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Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Huw Irranca-Davies, Chair
Legislation, Justice & Constitution Committee
Senedd Cymru
Cardiff Bay
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17th August 2022

Dear Huw

HISTORIC ENVIRONMENT (WALES) BILL

Thank you for your letter of 19 July 2022 following my evidence to the Committee on 11 July. I found the Committee's approach to that first evidence session extremely helpful and I appreciate the opportunity to provide further information and detail through our correspondence.

Legislation excluded from the Bill

1. We omitted provision from section 53 of Part 3 of the Ancient Monuments and Archaeological Areas Act 1979 for legislative competence reasons. This is the provision in section 53(4) about bringing proceedings elsewhere in Great Britain for offences committed in the territorial sea adjacent to Wales. Because of the limitations of the Senedd's competence in terms of the extent of any changes to the law, we would have been unable to restate the effect of section 53(4) in the Bill.

2. Part 2 of the Ancient Monuments and Archaeological Areas Act 1979 is not being restated in the Bill. The decision not to restate this provision has been made for different reasons to the other examples of legislation mentioned in your question. Part 2 of the 1979 Act makes provision about archaeological areas, but Part 2 has never been used to designate areas in Wales. The Part is of no practical utility or effect, so the Bill makes amendments to Part 2 so that it will no longer apply in relation to Wales.

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3. In the other Acts that are wholly or partly restated in the Bill, various provisions have been omitted from the consolidation under Standing Order 26C.2(iii) because they are no longer considered necessary. Those provisions are identified in the Drafters' Notes.

4. However, one provision of this kind was inadvertently omitted from the Drafters' Notes, and I would like to take this opportunity to correct that oversight. Section 54 of the Planning and Compulsory Purchase Act 2004 enables a development order under the Town and Country Planning Act 1990 to specify cases in which a person consulted about an application under the planning Acts is required to provide a response. This would include applications for listed building consent and conservation area consent, but the power has never been used in relation to those applications and Cadw considers that there is no prospect of it being used. Accordingly, in reliance on SO 26C.2(iii) the Bill does not amend section 54 to cover applications under the Bill, meaning that it will cease to apply to listed building and conservation area consent applications in Wales.

5. At a suitable opportunity the Drafters' Notes will be updated to include this reference.

6. The Drafters' Notes also include no reference to section 49 of the Planning (Listed Buildings and Conservation Areas) Act 1990, because that section will continue to apply to Wales after the consolidation. In our view, it would be more appropriate for section 49 to sit with the general law about compensation for the compulsory purchase of land, rather than with the law on the protection of the historic environment, and for that reason we do not think it belongs in this Bill.

7. Of the other examples of legislation mentioned in your Annex, the only realistic candidate for inclusion in the Bill was the provision about wrecks in the 1973 Act.

8. We took the view in relation to the 1969 and 1986 Acts that both Acts were peripheral to the subject-matter of the consolidation and should not be included in the Bill for that reason. In the case of the 1969 Act, the main provisions that are still in force are really about the powers of charities and the Charity Commission in connection with the disposal of land, rather than about the protection of the historic environment as such. Similarly, the 1986 Act is about preventing interferences with military aircraft that have crashed and vessels that have sunk. Had we included this provision in the Bill, we think this would have had a negative effect on the accessibility of the restated legislation.

9. As suggested above, the position in respect of the 1973 Act was different, and the legislation does protect certain wrecks thought to be historically, archaeologically or artistically important. The difficulty with the 1973 Act is that it was passed as "stop-gap" legislation at the time, creating what was meant to be a temporary mechanism for the designation and management of the sites of wrecks.

10. Incorporating the Act in the Bill would have required a number of new provisions to make it consistent with modern practices (the current provision is very light on detail about how the system established by the Act operates), and the legislation has not been used for 20 years (only six sites have ever been designated in relation to Wales). It also applies, of course, off-shore rather than on land. As a result the 1973 Act wasn't considered a priority partly because its omission could be justified and partly because it is not a significant part of the system for the protection of the historic environment.

UK Government proposed legislation

11. I understand, and to an extent share, the concerns of the Committee – the aim of all of the consolidation projects is to improve the accessibility of Welsh law, and we want to ensure that everything is done to maintain that improvement. That is not to say that

subsequent legislative changes cannot be made to legislation that has been consolidated. Clearly it can. What we want to ensure is that those changes are made as amendments to the consolidation, not as separate stand-alone legislative proposals.

12. Officials in the Office of the Legislative Counsel have discussed the Government's programme to improve the accessibility of Welsh law with their counterparts in the other UK drafting offices. This includes explaining our ambitions for maintaining the law once consolidated and codified. Those drafting offices are already aware of our existing policy that amendments to existing Welsh law by other legislatures must make changes to both language texts. There are plenty of examples of that happening already.

13. As explained in the evidence to the Committee, if the UK Government were to legislate for Wales on a matter for which the law had already been consolidated then the expectation would be that the consolidated law would be amended by that UK Bill. That is the approach, should this situation ever arise, that our officials would explain and discuss with the relevant policy, legal and drafting officials at the time.

14. I believe that, should this ever come to pass, then it would be appropriate to draw the Senedd's attention to the drafting approach being taken by the UK Government in their legislative proposals as part of the LCM process.

Codes of Welsh law

15. The Committee has understood the intentions for Codes of Welsh law correctly. They are, to adopt your wording, repositories of the law. They will most likely begin with a single piece of consolidated primary legislation. But they could also begin with the substantive statement of the law set out through an Act which reformed and restated the law on a subject (so through a Senedd Bill taken through Standing Order 26). Subsequent substantive primary legislation may also be part of a Code. For example, due to the amount of legislation involved, a Code of Welsh law on education may – as has been said in evidence previously – contain a number of Acts relating to different aspects of education law (e.g. schools, further education, higher education). If an Act is intended to form part of a Code, then a statement to that effect will be included within it – most usually in the way set out in section 1(1) of the Historic Environment (Wales) Bill.

16. Legislation which amends those substantive Acts will not form part of the Code and will not include the statement. They are simply the vehicle by which amendments to the, in this case, consolidated legislation is achieved.

17. The Committee is also correct to say that sitting within that Code (or 'repository') will be delegated legislation and guidance. The substantive regulations will include a statement that they form part of the Code. And again subsequent amending regulations will not be part of the Code but the effects they create will take place within the Code.

Legislation.gov.uk

18. Although The National Archives are aware of the Government's programme to improve the accessibility of Welsh law, we do not see that it is necessary to seek additional or different styling on legislation.gov.uk for legislation forming part of a Code. This is because it is not a new type or form of legislation (the Acts will continue to be Acts of Senedd Cymru for example).

19. We intend to use the Cyfraith Cymru/Law Wales website to set out the content of Codes of Welsh law. We will create a bespoke page for each Code, and users will be able to access the primary and subordinate legislation from this page, as well as links to

guidance. The Queen's Printer will remain responsible for the publication of the legislation (the official copies and printed versions) and legislation.gov.uk will continue to publish digital versions of the legislation (which is then available under the Open Government Licence for commercial publishers and others to re-use).

20. I will be updating the Senedd later this year on the excellent progress made with legislation.gov.uk on expanding the functionality of the site to enable the Welsh language texts of Welsh law to be updated. But ahead of this I can reassure the Committee that arrangements are being made to ensure that future amendments to Acts and SIs forming part of a Code of Welsh law will be updated on legislation.gov.uk swiftly.

Potential changes to Standing Orders

21. The Senedd and this Committee have recognised the risks, and arguably the damage, to the accessibility of law that has been consolidated subsequently fragmenting and proliferating again if amendments are not made to the substantive Acts. That is why we need to find a way to help ensure that the Senedd itself has to agree to any future legislative proposals doing anything other than amending a Code. I don't think we can say there would never be a good reason why this might happen, but I do think we can say that the Senedd has to be content were that to be proposed.

22. It seems to me that the best way to safeguard this principle is by including a provision on this in the relevant Standing Orders for Bills (and maybe also subordinate legislation if that was something the Senedd considered necessary).

23. The Trefnydd and I will seek to raise this with the Llywydd and the Business Committee once the intentions of the Senedd are known in relation to this Bill, so that a suitable approach to engaging with Members and Party Groups on this matter can be established. To reiterate the point I made at the evidence session, this is a matter that all Members need to consider and be content with – this is because Committees, individual Members and the Commission can bring forward legislative proposals, not just the Government.

New powers of the Welsh Ministers

24. Section 2(3) of the Bill includes a new power for the Welsh Ministers to provide for exceptions to the general rule that religious buildings used for religious purposes are not monuments for the purposes of Part 2 of the Bill.

25. This power has been included because of uncertainty about the meaning of the opening words of section 61(8) of the Ancient Monuments and Archaeological Areas Act 1979. That section prevents ecclesiastical buildings for the time being used for ecclesiastical purposes from being treated as "monuments".

26. In restating this provision in section 2(3) of the Bill, we were uncertain whether the exemption had originally been intended to apply in relation to the Church of England only, and uncertain about what the wording meant in the context of the operation of section 3 of the Human Rights Act 1998 (section 3 requires legislation to be read and given effect in a way that's compatible with ECHR rights, so far as it is possible to do so). We applied the provision to all religions in the first instance, because we took the view that this was the most likely ECHR compatible interpretation, but we have retained a degree of flexibility to respond to any future change in circumstances.

27. There are other examples in the Bill where provision has been moved from subordinate legislation into the Bill but changes might be needed in future. In those cases, the Bill

includes powers to amend the provisions. One example is the power in Schedule 3 to the Bill to change the categories of class consents; this is something that the 1979 Act leaves entirely to subordinate legislation. These examples do not involve the conferral of new powers and simply retain existing flexibility available to the Welsh Ministers to make adjustments to the system created by the Bill.

Section 209(6) of the Bill

28. This change has been made in the context of a change in the approach adopted by the Bill to what's covered on the face of the primary legislation. We have restated much more on the face of the Bill about key matters relevant to partnership agreements than currently appears on the face of the Ancient Monuments and Archaeological Areas Act 1979 and Planning (Listed Buildings and Conservation Areas) Act 1990. For example, provision about the termination of partnership agreements is covered exclusively by the Bill and not left to regulations (as is currently the case).

29. This difference in approach justifies a different procedure in our view, and this is something we think is permitted by Standing Order 26C.2. The matters we are leaving to regulations subject to negative procedure are the types of procedural matters that are also left to negative regulations elsewhere in the Bill; for example, in the provisions about applications for scheduled monument consent.

30. It's worth noting that any regulations modifying the effect of Part 2 of the Bill to partnership agreements would still be subject to the affirmative procedure. This is consistent with the Government's policy on determining the suitable procedure to apply to subordinate legislation.

Effect of the Interpretation Act 1978 and the Legislation (Wales) Act 2019 on the Bill

31. The Interpretation Act 1978 applies to all the Acts consolidated in the Bill and all the subordinate legislation made before 2020. The Legislation (Wales) Act 2019 applies to more recent subordinate legislation and will apply to the Bill. The Bill will therefore be subject to slightly different interpretation provisions from nearly all of the legislation it consolidates.

32. The main implications of this change are described in paragraphs 14 to 17 of the Drafters' Notes, and specific examples are given in the entries for sections 2, 3, 74, 160, 161 and 205 of the Bill and the entry for the omission of section 91(4) of the 1990 Listed Buildings Act. The Office of the Legislative Counsel also issued general guidance on the effect of the changes made by the Legislation Act in 2020: see https://gov.wales/guidance-for-preparing-welsh-legislation

33. The Schedules of generally applicable definitions in the two Acts are slightly different. In particular, the definition of "Wales" in the Interpretation Act does not include the territorial sea whereas the definition in the Legislation Act does. This has different implications for different Parts of the Bill. In Part 2, we have omitted provisions from the 1979 Act that give "Wales" the wider meaning, because they are not needed in a Bill that will be subject to the Legislation Act. In Part 3, we have added a provision giving "Wales" the Interpretation Act meaning; this preserves the effect of the silence in the 1990 Listed Buildings Act about the meaning of "Wales" (which means the Interpretation Act definition applies).

Use of 'expedient' and 'appropriate'

34. Our approach is that references to what is “appropriate” or “expedient” should not be included unless they are necessary. This reflects our general approach of omitting superfluous wording. Conversely, of course, wording should not be omitted where it *is* necessary.

35. Where a provision confers a power on a public authority to do something, it is generally unnecessary to require the authority to consider that doing that thing is “expedient” or “appropriate” because the law already requires public bodies to act reasonably. That position may have been less clear when some of the provisions restated in the Bill were first enacted (in some cases a very long time ago), which may explain why it was done. But a modern Bill would not normally include wording to indicate that a public body must act reasonably, and the references that have been omitted in the Bill are mainly of this kind.

36. Some references to what an authority considers “appropriate” have been retained in the Bill. This is where we think the references are necessary because the provisions in question would not work, or would be unclear, without them. But we are reviewing these references and we would be happy to look at any that the Committee considers may be unnecessary.

37. Where the Bill uses the word “appropriate,” the references should fall into the following categories:

    a. Provisions about consultation or notification often require Ministers to consult or notify specified persons and “any other persons they consider appropriate”. There are examples in sections 5(3), 78(2), 194(7) and 196(4) and paragraph 3(5) of Schedules 4 and 5, and similar provisions about who may be a party to a partnership agreement in sections 25(2) and 113(2) and (4) of the Bill. Referring only to “other persons” would be unclear and might have a different effect.

    b. Some provisions enable or require a public authority to take action it considers “appropriate” for particular purposes or having regard to particular considerations. The references to what the authority considers appropriate make clear the connection between the action and the purposes or considerations. There are examples in sections 35(1), 123(1) and 134(1) and paragraph 2(7) of Schedule 9.

    c. Some provisions state that a public authority may do anything it considers appropriate, in order to make clear that the power is a very broad one. This may be important if the context would otherwise suggest that the power might be narrower. There is an example in section 184(6).

    d. Some provisions refer to what is “appropriate” for a mixture of reasons b. and c., i.e. to make clear that a public authority has a wide power to do anything it considers appropriate for a particular purpose. There are examples in sections 9(5), 42(3), 81(5), 135(3) and 143.

38. These may not be the only reasons for including the word “appropriate” in legislation. For example, the Curriculum and Assessment (Wales) Act 2021 is a recent Act that includes the word “appropriate” in various places. Some of these references were included for reasons that are not relevant to the current Bill:

    a. Sections 12, 14, 16 and 51 of that Act confer powers for education bodies to do various things if they “consider it appropriate to do so”. These powers appear immediately after powers to do other things only if the bodies “consider it

necessary to do so". The references to what is "appropriate" are needed in these contexts to make clear that the test is not what is necessary.

b. Sections 33(4), 45(5) and 46(3) confer powers for a body to direct another person to "take the action that it considers appropriate". The wording is included to make clear that it is the body giving the direction that determines what action it is appropriate to take.

Engagement with HMCTS

39. The Welsh Government has followed the agreed procedures to make the HM Courts and Tribunals Service and the Ministry of Justice aware of the Bill. A Justice System Impact Identification form was submitted to the Ministry of Justice who have confirmed that the Bill will have nil or minimal impact on the justice system. In addition, information has also been submitted to the Lord Chief Justice and no issues have been identified that will impact on HMCTS or the Judicial College.

Judicial Review and Courts Act 2022

40. Section 13 of the Judicial Review and Courts Act 2022 was brought fully into force on 13 July 2022 by regulation 3 of the Criminal Justice Act 2003 (Commencement No. 34) and Judicial Review and Courts Act 2022 (Commencement No. 1) Regulations 2022 (SI 2022/816).

41. The Bill does not make any changes to the sentencing powers of Magistrates' Courts but incorporates actual and prospective changes to the penalties for historic environment offences made by other legislation. The only change to a sentencing power made by the Bill is in section 198, which omits the power to impose a sentence of imprisonment on conviction on indictment that is currently provided by section 330(5) of the Town and Country Planning Act 1990. (See the entry for section 198 in the Drafters' Notes.)

Updating TAN24

42. As part of the implementation phase anticipated in relation to the Bill, guidance and advice issued by the Welsh Government, including Technical Advice Note 24, will be updated. These will be textual changes updating the references to the title of the legislation or section numbers – the policy advice contained in these documents will remain the same.

43. Schedule 14 to the Bill makes transitional provisions, so that any reference to a repealed provision or enactment is to be read as reference to the corresponding provision of the Bill.

44. As I note above, I will be updating the Senedd later this year on progress under the Government's accessibility programme, including in relation to Cyfraith Cymru. But I hope my earlier comments on the intentions for publication of the Codes on that site set out how guidance will be included.

Costs associated with implementation

45. I note your comments regarding other legislation, but we must be clear that just because other legislation may not have costs at the level of this Bill, that in and of itself does not mean these costs are significant or lacking in accuracy or robustness. To calculate costs for this Bill, the parts of the historic environment sector that would be impacted by the new legislation were identified by Cadw, together with consideration of the work that

would be required. These informed estimates of costs, that also took comparisons with recent legislation and civil service pay grades into account.

46. Overwhelmingly, the costs identified were staff costs associated with updating websites, guidance and forms so that they refer to the correct legislation. Time will also be needed for staff to familiarise themselves with the new legislation. As noted in the Explanatory Memorandum these are 'opportunity' rather than 'actual' costs – only very limited actual costs (detailed in the Explanatory Memorandum) were identified.

47. Whilst I of course understand the Committee seeking clarification on any matter set out in Explanatory Memorandum, I should make clear that the Government does not intend to complete the full regulatory impact assessments in relation to consolidation Bills as we do, where relevant, for law reform Bills. In line with Standing Orders, the Government is required to set out the best estimates of any additional costs. In developing these, if it is considered that these costs would be significant, then this would suggest that the proposals cannot continue as a consolidation Bill and the government should consider whether or not to proceed by bringing forward a reform Bill. And a full RIA would be undertaken at that time.

48. But on the points raised by the Committee, I can confirm:

a) Costs for National Park Authorities and Local Authorities

The estimate of time reflects anticipated work to update websites and other materials to include references to the new legislation and familiarising key staff with the legislation. Much of the information that local authorities provide will not change as the effect of the law will remain the same. They may need to check, for example, links which take the reader to the Cadw website to ensure that they are correct, as well as to update references to the correct legislation. This is likely to be done at a similar cost by staff of similar grades to the Welsh Government and the costs have been estimated on this basis. Although no formal consultation has been undertaken, discussions with planning authorities on the impact of the Bill and what will need to be done prior to its commencement have informed our cost estimates.

b) Costs to land owners and private individuals

There will be no costs to landowners or private individuals as there is no change in the effect of the law.

c) Costs for third sector bodies and amenity societies

It is difficult to quantify this as some organisations will include links on their website which direct the reader to the pertinent legislation or associated material which will take a matter of minutes to update. Other organisations include more detailed explanatory text which will need to reflect the new legislation which may take longer to update. It is also not possible to place a cost on the time that this may take as each organisation will have different pay levels.

d) Familiarisation workshops for heritage crime officers

Although police authorities have their own mechanisms for identifying new legislation, there is a network of officers who deal specifically with heritage crime. There are four heritage crime liaison officers in Wales, one for each police force, one of whom is the overall single point of contact (SPOC) leading on heritage crime for Wales. The familiarisation session will be carried out as part of Cadw's regular meetings with the

heritage crime liaison officers. The identified costs include Cadw's costs, opportunity costs for the heritage crime officers' time to attend the session and any time needed to update any manuals or desk instructions.

e) Welsh Archaeological Trusts and the Royal Commission on the Ancient and Historical Monuments of Wales

The Welsh Archaeological Trusts are responsible for the Historic Environment Records of Wales. 'Archwilio' is the online access system to these records and contains information for the whole of Wales; some updating will be required to reflect the new legislation. The Welsh Archaeological Trusts also play a vital role in the management and promotion of the historic environment and we expect them to provide valuable assistance in raising awareness of the new legislation and related subordinate legislation and guidance. Accordingly, they will need to ensure their websites have the correct revised information.

The main costs for the Royal Commission will be associated with staff familiarising themselves with the Bill. The Commission will also need to review their websites and databases to identify changes that may be required to reflect the new legislation.

We have not undertaken formal consultation on the estimated costs, but discussions with the Welsh Archaeological Trusts and the Royal Commission suggest that this work will require minimal activity from both, and this is reflected in the cost estimates.

I look forward to the Committee's further deliberations on the Bill, and am happy to confirm that I will return to provide further evidence on 14 November.

Yours sincerely,

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