Infrastructure 30, Ashfords LLP

Senedd Cymru | Welsh Parliament

Pwyllgor Newid Hinsawdd, yr Amgylchedd a Seilwaith | Climate Change, Environment, and Infrastructure Committee

Bil Seilwaith (Cymru) | Infrastructure (Wales) Bill

Ymateb gan Ashfords LLP | Evidence from Ashfords LLP

General principles

What are your views on the general principles of the Bill, and is there a need for legislation to deliver the stated policy intention?

The Bill is a framework for a new consenting regime and much of the mechanics on how it will work in practice is missing as it will come forward through secondary legislation. Despite this, streamlining the consenting process for major infrastructure in Wales has to be welcomed; as is the inclusion of CPO powers given the need to facilitate the delivery of these major projects. The Nationally Significant Infrastructure Project (NSIP) regime under the Planning Act 2008 does – in general – deliver projects within the prescribed statutory timescales and has been successful. As such, mirroring this process is commendable.

As the process requires a statutory instrument to consent a project (i.e. an infrastructure consent order / ICO) it will inevitably mean that the scrutiny of the application will require more resource from all parties involved. This is because the public, stakeholders and applicants will need to understand fully the terms of the powers being sought in the ICO. Given the likely increased level of complexity and resource needed to engage in a new process, we have concern that the statutory timescales will not be met. As an example, the current Developments of National Significance (DNS) regime does – despite the commentary in the Regulatory Impact Assessment expressing the contrary position – have statutory timescales set out but the majority of DNS projects decided to date have not met these timescales. This has caused significant concern amongst those looking to develop in Wales.

Often statutory consultees struggle to respond and properly engage on DNS projects because of a lack of time and resource. In addition, Welsh Ministers are often the cause of delay e.g. some DNS projects have incurred significant delay in

the determination of decisions (over six months from the statutory deadline) and with no reasons being provided for this delay by Welsh Ministers. Delay and uncertainty are the enemies of securing investment, confidence and new infrastructure projects.

The current DNS process gives significant discretion to Inspectors to suspend Examinations and to WG to delay determinations. We would advocate a more limited set of circumstances where this is permitted to occur in the ICO regime. Much of this detail will be provided in secondary legislation and it is important that this comes forward as soon as possible and is scrutinised to ensure that it provides an appropriate procedure which aligns with the delivery ambitions of the regime.

We assume a first draft of any ICO will be based on a Development Consent Order (DCO) which is the statutory instrument required for Nationally Significant Infrastructure Projects (NSIPs) under the Planning Act 2008. If this is the case, these orders tend to be complex and require significant legal input (and understanding) from all parties. From our experience of the DCO process, often parties find it difficult to comprehend these complex documents without advice which – as noted – require a significant amount of input from participants to understand how the consent will operate and how the powers sought will be used. The DCO process does of course aim to set out how powers to be secured will operate in practice but, again, it takes time to engage with this. Our concern – from our experience of acting on 15 DNS projects – is that the resource available in the LPAs, NRW, Cadw etc. will struggle to deal with i) the number of projects that will come forward under the process and ii) the increased level of scrutiny needed to understand the provisions of the statutory order (which, in practice, whilst generally following a similar format, are different for every project). On this basis, we would call for there to be more support, resource and funding provided to statutory consultees by WG to ensure that they can meet the ambitions of the new regime.

Finally, it feels like there are loose ends which will need to be tied in with the proposed Planning (Wales)

What are your views on the Bill's provisions (set out according to parts below), in particular are they workable and will they deliver the stated policy intention?

Part 1 - Significant infrastructure projects

On DNSs, we have acted exclusively on energy DNSs. As such, we comment on clause 2 only.

Generally the MW threshold for energy projects (in Clause 2) is acceptable. However, in our experience, it is worth flagging that this threshold may not be the best approach for solar schemes. We suggest some thought is given to this because the MW threshold for solar projects is not necessarily future proof.

The reason for this is that the threshold is not flexible enough to allow greater extraction of energy generation from a site in the event of technological advancements in panel efficiencies and other equipment. When the 50MW threshold was introduced in the Planning Act in 2008 there were very few solar schemes being developed near to the 50MW threshold limit. However, as panel prices have fallen and efficiencies have improved, it has become more commercially viable to develop larger schemes which are therefore more likely to approach the 50MW threshold.

However, the result, in England particularly, is that many developers cap their projects at 49.9MW (AC) to avoid the 50MW threshold and a more complex consenting regime. The result of this is twofold: i) it prohibits the ability to extract more generation from a development – where panels have become more efficient – even where the level of land coverage is the same. For example, if a scheme is consented today for 40MW(AC) covering circa 200 acres, in 3-5 years (because of the improvement in panels) the same site could have the ability to generate over the 50MW threshold. However, when it comes to develop the site a developer is likely to constrain the generating capacity (possibly even under-developing) to ensure the 50MW cap is not exceeded. This is because going over the 50MW requires a different consent and developing without that consent could have criminal implications. It seems perverse that a consequence of the threshold is a reduction in the potential to generate more clean energy on the same land coverage; ii) the 50MW threshold often results in a dearth of projects in the 50MW-150MW range. This is, in part, because + 50MW projects engage a more involved and expensive consenting regime (i.e. the DCO or ICO process). Projects over 100MW (and more commonly projects below this threshold) may also need to connect to the transmission network – as opposed to the local distribution network – which is much more expensive to secure. As such, currently, the 50MW threshold seems to be limiting the development of projects in the 50MW-150MW bracket. It may be that a hectarage limit ensures a more effective deployment of clean energy from solar schemes. This could also provide better predictability in terms of land use impacts; after all whether 1 acre generates 1MW or 100MW does

not really make a difference in terms of its land use impacts.

For solar development, the 50MW threshold should be its inverter rating (AC) and not its DC rating (which for a 50MW AC project would be closer to 70MW). This position has broadly been accepted by the Secretary of State in England. It would be helpful for this to be set out in the Bill to avoid confusion on this threshold in Wales.

Clause 2 – "the following kinds of development" – this suggests that Clause 2 can include other, unspecified, development. We consider it should be limited to the list in s.1. It also provides that a significant infrastructure project is one where it is 'expected' to have a generating capacity of between 50MW and 350MW. We do not consider that this makes sense as it appears uncertain. If it is linked to a MW figure it should be its actual generating capacity, not an expected figure.

We agree with the 2km length for an overhead line. However, it is not clear what consent is needed for an under 2km line, given that the current DNS process covers all overhead lines at 132kv and above which are associated with devolved Welsh generating stations (see Reg 4B of the DNS Specified Criteria and Prescribed Secondary Consents (Wales) Regulations 2016). Will this still fall within the Town and Country Planning Act or revert back to a s.37 Electricity Act consent (which was amended on the introduction of the Planning Wales Act to bring it into the TCPA)?

Part 2 - Requirement for infrastructure consent

Clause 19 – We consider that reference should be made to the need to obtain an infrastructure consent order for a SIP. Reference to 'infrastructure consent' is confusing because in reality the consent to develop a SIP is contained in the ICO, which is what developer's will apply for and the WMs will consent.

Clause 20(1)(a) – we suggest making it clear that planning permission means planning permission under the TCPA.

Clause 23 – it is not clear whether the provisions in clause 23 allow for what are classed as 'secondary consents' under the DNS regime and whether this is the process to ensure that they are included in the ICO process. For example, one can apply for a secondary consent for works to common land and for replacement common land under the DNS regime but this is not specifically referenced in the Bill – the references to common land are to compulsory acquisition of that land or acquisition of rights only. The stopping up and diversion of footpaths is listed in

Schedule 1 as an item that can be included in an ICO (albeit no reference is given to not needing a stopping up and diversion order under the TCPA or the Highways Act for this in clause 20). However, there is no mention of works to common land in Schedule1.

Part 3 - Applying for infrastructure consent

Clause 30 – the approach to pre-application consultation and publicity is very important to developers, stakeholders and communities. The detail is deferred to regulations so the proposed process is uncertain. However, we consider that WG should detail what it proposes in practice so that there is an understanding of what needs to be secured in the Bill. It is imperative that consultation takes place which is effective and meaningful. However, the current process under the DNS regime is not ideal because of the need to consult on a full draft application. Once a full draft application is in place, it allows limited scope for amendment (often because of the need for technical assessments to have been finalised by the time of consultation). This approach has been criticised by users of the DNS process. Perhaps statutory consultation would be more useful if it happens earlier on in the process so that a proposal can be better influenced by consultees.

Some developers run a non-statutory consultation ahead of statutory consultation to ensure greater community engagement. We suggest that the information to be provided as part of a statutory consultation should be the key aspects of a draft proposal but not a full final draft; a working draft would be more appropriate where it is acknowledged that the materials are being developed and may change. This gives all parties more flexibility, control and opportunity to account for matters. This should also mean that delays (as we've seen in the DNS process post-submission) are avoided during the Examination process.

Clause 35 – it is not clear which local planning authorities need to serve a local impact report. Does the provision mean the host authority and neighbouring authorities; and is there a discretion for neighbouring authorities to submit one?

Part 4 - Examining applications

Clause 50 – the power appears to be very wide and could be contrary to the determination timescales of an application. There should be criteria set out which explicitly details when an examination can be re-open. It is not clear whether this will be set out in Regulations. Given no reference to this point in the clause, we assume this provision is that there is. As such, we consider this power to be too wide and there needs to be certainty on the process and timescales around a re-opening – it cannot go on indefinitely.

Part 5 - Deciding applications for infrastructure consent

Clause 53 – it is not clear how the infrastructure policy statements (IPS) will interact with the National Development Framework (Future Wales) in terms of priority. Currently, the NDF is relevant to DNS projects and the Planning and Compulsory Purchase Act (PCPA) sets out its primacy from a decision making process. We assume the NDF will become a relevant consideration in the determination of SIPs only but as there are no IPSs in place yet it would be helpful for WG to explain how they expect it will work in practice.

It also is not clear how this Clause fits in with the requirement for LDPs to be in general conformity with the NDF, and the policy hierarchy set out in the Planning and Compulsory Purchase Act (see ss. 38 and 60).

Clause 56 – please see our previous comment. The 52 week period is noted. We assume it will comprise a similar process to the NSIP process i.e. six month examination, three month period for the Examining Authority to make a recommendation and three months for the Welsh Ministers to make a determination. However, this is not clear and should be clarified.

We also have concern with the provisions which allow this period to be extended (for a seemingly indefinite period). For example, there is in clause 56(1)(b) the ability for the applicant and the WM to agree an extension to the 52 week period. We assume this – in practice – relates to the WM's determination period only and not, for example the Examination period or the Examining Authority's timescales to make a recommendation. However the provision also allows WG to extend the determination timescale unilaterally. From current experience of the DNS process, we consider that the use of this power should be restricted (ties to specific events) and it should be imperative for the WMs to give reasons for any extension to the determination timescales (something which has not been happening on DNS projects). This is not helped by the fact that there is no recourse for an applicant to challenge or appeal the WM's delay in determination and it is concerning to see Clause 93(8) which prevents any challenge by judicial review to ongoing delay.

In terms of Clause 56(5) (annual reports) there should be some form of scrutiny of these reports by the Senedd and the ability for the Senedd to make formal recommendations that WM must adhere to in the event of failings.

Clause 57(5) - there is a typo in line 28 (perhaps it should read 'to which the notice relates'?).

Part 6 - Infrastructure consent orders

Clause 88 – we would encourage any change to a consented ICO to involve a proportionate process. If a change to an ICO equates to the equivalent of a full ICO application it will doubtless be an impingement to the delivery of new infrastructure. Even a material change to a consented ICO should be able to be achieved quickly (depending on its extent of course) and within a short timescale that does not delay the delivery of the project.

Part 7 - Enforcement

N/A.

Part 8 - Supplementary functions

N/A.

Part 9 - General provisions

N/A.

What are the potential barriers to the implementation of the Bill's provisions and how does the Bill take account of them?

Please see previous responses.

How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)?

Almost all detail is deferred to secondary legislation. As such, it is difficult at this stage to understand how much of the process will work in practice. We assume that the SIs will be consulted on in due course.

Are any unintended consequences likely to arise from the Bill?

N/A.

What are your views on the Welsh Government's assessment of the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum?

N/A.

Are there any other issues that you would like to raise about the Bill and the accompanying Explanatory Memorandum or any related matters?

There is no detail on the transitional arrangements between the DNS and ICO processes. This would be very helpful to understand.

In the context of Clause 2, there is little detail on the 10W to 50MW ‘optional’ SIP category and how this will work in practice. The supporting material suggests that WG will determine that solar and wind projects between these thresholds will need a ICO and that that is a WG decision to take. Given the likely involvement in a ICO proposal (from a resource and cost perspective) it seems like these projects would benefit from a streamlined process rather than having to go through the full ICO process. Again, detail on this is scant and we would request clarity on it from WG.