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

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/JJ/1145/23

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

SeneddLJC@senedd.wales

25 April 2023

Dear Huw,

Many thanks to you and the Legislation, Justice and Constitution Committee members for considering the Legislative Consent Memoranda (initial Memorandum, revised memorandum, and Memorandum No. 2) in respect of the UK Government's Levelling-up and Regeneration Bill (the Bill).

I welcome the report published by the Committee on 24 February noting your request for a response to the recommendations. I apologise for the delay in providing this response.

Recommendation 1. The Minister should confirm whether the clauses identified in paragraph 59 of the revised Memorandum require the consent of the Senedd and, if not, why the Welsh Government has a different view from the UK Government.

The clauses identified in paragraph 59 of the revised Memorandum do not constitute a 'relevant provision' on the basis that they fall within the exception set out in Standing Order 29.1(i). That is, that they are incidental or consequential amendments (to retain the existing legislative position) to a reserved position (in this case a provision which applies only in relation to England). As such they do not require the consent of the Senedd. The UK Government is in agreement that the provisions do not modify the executive competence of the Welsh Ministers or the legislative competence of Senedd Cymru. I apologise if their inclusion as 'other amendments' in paragraph 59 of the revised Memorandum has caused confusion.

Recommendation 2. The Minister should explain why she is seeking amendments to the Bill to seek executive powers for the Welsh Ministers in relation to planning data provisions and environmental outcome reports rather than negotiating that those provisions apply to England only.

I have previously identified that the provisions in respect of planning data provisions and environmental outcome reports are potentially beneficial, and I was open to persuasion on their application to Wales.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Julie.James@llyw.cymru
Correspondence.Julie.James@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

I stand by this position. The position of Environmental Impact Assessment (EIA) in Wales is currently very complicated, with the relevant EU Directives governing this area currently implemented through a complex range of different methods, including primary legislation and Statutory Instruments made under section 2(2) of the European Communities Act 1972 (ECA) on an England and Wales, or Wales only basis, and under existing powers, such as section 71A of the Town and Country Planning Act 1990 (the TCPA). The system is complicated because EIA covers a very large number of policy areas, ranging from planning, water, marine through to agriculture and transport. More importantly the legislation is unable to adapt to changing circumstances as the majority of these policy areas do not have primary legislation to enable their future amendment. Therefore, what we have now, is what we have. It is also worth noting that there may be limited powers to preserve and assimilate retained EU law in devolved areas by virtue of the powers in the UK Government's Retained EU Law (Reform and Revocation) Bill. However, these powers are complex and limited in scope and time, and they may not provide an ability to amend upon expiry of the powers. The Bill is currently progressing through Parliament and is subject to change.

Whilst the majority of policy areas are clearly within devolved competence, there are other aspects of the current EIA regime that relate to reserved matters and are therefore dealt with by the UK Government on an England and Wales basis, for example in relation to nationally significant infrastructure projects and national security. If a Senedd Cymru Bill were to seek to make such provision, consideration would need to be given as to the extent that the reservation was engaged.

On this basis my officials have been engaging with the UK Government over what would be required to make the provisions acceptable and realise benefits to Wales. Of course, should those benefits not be realised I would seek to have the provisions apply in England only.

Recommendation 3. The Minister should clarify whether it would be possible for the Welsh Government to bring forward its own Bill covering planning data provisions and / or environmental outcomes reports, and if not what the barriers are to such an approach.

The Welsh Government would be able to bring forward primary legislation covering planning data provisions and / or environmental outcomes reports.

The legislative programme is set by the First Minister's statement announcement. The Counsel General has also announced the programme to improve the accessibility of Welsh Law. Under these programmes, we are currently progressing the Infrastructure Consenting Bill and the Planning Consolidation Bill. The Infrastructure Consenting Bill is very narrow in scope focusing on simplifying the consenting process for specified types of major on and offshore infrastructure and so could not accommodate the changes across so many different policy areas. The Planning Consolidation Bill can only consolidate the legislation under the remit of standing order 26C, therefore also preventing the inclusion of these provisions.

Recommendation 4. The Minister should provide an update on who, in Wales, the Welsh Government considers could be a 'relevant planning authority' for the purposes of Chapter 1 of Part 3 of the Bill.

The definition of a 'relevant planning authority' will apply in two situations in Wales. The first is in relation to non-devolved matters. Regulations affecting planning data, made under the Bill provisions, could be applied to local planning authorities and Natural Resources Wales as they undertake their consultee role, responding to Nationally Significant Infrastructure Projects under the Planning Act 2008.

In the second situation ‘relevant planning authority’ would refer to public authorities that have functions under Part 5 of the Bill on introduction (now Part 6). Functions may mean either preparing Environmental Outcomes Reports (EORs), contributing to such reports or considering them alongside an application for a permission, consent or other approval.

EORs are proposed as a replacement for Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA). As Clause 120 of the Bill (as introduced) seeks to prevent regression in environmental protection, it is anticipated that regulations made by the Secretary of State to define which public authorities have functions under the new regime would mirror those authorities currently engaged.

Across most of the sectors to which EIA applies, Natural Resources Wales and the Welsh Ministers would fall under the definition of ‘relevant planning authority’. Other bodies falling under the definition in specific sectors would be local authorities and national park authorities, internal drainage boards, harbour authorities and community councils.

The public authorities currently engaged with SEA and would therefore be likely to fall under the definition ‘relevant planning authority’ would be those preparing relevant plans and programmes. These are plans and programmes which set the framework for future development consents in a number of policy areas: agriculture; forestry; fisheries; energy; industry; transport; waste management; water management; telecommunications; tourism; town and country planning; and land use.

Recommendation 5. The Minister should clarify what is meant by the sentence “We will work with the UK Government to ensure all relevant Wales only legislation is also included” in paragraph 13.1 of her letter of 25 November 2022. In so doing, she should explain the practical effect of the change she appears to be seeking to clause 130 of the Bill (as introduced).

Clause 130 as introduced (now clause 152) defines the existing environmental assessment legislation that transposes or incorporates the SEA and EIA Directive. Clause 127 as introduced (now clause 149) ensures that EOR legislation made under this part is able to interact with existing environmental assessment legislation, as well as the Habitats Regulations subject to non regression provisions. Clause 120 as introduced (now clause 142) enables regulations to be made only if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed.

As the provisions seek non-regression of existing law it is considered important that the level of environmental protection set by Welsh law is maintained. This would be achieved by ensuring it was referenced in clause 130 of the Bill (as introduced).

Recommendation 6. The Minister should clarify whether she has sought to reverse the provision in clause 128(2) (as introduced) omitting section 71A of the Town and Country Planning Act 1990, which includes the current executive power of the Welsh Ministers to make provision in respect of the consideration of the likely environmental impacts of proposed development. If not, the Minister should explain the reasons why.

In line with the response to recommendation 2, should the proposals not realise benefits in Wales I would seek the application of the provision to England only.

Recommendation 7. The Minister should state whether clause 112 (as introduced) and amendment NC60 (Street votes: community infrastructure levy) will have an impact on the drafting of the Consolidation Bill on planning law which we are aware the Welsh Government is preparing for introduction to the Senedd.

These clauses make technical and clarifying legal amendments only. The forthcoming Planning Consolidation Bill will consolidate the law that affects Wales at the time of introduction. If clause 112 (as introduced) and amendment NC60 (Street votes: community infrastructure levy) are included in the Bill at Royal assent, it is anticipated they will be subsumed into our Planning Consolidation Bill.

Recommendation 8. The Minister should provide the Committee with an update regarding her negotiations with the UK Government about all provisions of the Bill for which she is recommending consent is withheld.

I wrote to Dehenna Davison MP Minister for Levelling Up on 19 December outlining my firm view that on Part 1, any actions to deliver against these missions could interfere significantly with the policy objectives of the Welsh Government. The letter also included a request to discuss the matters in person. This request was accepted and the Minister for Social Justice attended a meeting on 22 March at which she reiterated our opposition to the provisions.

While we have recommended withholding consent for the provisions relating to planning data and EOR in Chapter 1 of Part 3 and Part 5 (now Part 6) respectively, we have maintained the line with UK Government that if equivalent regulation making powers were offered for the Welsh Ministers we would re-consider our position. This is because the approach could simplify consenting procedures for a range of projects, however without sight of detailed drafting it has not been possible to consider whether the provisions would be appropriate for Wales.

On introduction, the planning data and EOR provisions were drafted as regulation making powers for the Secretary of State only, with prior consultation with the Welsh Ministers. This provides no constitutional protection, hence my recommendation. The UK Government have subsequently provided draft clauses that offer both the Welsh Ministers and the Secretary of State to make regulations. These powers can also be exercised jointly. However, the Secretary of State retains the constrained power to make provision in devolved areas, following consultation with the Welsh Ministers. The proposed draft clauses have not been formally laid. The draft clauses remain unacceptable as they also do not provide sufficient constitutional protection and do not adhere to the Cabinet principles on concurrent powers. At the meeting on the 22 March, draft text providing for equivalent powers was offered, however this is yet to be received.

Yours sincerely,

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