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—
Legislation, Justice and Constitution Committee

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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

Huw Irranca-Davies
Chair

Annex

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 SOC26.2(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[1] 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

[1] 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 17TH 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.