 2021–22, HL Paper 20).

27. **All supporting information, including IAs, must be laid before Parliament at the same time as the instrument in order to ensure effective Parliamentary scrutiny, transparency and accountability.**

*Delays due to the RPC?*

28. On occasion, a department may explain their failure to provide an IA alongside an instrument on the grounds that it has not yet been cleared by the RPC. We raised this with Stephen Gibson, Chair of the RPC. He told us that RPC scrutiny periods were well advertised:

“We have a target of a 30-day turnaround for the RPC process for the production of an opinion on an impact assessment. Currently the average timescale for that production is 22 days.”<sup>27</sup>

29. Given this, we queried whether the delay is not within the RPC but rather a failure by the departments to factor in the RPC turnaround time. Andrew Williams-Fry of RPC commented:

“In 2019, 35% of impact assessments received a request for an expedited process, that increased in 2020–21 to 40%. Where RPC have to expedite a process for a particular IA, that leads to other IAs potentially being delayed.”<sup>28</sup>

30. **Departments should ensure that they plan realistically, including time to address any problems identified by the RPC, and only ask for expedited consideration in exceptional circumstances. We urge the BRE to take steps to ensure departments understand this important point and to support departments with appropriate training.**
31. Conversely the publication of the RPC’s opinion on an IA can be delayed because the department itself has not published the IA. For example, when the draft Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 were laid before Parliament on 15 June, the EM stated that a full IA would be published “in due course”. After we had completed our scrutiny of the draft Regulations, it was brought to our attention that the IA had been assessed as not fit for purpose (“red-rated”) by the RPC. The IA and the RPC’s rating were published together on 14 July, a month after the instrument had been laid.<sup>29</sup>
32. We find the current approach unsatisfactory: if the RPC feels constrained not to pre-empt a department’s publication of an IA, material on the quality of an IA that could influence our view of the instrument’s policy is not available to us. **We suggest that the RPC should demonstrate its independence by publishing its view of a final-stage IA as soon as it is ready: when an SI has been laid for scrutiny Parliament should always have access to the RPC’s assessment, whether the department publishes the IA or**

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27 [Q 6](#) (Stephen Gibson).

28 [Q 1](#) (Andrew Williams-Fry).

29 HM Treasury, *Impact Assessment The Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 Statutory Instrument* (July 2022): [https://www.legislation.gov.uk/ukia/2022/62/pdfs/ukia\\_20220062\\_en.pdf](https://www.legislation.gov.uk/ukia/2022/62/pdfs/ukia_20220062_en.pdf) [accessed 28 July 2022]. See also: RPC, *Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds* (June 2022): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1090613/2022-06-30-RPC-HMT-5079\\_2\\_-\\_Amendments\\_to\\_the\\_Money\\_Laundering\\_Terrorist\\_Financing\\_and\\_Transfer\\_of\\_Funds\\_002.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090613/2022-06-30-RPC-HMT-5079_2_-_Amendments_to_the_Money_Laundering_Terrorist_Financing_and_Transfer_of_Funds_002.pdf) [accessed 28 July 2022].

**not. We also suggest that the RPC could do more to communicate to Parliament when it has ‘red-rated’ any IAs.**

*Delays due to the BIT target?*

33. The 2015 Act introduced the Business Impact Target (BIT) to monitor the financial impact of government legislation on business. The Act requires IAs to be produced within the BIT reporting year so that the net cost of government legislation in that year can be calculated. Laying an IA six months after an instrument has come into effect can still meet the BIT requirement, as long as the IA arrives before the end of the reporting year. We are concerned that this looser deadline may distract officials from Parliament’s need for an IA to be available as soon as an instrument has been laid. In addition, the BIT requires highly technical calculations about costs that may significantly lengthen the time it takes to produce an IA. Both BRE and RPC agreed that, at present, the BIT system was not achieving its intended purpose.<sup>30</sup> **We urge the BRE to ensure that officials are aware that, irrespective of the BIT reporting year, parliamentary scrutiny starts as soon as the instrument is laid before Parliament and an IA needs to be published at the same time as the instrument it supports.**

*‘No IA required’*

34. For instruments that do not require an IA (because they do not exceed the £5 million per annum threshold), the Impact Section of the EM often just states that ‘no IA is required’. This is, in our view, unhelpful in terms of both transparency and accountability.
35. We raised the problem of ‘no IA required’ with the BRE and RPC.<sup>31</sup> Although neither routinely see impact information for SIs below the threshold, they told us that departments have to prepare a simplified *de minimis* IA to be able to demonstrate when ‘called-in’ by the RPC that the £5 million threshold has not been reached. **For instruments below the threshold, departments should always include basic impact information in the EM and, we suggest, attach the *de minimis* assessment where available.**
36. That need not be an onerous request—often a couple of sentences in the EM would be adequate, for example:

**Pneumoconiosis (Workers’ Compensation) (Amendment) Regulations 2021<sup>32</sup>**

There will be an estimated £218,000 increase to the DWP Departmental Expenditure Limit for 21/22. These estimates are at the time of the submission but delayed assessments due to Covid-19 may impact on final costings.

This example also helpfully indicates the degree of uncertainty in the estimate. For pilot projects and new initiatives accurate data may not be available, but a well-explained ‘best guess’ of the likely costs offers a reassurance that the policy’s likely effects have been thought through and analysed.

30 Q 8 (Christopher Carr) and Q 8 (Stephen Gibson).

31 Q 4 (Christopher Carr) and Q 5 (RPC).

32 The Pneumoconiosis etc. (Workers’ Compensation) (Payment of Claims) (Amendment) Regulations 2021 (SI 2021/271).

37. We have remarked in several recent reports that, despite being made at speed, many of the Foreign, Commonwealth and Development Office (FCDO) instruments imposing sanctions against Russia have been accompanied by a well-developed draft of the IA. In these cases, there is good reason why the RPC has not had time to consider the IA but the FCDO has nonetheless provided the best information available alongside the instrument. **We encourage other departments introducing emergency legislation to follow the same practice and avoid the ‘all or nothing’ approach we frequently see.**

#### *Pandemic exemption*

38. During the pandemic, temporary measures lasting less than 12 months were exempted from the IA requirement. In consequence, the EMs to most coronavirus SIs simply stated ‘no IA required’. Mr Gibson of RPC thought that this was a missed opportunity:

“We think we could have added a lot of value, perhaps not at the first lockdown stage but thinking about what we learnt from the first lockdown for the second and third lockdowns: was it right to close gyms, hairdressers, restaurants or whatever? Doing that monitoring and seeing how it worked the first time around would have informed better regulatory policy-making at a later stage.”<sup>33</sup>

39. **When the Government are reviewing their handling of the pandemic legislation, we recommend that they consider whether these IA exemptions prevented useful information from being gathered that could have made subsequent measures more proportionate and better targeted.**

40. We wrote to Mr Scully, the previous BEIS Minister with responsibility for the provision of IAs, when he announced that exemption and he reassured us that:

“We will also continue to monitor the position of emergency legislation to ensure departments produce retrospective impact assessments where Covid-19 measures are to be made permanent.”<sup>34</sup>

**We would welcome information about how many departments have actually done this and what proportion of the total due that represents.**

#### **Post-Implementation Review**

41. *Post-Implementation Review* (PIR) is a checking process to see whether estimates were accurate, predictions were fulfilled, and the policy has achieved its intended outcome.
42. Sections 28–32 of the 2015 Act require any “regulatory provision” that passes the IA threshold to be reviewed five years after commencement and every five years after that. Section 30 requires the minister to publish a report on the conclusion of each review that must be validated by the RPC. It is required to:

- (a) set out the objectives intended to be achieved by the regulatory provision,

33 [Q 11](#) (Stephen Gibson).

34 Letter of 4 September 2021 see Appendix 1, *14th Report*, (Session 2021–22, HL Paper 76)

- (b) assess the extent to which those objectives are achieved,
- (c) assess whether those objectives remain appropriate, and
- (d) if those objectives remain appropriate, assess the extent to which they could be achieved in another way which involves less onerous regulatory provision.
43. There is extensive guidance on how to carry out a PIR from BRE,<sup>35</sup> the RPC,<sup>36</sup> the Treasury’s Magenta Book<sup>37</sup> and the National Audit Office (NAO).<sup>38</sup>
44. We find it surprising that despite the statutory requirement to carry out a PIR and the range of guidance available, we very rarely see any mention in EMs that the changes being made by an instrument are the result of a PIR. Mr Gibson made a similar point:
- “Often we see *post-implementation reviews* that simply have a default assumption that everything is working well, whereas in my experience Governments do not always get it right first time.”<sup>39</sup>
45. In 2008, this Committee conducted an inquiry into the use of PIR in collaboration with the NAO.<sup>40</sup> Key issues identified were the lack of any common review methodology or consistent tracking of SIs. The NAO followed up 229 SIs which required an IA and were at least three years old (which was the standard review date at that time). The outcome was:
- **29% of them had completed a PIR,**
  - **54% had done some sort of evaluation (though mainly informal and in-house), and**
  - **46% had not been subject to any sort of review.**
46. Regrettably, there appears to have been little progress since then. Mr Carr of the BRE estimated that only 25–40% of instruments completed their PIR despite it often being a statutory obligation.<sup>41</sup> Lord Callanan gave a higher figure, stating that before the pandemic 72% of instruments received a review on time, and suggested that the recent slump was understandable due to the pandemic.<sup>42</sup> **We have found that a few PIR reports on secondary legislation may be found on the Gov.uk website<sup>43</sup> but they are hard to**

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35 BEIS, ‘Producing post-implementation reviews: principles of best practice’: <https://www.gov.uk/government/publications/business-regulation-producing-post-implementation-reviews/producing-post-implementation-reviews-principles-of-best-practice> [accessed 28 July 2022].

36 RPC, *Post Implementation Reviews* (March 2019): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/790031/RPC\\_case\\_histories\\_post-implementation\\_reviews\\_March\\_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790031/RPC_case_histories_post-implementation_reviews_March_2019.pdf) [accessed 28 July 2022].

37 HM Treasury, ‘The Magenta Book’ (27 April 2011): <https://www.gov.uk/government/publications/the-magenta-book> [accessed 28 July 2022].

38 National Audit Office, *Principles of effective regulation* (May 2021): <https://www.nao.org.uk/wp-content/uploads/2021/05/Principles-of-effective-regulation-SOff-interactive-accessible.pdf> [accessed 28 July 2022].

39 **Q 11** (Stephen Gibson).

40 Merits of Statutory Instruments Committee, *What happened next? A Study of Post-Implementation Reviews of secondary legislation* (30th Report, Session 2008–9, HL Paper 180).

41 **Q 7** (Christopher Carr).

42 **Q 6** (Lord Callanan).

43 HM Government, ‘Search: post-implementation review’: <https://www.gov.uk/search/all?keywords=post-implementation+review&order=relevance&page=3> [accessed 28 July 2022].

**find, not systematically published and do not appear to use a common format or methodology.**

47. The BRE guidance says that each PIR report should be reviewed by the Cabinet Office Domestic and Economy Implementation Committee and both statutory and non-statutory reviews should be published on the Legislation.gov.uk website, under the “More resources” tab of the instrument to which it relates.<sup>44</sup> Our search of that website identified five such PIR documents<sup>45</sup>—the most recent of which was published in 2013. However, they are inconsistently flagged and hard to find.<sup>46</sup>
48. Lord Callanan told us that, as part of the review of the Better Regulation Framework, he was looking to set up a scrutiny board that would keep track of when PIRs are required, would remind departments of the timescale perhaps a year in advance, and support them through the process of implementing and coming up with the outcome of the review.<sup>47</sup> **We welcome this initiative to ensure that PIRs are monitored but the carrot of BRE support needs to be balanced with an effective stick to ensure compliance.**
49. **We also recommend that the review should consider how PIRs are published to make them more easily accessible and how officials can be encouraged to make use of them when formulating subsequent legislation.**

### Operational difficulties

50. Despite the availability of guidance and 80 BRE staff advising departmental officials on the process, between a quarter and a third of IAs sent to the RPC get an initial review notice (IRN) to say they are not fit for purpose.<sup>48</sup> Mr Gibson said that at the initial stage IAs tended to be weakest on the policy objectives and consideration of options, and those submitted for the final stage review tended to be weakest on the wider impacts (such as the legislation’s effects on competition, innovation, trade, or the environment) and on the monitoring and evaluation plan.<sup>49</sup>
51. Due to the RPC’s interventions very few final-stage IAs are judged not fit for purpose (“red-rated”). We query why there is such a high percentage of IRN’s issued, when there is such substantial support available. We think that part of the explanation may be the complexity of IAs, which are often 60–80 pages long, and their focus on the technical financial calculations set out in the Treasury Green Book.

44 BEIS, *Better Regulation Framework* (March 2020), sections 1.6–1.7: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916918/better-regulation-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf) [accessed 28 July 2022].

45 The National Archives, ‘Search Results: UK Impact Assessment’: <https://www.legislation.gov.uk/ukia?stage=Post-Implementation> [accessed 28 July 2022].

46 For example, although it did not appear in the website’s search facility the Draft Microchipping of Dogs (England) (Amendment) Regulations 2022 which builds on a PIR for SI 2015/108 was published in December 2021. Department for Environment, Food and Rural Affairs, *The Microchipping of Dogs (England) Regulations 2015 Post-Implementation Review* (December 2021): [https://www.legislation.gov.uk/uksi/2015/108/pdfs/uksiod\\_20150108\\_en.pdf](https://www.legislation.gov.uk/uksi/2015/108/pdfs/uksiod_20150108_en.pdf) [accessed 28 July 2022].

47 [Q 6](#) (Lord Callanan).

48 [Q 5](#) (RPC). We note that BRE staff numbers have since been reduced as part of the spending review: [Q 1 and 13](#) (Christopher Carr). RPC also mentioned an expectation of a 20% cut in its secretariat [Q 1](#) (Stephen Gibson).

49 [Q 1](#) (Stephen Gibson).

52. The Better Regulation principles define well-targeted regulation as law that focuses on the problem identified, minimises side effects and focuses enforcement primarily on the most serious risks. It is difficult to know the extent to which a thorough analysis of risks and options has been undertaken from looking at final-stage IAs because they often only offer the alternatives ‘do nothing’ or ‘do this’. We acknowledge that an IA produced at the consultation stage may have included a more extensive consideration of options, but we do not see it and we wonder why this useful information is removed.
53. Mr Gibson made a similar point:
- “... often the options we see at the final stage are to do nothing or to take the preferred option ... whereas in fact there may be quite a lot of choices: different options for how the regulation may be introduced, mitigation for smaller micro-businesses or different ways in which it can be as effective but have much lower costs to businesses and to society.”<sup>50</sup>
54. To improve the targeting of regulation, the BRE make a proposal in their consultation on *Reforming the framework for better regulation*<sup>51</sup> that departments should be required to submit an options appraisal for independent scrutiny at an earlier stage in the process. This proposal appears to us to have merit because it would demonstrate that departments have properly considered alternatives to regulation or different lighter-touch regulation, leaving the more complex analysis involved in a full IA for “the right option”.<sup>52</sup>
55. This approach has the potential for several benefits:
- easier for non-specialist civil servants to operate, whereas by contrast a full IA often needs the services of an economist;
  - broadening the range of factors considered at an early stage
    - because a policy team may lack experience of the business environment, and
    - because teams can unintentionally develop ‘group think’ that exposure to an external body should challenge;
  - improving the quality of policy targeting because the IA process is better integrated into the policy process; and
  - wider in scope because at the initial stage it will not be so evident which proposals will exceed the £5 million threshold.

#### *Public sector projects*

56. At present, measures that only impact the public sector are not required to provide an IA, although they are sometimes provided on a voluntary basis for major public policy changes and we find that extremely helpful.<sup>53</sup> Properly used the impact assessment process encourages officials to think of the wider

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50 Q 4 (Stephen Gibson).

51 BEIS, ‘Consultation outcome Reforming the framework for better regulation’: <https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation> [accessed 28 July 2022].

52 Q 2 (Christopher Carr).

53 For example, Ministry of Justice, *Extending Magistrates’ Court Sentencing Powers Impact Assessment* (April 2022): [https://www.legislation.gov.uk/ukia/2022/39/pdfs/ukia\\_20220039\\_en.pdf](https://www.legislation.gov.uk/ukia/2022/39/pdfs/ukia_20220039_en.pdf) [accessed 28 July 2022].

consequences of their legislation and might have avoided the sort of ‘tunnel vision’ we recently saw in a Department for Education instrument on Student Loans.<sup>54</sup> The EM included a single sentence stating that the changes were expected to generate £3.7 billion of savings for the Government, but failed to mention that this money would come from around a million students each paying an extra £113.40 per year. **We recommend that IAs should be published alongside all instruments which implement significant policy changes irrespective of the sector impacted.**

### Lack of a central point of authority

57. Both the Rt Hon. Jacob Rees-Mogg MP, former Leader of the House of Commons, and the current Leader, told us that they took seriously the importance of assisting parliamentary scrutiny by providing supporting explanatory material.<sup>55</sup> But the responsibility for the provision of that material rests with departments without any apparent point of authority within government to ensure the IA procedure is followed.
58. Lord Callanan said he was very keen to promote the use of IAs but admitted that:

“because we have no statutory means of enforcing the writ of impact assessments, we are relying on peer pressure to encourage and cajole departments to do it”.<sup>56</sup>

We find this disheartening because there appears to be little substance behind that peer pressure. As Baroness Vere of Norbiton, a Department for Transport Minister, told us during an oral evidence session about the missing IA for the Draft Motor Vehicles (Driving Licences) (Amendment) (No.5) Regulations 2021, the absence of an IA “did not cause delay because the regulations went through without the impact assessment.”<sup>57</sup>

59. Mr Gibson was clear that the RPC could not insist on an IA:

“We simply assess the quality of the evidence and analysis. If the Minister wishes to bring forward a measure where the costs and benefits have not been properly assessed, that is up to him or her.”<sup>58</sup>

60. The BRE guidance says that “All correspondence seeking collective agreement to a regulatory measure should continue to include an IA rated “fit for purpose” by the RPC, except where the impact on business is below the threshold for independent scrutiny.” Lord Callanan told us that “the provision of impact assessments is enforced by the Cabinet Office under the application of collective agreement rules”.<sup>59</sup> Yet no one appears to be enforcing those rules.

54 The Education (Student Loans) (Repayment) (Amendment) Regulations 2022 (*SI 2022/301*). SLSC, *36th Report*, (Session 2021–22, HL Paper 193).

55 SLSC, ‘Correspondence—The Rt Hon. Jacob Rees-Mogg’ (16 November 2021): <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/3/correspondence/>. See also SLSC, *Government Response: What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021–22* (8th Report, Session 2022–23 HL Paper 35).

56 *Q 4* (Lord Callanan).

57 Oral Evidence on Adequate information to support the Department for Transport’s regulations, (Session 2021–22) *Q 9* (Baroness Vere of Norbiton).

58 *Q 6* (Stephen Gibson).

59 *Q 3* (Lord Callanan). See a similar description in correspondence from Paul Scully MP, previous Minister for Better Regulation, in SLSC, *18th Report* (Session 2021–22 HL Paper 98).

61. We reasonably assumed that enforcement was a function of the Parliamentary Business and Legislation (PBL) Committee as the Cabinet Committee responsible for giving clearance for secondary legislation to be laid before Parliament. In his written evidence, however, Mr Spencer told us that the PBL triage process “does not consider the policy within secondary legislation, or supporting documents such as Impact Assessments. This is a matter for the department responsible ... Departments are responsible for their own internal clearances and quality assurance including the text of the SI, vires and the content of the Explanatory Memorandum”.<sup>60</sup>
62. In an oral evidence session on 20 July 2022 with the Leaders of both Houses we raised PBL’s hands-off approach again.<sup>61</sup> On this occasion the responses were slightly more promising:
- Mr Spencer agreed that “in principle, wherever possible, the impact assessment should be produced at the same point as the legislation. We are fairly robust in PBL in making sure that departments understand that.”
  - Baroness Evans of Bowes Park added that “we often go back expressing unhappiness at the way in which some departments have been running the process.”

However, the Committee concluded that some departments are serial offenders and PBL’s “expressions of unhappiness” do not appear to have sufficient influence to persuade them to change their ways.

*So who within Departments is responsible for quality control?*

63. In the run up to Brexit, and from time to time thereafter, we have asked the lead civil servants with the responsibility for legislation, the Treasury Solicitor, First Parliamentary Counsel and the Permanent Secretary with responsibility for the Policy Profession, to respond in an oral evidence session to our concerns about SI production. In 2017, we were told by Sir Chris Wormald, the Head of the Policy Profession:

**“Of the other big changes that we have made since the last time we were here, one of the biggest is that every department has now appointed a senior responsible owner for the SI process, so there is somebody senior in every department who has a responsibility for the SI process within their departments ...**

... Of course, the overall responsibility for anything that happens in the department goes to the Secretary of State and the permanent secretary. If the department is underperforming on anything, it is ultimately those two people’s responsibility ...

... those are quite busy people. **That is why we wanted a clear lead Minister, which is normally at junior Minister level, and a clear SRO who was part of the senior leadership who were responsible for the system;** and then for an individual SI, the quality control would be the lead Minister and normally the deputy director. Those would be the two people who would sign it off. Effectively, those are the three

<sup>60</sup> Appendix 2.

<sup>61</sup> Oral evidence on the government response to *Government by Diktat* (20th Report, Session 2021–22, HL Paper 105), [Q 10](#)

levels of accountability. The bit we have added is that clear lead Minister and clear lead SRO to make sure that somebody, both at political level and at Civil Service level, was looking across the whole performance on SIs. That is the bit of the accountability that we felt was missing and we therefore dealt with.”<sup>62</sup>

64. In a further evidence session in 2021, Sir Chris’ successor as head of the Civil Service Policy Profession, Tamara Finkelstein, said:

“Some of the improvements that have already been put in place have helped, but there is more to do and in a number of areas... **identifying accountable SROs—senior responsible owners—in departments who are accountable on SIs, and having a Minister for SIs, has made a considerable difference.** I see that in Defra. There is proper accountability. We need to build on that so that those SROs across departments are co-ordinated by the PBL secretariat to meet and to share ways in which to improve, and that there is a genuine sense of accountability to make improvements.”<sup>63</sup>

65. In contrast, in his written evidence, Mr Spencer told us that SI Ministers “are responsible for their departments’ secondary legislation programme as a whole, with policy ministers and officials responsible for delivering each individual SI within that programme”.<sup>64</sup> **We have struggled to obtain information on how the SI Ministers carry out that role as it seems to vary widely between departments.** The BRE and the RPC both confirmed that they have no contact with any of the appointed SI Ministers.<sup>65</sup>
66. We acknowledge that departments may have to deal with political imperatives that would make it difficult for an SI Minister to ask for a delay so that an IA can be completed. We note, for example, that even Lord Callanan could not prevent his department from laying the draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 without one (IA “to be published shortly, ahead of debates, as it has not yet been finalised.”)<sup>66</sup> **We are concerned however that insufficient weight is being placed on the role of the SI Minister. We would welcome further information about the role, their common objectives, what training they receive about the standards that SIs are expected to meet and what influence they are able to exert within a department in order to ensure that those standards are maintained.**

*Is departmental ‘self-discipline’ working?*

67. Both the BRE and the RPC commented that there is a wide variation in the quality of IAs produced within departments. Mr Carr of the BRE said:

“The difference between the good and the bad is within departments and not between them. Even the smallest department comprises hundreds of civil servants, and some of them are very good at this and some of them lack the skills and experience.”<sup>67</sup>

62 Oral evidence on Quality of information provided in support of secondary legislation (Session 2016–17), [QQ 1–13](#)

63 Oral evidence on Departmental support of secondary legislation (Session 2021–22), [QQ 1–16](#)

64 See also correspondence in SLSC, [30th Report](#) (Session, 2021–22, HL Paper 161).

65 [Q 1](#) (Lord Callanan), [Q 1](#) (RPC).

66 SLSC, [9th Report](#) (Session 2022–23, HL Paper 46).

67 [Q 2](#) (Christopher Carr).

68. Mr Gibson of the RPC explained:

“There is a range of reasons for differences. In some cases there are tight timescales or resource constraints. It may be very difficult to obtain good evidence because of the nature of the proposal. We occasionally see that impact assessments have been developed as an afterthought; once the policy has basically been made there is a realisation that they have to go through this hurdle. That undermines much of the purpose of the impact assessment, which is to support the decision-making process ... There are also issues with the experience of the civil servants involved. Many of them have very limited experience of business or of life outside Whitehall.”<sup>68</sup>

69. As well as frustrating the purpose of the IA as a policy-making tool, Mr Carr of BRE commented that: “The faster you wish to implement a policy, the poorer the analysis and evidence base will be”.<sup>69</sup> Such last-minute assessments are likely to be based on poor data or cannot provide a clear baseline, which can in turn create problems for PIR.
70. We infer from this that some departments are failing to carry out adequate consultation with the relevant external groups that might improve their data, or they do not allow enough time for it in their project plan.<sup>70</sup> The high percentage of IRNs that RPC are issuing at initial review stage may also indicate that departments are relying too much on RPC’s experts to tell them how to fix some of their deficiencies.
71. Given the large number of BRE staff, mainly based within departments, we are surprised that the quality of IAs within a department varies so much since we would assume that all policy officials have access to that resource. We are forced to conclude **that departments, whether through their BRE Unit or through their internal clearance procedures, are failing to impose adequate quality control themselves.**
72. To be effective any requirement under the IA procedure needs to be robustly enforced, and we will be considering the role of the PBL Committee in providing that enforcement below. Of course, an exemption for emergency legislation needs to be in place, but its conditions should be clearly defined and adhered to. Poor planning by a department should no longer be treated as an acceptable reason to bypass important elements of the policy formulation process.

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68 [Q 1](#) (Stephen Gibson).

69 [Q 2](#) (Christopher Carr).

70 [Q 8](#).

## CHAPTER 4: ESTABLISHING AN EFFECTIVE GATEWAY

73. We have concluded that there needs to be a central ‘gateway’ to ensure that secondary legislation is accompanied by the explanatory material necessary for effective parliamentary scrutiny, external to departments and therefore less likely to be overruled. The Cabinet Office, with central oversight, would seem the obvious place. Currently, however, it appears that, although the PBL Committee manages the flow of secondary legislation, it does not police the quality of associated explanatory material. Mr Spencer told us:
- “Each SI is considered on a case-by-case basis including ‘the purpose of the SI, anticipated laying date, parliamentary reaction, territorial extent and the type of procedure being used for the SI’”.<sup>71</sup>
74. We find this omission surprising and query how this aligns with the Leader’s commitment that “Parliament should be provided with the information it needs to scrutinise the legislation the Government brings forward.” PBL’s current remit does include consideration of “parliamentary reaction” and there have been a number of recent debates in the House where a department has been strongly criticised for not making an IA available on time.<sup>72</sup>
75. **We recommend that the PBL Committee should take responsibility for this commitment and extend its remit to include consideration of the explanatory material accompanying secondary legislation. Where it is deficient, we would expect the proposal for legislation to be rejected or, if an emergency, a full explanation for the deficiency to be provided in the EM.**

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71 See PBL written evidence in Appendix 2.

72 See for example HL Deb, 7 June 2022, [cols 1124–1142](#) which referred to there being no IA for the Immigration (Restrictions on Employment and Residential Accommodation) (Prescribed Requirements and Codes of Practice) and Licensing Act 2003 (Personal and Premises Licences) (Forms), etc., Regulations 2022. Members from all parties spoke critically of the lack of an IA.

## CHAPTER 5: CONCLUSION

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76. We have found that IAs are treated like speed limits—everybody says they are a good thing, but some take a more flexible attitude to complying with the requirements than others. The BRE provides the Highway Code and the RPC issues ‘speeding’ tickets in the form of red-rated assessments, but they are not enforced and so the problem spreads.
77. The IA procedure is there to produce well-evidenced legislation but an increased number of SIs appear to have taken shortcuts through the system and therefore failed to reap the benefits. The proposal to reform the Better Regulation Framework appears to be an acknowledgement that the current system requires improvement. We reiterate our three priorities for reform from our submission to the review:<sup>73</sup>
- It is essential for effective parliamentary scrutiny that an IA should be made available *at the same time* as the instrument is laid before Parliament.
  - Whether as part of an IA (when required) or included in the EM, it would assist parliamentary scrutiny if instruments were accompanied by a broad overview of potential impacts—not just the financial bottom line.
  - Greater emphasis on *post-implementation review* would enhance transparency and accountability if cited when amending legislation is put before the House.
78. We do not think that the proposals we are making are unreasonable, given that departments could produce IAs to a better standard in 2017. Corners were cut because of the pressure to achieve the Brexit and pandemic legislative programmes but, as the examples in this report show, many of the worst IA transgressions are for business-as-usual legislation. **We look forward to the PBL Committee taking a firm lead in instructing departments that, save in exceptional circumstances, secondary legislation will not be laid either without an IA cleared by RPC (when required) or without appropriate impact information being included in the EM.**
79. **The proposal that the RPC should look at an early-stage options analysis could have benefits but only if it is enforced by the Cabinet Office.** Because the current IA procedure is quite technical, the Government may wish to consider whether a simplified IA format might produce more consistent results and be more cost effective. **We recommend that:**
- **All secondary legislation that will add costs of £1–5 million should be published with a *de minimis* assessment.**
  - **All secondary legislation that will have costs above £5 million should not be laid without an IA, verified by the RPC.**
  - **Parliament should consider deferring approval of an instrument if the IA is not available before the debate.**

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73 See Appendix 3

- **The IA procedure should apply to significant public sector projects as well as those that affect business and the voluntary sector.**

**Given the improvements made to IAs by RPC scrutiny it may be premature to remove validation from Final Stage IAs as the BRE review proposes. We suggest that the Government retain this step while the other changes are bedding in.**

80. The role of a compliance officer is rarely a popular one, whether in government or in the private sector. The effectiveness of an SI Minister will depend on a combination of their own personality and the ‘culture’ of the department in which they work. They will therefore need the support of their Secretary of State, even—or perhaps particularly—in cases which are politically sensitive or controversial. If in a particular department it is felt that the political career of an SI Minister depends on his or her readiness to ‘bend with the wind’ there is the potential for any scrutiny process to be fatally undermined.
81. Providing Parliament with poor quality information or only providing detailed information after the scrutiny process has been completed is another example of the transfer of power from Parliament to the Executive that we highlighted in *Government by Diktat*.<sup>74</sup> Parliament’s legitimate role is to challenge the actions of the Executive. **If Parliament is to perform its critical function of holding the Government to account, it is of paramount importance that the two Houses are given complete and comprehensive information about the basis on which policy choices are made and the reasons why alternative options have been rejected. We cannot perform that role without the right information at the right time.**

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<sup>74</sup> SLSC, *Government by Diktat: A call to return power to Parliament* (20th Report, Session 2021–22, HL Paper 105).

## CHAPTER 6: LIST OF RECOMMENDATIONS

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***Recommendation 1: All supporting information, including IAs, must be laid before Parliament at the same time as the instrument in order to ensure effective Parliamentary scrutiny, transparency and accountability. (Paragraph 27)***

***Recommendation 2: Departments should ensure that they plan realistically, including time to address any problems identified by the RPC, and only ask for expedited consideration in exceptional circumstances. We urge the BRE to take steps to ensure departments understand this important point and to support departments with appropriate training. (Paragraph 30)***

***Recommendation 3: We suggest that the RPC should demonstrate its independence by publishing its view of a final-stage IA as soon as it is ready: when an SI has been laid for scrutiny Parliament should always have access to the RPC's assessment whether the department publishes the IA or not. We also suggest that the RPC could do more to communicate to Parliament when it has 'red-rated' any IAs. (Paragraph 32)***

***Recommendation 4: We urge the BRE to ensure that officials are aware that, irrespective of the BIT reporting year, parliamentary scrutiny starts as soon as the instrument is laid before Parliament and an IA needs to be published at the same time as the instrument it supports. (Paragraph 33)***

***Recommendation 5: For instruments below the threshold, departments should always include basic impact information in the EM and, we suggest, attach the de minimis assessment where available. (Paragraph 35)***

***Recommendation 6: When the Government are reviewing their handling of the pandemic legislation, we recommend that they consider whether these IA exemptions prevented useful information from being gathered that could have made subsequent measures more proportionate and better targeted. (Paragraph 39)***

***Recommendation 7: We welcome Lord Callanan's initiative to ensure that Post-Implementation Reviews (PIRs) are monitored but the carrot of BRE support needs to be balanced with an effective stick to ensure compliance. We also recommend that the review should consider how PIRs are published to make them more easily accessible and how officials can be encouraged to make use of them when formulating subsequent legislation. (Paragraphs 48–49)***

***Recommendation 8: We have struggled to obtain information on how the SI Ministers carry out that role as it seems to vary widely between departments and have insufficient weight. We would welcome further information about the role, their common objectives, what training they receive about the standards that SIs are expected to meet and what influence they are able to exert within a department in order to ensure that those standards are maintained. (Paragraphs 65–66)***

***Recommendation 9: We recommend that the PBL Committee should take responsibility for the Government's commitment to provide Parliament with the information it needs to scrutinise the legislation the Government brings forward and extend its remit to include consideration of the explanatory material accompanying secondary legislation. Where it is deficient, we would expect the proposal for legislation to be rejected or, if an emergency, a full explanation for the deficiency to be provided in the EM. (Paragraph 75)***

***Recommendation 10: The proposal that the RPC should look at an early-stage options analysis could have benefits but only if it is enforced by the Cabinet Office. (Paragraph 79)***

***Recommendation 11: We recommend that:***

- ***All secondary legislation that will add costs of £1–5 million should be published with a de minimis assessment.***
- ***All secondary legislation that will have costs above £5 million should not be laid without an IA, verified by the RPC.***
- ***Parliament should consider deferring approval of an instrument if the IA is not available before the debate.***
- ***The IA procedure should apply to significant public sector projects as well as those that affect business and the voluntary sector.***
- ***Given the improvements made to IAs by RPC scrutiny it may be premature to remove validation from Final Stage IAs as the BRE review proposes. We suggest that the Government retain this step while the other changes are bedding in. (Paragraph 79)***

## APPENDIX 1: LIST OF WITNESSES

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Evidence is published online at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/oral-evidence/> and available for inspection at the Parliamentary Archives (020 7219 3074)

Evidence received by the Committee is listed below

### Tuesday 22 March 2022

Christopher Carr, Director, Better Regulation Executive, [QQ 1-13](#)  
Department for Business, Energy and Industrial Strategy

### Tuesday 5 April 2022

Stephen Gibson, Chair of the Regulatory Policy Committee [QQ 1-14](#)

### Tuesday 5 April 2022

Andrew Williams-Fry, Member of the Regulatory Policy Committee [QQ 1-14](#)

### Tuesday 28 June 2022

Lord Callanan, Minister for Business, Energy and [QQ 1-10](#)  
Corporate Responsibility, Department for Business, Energy  
and Industrial Strategy

### Tuesday 28 June 2022

Sarah Montgomery, Deputy Director, Policy and Delivery, [QQ 1-10](#)  
Better Regulation Executive

## APPENDIX 2: WRITTEN EVIDENCE FROM THE PARLIAMENTARY BUSINESS AND LEGISLATION COMMITTEE

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### Letter from the Rt Hon. Mark Spencer MP, Lord President of the Council and Leader of the House of Commons, to Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 26th April requesting information on how the PBL Committee approaches secondary legislation.

As ever, I am grateful to you and your Committee for all the work you do to hold the Government to account. I agree that Parliament should be provided with the information it needs to scrutinise the legislation the Government brings forward.

You will be aware that it is a long-established precedent that information about the discussions that have taken place in Cabinet and its Committees is not normally shared publicly. This is in order to protect the principle of Cabinet collective responsibility, which requires ministers to have a private space for discussion ahead of coming to an agreed position. This also covers information about the workings and processes of the Cabinet and its Committees. Please find my response to your questions overleaf.

### How the PBL Committee approaches secondary legislation

The Parliamentary Business and Legislation (PBL) Committee is responsible for considering ‘*matters relating to the Government’s parliamentary business and delivery of its legislative programme*’<sup>75</sup>. The Committee is supported by a secretariat, based in the Cabinet Office. As part of this support, the PBL Secretariat performs a ‘*central coordination, clearance and monitoring function for delivering secondary legislation across Government (the triage process), which should be considered when formulating plans for secondary legislation*’<sup>76</sup>. It is for Ministers to determine how they discuss policy and reach collective agreement and the maintenance of this convention is fundamental to the continued effectiveness of Cabinet government.

The triage process was introduced to create a centralised process for ensuring, departments were planning their secondary legislation programme in advance, and that there was oversight of the upcoming flow of secondary legislation to support the effective management of Government business in both Houses.

The PBL triage process involves a subset of ministers serving on the PBL Committee who, on a monthly basis, will review the statutory instruments (SIs) planned to be laid over the following three months, and provide departments with PBL Committee clearance to proceed with the SI.

*1. What are the administrative processes involved in the PBL Committee triaging secondary legislation (for example, the typical timetable, and what instructions are given to departments about what should be included in their submissions)?*

The administrative support for the triage process is provided by the PBL Secretariat, who work on behalf of the Committee to ensure minister have the information

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75 HM Government, ‘List of Cabinet Committees’ (21 October 2021): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1027921/Cabinet\\_Committee\\_-\\_Membership\\_and\\_ToRs\\_October\\_2021\\_2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027921/Cabinet_Committee_-_Membership_and_ToRs_October_2021_2.pdf) [accessed 12 May 2022]

76 Cabinet Office, *Guide to Making Legislation* (January 2022), p 139: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1048567/guide-to-making-legislation-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048567/guide-to-making-legislation-2022.pdf) [accessed 12 May 2022]

they need to take decisions. Each SI is considered on a case-by-case basis, but generally ministers will take into consideration whether the secondary legislation can be justified and has a clear delivery plan to support its passage. Based on the information submitted to them by departments, the PBL triage ministers may clear SIs to be laid, ask for more information or reject SIs for laying. The monthly triage will consider the purpose of the SI, anticipated laying date, parliamentary reaction, territorial extent, and the type of procedure being used for the SI.

The triage process does not consider the policy within secondary legislation, or supporting documents such as Impact Assessments. This is a matter for the department responsible for the SI as part of their overall management of their secondary legislation programme.

As mentioned in the opening paragraphs, departments will submit information to the PBL triage on a monthly basis, relating to the SIs it plans to bring forward in the coming three months.

*2. What role does the PBL Secretariat play in assessing documents' fitness for submission? What percentage pass first time and are there any common faults?*

*3. What factors does the PBL Committee take into account when considering whether an instrument should be permitted to proceed to laying and what percentage pass first time?*

The PBL Secretariat expects departments to draft information that is of ministerial quality, that succinctly and clearly explains the purpose of the SI and what steps it intends to take to support its passage through Parliament. Departments are responsible for their own internal clearances and quality assurance including the text of the SI, vires, and the content of the Explanatory Memorandum.

The PBL Secretariat does not collect information relating to the percentage of SIs that require further information or are rejected by the triage ministers.

*4. In what circumstances (giving examples) are instruments allowed to proceed even though they, or the accompanying documentation, fail to meet the standards expected by Parliament?*

The Government only brings forward legislation that it deems necessary, proportionate and justified to achieve its objectives.

In instances where errors in SIs have been made, correcting SIs are brought forward as soon as possible. This was seen, for example, when the Government had to move at pace to respond to Russia's invasion of the Ukraine and during the COVID-19 pandemic.

*5. What criteria does the PBL apply (giving examples) when it takes the view that an instrument is so urgent that a breach of the 21 day rule is justified?*

The Government agrees that breaching the '21 day rule' should be the exception and not the rule to ensure that Parliamentarians have the time they need to scrutinise SIs. However, it is important to balance complying with this convention and the Government's ability to respond to emerging issues, a recent example being the closure of the tier 1 investor route. As the Explanatory Memorandum stated this was "... for reasons of national security and the operation of the immigration system, and to be consistent with the purpose of the closure of the Tier 1 (Investor) route to new applicants. It is anticipated that closure of the route with 21-days' notice, or

*less, would trigger a “closing down sale” effect, involving a very substantial upturn in application levels in advance of closure.”<sup>77</sup>*

Where departments intend to breach the convention, they are required to set out the reason why the breach is necessary in the Explanatory Memorandum. As usual practice, departments will inform the SLSC that the Government intends to breach the 21 day rule.

*6. Does the PBL Committee make recommendations to departments about the use of sunset or review clauses and, if so, to what effect (giving examples)?*

The PBL Secretariat discusses all aspects of legislation and best practice with departments on a daily basis. However, it is a matter for the minister in charge of the SI to determine whether it is appropriate to include sunset or review clauses. It may also depend on the powers in the parent Act, which Parliament will have scrutinised and endorsed. The reason for inclusion, or not, of sun-setting or review clauses, vary depending on the policy intent of that particular SI. For example, there was clear reasoning for including sunset provisions in some of the SIs responding to COVID-19.

*7. What is the relationship between the PBL Committee and departmental SI SROs and SI Ministers?*

Each SI Minister and SI SRO is an internal departmental appointment. They are responsible at ministerial and official level for their department’s secondary legislation programme as a whole, with policy ministers and officials responsible for delivering each individual SI within that programme. The processes and procedures in each department will vary according to the amount and type of secondary legislation the department lays and its internal structures.

The PBL Secretariat regularly shares advice and guidance with departments. In addition, the Parliamentary Capability Team, based in the Cabinet Office, provides training for civil servants of all grades. Training courses on understanding the secondary legislation process in Parliament and on creating effective Explanatory Memoranda are delivered on an ongoing basis. An ongoing six-monthly training programme for departmental SI Leads is delivered jointly by the Parliamentary Capability Team and the PBL Secretariat. This programme is delivered as a series of monthly seminars. A guidance ‘toolkit’ for SI Project Managers was also published in 2021, which is available via the Civil Service Learning website. I attach a copy of the toolkit for information. I am grateful the SLSC clerks were able to support the recent round of training. Support specifically for SI SROs is currently being scoped and designed by the Parliamentary Capability Team and they expect to launch this in autumn 2022.

**17 May 2022**

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<sup>77</sup> HM Government, *Explanatory Memorandum to the Statement of Changes in Immigration Rules* (CP 632), 17 February 2022: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1055715/E02722027 - CP 632 - EXPLANATORY MEMORANDUM PRINT .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055715/E02722027_-_CP_632_-_EXPLANATORY_MEMORANDUM_PRINT_.pdf) [accessed: 12 May 2022]

### APPENDIX 3: SLSC LETTER TO THE BETTER REGULATION EXECUTIVE ON ITS REFORM OF THE BETTER REGULATION FRAMEWORK

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#### Letter from Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee, to Christopher Carr, Director of the Better Regulation Executive

I am writing as Chair of the Secondary Legislation Scrutiny Committee (SLSC). The role of the SLSC is to scrutinise all statutory instruments laid before Parliament which are subject to a parliamentary procedure.

The Committee has only just learned of your consultation exercise on Reforming the Framework for Better Regulation from correspondence with the Minister Paul Scully MP. I understand that we have missed the formal consultation period. I hope however that there is still time for the Committee to offer three broad observations:

- (1) If it is to assist effective parliamentary scrutiny of secondary legislation, it is essential that an Impact Assessment (IA) should be made available at the same time that an instrument is laid. Where departments deposit an IA after laying, not only does this inhibit effective scrutiny but it is difficult to avoid the conclusion that information on impact was not used in the formulation of policy as it should be, but was treated as an after-thought.
- (2) Whether as part of an IA (when required) or included in the Explanatory Memorandum, it would assist parliamentary scrutiny if instruments were accompanied by a broad overview of potential impacts. This should include not only financial bottom line but also a thorough analysis of all potential consequences of the legislative change proposed, thereby enabling Parliament to weigh up the pros and cons of the policy change being effected.
- (3) Finally, we would welcome greater emphasis on *post-implementation review*. It would enhance transparency and accountability, if, when considering amendments to existing legislation, information was provided about the success or otherwise of the policy implemented by the original regulations.

**18 October 2021**

## APPENDIX 4: LIST OF MEMBERS AND INTERESTS

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### Members

Baroness Bakewell of Hardington Mandeville  
Lord De Mauley  
Lord German  
Viscount Hanworth  
Lord Hodgson of Astley Abbotts  
Lord Hutton of Furness  
The Earl of Lindsay  
Lord Lisvane  
Lord Powell of Bayswater  
Lord Rowlands  
Baroness Watkins of Tavistock

### Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the purposes of this inquiry, Members declared no specific interests.

Document is Restricted



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## WRITTEN STATEMENT BY THE WELSH GOVERNMENT

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<b>TITLE</b>	<b>Levelling-up and Regeneration Bill – Compulsory Purchase Provisions</b>
<b>DATE</b>	<b>28 September 2022</b>
<b>BY</b>	<b>Julie James MS, Minister for Climate Change</b>

This written statement is laid under Standing Order 30 – Notification in relation to UK Parliament Bills. It relates to the specific provisions in the Levelling-up and Regeneration Bill (“the Bill”) which will modify the Welsh Ministers’ functions but do not require a Legislative Consent Motion under Standing Order 29, as the Senedd does not have legislative competence in respect of those provisions. The Bill was introduced in the UK Parliament, the House of Commons, on 11 May 2022.

Other provisions in the Bill regarding land use planning; environmental outcome reports for certain consents; information and records relating to land, the environment or heritage; governance of the Royal Institution of Chartered Surveyors; and vagrancy and begging require the legislative consent of the Senedd. I have today laid a Legislative Consent Memorandum (<https://senedd.wales/media/5gdfx1u1/lcm-ld15356-e.pdf>) and will consider tabling a Legislative Consent Motion in due course.

The Senedd has limited competence in respect of compulsory purchase in devolved areas, including housing and land use planning. In practice, this means any proposed modifications to the law of compulsory purchase, via primary legislation, must clearly be in the context of specified changes to land use planning law or another non-reserved matter. The Senedd is therefore unable to modify the law of compulsory purchase generally, or for its own sake or to achieve reserved ends. This prevents the Senedd from modifying the general rules on compulsory purchase in legislation such as the Acquisitions of Land Act 1981 in respect of all compulsory acquisitions in Wales, as is proposed by the Bill. The proposals in the Bill relating to compulsory purchase will, however, impact the Welsh Ministers’ functions in their capacity as both a confirming authority and as an acquiring authority.

### Policy Objective

The UK Government's stated policy objective is to reverse geographical disparities between different parts of the UK by spreading opportunity more equally. Under this, the Bill has four overarching objectives:

- i. To place a duty on the UK Government to set, and report annually on progress towards achieving, levelling up missions to reduce geographical disparities across the United Kingdom;
- ii. To create a modern framework to support the most radical devolution of powers in modern times through the creation of a new model of combined county authorities to support delivery of the UK Government's levelling up mission that 'by 2030, every part of England that wants one will have a devolution deal with powers at or approaching the highest level of devolution and a simplified, long-term funding settlement';
- iii. To deliver a new suite of powers for local authorities to regenerate their towns through high street rental auctions and reforms to compulsory purchase to support delivery of the UK Government's levelling up mission that 'by 2030, pride in place, such as people's satisfaction with their town centre and engagement in local culture and community, will have risen in every area of the UK, with the gap between top performing and other areas closing'; and
- iv. To create a planning system which delivers more beautiful and greener homes, with the associated infrastructure and democratic support that neighbourhoods want and deserve.

### **Relevant provisions in the Bill**

#### **Clause 140 (Acquisition by local authorities for purposes of regeneration)**

Clause 140 of the Bill amends section 226 of the Town and Country Planning Act 1990 by introducing the wording "regeneration" to clarify local authorities can use their power under section 226 to compulsorily acquire land for regeneration purposes. However, this clause is for the purpose of England only and will not apply to Wales.

The Bill makes the following provisions which modify the existing functions of the Welsh Ministers:

#### **Clause 141 (Online publicity)**

Clause 141 amends sections 7, 11, 12, 15 and 22 and paragraph 9 of Schedule 3 to the Acquisition of Land Act 1981 ("the 1981 Act") which set out the publicity requirements for certain documents and notices issued as part of the compulsory purchase order (CPO) process. It also inserts a new section 12A into the 1981 Act. The clause will require certain documents and notices to be made available online whilst ensuring those who do not have internet access are able to find the information they need in local newspapers or in physical locations. Clause 144 (Corresponding provisions for purchases by Ministers) and paragraph 1 of Schedule 14 amend Schedule 1 to the 1981 Act the effect of which is to make the same provision as Clause 141 for Welsh Ministers acting in their capacity as an acquiring authority.

Clause 141 adds an additional requirement to acquiring authorities' existing functions requiring them to publish a notice on a website the public could reasonably expect to

find on searching for information about a scheme. There is also a new requirement introduced by the Bill for acquiring authorities to publish a notice on an appropriate website post-order making.

Clause 141 also adds an additional requirement to the Welsh Ministers' existing functions as a confirming authority (or appropriate authority where the acquiring authority is one of the Welsh Ministers) through a new discretionary power which allows them to direct that the existing requirement for a notice to name a place where a CPO and map may be viewed can be disapplied.

### **Clause 142 (Confirmation proceedings)**

Clause 142 amends sections 13A and 13B of the 1981 Act which set out the procedure the Welsh Ministers (in their role as confirming authority) should follow when considering objections to a CPO. The amendments mean the consideration of a CPO by the Welsh Ministers will now either be through a public inquiry or the representations procedure. The terminology for the latter has changed from "written representations" to "representations" as the procedure will allow for an informal oral hearing where an objector requests one. The current procedure is "written representations" and Wales currently has its own Written Representation Regulations.

Clause 144 and paragraph 2 of Schedule 14 amend Schedule 1 to the 1981 Act the effect of which is to make the same provision as Clause 142 for Welsh Ministers acting in their capacity as appropriate authority.

### **Clause 143 (Conditional confirmation)**

Clause 143 inserts a new provision (section 13BA) into the 1981 Act and makes consequential amendments to section 15 of that Act. It also makes consequential amendments to paragraph 3 of Schedule 5A to the Housing Act 1985. The clause will give the Welsh Ministers (acting in their role as confirming authority) an additional option of confirming a CPO subject to conditions before the compulsory purchase powers under it can be exercised by the relevant acquiring authority.

Clause 144 and paragraph 3 of Schedule 14 amend Schedule 1 to the 1981 Act the effect of which is to make the same provision as Clause 143 for the Welsh Ministers (acting in their capacity as an acquiring authority) to make a CPO conditionally. The effect of making a CPO conditionally is that the order:

- a) does not become operative until the Welsh Ministers have decided, following consideration by the appropriate authority, that certain conditions have been met, and
- b) expires if the Welsh Ministers have not decided that certain conditions have been met by a certain time.

### **Clause 145 (Consequential amendments relating to date of operation)**

Clause 145 amends section 26 of the 1981 Act which sets out the date on which a CPO becomes operative is the date on which notice of the confirmation or making of the CPO is first published. This clause amends section 26 to make provision for CPOs which are confirmed conditionally under clause 143 or paragraph 3 of Schedule 14.



### **Clause 146 (Time limits for implementation)**

Clause 146 amends section 4 of the Compulsory Purchase Act 1965 and section 5A of the Compulsory Purchase (Vesting Declarations) Act 1981 which set out the timeframe in which compulsory purchase powers under a CPO must be implemented after it has been confirmed. In both cases the current time period is 3 years.

This clause amends these sections and inserts a new section 13D into the 1981 Act to give the Welsh Ministers (acting in their role as confirming authority) the flexibility to allow a longer implementation period for a CPO where appropriate. The clause also inserts a new paragraph 3A in Schedule 1 to the 1981 Act which allows the Welsh Ministers (acting in their role as acquiring authority) to include provision in a CPO specifying a period of longer than 3 years for its implementation.

### **Clause 147 (Agreement to vary vesting date)**

Clause 147 amends the Compulsory Purchase (Vesting Declarations) Act 1981 by introducing a new section 8A into that Act to allow for the postponement of the date on which an acquiring authority will take ownership of an interest in the land, subject to the agreement of the owner. This will modify the Welsh Ministers' function as an acquiring authority. The clause also makes consequential amendments to reflect new section 8A.

Currently, the Welsh Ministers (acting in their capacity as acquiring authority) must give at least three months' advance notice of the date on which they intend to take ownership of land included in a CPO and once that date is set it cannot be varied. The purpose of this clause is to give greater flexibility to acquiring authorities and the owner of an interest in land should circumstances change after notice has been given.

### **Clause 148 (Common standards for compulsory purchase)**

Clause 148 introduces a new provision giving the Secretary of State the power to set by regulations data standards in relation to CPO information which all acquiring authorities will have to comply with. This will modify the Welsh Ministers' function as an acquiring authority. No equivalent power is given to the Welsh Ministers to set their own data standards for CPO data by regulations.

The aim of the measure is to facilitate the development of a compulsory purchase system that makes better use of digital technology to improve access to important compulsory purchase information, drive efficiencies in applications for confirmation and decision making, and facilitate better public engagement.

### **Clause 149 ('No-scheme' principle: minor amendments)**

Clause 149 amends sections 6D and 6E of the Land Compensation Act 1961 to ensure that, for the purposes of assessing the compensation for an interest in land acquired by compulsion, the definition of 'the scheme' which is the subject of the CPO also includes improvement of land in addition to re-development and regeneration.

The Welsh Ministers do not have competence in relation to land compensation by virtue of paragraph 185 of Schedule 7A of the Government of Wales Act 2006 and, as such, this provision does not affect any existing Welsh Ministers' functions.

### **Reasons for making these provisions**

The Welsh Government supports the use of compulsory purchase powers by local authorities to facilitate the economic recovery from the Covid-19 pandemic and promote placemaking principles to deliver beneficial environmental, social and economic change in our communities. The Welsh Government believes the use of compulsory purchase powers should be considered by local authorities to increase the supply of housing as well as bring vacant and empty properties back into use.

Used appropriately, compulsory purchase powers can contribute towards effective and efficient regeneration, the revitalisation of communities, placemaking, and the promotion of business, leading to improvements in quality of life.

As a government, we are committed to improving the compulsory purchase process to make it fairer, more efficient and intelligible. Our priority is to remove barriers to, and encourage greater use of, compulsory purchase powers by local authorities through streamlining and modernising the compulsory purchase process.

Notably, the Bill seeks to introduce online publicity requirements for certain documents and notices relating to the making and confirmation of CPOs. The Bill also aims to make the confirmation process more efficient by ensuring the most appropriate and proportionate procedure for considering objections to a CPO is used. These provisions will increase engagement and awareness of the CPO process together with making the process more streamlined.

I consider that it is appropriate for these provisions to apply in relation to Wales and for them to be included in this Bill.



Llywodraeth Cymru  
Welsh Government

Huw Irranca-Davies MS  
Chair of the Legislation, Justice and Constitution Committee  
Welsh Parliament  
Cardiff Bay  
Cardiff  
CF99 1SN

14 October 2022

Dear Huw,

## **Social Partnership and Public Procurement (Wales) Bill**

Further to your letter of 22 September to inform me the Legislation, Justice and Constitution Committee has decided to seek evidence in relation to the Social Partnership and Public Procurement (Wales) Bill in writing. Please see the accompanying annex 1 which responds to the questions set out in your letter.

I hope the Committee will find this information useful and I am happy to provide you with any additional information if required.

Yours sincerely

**Hannah Blythyn AS/MS**

Y Dirprwy Weinidog Partneriaeth Gymdeithasol  
Deputy Minister for Social Partnership

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

## Annex 1

### General

**1. Are you content that all provisions of the Bill as introduced fall within the legislative competence of the Senedd?**

The Llywydd's letter of 06 June to the First Minister confirmed that in her view this Bill is within the legislative competence of the Senedd.

**2. Are there any human rights issues arising from the Bill?**

No issues have been identified.

**3. The draft Bill included a fair work duty on Welsh Ministers to set fair work objectives, to take steps to achieve these, and to annually report on progress. For what reasons have these proposals not been included in the Bill introduced into the Senedd? Have these elements of the draft Bill been removed due to the limits on the Senedd's legislative competence?**

We are on record as having accepted the Fair Work Commission's definition and characteristics of fair work in our policy work. We stand by that. But this does not mean we can legislate for that definition. The Fair Work Commission recognised their definition covers reserved as well as devolved areas and clearly there are the implications of this under the devolution settlement.

Drawing on the Well-being of Future Generations (Wales) Act 2015 ("WFG Act") is consistent with the overall approach across the Bill, where other provisions are linked to the sustainable development principle set out in that Act. Our approach also reflects the spirit of the Fair Work Commission recommendation to incorporate fair work within the WFG Act. This means public bodies will be under a legal requirement to consider fair work in the pursuit of the 'A Prosperous Wales' well-being goal.

This approach captures public bodies and so has a greater reach and could have greater effect than a standalone Fair Work Duty only on Welsh Ministers as previously proposed. I also think it important to avoid the continuation of the use of different terms that can be interpreted to cover broadly similar or overlapping activity i.e., decent work and fair work. We know from our engagement that consistency in terminology will be welcomed. All of this could help contribute to a more effective approach to the consideration of fair work in the pursuit of well-being.

Wales' seven well-being goals are the blueprint to achieve a better and more sustainable future for all. They address the global challenges that we face here in Wales, including poverty, inequality, climate change, biodiversity loss, community cohesion and securing fair work for all. Securing fair work within the interconnected and indivisible well-being goals will send out a strong message that a more sustainable future, in line with the well-being goals, cannot be achieved without promoting fair work.

**4. Can you set out why the Welsh Government has chosen to introduce legislation in relation to social partnership, fair work and socially responsible public procurement as opposed to following a non-statutory approach?**

The purpose of this legislation is to improve the economic, social, cultural and environmental well-being of people in Wales (including by improving public services). As the Explanatory Memorandum accompanying the Bill notes, social partnerships, and collaborative working more broadly, have been a defining feature of the way in which Wales has been governed for many years. Many existing social partnership arrangements in Wales have developed voluntarily and organically. They are not currently underpinned by a common framework and are not co-ordinated with a view to achieving maximum impact. The number and range of partnerships can put pressure on social partners and can affect their capacity to engage and fully contribute.

In the absence of legislation, the existing informal and ad-hoc social partnership arrangements could be expected to continue. The Welsh Government believes, however, that there are limitations on how effectively improvements in public service delivery and well-being can be coordinated unless the social partnership approach has a statutory underpinning. This legislation will promote greater consistency of approach and strengthen the effectiveness of social partnership arrangements in Wales with a very clear purpose in mind.

Several reviews of procurement by public bodies in recent years have commented on the lack of consistency with which well-being outcomes are pursued. Whilst there are many examples of good practice based on existing guidance, legislation, along with a system of oversight and accountability, will ensure that good practice is more widespread.

**5. The Welsh Government wrote to the UK Government and other devolved administrations about this Bill as it is covered by the Public Procurement Common Framework. Did any of the other UK administrations raise concerns with you about the Bill? If so, what were their concerns and how did you respond?**

No concerns have been raised.

**Relationship with the UK Government Procurement Bill**

**6. The Minister for Finance and Local Government confirmed that the Welsh Government would use the UK Government's Procurement Bill to reform public procurement processes in August 2021. In a letter from the Minister for Finance and Local Government on 1 September, the Minister says:**

**“Incorporating the Procurement Bill into the SPPP Bill would have required changing the scope of the SPPP Bill as it would have predominantly become a Procurement Bill, shifting the focus of the Bill away from Social Partnerships. Also, the Bills are aiming to achieve different things – the Procurement Bill focuses on the processes underpinning procurement, whilst the SPPP Bill will focus on ensuring socially responsible outcomes are achieved from our procurement.”**

**With regard to the Finance Minister's letter to us of 1 September, why would changing the scope of the Bill to include procurement processes be a problem, particularly if it mirrored what the UK Government proposed and led to more**

## **accessible bilingual legislation?**

Welsh Ministers considered that both Welsh contracting authorities and suppliers would have been likely to suffer increased transactional and bidding costs had a single Bill been pursued that would inevitably have resulted in divergence between Wales and the rest of the UK. Common procurement processes across the UK are likely to ensure that Welsh contracts remain accessible and attractive to potential bidders, impacting on value for money and innovation. This also makes it easier for Welsh suppliers to bid for contracts elsewhere in the UK.

If Welsh Ministers had made the decision to legislate independently of UK Government, given the complexity and need for alignment the Welsh legislation would have been implemented later. Legislating with UK Government helps to maintain continuity for suppliers and ensure that cross-border business with England can largely continue without confusion or potential additional costs for users.

Welsh language standards will continue, as now, to apply to procurement processes and systems in Wales, ensuring that procurement can be carried out through the medium of Welsh.

- 7. The Explanatory Memorandum (“EM”) states that one of the Bill’s objectives is to “improve the link between procurement processes and the delivery of outcomes through contract management.” Does this statement not suggest that there is a similarity between the Bills and that there may have been benefit to combining the two of them?**

No, this statement is not intended to mean that both Bills relate to procurement processes. It means that the UK Bill does not include similar or related duties on contract management to those in the Social Partnerships and Public Procurement (Wales) Bill, and we believe that these contract management duties are needed.

The UK Bill largely focuses on ensuring procurement processes are transparent and fair, whereas the Welsh Bill focuses on embedding socially responsible policy priorities into procurement processes and securing these through improved contract management, reporting and oversight.

- 8. Did you consider a separate Welsh Government Procurement Bill, mirroring provisions in the UK Government Bill which would have enabled scrutiny by Members of the Senedd, which would sit alongside the Social Partnership and Procurement Bill?**

Yes, all options were considered carefully before a decision was taken not to bring forward a separate Procurement Bill covering all aspects of public procurement for Wales. The benefits of achieving a coherent set of procurement processes across the UK are significant.

It is also important to note that the UK Bill is undergoing scrutiny by Members of the Senedd through the Legislative Consent process and this will continue with the development of secondary legislation in Wales. Legislative Consent Memorandums were

scrutinised by the Public Administration and Public Accounts Committee on 21 September.

**9. The Minister's letter of 1 September letter also referred to the need for consistency in procurement practice. The UK Bill provides the Welsh Ministers with powers to make secondary legislation. Why can consistency be achieved through separate secondary legislation being implemented in Wales and England, but not separate primary legislation?**

The approach with the Procurement Bill is consistent with our Principles for Recommending Consent to UK Bills, that have been shared with the Senedd.

These Principles include seeking equivalent regulation-making powers for Welsh Ministers as those exercisable in relation to England.

When taking forward secondary legislation, officials will continue to work closely with UKG officials to ensure consistency which is essential for both buyers and suppliers in the immediate term.

However, equivalent powers will allow the Welsh Ministers to make changes if Welsh policy changes in the future. Such changes would not represent a sea-change as they're likely to be done on one or two aspects rather than in all areas where there are equivalent powers. They would also be subject to the Common Framework, as development of policies and legislation are subject to discussion by the Common Framework for public procurement working group to manage potential divergence issues.

**10. Can you summarise how this Bill interacts with the UK Government legislation, and how the UK Government legislation impacted upon the development of this Bill?**

Work on the public procurement duties in this Bill began about a year before the UK Government published its Green Paper on transforming public procurement in December 2020. Once the Green Paper was published it was reassuring to note that whilst the UK Government proposals centre on procurement processes, both Bills share the high level aims of reducing the workload associated with procurement, increasing transparency and strengthening accountability.

As well as a need to ensure consistent terminology in the two Bills, the main areas of interaction between them are in:

- the overlap between the Wales Procurement Policy Statement that is referenced in the UK Bill and the well-being goals referenced in this Bill;
- the mechanism for tracking Key Performance indicators in the UK Bill and the annual reporting process in this Bill; and
- the oversight arrangements required for the UK Bill and the SPC's procurement subcommittee.

## **Accessibility**

- 11. One of the principles set out by the Counsel General is to aim for clear and accessible law on the statute book in Wales. If this Bill and the UK Government's Procurement Bill are passed, procurement law that is applicable to Welsh citizens will be contained in both Senedd and UK Parliament Acts. Why has the Welsh Government not adhered to its own principles of clear and accessible legislation?**

Procurement practitioners in Wales are already used to working to more than one set of legislation and the concept of embedding socially responsible policy priorities into procurement processes, for example they already need to consider the requirements under the Well-being of Future Generations (Wales) Act 2015.

The potential negative impact on buyers and suppliers of divergent procurement process legislation on procurement would have been significant. This additional complexity would also be experienced by Welsh suppliers bidding for public contracts outside Wales. As the two Bills are moving forward on similar timescales this will allow the guidance, training and support provided to buyers and suppliers to be developed so that it is clear and accessible. My officials are working closely with those in the Welsh Government's procurement reform team, who are working with counterparts in the UK Government to ensure consistency and cohesion between the two Bills.

- 12. Section 17 of the Bill provides that the Welsh Ministers must consult with the Social Partnership Council "when making decisions of a strategic nature" about the reasonable steps to take to meet their wellbeing objectives under the Well-being of Future Generations Act 2015. In written evidence to the Equality and Social Justice Committee, Audit Wales considers that the phrase "decisions of a strategic nature" could be clarified on the face of the Bill, "as it does not seem entirely appropriate for the Welsh Ministers to be providing guidance to themselves on the interpretation of this phrase." Have you considered clarifying this phrase on the face of the Bill?**

Recently, through the enactment of the socio-economic duty we have provided statutory guidance on what is meant by 'decisions of a strategic nature' as set out in section 1 of the Equality Act 2010. This guidance provides examples of strategic decisions that public bodies may make, including medium and long-term plans such as corporate plans, and of course the setting of objectives.

In general, strategic decisions will be those which affect how the public body fulfils its intended statutory purpose over a significant period of time and will not include routine 'day-to-day' decisions.

- 13. Section 20 of the Bill amends section 4 of the Well-being of Future Generations Act 2015 by substituting 'fair work' for 'decent work' within the existing "A prosperous Wales" goal. In written evidence to the Equality and Social Justice Committee, Professor Alan Felstead noted that "the Explanatory Memorandum attached to the tabled Bill suggests this will mean that 'fair work takes on its ordinary meaning', even though the term has very specific meaning which has been accepted by Welsh Government." Do you believe that the absence of this accepted definition within this Bill will have any impact on the accessibility and**

## **the clarity of the requirements of the Well-being of Future Generations Act?**

As I have made clear in my response to question 3 above, the Welsh Government has accepted the Fair Work Commission's definition and characteristics of fair work in our policy work. In my view, the approach to Fair Work is consistent with the drafting of the Well-being of Future Generations Act 2015. The treatment of fair work will not have a negative impact as the goals were intended to set out a long-term national framework to enable sustainable development to be embedded at the heart of public bodies.

### **Powers to make subordinate legislation**

#### **14. Are you satisfied that the Bill strikes the right balance of providing detail on the face of the Bill versus giving regulation-making powers to the Welsh Ministers?**

The only subordinate legislation-making powers in this Bill are those in part 3, which deals with socially responsible public procurement. They have been included for what are often referred to as 'future-proofing' reasons: that is, to enable us to make any operational changes which may be necessary in the future: for example, to amend the list of contracting authorities subject to the provisions of the legislation, or to tweak the list of matters those bodies are required to consider when producing their procurement strategies, which are likely to change over time as strategic priorities evolve.

#### **15. Section 32 requires the Welsh Ministers to publish a code of practice (the "public services outsourcing and workforce code") about employment and pensions matters related to outsourcing services contracts. The "social public workforce clauses" will be included as part of that code. Other sections (such as section 33) also provides that the code published under section 32 must include model contract clauses, that will underpin the aims of the Bill in ensuring socially responsible public procurement. The code of practice will therefore play a central role. With that in mind, why does the code have no scrutiny procedure attached to it, and why is there no duty to consult on the code? Will the Welsh Government publish a draft code of practice at the very least before the amending stages of the Bill in order that Members have an opportunity to scrutinise it?**

All statutory guidance will be developed in social partnership and will include open consultation with stakeholders. This process cannot begin formally until such time as the Bill receives Royal Assent, although preliminary work will be taking place beforehand. Given the quantity of statutory guidance that will be needed to support the procurement duties it would be difficult to prepare a draft Code of Practice in time for the amending stages of the Bill.

#### **16. Section 38(3) gives Welsh Ministers regulation-making powers to amend section 38(2) of the Bill to specify other matters which procurement strategies should address and to reduce the number of days specified in section 38(2)(c) (the maximum number of days within which invoices should be paid). This is a power that can amend primary legislation (a Henry VIII power) yet only the negative scrutiny procedure is applied. Welsh Government drafting guidelines recommend that any powers to make secondary legislation that have the ability to amend primary legislation should be subject to the affirmative procedure. In light of this,**

## **why have you decided only to apply the negative scrutiny procedure in this case?**

In keeping with the convention agreed between the Senedd and Counsel General, we have ensured that those subordinate legislation-making powers which allow for provisions in the Bill itself to be amended are all subject to the affirmative procedure. The exception being regulations under section 38 which are operational in nature dealing with matters which procurement strategies must address. Those that deal with operational or technical matters, which do not alter the purpose or effect of the primary legislation itself in any way, are those we have concluded should be made under the negative procedure.

### **17. Section 48(1) of the Bill states that “this Act comes into force on such day as the Welsh Ministers may by order appoint”. When do you intend for the Bill to come into force, should it be passed by the Senedd?**

It is our intention that the legislation should come into force as soon as is reasonably practicable. Members will appreciate that the four component parts of the Bill place a range of duties and requirements on various bodies – including Welsh Ministers. As such it will be necessary to sequence commencement of certain sections of the Act. For example, in relation to the Social Partnership Council, we would be looking to commence the appointment provisions by autumn 2023, with a view to those appointments having been made, and the Council able to meet, before the end of 2023.

In terms of the fair work and social partnership duties, we intend to publish initial advice during 2023 so that public bodies, including any additional bodies which may be brought within the scope of the WFG Act are able to plan appropriately for the introduction of the new duties and understand what may be expected of them. Statutory guidance issued under the relevant provisions of the Bill will need to be agreed by the Social Partnership Council and will be published as soon as possible after the Council is established in order that public bodies are able to set or review their well-being objectives in 2024 having given regard to that guidance. More broadly, we will also be looking to align the objective-setting and reporting cycles in this legislation as far as possible with those that our partners already work to under the WFG Act.

Turning to socially-responsible procurement, whilst the Social Partnership Council will be responsible for establishing the public procurement sub group itself, work is already under way to develop the necessary guidance, training and monitoring arrangements which will be required to support these provisions. This work is being and will continue to be undertaken in consultation with social partners and the public procurement community in Wales. We will also look to coordinate the changes resulting from the implementation of the UK Procurement Bill in Wales with the provisions in our Bill are implemented in a coherent way so as to avoid overburdening service providers with uncoordinated waves of statutory changes.

Hannah Blythyn MS  
Deputy Minister for Social Partnership

22 September 2022

Dear Hannah

**Scrutiny of the Social Partnership and Public Procurement (Wales) Bill**

Thank you for agreeing to appear before the Committee on 12 September as Member in charge of the Social Partnership and Public Procurement (Wales) Bill.

In light of the suspension of Senedd business due to the death of Her Majesty Queen Elizabeth II, we have decided against rescheduling the session, and instead seek evidence on the Bill from you in writing.

Please find a list of questions at the Annex. I would be grateful to receive your responses to them by 14 October 2022.

Yours sincerely,



Huw Irranca-Davies  
Chair

## Annex

### General

1. Are you content that all provisions of the Bill as introduced fall within the legislative competence of the Senedd?
2. Are there any human rights issues arising from the Bill?
3. The draft Bill included a fair work duty on Welsh Ministers to set fair work objectives, to take steps to achieve these, and to annually report on progress. For what reasons have these proposals not been included in the Bill introduced into the Senedd? Have these elements of the draft Bill been removed due to the limits on the Senedd's legislative competence?
4. Can you set out why the Welsh Government has chosen to introduce legislation in relation to social partnership, fair work and socially responsible public procurement as opposed to following a non-statutory approach?
5. The Welsh Government wrote to the UK Government and other devolved administrations about this Bill as it is covered by the Public Procurement Common Framework. Did any of the other UK administrations raise concerns with you about the Bill? If so, what were their concerns and how did you respond?

### Relationship with the UK Government Procurement Bill

6. The Minister for Finance and Local Government confirmed that the Welsh Government would use the UK Government's Procurement Bill to reform public procurement processes in August 2021. In a letter from the Minister for Finance and Local Government on 1 September, the Minister says:

*"Incorporating the Procurement Bill into the SPPP Bill would have required changing the scope of the SPPP Bill as it would have predominantly become a Procurement Bill, shifting the focus of the Bill away from Social Partnerships. Also, the Bills are aiming to achieve different things – the Procurement Bill focuses on the processes underpinning procurement, whilst the SPPP Bill will focus on ensuring socially responsible outcomes are achieved from our procurement."*

With regard to the Finance Minister's letter to us of 1 September, why would changing the scope of the Bill to include procurement processes be a problem, particularly if it mirrored what the UK Government proposed and led to more accessible bilingual legislation?

7. The Explanatory Memorandum ("EM") states that one of the Bill's objectives is to "improve the link between procurement processes and the delivery of outcomes through contract management." Does this statement not suggest that there is a similarity between the Bills and that there may have been benefit to combining the two of them?
8. Did you consider a separate Welsh Government Procurement Bill, mirroring provisions in the UK Government Bill which would have enabled scrutiny by Members of the Senedd, which would sit alongside the Social Partnership and Procurement Bill?
9. The Minister's letter of 1 September letter also referred to the need for consistency in procurement practice. The UK Bill provides the Welsh Ministers with powers to make secondary legislation. Why can consistency be achieved through separate secondary legislation being implemented in Wales and England, but not separate primary legislation?
10. Can you summarise how this Bill interacts with the UK Government legislation, and how the UK Government legislation impacted upon the development of this Bill?

## Accessibility

11. One of the principles set out by the Counsel General is to aim for clear and accessible law on the statute book in Wales. If this Bill and the UK Government's Procurement Bill are passed, procurement law that is applicable to Welsh citizens will be contained in both Senedd and UK Parliament Acts. Why has the Welsh Government not adhered to its own principles of clear and accessible legislation?
12. Section 17 of the Bill provides that the Welsh Ministers must consult with the Social Partnership Council "when making decisions of a strategic nature" about the reasonable steps to take to meet their wellbeing objectives under the Well-being of Future Generations Act 2015. In **written evidence to the Equality and Social Justice Committee**, Audit Wales considers that the phrase "decisions of a strategic nature" could be clarified on the face of the Bill, "as it does not seem entirely appropriate for the Welsh Ministers to be providing guidance to themselves on the interpretation of this phrase." Have you considered clarifying this phrase on the face of the Bill?
13. Section 20 of the Bill amends section 4 of the Well-being of Future Generations Act 2015 by substituting 'fair work' for 'decent work' within the existing "A prosperous Wales" goal. In **written evidence to the Equality and Social Justice Committee**, Professor Alan Felstead noted that "the Explanatory Memorandum attached to the tabled Bill suggests this will mean that 'fair work takes on its ordinary meaning', even though the term has very specific meaning which has been accepted by Welsh Government." Do you believe that the absence of this accepted definition within this Bill will have any impact on the

accessibility and the clarity of the requirements of the Well-being of Future Generations Act?

### Powers to make subordinate legislation

14. Are you satisfied that the Bill strikes the right balance of providing detail on the face of the Bill versus giving regulation-making powers to the Welsh Ministers?
15. Section 32 requires the Welsh Ministers to publish a code of practice (the “public services outsourcing and workforce code”) about employment and pensions matters related to outsourcing services contracts. The “social public workforce clauses” will be included as part of that code. Other sections (such as section 33) also provides that the code published under section 32 must include model contract clauses, that will underpin the aims of the Bill in ensuring socially responsible public procurement. The code of practice will therefore play a central role. With that in mind, why does the code have no scrutiny procedure attached to it, and why is there no duty to consult on the code? Will the Welsh Government publish a draft code of practice at the very least before the amending stages of the Bill in order that Members have an opportunity to scrutinise it?
16. Section 38(3) gives Welsh Ministers regulation-making powers to amend section 38(2) of the Bill to specify other matters which procurement strategies should address and to reduce the number of days specified in section 38(2)(c) (the maximum number of days within which invoiced should be paid). This is a power that can amend primary legislation (a Henry VIII power) yet only the negative scrutiny procedure is applied. Welsh Government drafting guidelines recommend that any powers to make secondary legislation that have the ability to amend primary legislation should be subject to the affirmative procedure. In light of this, why have you decided only to apply the negative scrutiny procedure in this case?
17. Section 48(1) of the Bill states that “this Act comes into force on such day as the Welsh Ministers may by order appoint”. When do you intend for the Bill to come into force, should it be passed by the Senedd?

Hannah Blythyn AS/MS  
Y Dirprwy Weinidog Partneriaeth Gymdeithasol  
Deputy Minister for Social Partnership



Llywodraeth Cymru  
Welsh Government

Jenny Rathbone MS  
Chair  
Equality and Social Justice Committee  
Senedd Cymru  
Cardiff Bay  
CF99 1SN

13 June 2022

Dear Jenny,

### **Social Partnership and Public Procurement (Wales) Bill**

Following the introduction of the Social Partnership and Public Procurement (Wales) Bill into the Senedd on 7 June 2022, please find attached a statement of policy intent. This document is provided to support the Committee's scrutiny of the Bill.

I look forward to providing evidence to the Committee in due course.

I am copying this letter to the Chair of the Legislation, Justice and Constitution Committee.

Yours sincerely,

Hannah Blythyn MS  
Deputy Minister for Social Partnership

cc Huw Irranca-Davies MS  
Chair of the Legislation, Justice and Constitution Committee

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.



Llywodraeth Cymru  
Welsh Government

# **Social Partnership and Public Procurement (Wales) Bill**

Policy intent for regulations, directions and  
guidance

**June 2022**

# **SOCIAL PARTNERSHIP AND PUBLIC PROCUREMENT (WALES) BILL**

## **POLICY INTENT FOR SUBORDINATE LEGISLATION, DIRECTIONS AND GUIDANCE**

This document provides an indication of the current policy intention for the subordinate legislation, directions and guidance that the Welsh Ministers are empowered or required to make under the provisions of the Social Partnership and Public Procurement (Wales) Bill ('the Bill'). It has been published in order to assist the responsible Committee during the scrutiny of the Bill and should be read in conjunction with the Explanatory Memorandum and Explanatory Notes.

The Bill provides for a framework to enhance the well-being of the people of Wales by improving public services through social partnership working, promoting fair work and social responsible public procurement.

In summary, the Bill makes provision for:

- the establishment of a Social Partnership Council ("SPC");
- a statutory duty on certain public bodies to seek consensus or compromise with their recognised trade unions (or where there is no recognised trade union other representatives of their staff, when setting their well-being objectives and delivering on those objectives under section 3(2) of the WFG Act 2015;
- a statutory duty on Welsh Ministers to consult social partners, employers and worker representatives through the Social Partnership Council when delivering on their well-being objectives under section 3(2)(b) of the WFG Act 2015 ;
- amendment of section 4 of the WFG Act 2015 by substituting 'fair work' for 'decent work' within the description of the existing "A prosperous Wales" goal (one of the Well-being goals that public bodies subject to the Act must seek to contribute to);
- a statutory duty on certain public bodies to consider socially responsible public procurement when carrying out procurement, to set objectives in relation to well-being goals, and to publish a procurement strategy
- certain public bodies to carry out contract management duties to ensure that socially-responsible outcomes are pursued through supply chains.
- reporting duties to be imposed on the public bodies and Welsh Ministers in relation to the Social Partnership Duty and Procurement duty.

Section	Description	Policy Intention
<b>The Social Partnership Council</b>		
7(4) 7(6)	The Welsh Ministers will publish a set of procedures for the SPC that sets out how the Council will function.	The SPC's procedures will specify the details of how the SPC will operate that are not set out in the Bill. A 6-month time limit beginning on the day after subsection 7(4) comes into force is placed on publishing these procedures so that it does not delay the SPC being operational.
9(2) 9(4)	Welsh Ministers will publish a set of procedures for the public procurement subgroup that sets out how the subgroup will function.	Similarly to that of the SPC, the public procurement subgroups procedures will establish the operational detail and how the subgroup will be established and governed. A 6-month time limit beginning when this subsection comes into force is placed on publishing these procedures so that it does not delay the public procurement subgroup being operational.
<b>Social Partnership duty – Public Bodies</b>		
16 (3)	The Welsh Ministers may issue guidance to public bodies listed in section 6 of the WFGA 2015	<p>In considering what is reasonable under section 16(1) of the Bill a public body must take into account guidance published by the Welsh Ministers.</p> <p>The Welsh Ministers will take account of information and advice received from the Social Partnership Council on the operation of the Social Partnership duty in determining whether guidance for public bodies is needed and the content of any such guidance. Guidance might deal with the representation of staff and workers where there is no recognised trade union; what constitutes “decisions of a strategic nature” in relation to the reasonable steps public bodies</p>

		<p>must take (in the exercise of their functions) to meet their well-being objectives under section 3(2)(b) of the WFGA 2015; the nature of the information which should be made available to facilitate the process of engagement with recognised trade unions or other staff representatives; or the time which should be allowed for consultation and engagement with recognised trade unions or other staff representatives.</p> <p>Guidance may also be required on how the duty to seek compromise and consensus in relation to these matters differs from a requirement simply to consult.</p>
<b>Social Responsible Public Procurement</b>		
22(4)	The Welsh Ministers may modify, by regulations, the meaning of a “contracting authority”, a “contracting authority’s area”, and the list of contracting authorities included at Schedule 1.	<p>The Socially Responsible Public Procurement Duties fall on bodies known as “contracting authorities” and these are defined as those listed in Schedule 1. These bodies were identified in light of matters including the extent and nature of their procurement activities. The list of bodies subject to the duty may need to change from time to time, including potentially where new bodies may be created, their name changed or the procurement activities of bodies changes.</p> <p>Over time other bodies may come in or out of scope based on these criteria, or Ministers may choose to change these criteria or the definition</p>

		of a “contracting authority’s area. This regulation-making power allows for change.
24(8)(c)	The Welsh Ministers may make regulations defining a “prescribed contract”.	<p>Whilst the socially responsible public procurement duty applies to all of a contracting authority’s procurement activity, the publishing of objectives and particular actions in relation to contract management are required for a category of procurements described as “prescribed contracts”. These include major construction contracts (defined in section 25) outsourcing services contracts (defined in section 26) and any other public contract prescribed by Ministers.</p> <p>Particular contract management duties have been applied to major construction and outsourcing services contracts only at this time, but in future the Welsh Ministers may choose to include other categories in these contract management duties.</p> <p>The policy intention is that the definition of “any other public contract” is linked to the financial thresholds that are set by the World Trade Organisation (WTO) in its Agreement on Government Procurement (GPA) and updated every two years.</p> <p>This regulation-making power allows Ministers to define the categories of expenditure and financial thresholds that are required to define “prescribed contracts” in line with GPA thresholds initially, and when updated.</p>

		Section 21(2) clarifies that public contracts awarded as a result of framework agreements (as defined in section 45(1)) are to be treated in the same way as other public contracts.
25(3)	Welsh Ministers may amend the definition of a “major construction contract” by regulations.	As described above, the category of “prescribed procurements” includes “major construction contracts”, which are described in 25(2) as public works, works or works concession contracts with estimated value above £2m inclusive of VAT. This regulation-making power allows Ministers to update the threshold or any other aspect of this definition.
27(1) and (2)	Welsh Ministers will publish model social public works clauses to be included in major construction contracts in order to bring about improvements listed in the table in 27(2). The table groups these improvements into categories.	<p>This requires the publication of clauses to be included in all major construction contracts, and that a process is in place to ensure that they are implemented throughout supply chains.</p> <p>The intention is that these clauses will be published alongside statutory guidance issued under section 43 which will explain how they are to be applied.</p> <p>The categories to be covered by those clauses and the improvements to be achieved by those clauses as against each category are set out in the table in section 27(2).</p> <p>This section sets parameters for the subject matter that they will cover. The categories within which improvements are to be sought through</p>

		<p>the application of the drafted clauses are (in summary):</p> <ul style="list-style-type: none"> <li>• Prompt payment</li> <li>• Making employment opportunities available</li> <li>• Ensuring compliance with employment law</li> <li>• Providing training for workers</li> <li>• Providing sub-contracting opportunities for SMEs and voluntary organisations</li> <li>• Environmental management and climate resilience.</li> </ul>
30(4)	<p>This gives the Welsh Ministers a power of direction that may be used if a contracting authority does not provide adequate reasons for why it is not intending to include the social public works clauses in a major construction contract or put processes in place to ensure they are implemented.</p>	<p>This power allows the Welsh Ministers to direct a contracting authority to include the social public works clauses in a major construction contract and put processes in place to ensure they are implemented if the reasons provided for their non-inclusion are assessed as not being adequate.</p> <p>This allows, but does not require, Ministers to direct a contracting authority, because there may be situations where the reasons provided by the contracting authority for not including the clauses whilst not being considered adequate, may not dictate the issuing of directions for other practical reasons.</p>
32(1)	<p>This requires the Welsh ministers to publish a Public Services Outsourcing and Workforce Code, to which contracting authorities must have regard.</p>	<p>The policy intention is to replace the Workforce (two-tier) code of practice, and its associated guidance and procurement advice note,</p>

published in 2014. This Code is currently guidance to assist particular public bodies when they are transferring staff to a third party as part of an outsourcing contract.

The aims of both the existing Code, and the new Code are the same, and are set out in (section 33):

- ensuring that where public sector staff are transferred their terms and conditions of employment are protected;
- ensuring that where staff are subsequently recruited to work alongside the transferred workforce they are employed on terms and conditions that are no less favourable, and a reasonable pension provision is made; and
- requiring contracting authorities to monitor and report on the implementation of the Code.

However, under the Bill, contracting authorities will be required to have regard to the code in fulfilment of their socially responsible procurement duties under section 24(5)(c) and section 26(1)(a).

Following a review of the current Code, several matters require updating in the new Code to address recent developments and improve it in other ways.

The Code will include model contract clauses, the “social public workforce clauses” designed

		<p>to achieve the aims listed above, and described in sections 33 (a) to (c).</p> <p>The Code, and any subsequent revision of it, must be published and laid before the Senedd.</p>
36(4)	<p>This gives the Welsh Ministers a power of direction that may be used if a contracting authority does not provide adequate reasons for why it is not intending to include the social public workforce clauses in an outsourcing services contract, or put processes in place to ensure they are implemented.</p>	<p>This power allows the Welsh Ministers to direct a contracting authority to include the social public workforce clauses in an outsourcing services contract, and put processes in place to ensure they are implemented if the reasons provided for their non-inclusion are assessed as not being adequate.</p> <p>This allows, but does not require, Ministers to direct a contracting authority, because there may be situations where the reasons provided by the contracting authority for not including the clauses which not being considered adequate, may not dictate the issuing of directions for other practical reasons.</p>
38(3)	<p>The Welsh Ministers may make regulations that amend or add to the categories of content that must be included in a contracting authority's published procurement strategy.</p>	<p>Publishing a procurement strategy is one of the duties placed on contracting authorities designed to make commercial activities more transparent. The Bill does not specify in detail what must be included in a strategy, and only requires authorities to state how they comply with the socially responsible public procurement duty and take all reasonable steps to meet their socially responsible procurement objectives. They are also required to include their prompt payment procedure.</p>

		<p>Many contracting authorities already publish a procurement strategy and will be encouraged to continue including any other material that they see fit to include, which is likely to include matters other than socially responsible procurement.</p> <p>This regulation-making power allows Ministers to include other matters to be covered in procurement strategies, and to amend the 30 day payment requirement. The UK Procurement Reform Bill is expected to make provision for Welsh Ministers to reduce the 30 day requirement, which would require this regulation-making power to be exercised.</p>
39(2)(e)	The Welsh Ministers may make regulations that amend or add to the categories of content that must be included in a contracting authority's published annual report.	<p>Publishing an annual report is one of the duties placed on contracting authorities that is designed to make their procurement activities more transparent. The Bill summarises the information that needs to be included in the report:</p> <ul style="list-style-type: none"> <li>• a summary of “prescribed procurements”</li> <li>• the extent to which the socially responsible objectives were met</li> <li>• further steps that could be taken in future to better meet objectives</li> <li>• a summary of the procurement “pipeline” – procurements that are expected to be carried out in the next two years.</li> </ul> <p>Since the information included in these reports is likely to be similar to procurement-related</p>

		<p>material in the annual reports that are already required of those bodies included in the WFG Act 2015 the policy intention is that this reporting is coordinated and streamlined to minimise the workload for the contracting authorities concerned.</p> <p>This regulation-making power allows Ministers to require additional information to be included in annual reports.</p>
40(2)	The Welsh Ministers will specify in regulations the meaning of a “registrable contract”.	<p>Contracting authorities will be required to publish and maintain a register of the contracts that they have entered into, including the date of award, name of contractor, subject matter, estimated value, start and expected end dates and any possible period of extension.</p> <p>This regulation will allow Ministers to specify, amongst other matters, the expected values and types of contracts that must be included in the register. This may, for example, also include contracts smaller than the “prescribed contracts” defined in the Bill and other regulations. The UK Procurement Reform Bill is likely to include many provisions aimed at increasing transparency, with associated financial thresholds. In order to minimise workload for contracting authorities the intention is that these requirements are streamlined.</p>
43(1) and (2)	This allows the Welsh Ministers to issue guidance on all matters relating to Part 3 of the Bill, on Socially	This will allow for guidance on every aspect of Part 3 of the Bill to be issued and not only those listed in the following subsection. It may,

	<p>Responsible Public Procurement and to help contracting authorities in:</p> <ul style="list-style-type: none"> <li>• carrying out procurement in a socially responsible way;</li> <li>• setting objectives and taking all reasonable steps to meet them;</li> <li>• applying the social public works clauses, the social public workforce clauses and the public services outsourcing and workforce code; and</li> <li>• the preparation of procurement strategies and annual reports.</li> </ul>	<p>amongst other things, set out more detail on how a Procurement Investigation would work, for example on the evidence that might trigger an investigation and the process that would be followed.</p> <p>There will be detailed and clear guidance on what it means to carry out all procurement in a socially responsible way, seeking to improve the economic, environmental, social and cultural well-being of its area. Guidance will explain how this requirement should be scalable to procurements with different values and risk profiles. For the larger “prescribed contracts” advice will cover how to set appropriate objectives that are capable of being monitored or measured and reported.</p> <p>Guidance will include details of what needs to be considered in each category at the various stages of a procurement exercise. Stages include scoping of the requirement and procurement options, market testing, specification, preparing questions and tender documentation, preparing contract clauses, carrying out the contract, agreeing KPIs and contract and supply chain management.</p> <p>In each of the wellbeing categories various considerations will apply. For example:</p> <ul style="list-style-type: none"> <li>• In the economic well-being category consideration will be needed as to whether the requirement should be packaged to encourage smaller and</li> </ul>
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		<p>locally-based suppliers to bid for contracts or subcontracts, and methods for improving payment practices in supply chains</p> <ul style="list-style-type: none"><li>• In the social well-being category opportunities for improving the well-being of workers and service users, addressing equalities and risks of poor employment practices will be considered.</li><li>• In the environmental well-being category considerations relating to waste minimisation, decarbonisation, sustainable sourcing, climate resilience and enhancement of the natural environment and diversity will be included.</li><li>• In the cultural well-being category it is intended that guidance relating to opportunities for promoting the Welsh language will be set out.</li></ul> <p>These lists are not exhaustive.</p> <p>It will necessary to link statutory guidance developed for this Bill to other guidance developed to support the UK Procurement Reform legislation, and much existing guidance that is already in use.</p> <p>Clear links will also be made between this statutory guidance and the Wales Procurement Policy Statement.</p>
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		<p>Guidance will be developed to support the contract management duties for major construction projects and the application of the social public works clauses. This will explain how the clauses are to be applied, giving examples of processes that can be put in place to ensure delivery. Examples would include how audits and due diligence processes might be used to ensure compliance with employment law for workers in supply chains, use of sustainable materials, compliant disposal of waste.</p> <p>Guidance will set out practical details about sending a notification to Welsh Government if a contracting authority does not intend to include the clauses in a relevant procurement and put a process in place to ensure that they are implemented in supply chains. Further details of the notification process will be included and a mechanism developed for reporting the outcome.</p> <p>Similarly, a public services outsourcing and workforce Code will be produced to update the existing Workforce (Two-tier) Code, setting out how the new model clauses should be applied and practical details about sending a notification needs to Welsh Government, as well as details of the notification process.</p> <p>Guidance on the publication of procurement strategies will be developed, setting out what needs to be included and giving examples.</p>
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		<p>It is intended that guidance on the publication of annual reports will include details of data that must be collected and reported against each of the socially responsible procurement objectives set. Work has been underway on defining outcomes and metrics for procurement linked to well-being goals and this will feed into the statutory guidance.</p>
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Huw Irranca-Davies, Chair  
Legislation, Justice & Constitution Committee  
Senedd Cymru  
Cardiff Bay  
Cardiff  
CF99 1SN

17 October 2022

Dear Huw,

## **HISTORIC ENVIRONMENT (WALES) BILL**

Thank you for your letter of 20 September 2022. Given the technical nature of a number of the points raised, the Office of the Legislative Counsel has prepared a detailed response to those which I attach as an Annex.

There are a handful of matters which I am responding to directly:

- I am grateful to the Committee for drawing attention to a mistake, via question 22, in paragraph 2 of Schedule 7. This preserves any criminal liability arising under certain sections of the Bill while a building is subject to temporary listing or interim protection. Paragraph 2 of Schedule 7 should not mention liability under section 118, because section 118 does not apply to a building subject to temporary listing or interim protection. This is a matter I will seek to address at Detailed Committee Consideration if the Bill proceeds to that point.
- In question 79 you have asked about the effect upon existing powers; I can confirm the Government is content with the effect achieved by the Bill in this regard.
- Question 82 sought information about pre-introduction consultation. Cadw worked with a task and finish group composed of individuals drawn from across the historic environment sector. The nature of the interaction was that specific questions or the drafting was shared with the group to glean an understanding of how the provisions worked in practice or the extent to which the effect of the law remained unchanged. The exchanges were never intended to be made public.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

- Finally, on question 84, paragraph 23 of my letter of 17 August was not intended to refer to an absolute date, but rather towards a time when the Government felt it would be appropriate to seek agreement to further changes to Standing Orders. Both timeframes suggested by you, point towards an approach before summer recess.

I trust that the remainder of your questions are answered in the attached annex.

Yours sincerely,

A handwritten signature in blue ink, reading "Mick Antoniw". The signature is written in a cursive style with a horizontal line underneath the name.

**Mick Antoniw AS/MS**

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad  
Counsel General and Minister for the Constitution

*Monuments of special historic interest*

Question 1: section 2(3)

1. The power in section 2(3) of the Bill is in consequence of the change made in restating the opening words of section 61(8) of the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act), which appear in the opening words of section 2(3) of the Bill.
2. We are uncertain whether “*ecclesiastical*” in section 61(8) applies in relation to the Church of England only. It could have a broader meaning so that section 61(8) applies in relation to any religious building used for religious purposes.
3. “*Ecclesiastical*” is an expression used elsewhere in the 1979 Act in a context where it seems clear it is meant to be limited to the Church of England – see section 51, which deals with ecclesiastical property. But we consider this is not definitive in terms of accurately restating section 61(8) in a context where the legislation must be read so far as possible in a manner compatible with the rights contained in the ECHR. It’s also the case that section 60 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Listed Buildings Act) uses the expression in a way that seems clearly to have been intended to go beyond the Church of England.
4. Section 2(3) of the Bill restates section 61(8) in the way we consider is most likely to be Convention compliant (to avoid the potential of unjustified discrimination), subject to a power for exceptions to the general position to be specified by regulations. We did not find relevant case law on this particular point, so the position arrived at in the Bill involved a degree of speculation on our part. In *AG ex rel Bedfordshire County Council v Howard United Reformed Church Trustees* (1976) (which related to listed buildings), the House of Lords found it unnecessary and unwise to decide whether “*ecclesiastical buildings*” was confined to Christian buildings. In practice, buildings which might otherwise be scheduled but which have not been after considering section 61 of the 1979 Act are all Christian ones. It is necessary to have flexibility to make provision to ensure buildings which should be protected can remain protected, if that is appropriate.
5. Standing Order (SO) 26C.2(iv) permits the addition of this kind of safeguard: the Llywydd’s guidance on SO 26C specifically mentions the ECHR in the context of the kind of changes to the law might need to be made in a consolidation Bill.
6. The power to make supplementary etc. provision is commonly used to ensure the law operates effectively and covers provision for minor associated detail. See also the response to question 77.

Question 2: section 5

7. We have chosen not to restate section 1AA(6) of the 1979 Act to avoid including a provision that would never be used. This kind of omission is permitted by SO 26C.2(iii) on the basis the provision is of no practical utility or effect. We don’t think this

assessment is affected by the fact section 1AA(6) was added to the 1979 Act by amendment in 2016.

8. We are not aware of any other power to amend the list of consultees.
9. Cadw has no records of any complaints from people who say they should have been consulted on proposed schedulings or listings. Notices of consultation on proposed schedulings and listings are posted on Cadw's website.

Question 3: section 14(2), (4) and (5)

10. In restating provision about applying for scheduled monument consent, the view has been taken that the balance in the current law between what's addressed on the face of the primary legislation and what has been left to regulations ought to be changed. It is helpful for future users of the legislation to see more of the essential requirements of the system in the primary legislation, instead of having to look elsewhere. This objective guided our approach to sections 14(2), (4) and (5). For example, the specific information mentioned in section 14(2) would always be essential to a full consent application (rather than an application for minor works under section 14(4) and (5)) and it seems preferable to say so in the Bill, instead of in regulations. This also provides greater consistency with the material required for an application for listed building consent in section 90.
11. Sections 14(4) and (5) relate to the simplified consent process introduced by the Historic Environment (Wales) Act 2016 (the 2016 Act). These provisions are working well but future administrations may wish to specify additional cases where the simplified process applies.

Question 4: Schedule 6, paragraph 3

12. The change will affect participants in a local inquiry or hearing held prior to determining an application for scheduled monument consent, or a modification or revocation of a granted consent. Costs will only be granted if a person has behaved unreasonably during an inquiry or hearing and that behaviour has caused another party to incur unnecessary or wasted expenditure. These costs could be awarded against any participant, including Cadw, if behaviour is deemed unreasonable.
13. In its amended form Part 1 of Schedule 1 to the 1979 Act, if taken at face value, makes no provision about evidence and costs at local inquiries caused to be carried out by the Welsh Ministers. We think this is clearly an oversight, because in the absence of provision about these matters, the efficacy of those inquiries could be undermined. If this were a deliberate choice, it would also leave inquiries under Part 1 of the 1979 Act as the only example of an inquiry in that Act in respect of which provision for these matters hadn't been made. Paragraph 4(1) ought to have been applied in relation to the new provision inserted by the 2016 Act.

Question 5: section 21(5)

14. Section 7 of the 1979 Act makes provision for the payment of compensation on the refusal of scheduled monument consent under certain circumstances. Section 7(4) of the 1979 Act originally provided a person would be entitled to receive compensation

for the refusal of scheduled monument consent, even if proposed works would involve the total or partial destruction of a monument, if those works were for the use of the monument for the purposes of agriculture or forestry. Section 7(4A) was introduced by the 2016 Act as there was no evidence to support preferential treatment for agriculture or forestry under section 7(4). There is no record in Wales of any such claims for compensation associated with agriculture or forestry works. The power in section 7(4A) was proposed as a replacement for section 7(4) in Wales in case there were grounds to make any distinction as to the right to compensation for any purpose. In the intervening period, no evidence has been forthcoming to indicate refusal of scheduled monument consent for the total or partial destruction of a monument in the circumstances set out in section 21(3)(b) or (c) of the Bill warrant compensation.

15. There is no prospect of section 10 of the 2016 Act, which includes the prospective amendment of section 7 of the 1979 Act, being brought into force for the reasons set out above. These circumstances mean it is a change permitted by SO 26C.2(iii), and section 7(4A) is not restated on that basis.

Question 6: section 30(7)(b)

16. In revisiting section 2(8A) of the 1979 Act and the drafting of its predecessor – section 2(8) – it became clear the changes made by the 2016 Act had unintentionally altered the effect of the original defence. In the context of section 2, and this particular defence, a person’s knowledge before works have been carried out is relevant only in relation to having to prove steps had been taken with a view to finding out whether land contained a scheduled monument. The separate question of a person’s knowledge or belief ought to be a relevant factor throughout the process of planning and carrying out works for the purposes of the availability of the defence (as was clear before section 2(8) was amended). The alternative position is at odds with the public policy interest protected by the offences in section 2, because it would potentially offer a defence to a person who acquired knowledge of a scheduled monument’s position after works damaging the monument began.

Question 7: section 31(5)

17. In practice, Cadw would choose to serve copies of a temporary stop notice on occupiers of a scheduled monument, although not all occupiers would necessarily be considered to have an interest in the monument or land for the purposes of section 9ZI of the 1979 Act.
18. Section 171E(4) of the Town and Country Planning Act 1990 (the 1990 Planning Act), relating to temporary stop notices in respect of breaches of planning control, provides for notices to be served on an occupier as well as a person with an interest in the land. The provisions the 2016 Act inserted into the 1979 Act and the 1990 Listed Buildings Act do not make express provision for service on occupiers. That was because references to occupiers were thought to be unnecessary, rather than reflecting an intention occupiers should not be served. For the reasons given above, we now consider express references to occupiers should have been included.
19. SO 26C.2.(ii) is relevant in this context, because it permits clarification of the way the law operates in practice. Also relevant is ensuring consistency across the Bill between equivalent provisions, including provision that will be restated in the planning

consolidation project currently underway. For example, section 206 of the Bill (about service of documents) differentiates between occupiers and persons having an interest in monuments, buildings or other land.

Question 8: section 39(2)(c)

20. Section 9ZE(3)(c)(i) of the 1979 Act is at odds with the prohibition in section 2 on carrying out works affecting a scheduled monument (this prohibits works of repair or alteration). That's because it suggests works of repair or the provision of temporary support would be permitted without consent. Although there is a defence in section 2(9) relating to works carried out for health and safety in breach of section 2(1) or (6), this doesn't refer to the possibility of carrying out temporary repairs or support. This is in contrast to the position under section 8 of the 1990 Listed Buildings Act in relation to listed buildings. We think the provision included in section 9ZE(3) mistakenly replicated the position for listed buildings.
21. The dividing line between the different categories of change permitted by SO 26C isn't always clear. In this case, SO 26C.2(iv) is relevant because the Bill is correcting what appears to be a clear anomaly/error in the provision being restated.

Questions 9 and 17 - section 46(3) and 62(6)

22. It isn't immediately clear from the 1979 Act whether the expression "*employed as*" is referring to the contractual basis on which a person is acting as a caretaker, or whether it is a synonym for "*engaged as*" or "*acting as*".
23. What appears to matter for the purposes of the 1979 Act is whether a person is occupying a monument in the capacity of caretaker, not whether they're doing so under a particular contractual arrangement. This fits with our understanding of how this provision has been understood in practice (where the arrangements involving caretakers vary). We don't think the omission of the wording broadens the provision.
24. We think the change clarifies the application of the current law by removing ambiguity and is why we've relied on SO 26C.2(ii) and (iv).

Questions 10 and 11: sections 47(4) and 49(5)(a)

25. We consider the provision included on charging clarifies the current position but does not change it (hence relying on SO 26C.2(ii)). By virtue of being appointed guardian of a monument or associated land, a person has full control and management of the monument or land. We don't think there is any doubt this includes the power to charge for certain uses of the monument, as would be the case for other persons who have control or management of particular premises for other reasons.
26. While Cadw and local authorities have relied on the full control and management of monuments in guardianship the 1979 Act provides, relationships with the freeholders of guardianship monuments can be complex. Therefore, greater clarity on the powers regarding charging for the use of monuments is desirable.

Questions 12 to 15: section 55(4), 55(5), 55(5)(c) and 55(6)

27. On section 55(4):
- a. The powers available to local authorities under section 19 of the 1979 Act to legislate have been restated in a modified form: they've been restated as powers to make byelaws, not regulations. It's also the case the powers have been narrowed in terms of the range of things they might cover. This includes removing the requirement that the normal times of public access to monuments be controlled by regulations, so the issue will be addressed administratively by each local authority. This narrowing of the existing power could be viewed as the removal of a power to make regulations.
  - b. The change is a minor one relating to a matter of form; it reflects the way the rules on accessing monuments have been applied in practice and is consistent with modern drafting practice (it is very unusual for an issue of this nature to be addressed by subordinate legislation).
  - c. As such the Drafters' Notes refer to SO 26C.2(ii) and (iv).
28. Section 55(5) - this change reflects the way the provision in section 19 has been applied in practice, which is a type of change permitted by SO 26C. We referred to paragraph (iv) in acknowledgment of the fact we are changing the current law.
29. Section 55(5)(c) and 55(6) - we do not consider the drafting changes the current position; it clarifies what's already permitted, we think, by virtue of the Welsh Ministers or a local authority having control or management of a monument. The position in the 1979 Act isn't clear, though, because of the absence from section 19(2) of the Act of an acknowledgement of this connection. The drafting in the Bill has been included to clarify the basis on which current practice is carried out, and this is a change permitted by SO 26C.2(ii).
30. Controls on public access would be exercised on the basis of ownership, guardianship or general powers such as section 60 of the Government of Wales Act 2006 (GoWA 2006) or the equivalent in local government powers.

Question 16: section 56(1)

31. Under the 1979 Act, a range of matters were subject to regulations under sections 19(3) and (4) and contravention would be an offence incurring a fine. In practice, the Welsh Ministers would only make such regulations if they would prohibit or regulate behaviour that would damage the monument or disturb the public's enjoyment. Restating the provision in this way provides transparency and clarity about its intent.
32. The restated powers taken from section 19 reflect the way in which the system created by the 1979 Act has been applied in practice. The absence of any regulations made for Wales under that section suggests the power in its current form is not required in the Bill. This is a change considered to be permitted by SO 26.2(ii), but the reference in the Drafters' Notes to SO 26C.2(iv) is an acknowledgement of a change to the current law.

Question 18: section 64(1) to (3)

33. The 1979 Act predates Welsh devolution, and there are powers currently available to the Welsh Ministers under the Act that overlap entirely with the general powers available to Ministers under Part 2 of GoWA 2006. Our approach to restating section 45 was to omit any powers where that overlap existed. This is consistent with SO 26C.2(iii) – omitting provision that is unnecessary.
34. Our general approach to the powers of the Welsh Ministers is to omit provision from the restatement only where the same effect could be achieved using general powers, taking into account any controls over the way in which the powers in the 1979 Act are exercisable. Where the exercise of powers is conditional on meeting certain tests or subject to other express restrictions, the powers in the Bill are restated instead of relying on the functions conferred by GoWA 2006.

### *Buildings of special architectural or historic interest*

#### Question 19: section 76(1)

35. The duty to either compile lists of buildings or approve lists compiled by others was first imposed by the Town and Country Planning Act 1947, but in practice lists of buildings in Wales have always been compiled by or on behalf of Ministers.
36. Because the list of buildings has already been compiled and a systematic resurvey of Wales was completed in 2006, there is no need for approving lists compiled by others. The vast majority of Cadw's listings are now individual 'spot listings' triggered by requests from the public. While reports on specific categories of buildings appropriate for listing may be commissioned from time to time, candidate buildings would always be fully assessed by Cadw officers before inclusion in the list. In the circumstances, the power to approve lists of buildings compiled by others no longer has any practical utility.

#### Question 20: section 76(1)

37. When section 2(4) of the 1990 Listed Buildings Act was first enacted as section 11 of the Civic Amenities Act 1967, lists and amendments were kept on paper, but the list of buildings is now maintained electronically. There is no hard copy version of the entire list, which includes more than 30,000 buildings.
38. Replacing the duty to make copies available for inspection with a duty to publish the list is intended to reflect what the duty is understood to mean as a result of technological changes since 1967. It could also be described as omitting outdated requirements that no longer have any practical utility or effect.
39. Local authorities continue to provide access to list entries as described in section 77(4) and (5) of the Bill. If people have no access to the internet, they may obtain list entries directly from the relevant local authority or on request from Cadw. They may also access the online database in local libraries.
40. These arrangements are in addition to any other rights of access to information a person might have. But published information is likely to be exempt from disclosure under section 21 of the Freedom of Information Act 2000 on the basis it is already reasonably accessible to the person by other means.

Question 21: section 78

41. We are not aware of any other power to amend the list of consultees.
42. These consultation provisions have been in force since 2017. Since then Cadw has not identified any reason why it might be necessary to amend the list of consultees, because it already includes all the people it would be appropriate to consult. The power has been omitted under SO 26C.2(iii) because it has no practical utility. See also response to question 2.

Question 23: section 81(2) and (6)

43. The main change here is moving the grounds for reviews from regulations into the Bill, to reflect the importance of the provisions. Retaining the power to amend them (with an enhanced Senedd procedure because any regulations would now be amending primary legislation) preserves flexibility that already exists. The combined effect of these changes is to make the provisions more coherent and accessible without significantly altering their practical effect. It is appropriate to make the changes for the purposes of achieving a satisfactory consolidation.

Question 24: section 81(3) and (4)

44. Section 81 of the Bill reflects the effect of regulation 3 of SI 2017/644, with a power to make exceptions derived from paragraph 1(2) of Schedule 1B to the 1990 Listed Buildings Act. This does not change the substantive law but reflects the existing effect of paragraph 1 of Schedule 1B and regulation 3. The only change is in the status of the provision for all reviews to be carried out by appointed persons, which has been moved from secondary to primary legislation. This is considered appropriate to achieve a more coherent piece of legislation.
45. Since the Welsh Ministers are responsible for listing buildings, the use of an appointed person in designation reviews ensures a degree of independence and transparency, the need for which is unlikely to change in future.

Question 25: section 90(1)

46. Confirmed.

Question 26: section 90(2)(c)

47. Section 10 of the 1990 Listed Buildings Act could be read as assuming all applications are made to the local planning authority. The drafting of section 90 of the Bill, on the other hand, makes it clear some applications for listed building consent are made to the Welsh Ministers.
48. Just as planning authorities may have to go back to applicants for information to make sure they have all the relevant material for the purposes of a decision, so may the Welsh Ministers. We consider the existing provisions must be read as giving the Welsh Ministers a power to require further information where an application is made to them, and it is more helpful to set that out as an express power in the Bill.

Question 27: section 90(3)

49. Section 10(3)(a) to (ab) of the 1990 Listed Buildings Act provides regulations may make provision about the form and manner in which applications are to be made, the particulars of such matters as are to be included in such applications, and the documents or other materials which should accompany such applications. The Welsh Ministers and their predecessors have long provided forms for this purpose which are always used in practice. SI 2012/793 require applications to be made in writing to a local planning authority on a form published by the Welsh Ministers (or a form to substantially the same effect). Currently an application is made online using the 1App or using a copy of an application form issued by the Welsh Ministers.

Question 28: section 92(1)

50. Confirmed.

Questions 29 and 30: sections 92 and 95

51. The Committee and its predecessors have recommended provisions in various Senedd Bills conferring powers on the Welsh Ministers to give directions should be replaced with powers to make orders or regulations in the form of statutory instruments subject to Senedd procedure. (For example recommendations 8, 18 and 19 of the Committee's report on the Tertiary Education and Research (Wales) Bill.) The Welsh Government has not always agreed with the recommendations, for example if the directions in question apply only to specific bodies or cases, or if their effect is only minor and technical. However, the principle that general law-making powers conferred on the Welsh Ministers should usually be exercisable by statutory instrument, with an appropriate level of Senedd control, is well accepted.
52. Where a consolidation Bill is restating provisions that confer powers to make general provision of a legislative character in the form of directions, it may be appropriate to replace those powers with powers to make regulations by statutory instrument. The Llywydd's guidance to support the operation of SO 26C gives this as an example of the type of change that may be made to achieve a satisfactory consolidation under SO 26C.2(iv).
53. Whether such a change should be made needs to be judged on a case-by-case basis, taking account of the nature and scope of the provision that may be made in the directions and any practical difficulties the change might cause. In the case of the powers restated in sections 92 and 95 of the Bill, the powers to give directions of general application have been replaced with powers to make regulations and countervailing considerations in favour of retaining directions have not been identified.

Question 31: section 95(7)

54. The examples in section 95(7) provide an indication of some of the more significant types of provision that could be made (and have already been made) in directions. They provide helpful clarification by making it easier for the reader to understand how the power is likely be used.

### Question 32: section 98

55. Section 51 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) would change the default period within which development authorised by planning permission and works authorised by listed building consent or conservation area consent must begin. The change has not been brought into force in Wales. It was enacted for England and Wales by an Act of the UK Parliament passed before the Senedd had legislative powers; there was no evidence a reduction in the timescale was needed in Wales, and no reduction has proved to be necessary since 2004.
56. For planning permission, the changes made by section 51 were reversed by section 35 of the Planning (Wales) Act 2015 (which also made other changes to the law) because they were no longer considered appropriate.
57. We consider section 51 of the 2004 Act is no longer of practical utility for the purposes of SO 26C.2(iii).

### Question 33: section 98(3)(b)

58. The provision moved from SI 2021/1177 into the restatement of section 18 of the 1990 Listed Buildings Act specifies a type of consent to which section 18 does not apply. It is a provision narrowing the effect of primary legislation, and it is appropriate for it to appear in the primary legislation.
59. Section 18(3) already specifies another type of consent to which the section does not apply. Moving the provision from the 2021 Regulations into the section means these provisions appear in one place, giving a more coherent statement of the law.

### Question 34: section 99(3)

60. Section 99(3) restates section 19(3) of the 1990 Listed Buildings Act with two changes to the list of provisions that apply to applications to vary or discharge the conditions of listed building consent or conservation area consent:
  - a. Firstly, section 99(3) applies section 93 of the Bill, which restates section 81A of the 1990 Listed Buildings Act about refusing similar applications. Section 81A is inserted by section 43 of the 2004 Act, which does not amend section 19 of the 1990 Listed Buildings Act to apply section 81A to applications to vary or discharge conditions. This seems anomalous given all the other provisions about dealing with applications for consent are applied to applications to vary or remove conditions, and the wording of section 20(2)(aa) of the 1990 Listed Buildings Act (also inserted by section 43 of the 2004 Act) might imply section 81A is thought to apply to those applications. No reason has been identified for not applying section 81A. It may have been overlooked because the corresponding amendments section 43 made to the 1990 Planning Act did not need to deal with applications to vary or remove conditions (planning conditions are varied or removed by applying for a new planning permission).
  - b. Secondly, section 99(3) excludes the provisions in section 90 relating to heritage impact statements. Such statements are not provided with applications for the

variation or removal of conditions. Section 99(3) of the Bill changes the powers of the Welsh Ministers, by omitting the power to require a statement to be provided with an application under that section. There would never be any need for a statement with an application for variation or removal of conditions, because such an application will have no impact on the content of a heritage impact statement.

Question 35: section 99

61. This amendment was also made by the 2004 Act. There was no evidence this was an issue in Wales needing to be addressed by legislation.

Question 36: section 100(4)

62. It is anomalous the period after which an appeal may be brought under section 20(2) of the 1990 Listed Buildings Act is set out in different places for different cases. Removing that difference results in more coherent legislation.
63. Setting the period after which an appeal may be made in regulations is consistent with the approach for planning appeals in section 78(2) of the 1990 Planning Act, and with the fact the period within which appeals may be brought is set by subordinate legislation under both 1990 Acts. Consistency between the two Acts is particularly desirable because most works requiring listed building consent also require planning permission; applications under both Acts are often required.
64. There is not currently a power to amend the 8-week period for determining an application for consent specified in section 20(3)(b) of the 1990 Listed Buildings Act, so it has not changed. The 8-week period prescribed under section 20(3)(a) is currently set out in regulation 3(5) of SI 2012/793 (the same period was specified in regulation 3(4) of SI 1990/1519).
65. Although there are no current plans to change the periods set by SI 2012/793, it is possible changes might be considered in future. In the planning context, the 8-week determination period is extended if an application is amended (see article 22 of SI 2012/801). Different determination periods have been set for applications requiring an Environmental Impact Assessment (see regulation 61 of SI 2017/567) and for various other types of application in England (see article 34 of SI 2015/595). Any proposal to make regulations under section 100(4) of the Bill changing the determination period for any type of application would be subject to consultation.

Question 37: section 102(2)

66. Section 21(4B) of the 1990 Listed Buildings Act requires regulations to provide for an application which is varied "*to be subject to such further consultation as the Welsh Ministers consider appropriate*". Regulation 12B(2) of SI 2012/793 was made under this power and repeats the wording of the power without adding anything. The requirement has been moved on to the face of the Bill, rather than being left to regulations, to avoid this unnecessary duplication; a minor change made to achieve a satisfactory consolidation under SO 26C.2(iv).

67. It is not entirely clear from the wording of the current provisions how the Welsh Ministers are to indicate what consultation they consider appropriate, or who will carry it out. The provision for the Welsh Ministers to “*direct*” further consultation is intended to give a clearer flavour of how the provision operates in practice, relying on SO 26C.2(ii).
68. Neither of these changes involve replacing the power to make regulations in section 21(4B) with a power to give directions.

Question 38: section 105

69. No modifications have ever been made under section 82(1) of the 1990 Listed Buildings Act, and Cadw has been unable to identify any modifications that might need to be made. The power is omitted on the basis it has no practical utility.

Question 39: section 105(1) and (2)

70. Sections 82 and 82F of the 1990 Listed Buildings Act contain wording that is unclear, incorrect and too wide. The lack of clarity relates to the types of applications to which the sections apply; the incorrect and excessively wide wording relates to the provisions that may be modified under them.
71. The main clarification made in section 105 is that subsection (2) lists the types of application to which it applies, adopting the terminology used elsewhere in Part 2 of the Bill. Section 82(2) of the 1990 Listed Buildings Act refers to applications “*relating to the execution of works for the demolition, alteration or extension of listed buildings,*” which requires more effort to work out which applications are covered. Section 82F of the Act only mentions applications for consent, but it must also be intended to apply to applications to vary or remove conditions or obtain approval under a consent. Section 105(2) of the Bill makes this position clear.
72. The list of provisions that may be modified in section 82(3) of the 1990 Listed Buildings Act is incorrect. Modifications under section 82(2) must relate to applications, but the list of provisions in section 82(3) includes provisions that have nothing to do with applications while not including some sections about applications (such as section 81A and 88E, added by later legislation which did not amend section 82). The power in section 82F is too wide. It allows modifications of provisions “*contained in or having effect under any enactment*” but the provisions about applications are all made in or under the 1990 Listed Buildings Act and the 1990 Planning Act and are all restated in the Bill. Section 105(1) avoids these problems by conferring a power to exclude or modify “*any provision made by or under this Act*”. The modifications will have to relate to applications, so the regulations will only be able to affect provisions relevant to applications.
73. There is no change of Senedd scrutiny procedures. Regulations under sections 82 and 82F of the 1990 Listed Buildings Act are subject to negative procedure (see section 93(3) of that Act). Regulations under section 105 of the Bill are subject to negative procedure (see section 209(6)).

Question 40: section 105(3)

74. Sections 82 and 82F of the 1990 Listed Buildings Act both confer broad powers to modify provisions. Section 82(4) gives two examples of specific modifications that may be made whereas section 82F does not. Nevertheless, we consider both types of modification would be within the power conferred by section 82F.
75. Section 105(3) of the Bill is not giving the Welsh Ministers a new power they do not have under section 82F of the 1990 Listed Buildings Act. But if section 105(3) only stated it applied to applications by planning authorities, that would be misleading as it might imply the power from section 82F was being narrowed.
76. Provision for the Welsh Ministers to decide an application under section 82(4)(a) of the Act could include provision for them to give notices relating to the application that would otherwise be given by the planning authority. We cannot identify any other way the power to provide for the Welsh Ministers to serve notices in section 82(4)(b) could be used in relation to applications. It is omitted under SO 26C.2(iii) as having no practical effect or utility.
77. On further consideration, we do not consider it is necessary to rely on SO 26C.2(iv) for either of these changes. The Drafters' Notes will be updated in due course to omit the reference to paragraph (iv).

Question 41: section 109(6)

78. Section 32(4) of the 1990 Listed Buildings Act requires that, in determining whether a building or land is capable of reasonably beneficial use, no account is to be taken of a prospective use involving certain types of development of land or any works requiring listed building consent.
79. Section 32(4) requires a use to be ignored if it would involve development "*other than any development specified in paragraph 1 or 2 of Schedule 3 to the principal Act*". The development specified in Schedule 3 to the 1990 Planning Act consists only of the redevelopment and subdivision of buildings. Almost identical provision is made by section 138 of the 1990 Planning Act in relation to purchase notices under that Act.
80. The courts have considered the effect of the reference to Schedule 3 in section 138 of the 1990 Planning Act, and have held Schedule 3 is irrelevant to the question of whether land has any reasonably beneficial use: see *Gavaghan v Secretary of State for the Environment* (1988) 59 P&CR 124, [1989] 1 PLR 88; *Hudscott Estates (East) Ltd v Secretary of State for the Environment, Transport and the Regions* (2001) 82 P&CR 8, [2001] 2 PLR 11; and paragraph P138.03 of the *Encyclopedia of Planning Law and Practice*.
81. The uses of land to be ignored under section 138 are those requiring a grant of planning permission: see *R (Stafford Borough Council) v Secretary of State for Communities and Local Government* [2011] EWHC 936 (Admin).
82. Section 109(6) of the Bill restates section 32(4) on the basis of the caselaw in relation to section 138.
83. These changes are clarifying the effect the courts have held section 138 to have, in reliance on SO 26C.2(ii). The removal of the reference to Schedule 3 to the 1990

Planning Act could also be described as omitting wording that no longer has any practical effect under SO 26C.2(iii).

84. Section 32(4) refers to cases where there has been an undertaking to grant listed building consent but not to cases where an undertaking has been given to grant planning permission. We cannot identify any reason for this difference. Section 109(6) removes this anomaly by including a reference to an undertaking to grant planning permission, relying on SO 26C.2(iv).

Questions 42 and 43: Schedule 9, paragraphs 1(7) and 4(7)

85. We are unable to identify any reason why the 1990 Listed Buildings Act would have deliberately changed the position relating to withdrawal of notices to treat. The changes the Act made deliberately were those recommended by the Law Commission in its *Report on the Consolidation of Certain Enactments Relating to Town and Country Planning* (Cm 958, February 1990). The report did not suggest any changes in relation to the withdrawal of notices to treat.

Question 44: section 113(6) and (7)

86. Section 26L(6) of the 1990 Listed Buildings Act states an agreement “*may contain provision... granting listed building consent ... and specifying any conditions to which the consent is subject*”. The most obvious and sensible reading of the provision is that any conditions must be included in the agreement, since otherwise they will not be recorded. This is how the provision is understood in practice, but the wording has been adjusted in section 113(7) of the Bill to avoid any doubt.

Question 45: section 125(4)

87. Section 125(4) of the Bill makes explicit that which is already implied in section 38(6) of the 1990 Listed Buildings Act. Section 38(6) requires notice of the withdrawal or variation of an enforcement notice to be served on every person who has been served with a copy of the notice or would, if the notice were re-issued, be served with a copy. In our view, this means section 38(6) applies only if the enforcement notice has been served, and the reference to people who would be served if the notice were reissued relates to cases where the ownership or occupation of the building has changed since copies of the notice were served. We are not aware of any scenario in which a notice of withdrawal or variation would need to be served if copies of the original enforcement notice had not been served.
88. We are not aware of any issues relating to the interaction between the provisions about when enforcement notices take effect and the powers to vary or withdraw them.

Question 46: section 128(3)(b)

89. We cannot say what “*limitation*” means in section 41(6)(b) of the 1990 Listed Buildings Act, because there is no provision for listed building consent to be granted subject to limitations. The 1990 Planning Act does refer to both conditions and limitations of planning permission, but even in that Act the distinction is problematic. The Law Commission has recommended abolishing it (*Planning Law in Wales*, recommendation 8-9).

90. We think the reference to “*limitations*” in section 41(6)(b) of the 1990 Listed Buildings Act was a mistake, and the only effect of correcting the mistake is to remove superfluous wording. In the Town and Country Planning Act 1971, section 88 about appeals against planning enforcement notices referred to conditions and limitations, while section 97 about appeals against listed building enforcement notices referred only to conditions. The erroneous reference to limitations in the provisions about listed building enforcement notices derives from the Schedule to the Local Government and Planning (Amendment) Act 1981, which replaced sections 88 and 97 of the 1971 Act with new provisions. It is possible that the provisions about listed buildings cases were drafted by adapting the provisions about planning cases, but that not all the necessary adaptations were made.

Questions 47 and 48: sections 130 and 132(2), (3), (7) and (8)

91. Section 42(3) of the 1990 Listed Buildings Act confers a power to apply certain sections of the Public Health Act 1936 (the 1936 Act) with modifications. That is currently done by regulation 15 of SI 2012/793. To understand the position, a reader must therefore consult section 42, regulation 15 and the 1936 Act. In the Bill, section 130 restates the effect of those provisions in one place, for the purposes of achieving a satisfactory consolidation.
92. Section 42(4) specifies a particular purpose for which modifications of section 289 of the 1936 Act may be made. No modifications have been made for that purpose, and Cadw have not identified any that might be needed. That power is therefore omitted from the Bill as having no practical utility. The Drafters’ Notes should have cited SO 26C.2(iii) for this omission and will be updated in due course.
93. Section 178 of the 1990 Planning Act contains identical powers. Recommendation 18-13 in the Law Commission’s report *Planning Law in Wales* was to restate those provisions in primary legislation, and is equally applicable to section 42 of the 1990 Listed Buildings Act.

Question 49: section 132(5)

94. Section 132(5) and (6) of the Bill do not involve a change of policy. Regulation 15(2) of SI 2012/793 is moved into the Bill for the purposes of achieving a satisfactory consolidation. Dealing with this issue in primary legislation is consistent with section 55(5C) of the 1990 Listed Buildings Act, restated in section 146(3) of the Bill.

Question 50: section 132(7) and (8)

95. Section 276(3) of the 1936 Act is a surprising provision because it is hard to see why the power to sell materials, or the duty to account to the owner for the proceeds of sale, should be subject to an exception for “*refuse*” (which we would now call “*waste*”). We think the exception made sense in the context of the 1936 Act as originally enacted and may still be relevant in relation to waste collection, but it does not fit the context where section 276 is applied for the purposes of other Acts.
96. Sections 72 and 73 of the 1936 Act gave local authorities functions of collecting domestic and trade refuse. Section 76(2) gave them a power to sell refuse they

removed, without any duty to account for the proceeds. Section 276 of the 1936 Act says it applies wherever an authority removes any materials from any premises and it includes a duty to account to the owner in section 276(2). Section 276(3) makes provision for the relationship between sections 76(2) and 276(2).

97. This issue does not arise where a planning authority enters land to do works required by an enforcement notice. So the omission of section 276(3) is justified under either of paragraph (iii) or (iv) of SO 26C.2.
98. SI 2012/793 followed the approach taken in earlier regulations. It may have been considered unnecessary to expressly disapply section 276(3) or it may have been an oversight.
99. We concluded we were unable to add any words to section 132(8)(b) to clarify which costs may be recovered from an owner of materials, or how they may be recovered. Any change to the position of owners of materials who do not also own the land might also raise policy questions that would require further consideration.

#### Question 51: section 136(4)

100. Section 52(1) of the 1990 Listed Buildings Act gives planning authorities the power to acquire buildings by agreement. Subsection (2)(b) says it applies to acquisitions under subsection (1), but it purports to modify the Compulsory Purchase Act 1965 for the situation where land is acquired by Ministers or statutory undertakers. That is a completely different situation that cannot arise under subsection (1).
101. Section 52(2)(b) restated section 132(4)(c) of the Town and Country Planning Act 1971. This is a general provision modifying the 1965 Act in relation to all the cases to which it was applied by Part 6 of the 1971 Act, which contained a wider range of powers to acquire land (including the powers restated in Part 9 of the 1990 Planning Act as well as those restated in Chapter 5 of Part 1 of the 1990 Listed Buildings Act). Even if section 132(4)(c) was relevant to acquisitions under any of those other powers, it was not relevant to the power for certain local authorities to acquire listed buildings by agreement and should have been omitted from the 1990 Listed Buildings Act.
102. So far as it refers to statutory undertakers, the provision should not have been restated in the 1971 Act either. Although the Town and Country Planning Act 1962 had contained provisions under which statutory undertakers could be authorised to acquire land, those provisions were repealed by the Town and Country Planning Act 1968.

#### Question 52: section 151

103. Drafting was shared with Cadw's task and finish group and no issues were raised. The 'special' interest of a listed building is a well-established consideration in the assessment of its significance, whereas 'outstanding' is not a term regularly used in such evaluations.

#### Question 53: section 152(4)

104. The 2016 Act amended both the 1979 Act and the 1990 Listed Buildings Act to insert powers to issue temporary stop notices, with associated powers of entry. The powers inserted into the 1979 Act included in section 9ZJ(a) an express power to enter land to ascertain whether a temporary stop notice should be served, while those inserted in section 88(3A) of the 1990 Listed Buildings Act did not. Restating both sets of provisions in one Bill has focussed attention on this drafting difference and on the question of whether different powers were intended. There is no reason for the powers to be different, and the failure to include the same power in the 1990 Listed Buildings Act as in the 1979 Act is thought to have been an oversight.
105. There are already powers in both Acts (which are also restated in the Bill) to enter land to investigate whether works are being carried out without consent or in breach of a condition of consent. Those powers could be used to assess whether the first condition for issuing a temporary stop notice had been met, but not to consider the second condition, which is whether works should stop immediately. We consider the addition of an express power covering that second condition to be a minor change it is appropriate to make in the interests of achieving a satisfactory consolidation.
106. The 2016 Act amended both Acts to insert express powers to enter land to consider claims for compensation relating to temporary stop notices, but both Acts also include general powers to enter land to survey or value it in connection with a claim for compensation (in section 43 of the 1979 Act and section 88(4) of the 1990 Listed Buildings Act, also restated in the Bill). The specific powers duplicate the general ones and they have been omitted from the Bill as unnecessary.

Question 54: section 152(9)

107. As explained in the Drafters' Notes, the repeal made by the Planning and Compensation Act 1991 resulted in a difference between the powers to enter land in the 1990 Listed Buildings Act (which do not include a power to bore to determine the presence of minerals) and those in the other planning Acts and the 1979 Act (which do). The difference appears to be an anomaly and we have been unable to identify any reason for it.
108. Schedule 3 to the 1991 Act amended the 1990 Listed Buildings Act by inserting more detailed provisions about the exercise of powers of entry, as well as repealing the reference to minerals in section 88(6). That Schedule was added to the Planning and Compensation Bill without any debate in Parliament.
109. We do not think reinstating the reference to minerals is a significant extension of the powers in section 88 of the 1990 Listed Buildings Act, which already include boring to determine the nature of the subsoil.

Question 55: section 155(5)

110. No time limit is specified for claiming compensation under section 88B(7), leaving the position unclear, but it cannot be the case the entitlement to make a claim lasts forever. Compensation claims for damage related to the exercise of powers of entry must be made in a timely manner so that evidence of damage can be presented.

111. Section 9 of the Limitation Act 1980 sets a 6-year limitation period for claiming any "*sum recoverable by virtue of any enactment*". That limitation period may apply to compensation under section 88B(7) of the 1990 Listed Buildings Act, and is obviously very different from the 6-month limitation periods for all other compensation claims under the legislation consolidated in the Bill.
112. The failure of the 1990 Listed Buildings Act to provide for a time limit for claiming compensation under section 88B(7) is clearly an anomaly – and it is interesting to note Cadw have no records of a claim being made. A 6-month time limit was included in section 155(5) of the Bill for consistency with the other compensation provisions, in the interests of achieving a satisfactory consolidation. This is not a change of policy but involves correcting an anomaly by bringing claims under section 155(5) within the same general policy applying to all time limits for compensation claims under the Bill.

Question 56: section 156(1)

113. Drafting was shared with Cadw's task and finish group, which contained representatives of exempt denominations and local authorities, and no issues were raised. The current legal position, set out in the 1990 Listed Buildings Act and SI 2018/1087, has been criticised by users as complicated and confusing.
114. Section 60 of the Act gives the false impression all ecclesiastical buildings used for ecclesiastical purposes are exempt, when the effect of SI 2018/1087 is the exemption is relatively narrow. If the default position in primary legislation is reversed and regulations are made conferring the same exemption as SI 2018/1087, the result will be clearer and simpler legislation. In that respect, section 156 of the Bill helps to clarify the law under SO 26C.2(ii).
115. The change of approach in section 156 could also be seen as moving the general provision that ecclesiastical buildings are not exempt, currently set out in article 3 of SI 2018/1087, onto the face of the Bill. Moving the provision from secondary to primary legislation could be described as a minor change appropriate to make for the purposes of achieving a satisfactory consolidation under SO 26C.2(iv).

Question 57: section 156(3)(e)

116. There are no modifications of the 1990 Planning Act in SI 2018/1087, or in SI 1994/1771 which it replaced. Furthermore, most of the provisions of the 1990 Planning Act relevant to listed building consent are restated in the Bill and could still be modified under section 156(3)(e). Insofar as section 60 confers a power to modify other provisions of the 1990 Planning Act, it is no longer of practical utility.

Question 58: section 157

117. The definition of "*local authority*" in section 157 of the Bill applies to the references in sections 144 to 147, 152(6), 170, 171, 177(4), 183(7)(c), 197 and Schedule 9. (Other provisions confer functions on a narrower range of local authorities or on planning authorities.) Where those provisions give functions to local authorities, National Park authorities have the functions to the same extent as under the original legislation.

118. Wherever the 1990 Listed Buildings Act refers to a local authority and relies on the general definition of that term in the 1990 Planning Act, National Park authorities are also included, by virtue of provisions inserted by paragraphs 32(11) and 33 of Schedule 10 to the Environment Act 1995 or glossing provisions in paragraph 2(4) of Schedule 8 and paragraph 13 of Schedule 9 to the 1995 Act.
119. Section 177 of the Bill restates provisions from section 250 of the Local Government Act 1972 about evidence at local inquiries. They include a provision that a person may not be required to produce the title of land which does not belong to a local authority. In the 1972 Act, "*local authority*" does not include a National Park authority, but since National Park authorities exercise all the functions of planning authorities and local authorities in relation to historic buildings and conservation areas, it does not seem appropriate to treat them differently from other authorities in this context, so section 177 relies on the general definition of "*local authority*" in section 157.

### *Conservation areas*

120. It is worth reiterating the Government has aimed to restate the existing legislation so as to 'tell the story' in the clearest, most certain, way. In doing so, judgments have been made about which matters need to be set out expressly and which can be assumed. In some cases, different judgments have been made from the drafters of the existing legislation, for example because existing provisions do not reflect modern drafting practice. However, the approach of applying listed building provisions with modifications has been retained to avoid repetition and damaging the overall accessibility of the legislation.

### Question 59: section 158

121. The reason for omitting section 69(2) of the 1990 Listed Buildings Act is not that it is implicit. It is omitted because, rather than making express what section 69(1) implies, we think it duplicates what section 69(1) has already expressly said in different words, namely the duty to designate is an ongoing one. In such a case duplication leads to confusion about what the respective provisions mean.
122. By contrast, the inclusion of section 158(2) of the Bill fills in a chronological gap in the story: it is helpful to set out planning authorities may vary or cancel designations before setting out authorities must notify the Welsh Ministers when they have done the varying or cancelling.
123. Section 69(3) of the 1990 Listed Buildings Act is omitted as the Welsh Ministers' have never used their power to designate conservation areas. Planning authorities are, through their local knowledge, better placed to exercise this function. There is no reason to think this will change in future.

### Question 60: section 161

124. There is no expectation of the ecclesiastical exemption being reapplied in relation to conservation area consent. The cases to which the exemption, if reapplied, would be capable of applying would be rare (because demolition would nearly always be inconsistent with ongoing use of a building for religious purposes, and where religious use cannot continue after the works, the exemption cannot apply).

125. On the second part of the question, religious use might be able to continue in a new building on the site, but that would not be relevant to the ecclesiastical exemption (if it were reapplied in future).

Question 61: section 161(2)(c) and (d)

126. To the extent the existing power of direction enables provision to be made which will effectively alter the conservation area regime across Wales, the Welsh Ministers consider it is more appropriate for that to be subject to Senedd scrutiny. Section 161 provides the power must now be exercised by regulations. This is a change to the existing law: section 75(1)(d), (2) and (3) of the 1990 Listed Buildings Act enable the Welsh Ministers to make general directions (not regulations). We consider this is appropriate for the purposes of achieving a satisfactory consolidation. See also response to questions 29 and 30 above.

Question 62: section 163

127. Moving modifications of provisions as they apply in relation to conservation area consent from regulations into primary legislation is a minor change to the current law; we are restating modifications that have already been made. But we think this change significantly improves accessibility. The fact many listed buildings provisions apply in modified form to conservation areas is an important matter, and it is more accessible to have the modifications set out in the conservation area part of the primary legislation than to oblige readers to locate those modifications in separate regulations.

128. The change in the applicable Senedd procedure is a consequence of moving the existing modifications into primary legislation: in order to preserve the Welsh Ministers' power to make modifications in future, it is necessary to provide a power to amend primary legislation.

Question 63: section 163(1)(c)(i) and (2)(d)

129. There is no intention to grant new powers of entry. Instead the intention is to state more clearly the powers of entry we consider must already apply in relation to conservation area consent. We cannot think of a reason why Parliament would have intended powers of entry to apply in the context of the listed building consent regime but not the conservation area consent regime; and we think the references in section 88 of the 1990 Listed Buildings Act to other sections of that Act would be read as including references to those sections as applied by section 74(3). But mentioning sections 88 to 88C in section 74(3) would have made it clearer they are intended to apply in relation to conservation area consent. That is the point now clarified in section 163(1)(c)(i) and (2)(d) of the Bill.

Questions 64 and 65: sections 165(1) and 166(3)

130. Although some existing legislation includes express powers to make grants subject to conditions, we consider such provisions reflect the position that would exist in the absence of express provision. Where a public authority has the power to make grants, it must follow there is a power to include conditions in a grant agreement, and it is hard to imagine a grant being made without any conditions. As such it is unnecessary

to say the grant may be made subject to conditions, and the provisions to that effect are omitted in reliance on SO 26C.2(iii). In addition, sections 165 and 166 both make provision about the effect of breaching conditions of a grant, so it is obvious conditions may be imposed. On the other hand, in section 148(6) it was appropriate to state more directly conditions could be included, to introduce the specific example of conditions relating to public access.

*Supplementary provision about buildings of special interest and conservation areas*

Questions 66: section 169(6)

131. The list of functions to which paragraph 7 of Schedule 4 to the 1990 Listed Buildings Act applies includes all the functions of planning authorities relating to temporary listing and listed building consent, but only some functions relating to enforcement and none relating to heritage partnership agreements (HPAs). We think this is because the list of functions was not updated correctly when the Act was amended by subsequent legislation.
132. Paragraph 7 (of Schedule 4) applies to functions under sections 38 and 42 relating to issuing enforcement notices and doing works required by those notices. It also refers to functions under section 44D, as inserted by the 2016 Act, which is about compensation for loss caused by a temporary stop notice. In the context, it is clear the reference should have been to the power to issue a temporary stop notice under section 44B. Paragraph 7 does not mention the function of applying for an injunction under section 44A, which was inserted by the Planning and Compensation Act 1991, but we cannot identify any reason why it should apply to all enforcement functions except that one. The most likely explanation is that the need to add a reference to section 44A was missed in the drafting of the 1991 Act.
133. Paragraph 7 should apply to an authority's functions relating to HPAs, just as it applies to their functions relating to applications for listed building consent, because HPAs can grant listed building consent. The question of how the 1990 Listed Buildings Act should be modified in relation to HPAs was considered in the drafting of SI 2021/1177, but the need to apply paragraph 7 of Schedule 4 was missed.

Questions 67: section 171(3)

134. Section 90(1) and (3) of the 1990 Listed Buildings Act both apply where compensation is paid by a local authority because of things done under the provisions in Chapters 1 to 4 of Part 1 of that Act about listing, consent, purchase notices and enforcement. Subsection (1) specifically mentions Schedule 3 (about the determination of appeals), whereas subsection (3) does not. It is hard to see what a local authority could do under Schedule 3 that could give rise to a claim for compensation; and in any case Schedule 3 should already be covered by the references to Chapters 2 and 4 of Part 1 of the Act.
135. Both subsections mention things done under section 60 (the ecclesiastical exemption) even though that section only disapplies other sections rather than conferring any functions on local authorities.
136. Subsection (3) refers to things done under section 56, which does not confer any functions apart from a duty to consider whether to exercise other functions, and under

section 59, which does not confer any functions at all. It also refers to section 66(1), which is a duty to have regard to certain matters when exercising functions under the 1990 Planning Act, which contains its own financial provisions. And it refers to sections 67, 68 and 73, which are not restated in the Bill.

137. In other words, wherever either subsection refers to a provision not mentioned in the other subsection, the reference is either incorrect or unnecessary.

Questions 68: section 174(7)

138. At present there is a gap in the provisions for urgent Crown applications. Section 82B(11) provides section 12(4) applies to an urgent Crown application in the same way it applies where a direction is given under section 12, which originally meant the applicant and planning authority had a right to be heard by an appointed person. But SI 2014/2773 amended section 12 so subsection (4) no longer applies in Wales.

139. The Welsh Ministers have no record of having dealt with an application relating to urgent works on Crown land.

Questions 69: section 184(2)

140. Section 62(1) of the 1990 Listed Buildings Act provides the decisions listed in subsection (2) cannot be questioned in any legal proceedings except as provided in section 63. Those decisions include a decision on an enforcement appeal granting listed building consent or discharging a condition of a consent. Section 62(1) means a challenge to such a decision can only be made by applying for statutory review under section 63 and not by appealing under section 65.

141. In considering the corresponding provisions of the 1990 Planning Act, the courts have held a challenge to a decision on an enforcement appeal granting planning permission, or discharging a condition or limitation of permission, must be made by applying for statutory review, but a challenge to any other decision on such an appeal must be brought by making an appeal to the High Court (*Jarmain v Secretary of State for the Environment, Transport and the Regions* [2002] 1 PLR 105; *R (Wandsworth Borough Council) v Secretary of State for Transport, Local Government and the Regions* [2004] JPL 291; *Oxford City Council v Secretary of State for Communities and Local Government* [2007] 2 P&CR 29).

***General provisions***

Question 70: section 197(3)

142. We've not taken a view as to whether the approach adopted to the issue by the 1979 Act was deliberate, but the absence of a clear deadline seems undesirable in the context of an offence of failing to give information. Because we've rationalised similar but slightly different powers to require information from separate Acts into a single Bill, it's been necessary to make judgments about how to address inconsistencies between the relevant legislation. In this instance, the silence in the 1979 Act on this point isn't consistent with modern drafting practice and is undesirable for the reason given above about criminalising failures to comply with a notice.

Question 71: section 200

143. The issue here arises because the offences in section 59 of the 1990 Listed Buildings Act originally existed outside the Town and Country Planning Acts, in section 3 of the Civic Amenities Act 1967. The 1967 Act made some amendments to the Town and Country Planning Act 1962, but section 3 was a free-standing provision. Neither the 1962 Act nor the 1967 Act included any provision about the situation where an offence is committed by a corporation. The Town and Country Planning Act 1968 did make provision about that situation, but only for offences under the 1962 Act and the 1968 Act, not the offences in section 3 of the 1967 Act.
144. Subsequent consolidations have preserved this position, but we cannot identify any reason why the provision about offences committed by corporations in the 1968 Act should not have been applied to the offences in section 3 of the 1967 Act. We think it should have been applied to those offences, given it applied to all the other statutory offences relating to listed buildings. It seems likely the failure to apply it was an oversight in the drafting of the 1968 Act.

Question 72: section 201

145. The new offences inserted into existing Acts by the 2016 Act were the offences of breaching a scheduled monument enforcement notice and breaching a temporary stop notice (in relation to a scheduled monument or listed building). The offence of breaching a listed building enforcement notice was already included in the 1990 Listed Buildings Act and was therefore a “*relevant offence*” for the purposes of the Regulatory Enforcement and Sanctions Act 2008 (the 2008 Act), as were all the other offences relating to unauthorised works and causing damage to scheduled monuments or listed buildings. As explained in the Drafters’ Notes, the need to apply Part 3 of the 2008 Act to the new offences inserted by the 2016 Act was missed during the drafting of the Historic Environment (Wales) Bill 2015.
146. The other offences in the current Bill to which Part 3 of the 2008 Act does not already apply are those in sections 177 and 197 and paragraph 2 of Schedule 6 relating to the provision of information. Again, it would seem anomalous to exclude those offences from section 201 given all the other offences that are restated in the Bill, including offences relating to the provision information with applications for consent, are “*relevant offences*” for the purposes of Part 3 of the 2008 Act.
147. These changes are made for the purposes of achieving a satisfactory consolidation under SO 26C.2(iv). On further consideration, SO 26C.2(ii) is not relevant and the Drafters’ Notes will be updated in due course.

Question 73: section 203

148. Section 31(4) and (5) of the 1990 Listed Buildings Act are subject to “*the provisions of any regulations made under this Act,*” but it is not completely clear whether this is referring to regulations under powers set out elsewhere in the Act, or it is conferring separate powers to modify those subsections. In any event, no regulations have been made to limit or exclude the operation of section 31(4) and (5), and we cannot envisage any scenario in which they would be made. Insofar as section 31(4) and (5) are conferring

separate regulation-making powers, they are no longer of any practical utility for the purposes of SO 26C.2(iii).

149. It is conceivable regulations under section 28 or 116 of the Bill modifying the provisions about compensation for termination of a partnership agreement could be used to make consequential modifications of section 203 of the Bill, although we cannot think of any reason why that would be necessary. We are not aware of any other delegated powers that could be used to modify section 203; and if any such powers existed, there would be no need for section 203 to refer to them.

Question 74: section 207(3)

150. We cannot envisage any scenario in which it would be necessary to amend the definition of “*Crown interest*” in the Bill. The Crown and Duchy interests in land covered by section 207(3) and (4) of the Bill are the same as those covered by definitions in many other Acts (see, for example, section 10(2) of the Wild Animals and Circuses (Wales) Act 2020). We do not think there are any other Crown interests in land that could be added.
151. The only order made under section 82C(3)(c) of the 1990 Listed Buildings Act is SI 2006/1469, which relates to the Houses of Parliament and is not relevant to Wales. The Senedd is dealt with differently, in an order under GoWA 2006 whose effect has been incorporated into section 207 of the Bill.
152. In the unlikely event it did prove necessary to amend the definition of “*Crown interest*” because of a legislative change, we would expect the relevant legislation to make any consequential amendments to section 207. If an amendment was needed for some other reason, it is likely a Senedd Bill would be required.

Question 75: section 207(3), (6)(c) and (9)(a)

153. No discussions have been had with the UK Government specifically on Crown-related land. We have liaised with the UK Government on the Bill more generally and no concerns have been raised in relation to Crown-related land.
154. The approach adopted to these interests means land in which these interests exist could be subject to Part 2 of the Bill, as applied by section 74. We don’t think this is significant because section 74 allows interferences with that land only to the extent Crown interests are unaffected, and does not affect things done by or on behalf of the Crown. And as suggested in the Drafters’ Notes, there seems no justification for restating the current inconsistency between the two principal Acts. The drafting would capture any interests in land held in right of His Majesty’s private estates.

Question 76: section 208(3)

155. Section 208(3) of the Bill restates section 51(3) of the 1979 Act and section 86(3) of the 1990 Listed Buildings Act. Section 51(3) applies to all compensation under the 1979 Act. Section 86(3) applies to compensation for loss caused by a building preservation notice (that is temporary listing) or the termination of a HPA. It does not apply to compensation for losses caused by interim protection, the revocation or modification of consent, a temporary stop notice or the exercise of a power of entry, even though

section 51(3) of the 1979 Act applies to the compensation for the corresponding losses under that Act.

156. We are unable to identify any reason for these differences. The 2016 Act amended section 51(3) of the 1979 Act to include compensation relating to interim protection and temporary stop notices, and the failure to make corresponding amendments to section 86(3) of the 1990 Act was an oversight. We think the Planning and Compensation Act 1991 should also have applied section 86(3) of the 1990 Act to compensation under section 88B(7) relating to powers of entry. The fact section 86(3) does not apply to compensation for the revocation or modification of consent derives from the Town and Country Planning Act 1968, which first introduced listed building consent. We are unable to tell whether that was a deliberate choice or an oversight, but it is another anomaly that should be corrected for the purposes of achieving a satisfactory consolidation.

Question 77: section 209(2)(b)

157. The 1990 Planning Act and 1990 Listed Buildings Act do not include general provisions conferring express powers for orders and regulations to make ancillary provision, but such powers are included in some sections. Modern drafting practice is to spell out that powers to make subordinate legislation include powers to make ancillary provision, although it is long established that even in the absence of such provision ancillary powers can be implied where they are needed: see *Attorney General v Great Eastern Rly Co* (1880) 5 App Cas 473. Accordingly, subordinate legislation under the 1990 Acts may make consequential, incidental and supplementary provision where appropriate or necessary.

158. The inclusion of express ancillary powers in section 209(2)(b) of the Bill clarifies those powers are available and avoids the need to rely on implied powers. (Similarly, the Explanatory Notes to the Levelling-up and Regeneration Bill state the purpose of inserting express ancillary powers into the 1990 Acts is “to make the legal position clear and express”.) It would be misleading and unhelpful for section 209 to provide that only certain powers in the Bill included ancillary powers, as that could suggest ancillary powers were available in some cases but not others.

*Other matters*

Question 78: new delegated powers

159. In most instances, the delegated powers in the Bill are not new, but have been derived from existing legislation. In some cases, the character of existing delegated powers has been altered, for instance from directions to regulations, but they are not new powers (see response to questions 29 to 31). In other cases, delegated powers have been changed, frequently narrowed, to reflect that the provisions have now been incorporated in the Bill, rather than left to subordinate legislation.

160. A new delegated power for the Welsh Ministers has been identified in the Bill in section 2(3); it allows the Welsh Ministers to except specified buildings from a general exclusion of religious buildings in religious use from scheduling (see response to question 1).

161. No new delegated powers have been identified in the Bill for any other public bodies. In some instances, regulation-making powers for local authorities (including National Park authorities) have been changed to by-law-making powers.

Question 80: status of subordinate legislation

162. The Government's programme to improve the accessibility of Welsh law, *The Future of Welsh Law*, committed to a project considering a package of subordinate legislation to implement this Bill if passed. All associated subordinate legislation, including SI 2017/643, will be considered as part of this project.

Question 81: omitting section 81B of the 1990 Listed Buildings Act

163. In its report, *Planning Law in Wales*, the Law Commission made recommendations (8-5 and 8-6) concerning a planning authority's ability to decline to determine similar applications. It recommended restating sections 70A and 78A of the 1990 Planning Act but omitting section 70B. The Welsh Government accepted these recommendations. The provisions of the 1990 Listed Buildings Act corresponding to sections 70A, 70B and 78A are sections 81A, 81B and 20A respectively.

164. There are occasions where applications for planning permission and listed building consent are submitted in parallel, so it is not sensible to have different systems in operation. Therefore, sections 20A and 81A of the 1990 Listed Buildings Act were included in the consolidation and section 81B was omitted.

*Follow up questions*

Question 83: legislation excluded from the Bill

165. Section 50 of the 1990 Listed Buildings Act specifically relates to compulsory acquisitions made under section 47 of that Act. Section 47 of the 1990 Act has been restated in the Bill (in section 137) and so section 50 is also restated. Section 50 is different in scope to section 49, which relates to any compulsory acquisition of land, not only those acquisitions provided for under the Bill. We have taken the view that restating it in this Bill, which does not deal with all such compulsory acquisitions, would not improve accessibility.

Question 85: new powers

166. See response to Question 1.

Mick Antoniw MS  
Counsel General and Minister for Constitution

20 September 2022

Dear Mick

### Historic Environment (Wales) Bill

Following our productive meeting on 11 July 2022, during which we began our scrutiny of the Historic Environment (Wales) Bill (the Bill), we now have a further list of questions which we would like to explore with you. The list of questions in the Annex is mainly drawn from matters of interest to us in the Drafters' Notes. The list also includes some questions related to broader themes, as well as some follow-up questions to your response (dated 17 August 2022) to our letter of 19 July 2022.

I would be grateful to receive your response to our questions by 18 October 2022.

Kind regards,

Yours sincerely,



Huw Irranca-Davies  
Chair

### MONUMENTS OF SPECIAL HISTORIC INTEREST

1. **Section 2(3)** – The Drafters’ Notes describe the change as “Reframing exemption for ecclesiastical buildings” and note the addition of a new regulation-making power (draft affirmative procedure) to specify exemptions. The Drafters’ Notes state that the “current effect of the provision is uncertain” and that the regulation-making power is there for reasons of flexibility in case further clarification is needed in the future.
  - a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv).
  - b. Why is the effect of the current provision in the *Ancient Monuments and Archaeological Areas Act 1979* (1979 Act) uncertain?
  - c. The new regulation-making power (draft affirmative procedure) allows the Welsh Ministers to change policy. The power is not limited to providing clarity – it is a power to apply historic environment law to buildings (i.e. religious buildings) that have not previously been subject to historic environment law. The power can also be used to make incidental, supplementary etc provision (read with section 209(2)). We would welcome further explanation and clarity on why the flexibility is needed.
2. **Relevant to section 5** - Omission of power to make regulations to add to list of consultees. The Drafters’ Notes state that the experience of implementing amendments made by the *Historic Environment (Wales) Act 2016* (the 2016 Act) has shown that the power is unnecessary, and that Cadw considers that the list of consultees in the section is already comprehensive.
  - a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).
  - b. We would also welcome confirmation that there is no other delegated power available to the Welsh Ministers that could be used to add to the list of consultees.
  - c. We would welcome clarification as to whether there have ever been complaints from people who say they should have been consulted.
3. **Section 14(2), (4), (5)** – The Drafters’ Notes state that important parts of the process for applying for scheduled monument consent have been moved into the Bill from a regulation-making power, because these are “settled elements of the application process” and are unlikely to change in the future. We would welcome clarity regarding the “unlikely to change” reason in the Drafters’ Notes.
4. **Schedule 6, paragraph 3** – The Drafters’ Notes state that a change has been made to introduce consistency throughout this Part of the Bill on costs incurred by Ministers. The costs regime

currently applies to local inquiries but not hearings. The Bill applies the costs regime to both inquiries and hearings.

- a. We would welcome clarity on who this change will affect, in particular, who will end up having to pay more costs or less costs.
  - b. We would also welcome clarity on why the consequential amendment to paragraph 4(1) of Schedule 1 to the 1979 Act is deemed to have been “missed” rather than being a deliberate omission.
5. **Relevant to section 21(5)** – Omission of power to specify exceptions by regulations. The Drafters’ Notes state that section 7(4A) of the 1979 Act is not yet in force, and that the experience since 2016 suggests the power would never be used.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).
  - b. We would welcome further explanation and clarity regarding the “power would never be used” reason cited in the Drafters’ Notes, given that the power to specify exceptions was included in the 2016 Act.
6. **Section 30(7)(b)** – The Drafters’ Notes state that the requirement that knowledge exists before works were carried out has been omitted. The Drafters’ Notes state that this omission corrects an error in the drafting of section 2(8A) of the 1979 Act in relation to cases where the offence is committed later. The omission appears to be changing the elements of criminal defence in certain criminal proceedings. We would welcome confirmation that the Welsh Government has carefully considered the changes to the defence.
7. **Section 31(5)** – The Drafters’ Notes state that there has been an addition of references to persons permitting works and occupiers as potential recipients of a temporary stop notice.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).
  - b. We would welcome further explanation as regards the lack of clarity of the effect of the existing law to which Welsh Government refers, i.e. in the context of adding references to occupiers.
8. **Section 39(2)(c)** – The Drafters’ Notes state that provision about securing safety or health by works of repair or works affording temporary support or shelter have been omitted. The Drafters’ Notes also states that the ground of appeal in section 9ZE(3)(c) of the 1979 Act replicates equivalent provision for listed building but “seems to have been included by error in section 9ZE.”
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv).

- b. We would welcome clarity as regards the reasoning offered in the Drafters' Notes that provision in the 1979 Act "seems to have been included by error". We note that section 9ZE was inserted into the 1979 Act by the 2016 Act.
9. **Section 46(3)** – Reference to being 'employed' as a caretaker has been omitted. The Drafters' Notes states that it is "uncertain what "employed as" means in this context", and that the omission "avoids the ambiguity". We would welcome further explanation and clarity as regards:
- the reliance on SO26C.2(ii) and (iv);
  - the reasoning offered in the Drafters' Notes about avoiding ambiguity;
  - whether this broadens the category of caretakers captured by section 46(3) of the Bill, when compared to section 12(10) of the 1979 Act.
10. **Section 47(4)** – The Drafters' Notes state that the new drafting provides clarification that guardians may require the payment of a charge in connection with any use of a monument. The Drafters' Notes also state that this reflects established practice; for example, Cadw charges for weddings held on or near monuments.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).
- b. What difficulties have arisen in the past in respect of such charging, including the power to charge? If none, why is clarification needed?
- c. Where does the power currently reside which permits guardians to charge?
- d. While there may be evidence of established practice, we would welcome further explanation as to whether or not the new drafting amounts to a policy change.
11. **Section 49(5)(a)** – The Drafters' Notes state that this provides clarification that the power of full control and management of land in the vicinity of a monument allows charging for any use of the land. The Drafters' Notes also state that this reflects established practice; for example, Cadw charges for weddings held on or near monuments.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).
- b. What difficulties have arisen in the past in respect of such charging, including the power to charge? If none why is clarification needed?
- c. Where does the power currently reside which permits guardians to charge?
- d. While there may be evidence of established practice, we would welcome further explanation as to whether or not the new drafting amounts to a policy change.

12. **Section 55(4)** – The Drafters’ Notes indicate that a change to the existing legal position has been made so that a power of local authorities to control the times of public access is no longer exercisable by regulations, and that this change “reflects established practice”. We would welcome further explanation and clarity:
- as regards the reliance on SO26C.2(ii) and (iv);
  - as to whether this is a removal of an existing regulation-making power;
  - under what legal authority has the “established practice” been carried out.
13. **Section 55(5)** – The Drafters’ Notes indicate that a change to the existing legal position has been made so that a power of local authorities to exclude the public from access is no longer subject to a requirement for Ministerial consent, and that this change “reflects established practice”. We would welcome further explanation and clarity as regards:
- the reliance on SO26C.2(ii) and (iv).
  - under what legal authority have local authorities been controlling access without Ministerial consent?
14. **Section 55(5)(c)** – The Drafters’ Notes state that the change to the existing legal position provides clarification that public access may be controlled in connection with events or other activities, and that this change “reflects established practice”. We would welcome further explanation and clarity as regards:
- the reliance on SO26C.2(ii).
  - under what legal authority has the “established practice” been carried out.
15. **Section 55(6)** – The Drafters’ Notes state that the change to the existing legal position provides clarification that public access may be controlled in connection with events or other activities, and that this change “reflects established practice”. We would welcome further explanation and clarity as regards:
- the reliance on SO26C.2(ii).
  - under what legal authority has the “established practice” been carried out.
16. **Section 56(1)** – The Drafters’ Notes state that the existing power to make regulations in connection with public access to monuments under public control has been narrowed. The Drafters’ Notes also state that the existing power to make regulations has not been exercised and that the power “has been limited to what Cadw considers is required”. We would welcome further explanation and clarity as regards:

- the reliance on SO26C.2(ii) and (iv), and
  - the reasoning offered in the Drafters' Notes as to what Cadw considers is required.
17. **Section 62(6)** - Reference to being 'employed' as a caretaker has been omitted. The Drafters' Notes states that it is "uncertain what "employed as" means in this context", and that the omission "avoids the ambiguity". We would welcome further explanation and clarity as regards:
- the reliance on SO26C.2(ii) and whether the ground in (iv) is also applicable;
  - the reasoning offered in the Drafters' Notes about avoiding ambiguity;
  - whether this broadens the category of caretakers captured by section 62(6) of the Bill, when compared to section 24(5) of the 1979 Act.
18. **Section 64(1) to (3)** – The Drafters' Notes state that current powers available to the Welsh Ministers in relation to expenditure by local authorities on archaeological investigation have been omitted. The Drafters' Notes also state that the practice is to use general powers available under the *Government of Wales Act 2006* (the 2006 Act).
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).
  - b. We would welcome clarity as regards how the Welsh Government decided which provisions to include in the Bill and which to omit because they could be dealt with under the 2006 Act.

## **BUILDINGS OF SPECIAL ARCHITECTURAL OR HISTORIC INTEREST**

19. **Relevant to section 76(1)** – Omission of references to Ministers "compiling" a list of buildings and approving lists compiled by others. The Drafters' Notes state that the power to approve lists compiled by others has never been used and "Cadw considers there is no prospect of it being used". We would welcome further explanation and clarity as regards:
- the reliance on SO26C.2(iii).
  - the "Cadw considers there is no prospect of it being used" reason cited in the Drafters' Notes.
20. **Relevant to section 76(1)** – The Drafters' Notes state that this is the addition of a simple requirement for the Welsh Ministers to publish an up-to-date list of buildings they consider to be of special architectural or historic interest, instead of a requirement for them to make copies available for public inspection. In reliance on SO26C.2(ii), the justification is that this reflects established practice, and the up-to-date list is published online on part of the Cadw website. The original publication requirements are set out in sections 1(1) and 2(4) of the *Planning (Listed*



*Buildings and Conservations Areas) Act 1990* (1990 LB Act), which require the Welsh Ministers to make the list available for public inspection, free of charge at reasonable hours in a convenient place.

- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).
  - b. Section 76(1) sets out how the Welsh Ministers currently comply with their publication obligations in the 1990 LB Act. We would welcome clarity as to whether that is the same as “clarifying the application or effect of existing law” for the purposes of SO26C.2(ii), when the new provision contains none of the specific access requirements stipulated by the existing law. Is this a change in policy?
  - c. Why has the equivalent requirement on planning authorities in section 76(4) and (5) not been similarly simplified?
  - d. We would come clarity as regards whether there is any interaction with other access to information rights?
  - e. How will people without a reliable internet connection access the list?
  - f. Why has the equivalent requirement on planning authorities in section 76(4) and (5) not been similarly simplified?
21. **Relevant to section 78** – Omission of existing power to make regulations amending the list of persons to be consulted about proposals to list or de-list buildings. The Drafters’ Notes state that the experience of implementing the 2016 Act “has shown power is unnecessary” and that Cadw considers that the list in the section is “already comprehensive”. We would welcome:
- clarity regarding whether there is any other delegated power that could be used to add to the list of consultees (see also the omission of existing power relevant to section 5);
  - a further explanation regarding the “Cadw considers” reason cited in the Drafters’ Notes and clarity on how this makes the provision obsolete, spent or no longer of practical utility or effect such that SO26C.2(iii) is appropriate.
22. **Schedule 7, paragraph 2** – The Drafters’ Notes state that the current provisions in Schedule 1A, paragraph 2 and Schedule 2, paragraph 2 to the 1990 LB Act which continue criminal liability after the end of interim protection or temporary listing have been extended to cover the offence of intentionally damaging a listed building under section 118 of the Bill. The Drafters’ Notes also state that this “Removes an anomaly, as the provision should apply to all listed building offences”.

- a. Sections 79(2) and 83(4) appear to expressly exclude the application of the section 118 offence in relation to buildings subject to interim protection or temporary listing. We would welcome clarity as to how paragraph 2 of Schedule 7 will take effect.
  - b. The change seeks to extend the circumstances when an existing criminal offence can be prosecuted. Given the seriousness of criminal convictions and penalties, we would welcome further explanation and clarity as regards the reliance on SO26C.2(iv), in particular further reasoning as to how this is a “minor” change to the law.
23. **Section 81(2) and (6)** – The Drafters’ Notes state that the existing ground for review has been moved from regulations to the Bill “with simplified wording” and that this is subject to a new power to amend the ground. The Drafters’ Notes also state that the change “Ensures that the section deals with this important matter, while retaining flexibility for any future changes”. Previously section 2D(6)(a) of the 1990 LB Act gave Welsh Ministers the power to prescribe grounds in regulations. In the Bill, the grounds are set out in the primary legislation with a Henry VIII power to amend that list (affirmative procedure). We would welcome confirmation and clarity as to how this new regulation-making power is within the scope of SO26C.2(iv).
24. **Section 81(3) and (4)** – The Drafters’ Notes state that the requirement to carry out reviews and make decisions in section 2D(3)(a) and (b) of the 1990 LB Act is restated to reflect the requirement in regulations (SI 2017/644, regulation 3) for all reviews to be carried out by persons appointed by the Welsh Ministers, and that the existing regulation-making power to specify exceptions is being retained. The Drafters’ Notes also state that the position under the existing regulations is “not expected to change” and that “section 2D(3) may be misleading”.
- a. We would welcome further explanation as to why the position is not expected to change.
  - b. Under section 2D of the 1990 LB Act the default position is that the Welsh Ministers must carry out the review, subject to exceptions set out in Regulations. While in practice SI 2017/644 has the effect of requiring all applications to be treated as exceptions, we would welcome further explanation as to how inverting the existing position in primary legislation amounts to a “minor” change in the law.
25. **Section 90(1)** – The Drafters’ Notes state that the Bill now includes references to additional provisions that may require applications to be made to the Welsh Ministers instead of the planning authority, on the basis that the existing list of provisions is incomplete and the additional references “clarify effect”. We would welcome confirmation that every provision listed in section 90(1) (or its origin provision where relevant) already applies in relation to applications for listed building consent, even if not expressly referred to in section 10(1) of the 1990 LB Act.
26. **Section 90(2)(c)** – The Drafters’ Notes state that the Bill now includes the addition of a reference to the Welsh Ministers being able to require information to be included in an application, which

“Reflects how provision is understood in practice”. We would welcome further explanation to support the statement that this ‘reflects how the provision is understood in practice’.

27. **Section 90(3)** – The Drafters’ Notes state that the Bill now includes the addition of a provision for the relevant regulations to specify the content of applications and require the use of forms issued by the Welsh Ministers or others. The Drafters’ Notes state that this clarifies matters that are understood to be within the scope of the existing power. We would welcome clarity regarding the extent of the existing provision, and request a more detailed explanation of the basis for the understanding that the scope includes the power to prescribe forms.
28. **Section 92(1)** – The Drafters’ Notes state that the Bill now includes the addition of references to all provisions under which a planning authority may not or must not consider an application made to it. The Drafters’ Notes also state that this “fills gaps” as section 10(1) of the 1990 LB Act is “incomplete because it does not refer to section 81A of that Act or section 327A of the [*Town and Country Planning Act 1990*] 1990 Planning Act”. We would welcome confirmation that adding provisions to this section does not change the existing effect of the law.
29. **Section 92(2)(b), (3) and (4)** – The power to give notification directions has been limited to imposing requirements on individual planning authorities, and replaced with regulations for requirements applying generally. The Drafters’ Notes state that “regulations are considered appropriate and there is no need for general requirements to be imposed by directions”. We would welcome a more detailed explanation as to why regulations are considered more appropriate for requirements applying generally.
30. **Section 95(4) and (5)(a)** – Directions excluding a requirement to notify the Welsh Ministers before granting consent have been limited to individual planning authorities and replaced with a regulation-making power for making exceptions that apply generally. The Drafters’ Notes state that “regulations are considered appropriate and there is no need for general requirements to be imposed by directions”. We would welcome a more detailed explanation as to why regulations are considered more appropriate for exceptions applying generally.
31. **Section 95(7)** – The Drafters’ Notes state that this new provision sets out ways in which regulations or directions may specify a description of applications. The Drafters’ Notes also state that this clarifies the scope that the existing direction-making power is understood to have and gives examples. We would welcome further details as to how this new provision clarifies the scope of the powers and what it adds to the existing law.
32. **Section 98(1) and (2)** – Omission of amendments to section 18 of the 1990 LB Act which would reduce the default period for starting works to 3 years but extend it in the case of legal challenge. The Drafters’ Notes state that the amendments have not been brought into force and

“Cadw considers that there is no prospect of them being brought into force”. We would welcome further clarity as regards

- the reliance on SO26C.2(iii), and
  - a further explanation regarding the “Cadw considers” reason cited in the Drafters’ Notes.
33. **Section 98(3)(b)** – The Drafters’ Notes state that the provisions meaning that section 18 of the 1990 LB Act does not apply to consent granted by a partnership agreement have been moved from regulations to the Bill because “it changes the application of the section”. We would welcome further detail as to the reasons for moving the provision from secondary to primary legislation.
34. **Section 99(3)** – The Drafters’ Notes state that the existing list of provisions which apply to applications to vary or remove conditions are amended to exclude the requirement for a heritage impact statement but include the power to refuse similar applications. The Drafters’ Notes also state that the change ensures that provisions which are appropriate for applications to vary and remove conditions are applied, and provisions which are not appropriate are not applied.
- a. We would welcome further clarity regarding this change, and an explanation as to the difference between the existing and new provisions.
  - b. We would welcome a further explanation as to why removing the heritage impact statement requirement does not amount to a policy change.
35. **Relevant to section 99** – Omission of amendment inserting a new section 19(5) into the 1990 LB Act which would prevent conditions being varied to extend the period within which works must start. The Drafters’ Notes state that the amendment has not been brought into force and “Cadw considers that there is no prospect of it being brought into force”. We would welcome a further explanation regarding the ‘Cadw considers’ reason cited in the Drafters’ Notes.
36. **Relevant to section 100(4)** – Omission of the provision in the 1990 LB Act specifying the determination period for applications for approval of details, so that determination periods for all applications to which the section applies are set by regulations. The Drafters’ Notes state that the purpose of the change is to “improve consistency by having all periods set out in one place”, which is regulations, because “it is procedural detail that may change from time to time”. We would welcome clarity as follows.
- a. Is there an existing power which allows for the determination period set out in the 1990 LB Act to be changed?
  - b. Has the determination period been changed since 1990?



- c. If the determination period has not changed for over 30 years, should the ability to change the period be subject to wider discussion / consultation (i.e. why should it be done via a consolidation Bill)?
37. **Section 102(2)** – The Drafters’ Notes state that provision for further consultation has been moved from regulations (Negative procedure – see section 93(3) of the 1990 LB Act) to the Bill and reworded to clarify that any requirement for further consultation will be imposed by the Welsh Ministers giving directions. The Drafters’ Notes also state that a regulation-making power is not needed “but the subsection clarifies how further consultation would be required”.
- a. We would welcome clarity regarding what specific rewording has taken place?
- b. The Drafters’ Notes cite SO26C.2(ii) and (iv) - which parts of the provision are clarification and which are minor change(s)?
- c. We would welcome your view on whether the shift from (negative) regulations to directions lessens or removes the possibility of Senedd scrutiny.
38. **Relevant to section 105** – Omission of the power to modify certain provisions about listing buildings in relation to land of planning authorities. The Drafters’ Notes state that the power has not been used and “Cadw considers that there is no likelihood of it being used”. We would welcome further clarity as regards:
- the reliance on SO26C.2(iii), and
  - a further explanation regarding the “Cadw considers” reason cited in the Drafters’ Notes.
39. **Section 105(1) and (2)** – The Drafters’ Notes state that the existing powers to modify legislation in relation to applications by planning authorities and the Crown are “combined, simplified and made consistent”. The types of application to which they apply are also “clarified”. The Drafters’ Notes state that the list of provisions that may be amended in section 82(3) of the 1990 LB Act is “incorrect” while that in section 82F “seems too wide”. The Drafters’ Notes also state that “It is not entirely clear which applications the powers apply to, but there is no reason to exclude any type of application for which the Act provides”. We would welcome further detail as follows.
- a. What specifically has been changed which amounts to ‘clarification’?
- b. What legislation can be modified?
- c. By combining powers, has this resulted in any current delegated power being subject to the downgrading of scrutiny procedure?
- d. If the current position is “not entirely clear” how can it be said that the existing provisions are both “incorrect” and “too wide”?

- e. Whether the power is now wider than under section 82(2) and (3) of the 1990 LB Act (“any provision” rather than only a specified list) and, if so, what is the justification for this.
40. **Relevant to section 105(3)** – The Drafters’ Notes state that a current power for regulations to require applications to be made to the Welsh Ministers is extended to Crown applications, and a power to provide for Ministers to serve notices is omitted. We would welcome the following:
- confirmation that this is an extension of a delegated power;
  - clarification as to why a power to provide for Ministers to serve notices is not required;
  - clarification about the “reflects effects powers are already understood to have” reasoning provided in the Drafters’ Notes;
  - an explanation as to how SO26C.2(ii), (iii) and (iv) each apply to the provision.
41. **Section 109(6)** – The Drafters’ Notes state that the requirements to ignore development requiring planning permission and works requiring consent have been clarified and made consistent, while reference to Schedule 3 to the 1990 Planning Act has been omitted. According to the Drafters’ Notes the change “Removes inconsistencies for which no reason has been identified; clarifies effect of provision; omits reference which has no practical effect and should have been repealed”. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii), (iii) and (iv), and ask for confirmation as to whether the inconsistencies/clarifications relate purely to the wording of the provision, or whether something else that has changed.
42. **Schedule 9, paragraph 1(7)** – The Drafters’ Notes state that a provision has been added so that an authority may not withdraw a notice to treat that it is treated as having served by virtue of accepting a purchase notice. The Drafters’ Notes also state that this “Corrects an apparent error. The equivalent provision in section 208 of the *Town and Country Planning Act 1971* [the 1971 Act] did apply to listed building purchases, and its omission from the 1990 LB Acts seems to have been a mistake”. We would welcome clarity that there could be no reason why the omission from the 1990 LB Act may have been deliberate.
43. **Schedule 9, paragraph 4(7)** – The Drafters’ Notes state that a provision has been added so that an authority may not withdraw a notice to treat that it is treated as having served due to the confirmation of a purchase notice. As with the new provision in Schedule 9, paragraph 1(7), the Drafters’ Notes also state that this “Corrects an apparent error” for the same reasoning. We would welcome clarity that there could be no reason why the omission from the 1990 LB Act may have been deliberate.

44. **Section 113(6) and (7)** – The Drafters’ Notes state that the effect of current wording about agreements granting consent subject to condition has been clarified, and the description of types of condition has been omitted. The Drafters’ Notes also state that the current wording suggests a discretion as to whether conditions are included in an agreement, which is not how the provision is understood in practice.
- a. We would welcome further information about why there is a discrepancy between how the current provision is understood in practice and how the provision is actually worded.
  - b. We would welcome further explanation as regards the change from the discretion to include conditions in a partnership agreement (1990 LB s.26L(6)(b)) to the mandatory obligation to include any conditions (s.113(7)).
45. **Section 125(4)** – The Drafters’ Notes state that the new provision clarifies that the notification requirement only applies where the enforcement notice had been served, which sets out the effect that the existing law is already understood to have. We would welcome:
- a more detailed explanation about how the new provision sets out the effect of the existing law;
  - an explanation of any implications of the interaction between section 124 (service and taking effect) and section 125(4) and (5);
  - confirmation as to whether there is any scenario where the notice has not been served but it would still be appropriate for notice to be given of variation or withdrawal.
46. **Relevant to section 128(3)(b)** – Omission of the reference to discharging (i.e. removing) a “limitation” of listed building consent. The Drafters’ Notes state that the reference has been removed because the term “limitation” is not used elsewhere in the provisions.
- a. We would welcome clarity as to the meaning of “limitation” and the effect of removing it.
  - b. Does the Welsh Government know why “limitation” was originally included in these sections if it does not have a specific meaning under the 1990 LB Act?
47. **Section 130** – Omission of powers to apply section 289 of the *Public Health Act 1936* (the 1936 Act) with modifications, and restatement of section 289 (as modified) in the Bill. The Drafters’ Notes state that the provisions have been moved “because of importance of provision and because how section 289 applies has not changed for a very long time (since at least SI 1972/1362)”. The Drafters’ Notes also state that this change was recommended by the Law Commission for the corresponding powers in the 1990 Planning Act. We would welcome:
- further clarity regarding these omissions and the modifications;

- further explanation as regards applying the Law Commission recommendation which related to the 1990 Planning Act to the 1990 LB Act.
48. **Section 132(2), (3), (7) and (8)** – Omission of powers to apply sections 276 and 294 of the 1936 Act with modifications, and restatement of sections 276 and 294 (as modified) in the Bill. The Drafters’ Notes state that the provisions have been moved “because of important of provisions and because how they apply has not changed for a very long time (since at least SI 1972/1362)”, and that this change was recommended by the Law Commission for the corresponding powers in the 1990 Planning Act. We would welcome:
- further clarity regarding these omissions and the modifications;
  - further explanation as regards applying the Law Commission recommendation which related to the 1990 Planning Act to the 1990 LB Act.
49. **Section 132(5)** – The Drafters’ Notes state that a provision for costs of works to be a charge on the land has been moved from regulations to the Bill, and the regulation-making power is omitted. We would welcome clarity as to why the power that was previously discretionary (and could be changed) is now to be made permanent on the face of the Bill. Does this amount to a policy change?
50. **Section 132(7) and (8)** – The Drafters’ Notes state that this is a restatement of section 276 of the 1936 Act, but omits subsection (3) which provides that the section does not apply to “refuse” removed by a local authority. According to the Drafters’ Notes, “The exclusion of refuse seems intended to avoid any conflict between section 276 and other provisions of the 1936 Act allowing waste to be sold. It does not seem relevant or necessary where an authority does works required by an enforcement notice”.
- a. We would welcome further detail regarding the statements that things “seem” a certain way.
  - b. We would also welcome clarity as to why subsection (3) of section 276 to the 1936 Act wasn’t disapplied by regulation 15 of SI 2012/793 if it is irrelevant.
  - c. We would welcome your view as to whether section 132(8)(b) could be further clarified, to make clear what (if any) costs may be recoverable from an owner of the materials who is not also the owner of the land?
51. **Relevant to section 136(4)** – Omission of the modification of Part 1 of the *Compulsory Purchase Act 1965* (the 1965 Act) in relation to land acquired by Ministers or statutory undertakers. The Drafters’ Notes state that the inclusion of this modification in earlier consolidations appears to

have been an error. We would welcome clarity on how it has been determined that the inclusion of the modification in earlier consolidations was in error.

52. **Section 151(2) paragraph (a) of the definition of “relevant building”** - Reference to a building of “outstanding” interest is changed to refer to “special interest”. The Drafters’ Notes state that this change has been made for “consistency and clarity” and that the “tests of “special” and “outstanding” interest are not considered to be any different in practice”. We would welcome the following clarity and confirmation:
- who has been consulted on whether the two terms are the same in practice?
  - was there unanimous agreement?
53. **Section 152(4)** – The Drafters’ Notes state that a power has been added to enter land to decide whether a temporary stop notice should be served, while a power to do so to consider a claim for compensation related to a temporary stop notice has been omitted. The Drafters’ Notes also state that this corrects gap in provision. We would welcome the following clarity and confirmation:
- is this a new power of entry?
  - why is it appropriate to make this change via a consolidation Bill?
  - how does this amount to a “minor” change to existing law?
54. **Section 152(9)** – The Drafters’ Notes state that a new provision has been inserted to the effect that the power to survey land includes determining presence of minerals. The Drafters’ Notes also state that the change make the position consistent with the position for monuments under section 43(3) of the 1979 Act and “corrects anomaly”. The Drafters’ Notes add that “Section 88(6) [of the 1990 LB Act] originally referred to minerals but the reference was repealed by the *Planning and Compensation Act 1991* [the 1991 Act]. It is unclear why, as the presence of minerals could be relevant to compensation under the 1990 [LB] Act”. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv), in particular:
- how it is appropriate to re-insert a provision using a consolidation Bill which was repealed by the UK Parliament when it passed the 1991 Act?
  - how does this amount to a “minor” change to existing law?
55. **Section 155(5)** – The Drafters’ Notes state that there is an addition of a time limit for claiming compensation for damage. The Drafters’ Notes also state that this corrects a gap and makes the position consistent with that for monuments, based on SI 2017/641, regulation 2(1)(e).
- a. We would welcome clarity on what is the understanding of the current time limit.

- b. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv), and as to how and why this does not amount to a change in policy.
56. **Section 156(1)** – The Drafters’ Notes state that the default position in current law has been reversed, so that religious buildings are exempt only to the extent provided for in regulations, rather than being exempt unless regulations restrict or exclude the exemption. The Drafters’ Notes also state that this “Better reflects existing position under SI 2018/1087, which removes exemption entirely but then re-exempts some building”.
- a. Who has been consulted on this matter and do they agree?
- b. How does reversing the current default position amount to ‘clarification’?
57. **Relevant to section 156(3)(e)** – The Drafters’ Notes state that the power to amend the 1990 Planning Act has been omitted because it “has not been used and no need for it has been identified”. We would welcome further explanation as regards the reliance on SO26C.2(iii) and further clarity and detail on the reasoning cited in the Drafters’ Notes.
58. **Section 157** – Inclusion of National Park authorities in the definition of “local authority”. We would welcome the following clarification and confirmation.
- a. Are the obligations, duties, powers etc of National Park authorities the same in the Bill as in the original provisions?
- b. Are there any provisions of the Bill that apply in relation to local authorities that should not apply in relation to National Park authorities?

## **CONSERVATION AREAS**

59. **Relevant to section 158** – Omission of a provision obliging planning authorities to review past exercise of the designation function, of the power of the Welsh Ministers to designate conservation areas, and of the requirements for the Welsh Ministers to consult and give notice of designations. Sections 69(2) and (3) and 70(3) and (6) of the 1990 LB Act are omitted from the restatement. The Drafters’ Notes state that section 69(2) has not been restated to avoid duplication with the restatement of section 69(1); section 69(3) has not been restated because Welsh Ministers have never used the power therein; and section 70(3) and (6) have been omitted from the restatement as a consequence of not restating section 69(3) of the 1990 LB Act.
- a. We would welcome further clarity as to why section 69(2) of the 1990 LB Act is omitted because it is implicit, whereas other sections of the Bill take the approach of spelling out currently implicit powers (for example, section 158(2)). What is the basis for these different approaches?

- b. We would also welcome further explanation as regards the reliance on SO26C.2(iii) to remove as obsolete a provision that has not been used or needed so far, and further information as to why the power has never been used and is not needed.
60. **Relevant to section 161** – Omission of the ecclesiastical exemption from the requirement for consent in section 75(1)(b) and (5), and of powers to restrict, exclude or modify the exemption in subsections (7) to (9). The Drafters’ Notes state that this reflects the fact that the exemption has been removed by article 5 of SI 2018/1087 and “There is no expectation of it being re-applied”. The Drafters’ Notes also state that demolition would nearly always be inconsistent with the ongoing use of a building for religious purposes, and where religious use cannot continue after the works the exemption cannot apply. We would welcome further clarity as to the statements in the Drafters’ Notes that:
- there is no expectation of the exemption being reapplied;
  - that demolition is “nearly always” inconsistent with ongoing use for religious purposes. Could religious use not continue in a new building on the site?
61. **Section 161(2)(c) and (d)** – The Welsh Ministers’ direction-making power regarding exempting buildings from the requirement for consent has been limited to cases involving individual planning authorities, and replaced with a new power to make regulations (affirmative procedure – see section 209(5)(h)) conferring exemptions that apply generally. The Drafters’ Notes state that regulations are “considered more appropriate for making general exemptions given their potential effect on the scope of the conservation area consent regime”.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv) and the reasoning set out in the Drafters’ Notes.
- b. Why are regulations considered more appropriate than a general direction-giving power?
62. **Section 163 (whole section)** – The Drafters’ Notes state that modifications of provisions in Part 3 of the Bill as they apply in relation to conservation area consent have been moved from regulations into the Bill, while preserving the Welsh Ministers’ power to make other modifications or exclusions in future. The Drafters’ Notes also state that key matters relating to conservation area consent are now set out together in the Bill, instead of it being left to regulations to exclude or modify provisions. The change from the original provision to the restated provision is significant enough to require a change in the applicable Senedd procedure. Does that suggest a more than minor change to the current law?
63. **Section 163(1)(c)(i) and (2)(d)** – The Drafters’ Notes state that there has been addition of provisions applying powers of entry for the purposes of conservation area consent, subject to exceptions. The Drafters’ Notes also state that this “Clarifies that certain powers of entry in

sections 152 to 155 must apply for the purpose of conservation area consent, while excluding others that are irrelevant, to reflect how the existing powers are understood to apply. Corrects what appears to have been an oversight”.

- a. We would welcome clarity and confirmation regarding the explanation in the Drafters’ Notes about ‘correcting what appears to be an oversight’.
  - b. Powers of entry are intrusive and likely to engage human rights. Is it appropriate to extend this type of power by way of a consolidation Bill?
64. **Relevant to section 165(1)** – Omission of the provision that grants may be made subject to conditions. The Drafters’ Notes state “Omitted because it goes without saying”.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).
  - b. We would welcome further details as to why it “goes without saying” that the grant may be subject to conditions.
  - c. We would also welcome further clarity as to why it is necessary for section 148(6) to spell out that a grant could be subject to conditions, if such a provision is not needed here.
65. **Relevant to section 166(3)** – Omission of the provision that conservation area agreement grants may be made subject to conditions. The Drafters’ Notes state “Omitted because it goes without saying”.
- a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).
  - b. We would welcome further details as to why it goes without saying that the grant may be subject to conditions.

## **SUPPLEMENTARY PROVISION ABOUT BUILDINGS OF SPECIAL INTEREST AND CONSERVATION AREAS**

66. **Section 169(6)** – The Drafters’ Notes state that functions to which provisions apply have been extended to include functions relating to compensation, purchase notices and listed building partnership agreements. The Drafters’ Notes also state that the change “Removes anomalous gaps in the provisions and corrects an oversight in the drafting of SI 2021/1177”.
- a. We would welcome further clarity regarding the explanation in the Drafters’ Notes that the change “Removes anomalous gaps”.
  - b. We would welcome an explanation regarding the oversight in the drafting of a statutory instrument made only last year.



67. **Section 171(3)** – The Drafters’ Notes state that the existing provision has been amended to remove minor differences between lists of functions covered by the Welsh Ministers powers’ to make contributions and require other authorities to make contributions. The Drafters’ Notes also state that the difference between the lists of provisions in section 90(1) and (3) of the 1990 LB Act are minor and “no reason for them has been identified”. The Drafters’ Notes also state that the lists “seem to contain errors”. We would welcome clarity regarding what are the differences and what are the identified errors.
68. **Section 174(7)** – The Drafters’ Notes state that the Bill now brings urgent Crown applications for consent within the scope of the legislation. (The Drafters’ Notes also state that this “Corrects an error. The omission of urgent Crown applications from section 88E of the 1990 [LB] Act was an oversight in SI 2014/2773.”)
- a. We would welcome clarity as to how has it been confirmed that the omission from SI 2014/2773 was an oversight and not a deliberate action?
  - b. What scrutiny procedure has applied to urgent Crown applications since the 2014 statutory instrument, if there have been any made?
69. **Section 184(2)(a)** – The Drafters’ Notes state that wording has been added to make clear that the right of appeal under this section does not apply to decisions to grant consent or remove conditions (which are subject to statutory review – see sections 182 and 183). The Drafters’ Notes also state that this clarifies that the rights to appeal and apply for statutory review are mutually exclusive. How can we be sure that the intention was not for rights of appeal to apply to decisions to grant consent or remove conditions?

## GENERAL PROVISIONS

70. **Section 197(3)** – The Drafters’ Notes state provisions about the period within which information must be given has been applied to Part 2 of the Bill. The Drafters’ Notes also state that section 57 of the 1979 Act is “currently silent on this issue” and that the change is “made for consistency with position under the 1990 [LB] Act”. We would welcome an explanation as to why the Welsh Government considers that the 1979 Act being “silent on this issue” was not a deliberate act.
71. **Relevant to section 200** – Omission of provision disapplying section 331 of the 1990 Planning Act in relation to offence of damaging listed building under section 59 of the 1990 LB Act (in section 80(2) of that Act). The Drafters’ Notes state that section 89(2) of the LB Act “continued an error”. The Drafters’ Notes also state “The section 59 offence was first created by the *Civic Amenities Act 1967* [the 1967 Act], while section 331 of the 1990 Planning Act was first enacted in the *Town and Country Planning Act 1968* [the 1968 Act]. The need to apply it to this offence was apparently missed.” We would welcome an explanation as to how the Welsh Government has determined that the omission of the offence was not a deliberate act.

72. **Section 201 (whole section)** – The Drafters’ Notes state that a power to make provision for civil sanctions equivalent to what is permitted by Part 3 of the *Regulatory Enforcement and Sanctions Act 2008* (the 2008 Act) has been extended to cover all offences under the Bill. The Drafters’ Notes also state that the powers in Part 3 of the 2008 Act apply to “relevant offences” that were in existence immediately before the day that Act was passed (see 2008, s. 37(2) and 38(2)). Section 201 preserves the effect of Part 3 of the 2008 Act in relation to relevant offences restated in the Bill, but also brings in offences that were added to the 1979 Act and 1990 LB Act by the 2016 Act, as well as a few offences from the 1990 Planning Act and 1972 Act included in the restatement. The Drafters’ Notes state that “This is considered appropriate to avoid gaps and ensure consistency. The added offences are all very similar to offences that were already relevant offences for the purposes of the 2008 Act. The failure to extend the 2008 Act to offences inserted by the 2016 Act was a missed consequential amendment.” We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii) and (iv), particularly as to the application of the civil sanctions regime to more offences that already exist.
73. **Section 203(1) and (2)** – The Drafters’ Notes state that powers for regulations to provide for exceptions and modification in the 1990 LB Act and the 1990 Planning Act have been omitted because they “have not been used and no need for them has been identified”. The Drafters’ Notes also state that “Omitting them is also consistent with the position under the 1979 Act (which does not include equivalent powers).”
- a. We would welcome clarity on the removal of any existing regulation-making powers, including confirmation as to a ‘what if’ scenario where it is later discovered that the power is actually needed.
  - b. We would also welcome confirmation as to whether the regulation-making powers are not needed because there are other delegated powers which could be used in the future.
74. **Section 207(3)** – The power to specify additional interests as Crown interests have been omitted from the restatement. The Drafters’ Notes state that there is no equivalent power in the 1979 Act and that the “Power in section 82C(3)(c) has not been used in relation to any land in Wales, and Cadw does not think it is required”. We would welcome clarity on the removal of existing power, including confirmation as to a ‘what if’ scenario where it’s later discovered that the power is needed.
75. **Section 207(3), (6)(c) and (9)(a)** – The Drafters’ Notes state that the reference to interest in right of Her Majesty’s<sup>1</sup> private estates applied to monuments. The Drafters’ Notes also state that the change has been made for consistency with listed buildings and that “Section 50(4) of the 1979

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<sup>1</sup> This reference relates to the Drafters’ Notes laid before the Senedd in July 2022, and before the recent death of Her Majesty Queen Elizabeth II.

Act is currently silent on this point, but there is no reason for Crown land to have difference meanings in different parts of the Bill.”

- a. What discussions has the Welsh Government had with the UK Government on Crown-related matters, and have any concerns been raised?
  - b. We would welcome a further explanation of the impact of the change, including confirmation of what private estates will be captured by section 207.
76. **Section 208(3)** – The provision about payment and use of compensation has been extended to apply to all compensation under the Bill. The Drafters’ Notes state that this “Removes gaps” and that “Section 86(3) of the 1990 [LB] Act does not currently apply to all compensation payable under the Act, but that seems to be an error”. We would welcome clarity as regards the explanation in the Drafters’ Notes regarding the removal of gaps in the current law and the extension of the provisions around compensation.
77. **Section 209(2)(b)** – The express powers to make ancillary provision included for all regulations under the Bill. The Drafters’ Notes state that this “Ensures powers to make ancillary provision are included for all powers from the 1990 [LB] Act and 1990 Planning Act. Such powers can generally be implied, but the change ensures consistency.” The Drafters’ Notes also state that “Clause 112 of the Levelling-up and Regeneration Bill introduced in the UK Parliament on 11 May 2022 would amend both Acts to include express ancillary powers, but this change does not depend on that Bill being passed for the reasons given above”.
- a. We would welcome confirmation that this is the creation of broader delegated powers for the Welsh Ministers (particularly as regards the additional ‘supplementary’ power).
  - b. We would welcome further explanation regarding the statement that these powers can “generally be implied”.

## **OTHER MATTERS**

78. It is unclear how many brand-new delegated powers there are in the Bill. We would welcome further clarity and confirmation.
79. There are instances in the Bill where existing powers are being lost or narrowed. For example: Section 56(3) – The Drafters’ Notes state that the existing power to regulate public access for any reason in connection with public access to monuments under public control “has been reframed as power to make byelaws and narrowed” (The Drafters’ Notes also state that the existing power to make regulations has not been exercised and that the power to make byelaws will “attract relevant provisions from the *Local Government Byelaws (Wales) Act 2012*.”) We would

welcome confirmation that the Welsh Government is content with losing/narrowing powers as a result of the Bill.

80. What will be the status of subordinate legislation made under the Acts that are being consolidated? For example, regulation 4 of the Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017 currently sets out two grounds for review of certain decisions made by the Welsh Ministers. One of those grounds has been incorporated into the Bill in section 9(2). What will be the status of the other ground set out in regulation 4?
81. Omitted provision in reliance on SO26C.2(iii) – the omitted provision is section 81B of the 1990 LB Act (section not in force) which contains a power for a planning authority to decline to determine an application where similar application is under consideration. The Drafters' Notes state "The insertion of section 81B by the 2004 Act has not been brought into force in Wales, and Cadw considers that there is no prospect of it being brought into force."
- a. We would welcome a further explanation regarding the "Cadw considers" reason cited in the Drafters' Notes.
  - b. Sections 16 and 93 of the Bill contain a power for the Welsh Ministers to refuse to consider similar applications. The omitted provision is an un-commenced power for local planning authorities to do the same. We would welcome clarity as to why the Welsh Ministers have the power but the planning authorities will not.
82. We would welcome confirmation as to whether the Welsh Government's pre-introduction consultation and work with stakeholders (or a summary of that work/findings) will be made public?

## **FOLLOW-UP TO 17<sup>TH</sup> AUGUST LETTER**

83. Paragraph 6 in response to question 1 in the Committee's outgoing letter regarding legislation excluded from the Bill:
- a. We would welcome further clarity and explanation as to why section 49 of the 1990 LB Act is not restated in the Bill.
  - b. Section 50 of the 1990 Act, which also relates to the amount of compensation in relation to a compulsory purchase, has been included in the Bill at sections 140 and 141. We would welcome clarity and more detail as to why the line was drawn between sections 49 and 50.
84. Paragraph 23 in response to question 5 in the Committee's outgoing letter regarding potential changes to Standing Orders – The letter states "once the intentions of the Senedd are known in relation to this Bill". Does this mean if/when the Senedd agrees the Bill can proceed as a Consolidation Bill or if/when the Bill is passed?



85. Paragraph 26 in response to question 6 in the Committee's outgoing letter regarding new powers of the Welsh Ministers - The letter states "we have retained a degree of flexibility to respond to any future changes in circumstances". We would welcome clarity on what kind of future changes the Welsh Government envisages.



Huw Irranca-Davies AS  
Cadeirydd y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

Drwy e-bost at:  
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17/10/2022

Annwyl Gadeirydd

### **Craffu ar Fil Cydgrynhai cyntaf Cymru – Bil yr Amgylchedd Hanesyddol (Cymru)**

Rwy'n ymwybodol y bu'r Pwyllgor yn craffu ar Fil Cydgrynhai cyntaf Senedd Cymru dros yr haf. Er i ni fethu'r cyfle hwnnw i rannu sylwadau gyda chi, deallaf fod y Pwyllgor yn parhau i roi ystyriaeth gychwynnol i'r Bil. Hyderaf felly bydd cynnwys y llythyr hwn yn ddefnyddiol wrth i chi barhau â'r trafodaethau.

Mae gennym ddiddordeb byw yn y Bil hwn ar gyfrif ein cyfrifoldeb unigryw i safoni enwau lleoedd Cymru a'n diddordeb polisi mewn hyrwyddo a gwarchod enwau Cymraeg. Fodd bynnag, mae ein diddordeb yn y Bil hwn yn disgyn y tu allan i gwmpas gorchwyl presennol y Pwyllgor mewn gwirionedd. Nid ydym yn ystyried bod gennym sylwadau penodol i'w cynnig mewn perthynas â chylch gwaith y Pwyllgor sy'n deillio o Reol Sefydlog 26C.

Deallwn nad oes cyfle i ddiwygio na chryfhau'r ddeddfwriaeth bresennol yn rhan o'r ymarferiad cydgrynhai. Mae ein diddordeb ni yn y Bil hwn yn ymwneud yn bennaf â'r Rhestr Enwau Lleoedd Hanesyddol statudol a byddwn yn ceisio cyfleoedd eraill i drafod sut y gellid cryfhau ymhellach statws a chynnwys yr adnodd hwn. Roeddem yn falch o gyfrannu yn ddiweddar at Grŵp Gorchwyl a Gorffen oedd yn darparu argymhellion i'r Comisiwn Brenhinol at y dyfodol, er enghraifft. Ac mae'n drafodaeth amserol wrth i Lywodraeth weithio tuag at y nod a amlinellir yn y Cytundeb Cydweithio i 'sicrhau bod enwau lleoedd Cymraeg yn yr amgylchedd adeiledig a naturiol yn cael eu diogelu a'u hyrwyddo'.

Mae gennym ddiddordeb hefyd, wrth reswm, ym mhotensial cyfraith Cymru i gryfhau ymhellach statws y Gymraeg. Mae'r ymarferiad cydgrynhai hwn yn digwydd mewn cyd-

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destun deddfwriaethol lle mae gan y Gymraeg statws swyddogol yng Nghymru. Ar hyn o bryd, nid oes unrhyw gyfeiriad at y Gymraeg yn y Bil fel y'i cyflwynwyd. Yn wir, mae'r cyfeiriadau at y Gymraeg yn brin yn neddfau'r Senedd yn gyffredinol, fel yr amlygwyd yn [Adroddiad 5-mllynedd y Comisiynydd](#) (gweler t.29), a gallai'r prosiect cydgrynhoi cenedlaethol hwn fod yn gyfle i unioni'r cam hwnnw.

Carwn nodi, wrth gloi, ein croeso cyffredinol i'r ymarferiad presennol a'r nod cyffredinol o sicrhau bod cyfraith Cymru yn fwy hygyrch, clir, a hawdd ei defnyddio. A hynny yn nwy iaith swyddogol Cymru. Mae'r gwaith hwn wedi sicrhau, wrth gwrs, fod deddfwriaeth hanesyddol a luniwyd yn San Steffan ar gael yn y Gymraeg am y tro cyntaf. Byddai'n dda deall rhagor am sut y mae'r drafftwy'r dwyieithog, cyfieithwyr deddfwriaethol a therminolegwyr wedi cydweithio er mwyn gwella hygyrchedd y gyfraith a safoni a chysoni terminoleg yn y ddwy iaith. Mae'n debyg fod hyn, hefyd, y tu hwnt i gwmpas y craffu presennol ond byddai'n fuddiol ystyried a oes yna wersi i'w dysgu ac arferion llwyddiannus i'w trosglwyddo wrth i'r rhaglen cydgrynhoi fynd rhagddi.

Hoffwn gymryd y cyfle hwn i ddymuno'n dda i chi fel pwyllgor wrth i chi ddechrau ar y gwaith o graffu ar fil cydgrynhoi cyntaf Senedd Cymru.

Yr eiddoch yn gywir,



**Gwenith Price**

Dirprwy Gomisiynydd y Gymraeg



Huw Irranca-Davies MP  
Chair of the Legislation, Justice and Constitution Committee

By email to:  
[SeneddLJC@senedd.wales](mailto:SeneddLJC@senedd.wales)

17/10/2022

Dear Chair

### **Scrutiny of Wales' first Consolidation Bill - The Historic Environment (Wales) Bill**

I am aware that the Committee scrutinised the Welsh Parliament's first Consolidation Bill over the summer. Although we missed that opportunity to share our views with you, I understand that the Committee is still giving initial consideration to the Bill. I therefore trust that the contents of this letter will be useful as these discussions continue.

We have a keen interest in this Bill on account of our unique responsibility to standardise Welsh place names and our policy interest in promoting and protecting Welsh names. However, our interest in this Bill actually falls outside the scope of the Committee's current remit. We do not consider that we have specific comments to offer in relation to the Committee's terms of reference arising from Standing Order 26C.

We understand that there is no opportunity to amend or strengthen the existing legislation as part of the consolidation exercise. Our interest in this Bill relates mainly to the statutory List of Historic Place Names and we will seek other opportunities to discuss how the status and content of this resource could be strengthened further. We were happy to contribute recently to the work of a Task and Finish Group that made recommendations to the Royal Commission, for example. And it is a timely discussion as the Government works towards the goal outlined in the Co-operation Agreement to 'ensure that Welsh place names in the built and natural environment are protected and promoted'.

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We are also, of course, interested in the potential of Welsh law to further strengthen the status of the Welsh language. This consolidation exercise is taking place in a legislative context where the Welsh language has official status in Wales. There is no reference currently to the Welsh language in the Bill as introduced. Indeed, references to the Welsh language are rare in the Acts of the Senedd in general, as highlighted in [the Commissioner's- 5 year report](#) (see p.29), and this national consolidation project could be an opportunity to rectify this.

In conclusion, we would like to note that, in general, we welcome the current exercise and the general aim of ensuring that Welsh law is more accessible, clear and user friendly in both the official languages of Wales. This work has ensured, of course, that historic legislation drawn up in Westminster is available in Welsh for the first time. It would be good to have a better understanding of how the bilingual drafters, legislative translators and terminologists have worked together in order to improve the accessibility of the law and to standardise and align terminology in both languages. This, too, is probably beyond the scope of the current scrutiny process but it would be beneficial to consider whether there are lessons to be learned and successful practices to be transferred as the consolidation programme progresses.

I would like to take this opportunity to wish you well as a committee as you begin the work of scrutinising the first consolidation bill of the Welsh Parliament.

Yours sincerely,

**Gwenith Price**

Deputy Welsh Language Commissioner

# Agenda Item 18

Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd  
Minister for Rural Affairs and North Wales, and Trefnydd



Llywodraeth Cymru  
Welsh Government

Rt Hon Elin Jones MS  
Llywydd and Chair of the Business Committee  
Senedd Cymru  
Cardiff  
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[llywydd@senedd.wales](mailto:llywydd@senedd.wales)

18 October 2022

Dear Elin,

You will be aware of the UK Energy Prices Bill (the Bill), which includes relevant provision requiring the consent of the Senedd.

The Bill, which we did not have sight of until the evening before introduction, was introduced in the House of Commons on 12 October 2022. All House of Commons stages took place on 17 October, with no amendments to the Bill. All House of Lords stages are scheduled to complete on 24 October and the Bill is expected to receive Royal Assent on 25 October. Despite representations to the UK Government to seek to extend the timetable, the period available to complete the legislative consent process is, therefore, extremely short. The regrettably limited opportunity for scrutiny in the Senedd arising from the UK Government's timetable and the lack of advance sharing of the Bill, will be pursued further with the UK Government.

In order to provide the Senedd with the opportunity to debate and vote on consenting to the relevant provisions in the Bill, we propose to hold a Legislative Consent Motion Debate on Wednesday, 19 October. Our Legislative Consent Memorandum will be laid today recommending the Senedd gives consent to the relevant provisions in the Bill. This will be followed by the tabling of the Legislative Consent Motion.

Bae Caerdydd • Cardiff Bay  
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Canolfan Cyswllt Cyntaf / First Point of Contact Centre:  
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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

In order to allow the debate to take place on 19 October, it will be necessary to suspend Standing Orders upon the tabling of our legislative consent motion. It is possible the motions will need to be tabled less than the requisite one working day before we propose to hold the debate. Consequently, in accordance with Standing Order 33.8 we are seeking your agreement in advance to the tabling of these motions. We would, where possible, always seek to provide the Senedd with as much formal notice of a debate as possible and would wish to avoid suspending Standing Orders, however, in the case of this Bill, and in light of the timing imposed by UK Government, we consider it important the Senedd has its say given the significant impact of its provisions on Wales.

I am copying this letter to all Senedd Committee Chairs and all Members of the Senedd.

Regards,

A handwritten signature in black ink that reads "Lesley Griffiths". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

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