

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

**Legislation, Justice and
Constitution Committee**

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Julie James MS

Minister for Climate Change

27 July 2023

Dear Julie,

Infrastructure (Wales) Bill

Thank you for accepting our invitation to attend our meeting on 25 September 2023 to discuss the Infrastructure (Wales) Bill (the Bill).

Ahead of that session, we have a number of questions to ask you about the Bill. I would be grateful to receive a response to the questions in the Annex by Friday 8 September.

I am copying this letter to the Climate Change, Environment, and Infrastructure Committee.

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies

Chair



ANNEX

Question 1: Please can you provide a narrative explaining in broad terms how the new infrastructure consenting process will work, identifying key players, processes and milestones and how it differs from the existing process.

Question 2: The Explanatory Memorandum, at paragraph 3.9, states “the differences between [infrastructure consenting] regimes have perpetuated and further widened with devolution of energy infrastructure under the Wales Act 2017”. Please would you provide further clarity and explanation about these differences.

Question 3: The Explanatory Memorandum, at paragraph 3.19, states that having a unified consent process “would enable the Welsh Minister to include other consents and authorisations required in a ‘one stop shop’ approach”. Could you explain further what this means, and provide additional explanation.

Question 4: Please would you confirm the number and breakdown by type of all delegated powers in the Bill, including regulation-making powers (including whether a power is a Henry VIII power), direction-making powers and order-making powers, and the scrutiny procedure attached to each.

Question 5: In the Explanatory Memorandum, the regulations needing to present or accommodate “significant detail” is used as a justification for the use of the negative procedure in respect of a number of delegated powers in the Bill. These include sections 27(1), 31(4), 33(3), 34, 53(4), 55, 126, and 129(2). A similar explanation is provided for the regulation-making power in section 128 of the Bill which is subject to the affirmative procedure. Please would you provide further clarity and explanation as to how the need to present or accommodate “significant detail” is relevant to the choice of procedure in each of these provisions?

Question 6: In the Explanatory Memorandum, the ability to “legislate swiftly” is used as a justification for the use of the negative procedure in respect of a number of delegated powers in the Bill. These include sections 26, 27(1), 28(5), 29(1)(d), 30(2) and (3), 31(4), 31(5), 33(2)(c), 33(3), 33(5), 35(4)(b), 36(4)(b), 37(2) and (3), 38, 41(3), 41(5), 42, 45(6), 52(1), 53(4), 54(d), 55, 56(4) and (6), 57(6), 59(3), 62(4), 69(1) and (2), 81(1), 81(4), 85, 88(1) to (3) and (5) to (7), 91(3), 92(2), 93(7)(b), 110(8), 115(1), 125(6) and (7), 126(1), (3) and (4), 127(2)(c), 127(3) and (4), 133(2)(e), and 141. How is the need to act “swiftly” relevant to the choice of procedure in each of these provisions?

Question 7: Section 22 of the Bill deals with directions specifying a development as a significant infrastructure project. **a)** Please would you confirm the purpose of, and requirement for, the direction and regulation-making powers contained within section 22 of the Bill? **b)** We note that there is a separate power to add, vary or remove significant infrastructure projects in section 17 of the Bill. Why will the powers in section 22 be required, given that the powers in section 17 are also provided to the Welsh Ministers?

Question 8: In relation to section 30(2) and (3) relating to pre-application consultation, the Explanatory Memorandum, in describing the appropriateness of the delegated power, states the requirements set out in the regulations will accommodate “a significant level of detail which would encumber the reading of the Bill”. The Explanatory Memorandum also describes the requirement to undertake pre-application consultation as “a minor procedural matter”. **a)** Could you explain further what this means? **b)** Why have you taken the view that a requirement to undertake pre-application consultation is a minor matter?

Question 9: In relation to section 31(5) relating to applying for infrastructure consent, the Explanatory Memorandum, in describing the appropriateness of the delegated power, states the list of potential functions will present “a significant level of detail which would encumber the reading of the Bill”. The regulations will be subject to the negative procedure, and may confer a function on any person, including the exercise of a discretion. A similar explanation is provided for the regulation-making power in section 128 of the Bill which is subject to the affirmative procedure. Could you explain further what this means and why you take the view that this is a “minor technical matter”?

Question 10: Section 34 deals with regulations about notices and publicity. Section 34(1)(b) states that regulations may impose requirements on persons specified in the regulations to respond to a notice under section 33(2). What requirements will be imposed and are there any requirements that could not be imposed?

Question 11: Section 37(4) defines an “affected person” for the purpose of that section. It states that a person is an “affected person” if the applicant “after making diligent inquiry” knows that the person is interested in the land to which the compulsory acquisition request relates. **a)** What is meant by “diligent inquiry”? **b)** How will this be tested? **c)** Is this an established concept in the current law relating to applying for infrastructure consent and/or compulsory acquisition requests?

Question 12: Section 38 enables regulations to be made which will require consultation in relation to compulsory acquisition. It is our understanding that subsection (1) contains the regulation-making power in this section. **a)** Please would you clarify how subsections (2) and (3) will operate and, in particular, confirm that the reference to subsection (2) in subsection (3) is correct. **b)** Under what circumstances will consultation not be required?

Question 13: Section 42 enables regulations to be made that will make provision about the procedure to be followed in connection with the examination of an application under Part 4 of the Bill. **a)** Please would you provide further explanation and clarity regarding the direction specified in subsection (3), and confirm which power will be relied upon in order to ‘switch’ decision maker (from the Welsh Ministers to the examining authority, and vice versa). **b)** The Explanatory Memorandum, in describing the appropriateness of the regulation-making power in section 42, states the details in the regulations will accommodate a “significant level of detail which would encumber the reading of the Bill”. The regulations will be subject to the negative procedure. A similar explanation is provided for the

regulation-making power in section 128 of the Bill which is subject to the affirmative procedure. Could you explain further what this means and why you take the view that this is a minor matter?

Question 14: Section 43 enables regulations to make provision for powers of entry to inspect land owned or occupied otherwise than by the applicant. **a)** What principles will apply to the powers to enter land and why are they not on the face of the Bill? **b)** Who is covered by the phrase “a person, alone or with others” for the purpose of section 43? **c)** This regulation-making power is not subject to the affirmative procedure, as it is not listed in section 138(4) of the Bill. Why was the negative procedure considered to be appropriate in this case? The Explanatory Memorandum states only that the power to enter land is “a minor procedural matter in the wider legislative scheme”.

Question 15: Section 45 relates to access to evidence at a local inquiry. Subsection (6) contains a regulation-making power which will enable regulations to make provisions about procedures to be followed and the functions of an appointed representative. The Explanatory Memorandum, in describing the appropriateness of the delegated power, states that this matter is considered suitable to be included in regulations “as arrangements need to be flexible to respond to future changes in procedure”. The justification does not appear to address subsection (6)(b) which will enable the regulations to provide for the functions of an appointed representative, and which does not relate to procedures. Please would you provide further clarity, including an explanation of what the functions of an appointed representative are and how they might change over time.

Question 16: Section 55 enables the Welsh Ministers to make regulations which specify matters that the examining authority or the Welsh Ministers may disregard in deciding an application for infrastructure consent. What is the purpose of this provision and what matters may be disregarded? The Explanatory Memorandum provides no detail about what this provision seeks to achieve, only that the matters “will present a significant level of detail and will also need to be flexible to respond to any future changes in procedure”.

Question 17: Section 56(6) provides a power for regulations to amend section 56(1)(a). This is a Henry VIII power enabling the amendment of primary legislation. As such why are regulations made under section 56(6) not included in section 138(4) of the Bill so as to require them to follow the affirmative procedure?

Question 18: Section 57 deals with the granting or refusal of infrastructure consent. Subsection (6) enables regulations to be made which will make provision regulating the procedure to be followed if the Welsh Ministers propose to make an infrastructure consent order on terms which are “materially different” from those proposed in the application. Such regulations are to be subject to the negative scrutiny procedure. Given that “materially different” is likely to include changes which are more than minor in nature, and could include significant changes, please would you clarify why you consider the negative procedure to be appropriate for such regulations.

Question 19: Section 59 of the Bill relates to the reasons for a decision to grant or refuse infrastructure consent. Are there any persons who will always be provided with a copy of a statement by the Welsh Ministers under section 59(3)?

Question 20: Section 81 of the Bill relates to removing consent requirements and deeming consents. **a)** What specific consents are covered by section 81(1)(a)? **b)** Under section 81(4) regulations may provide exceptions to the requirement to meet the conditions in subsections (2) and (3). What are the exceptions and why can they not be placed on the face of the Bill?

Question 21: Section 82 of the Bill relates to the publication and procedure for infrastructure consent orders. Subsection (4) requires the Welsh Ministers to lay a copy of a statutory instrument, a plan and a statement of reasons before the Senedd. We note that section 138(5) of the Bill provides that the negative procedure is intended to apply to any instrument containing regulations to which 138(4) does not apply. An instrument made under section 82 is not listed in section 138(4). Is it intended that such an instrument would follow the negative resolution procedure, or is a wholly new procedure intended?

Question 22: Please would you confirm our understanding that section 84(4) contains an order-making power, and that the Explanatory Memorandum will be amended accordingly at the next available opportunity.

Question 23: In relation to section 88, which relates to the procedure for changing and revoking infrastructure consent orders, the Explanatory Memorandum, in describing the appropriateness of the delegated power, states the details in the regulations will accommodate a “significant level of detail which would encumber the reading of the Bill”. The regulations will be subject to the negative procedure. A similar explanation is provided for the regulation-making power in section 128 of the Bill which is subject to the affirmative procedure. Could you explain further what this means and why you take the view that this is a minor matter?

Question 24: Section 92 deals with when a development begins, for the purposes of the Act. Section 92(2) states that a “Material operation” means any operation except an operation of a kind specified in regulations”. What operations will not be material operations?

Question 25: Section 115 deals with restrictions on the power to issue a temporary stop notice. What activities will not be prohibited by a temporary stop notice under section 115(1)?

Question 26: Section 121 deals with fees for performance of infrastructure consent functions and services. **a)** Under section 121, which public authorities will be permitted to charge fees? **b)** Under section 121(5) functions may be conferred on any person by regulations. What are the functions and on who will they be conferred?

Question 27: Please would you confirm our understanding that section 127(3) contains a direction-making power, and that the Explanatory Memorandum will be amended accordingly at the next available opportunity.

Question 28: Section 128 provides a regulation-making power to the Welsh Ministers which will enable them to direct that requirements under the Act do not apply in cases specified in the direction. The regulations will be subject to the draft affirmative procedure. The Explanatory Memorandum, in justifying the procedure, states that "Subordinate legislation will limit this power". **a)** Why is this power appropriate and necessary? **b)** How will subordinate legislation be used to limit the power?