

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



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: JJ/PO/330/2023

Huw Irranca-Davies MS
Chair, Legislation, Justice and Constitution Committee
Welsh Parliament
Cardiff Bay
Cardiff
CF99 1SN

3 October 2023

Dear Huw,

Thank you for your two letters of 27 September and the questions put forward by the Legislation, Justice and Constitution Committee relating to the Infrastructure (Wales) Bill. I am pleased to provide a combined response which is attached at Annex A.

I also attach the Welsh Government's Justice System Impact Identification (JSII) form for the Bill as considered by the Ministry of Justice.

I trust the responses in Annex A answer your questions. However, if there are any additional questions or areas requiring clarification, I am happy to provide further information in writing.

I am copying this letter to the Chair of the Climate Change, Environment, and Infrastructure Committee for information.

Yours sincerely,

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

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annex A

Question 1

Section 57 relates to the granting or refusal of infrastructure consent. In your letter to us on 11 September 2023, you stated that you envisage subordinate legislation made under this section will specify that the Welsh Ministers “must only make an order which contains minor changes”. You further stated that “whilst on the face of the Bill there is reference to changes to an application being “material”, the regulations will provide clarification that any changes made should only be minor in nature”. If changes are to be minor, why is the power drafted much wider than is necessary to achieve its purpose?

Response

The intention is that subordinate legislation will specify that an order made by the Welsh Ministers may only include minor changes to the draft order applied for. Even minor changes can be material in some respects and therefore drafting is appropriate.

Question 2

Section 82 relates to the publication and procedures attached to infrastructure consent orders. By virtue of paragraph 29 of Schedule 1, an order can create a criminal offence. Such an order will be subject to the negative scrutiny procedure. Why has the affirmative procedure not been attached to this power?

Response

The Order that is made relates to the granting of an individual development and any criminal offence is relevant and necessary for the granting of the consent. The criminal offences that can be created by an Infrastructure Consent Order are very limited in scope. They will be of local effect and there are limited sentencing powers that may be attached to them.

Because of the pre application processes built into the system, applicants will need to engage with all stakeholders and local communities about any criminal offences they wish to have included in the Order.

The appropriateness for any offences will be one of the aspects that will be scrutinised by the examining authority. These provide suitable safeguards to ensure this power is used appropriately and it will be open to the Welsh Ministers to issue an order without offences that are in the order that was applied for using the power in section 57 of the Bill.

Question 3

Section 88 relates to the procedure for changing and revoking infrastructure consent orders. What persons will always be given notice of a change to or revocation of an infrastructure consent order under section 88(6)?

Response:

The ability to seek an amendment or revocation of an infrastructure consent order has many potential avenues, which presents a degree of complexity. For example, there could be a request to revoke an order from an applicant or LPA. Alternatively, the Welsh Ministers have the power to revoke an order unilaterally.

It is therefore difficult to anticipate who would always be given notice of an amendment or revocation of an infrastructure consent order.

However, as a matter of public law and natural justice, there would always be a requirement to provide notice to the person who originally applied for the infrastructure consent order.

Based on these principles of public law and natural justice, it was concluded it would not be necessary to place this requirement on the face of the Bill.

Question 4

Which public authorities will be consulted under section 126(1) and why are they not included on the face of the Bill?

Response:

It is intended that the list of authorities and bodies to be identified as statutory consultees will be set out in subordinate legislation following a consultation exercise, to ensure that all relevant bodies are engaged in the process. However, it is anticipated many of the authorities and bodies currently consulted as part of the Development of National Significance process will also be statutory consultees for the purposes of this new consenting regime where a development is on land.

It is envisaged that Natural Resources Wales would be consulted in all instances, however, more specialised public bodies would be consulted under certain circumstances. For example, the Ministry of Defence would be consulted when a development that falls within statutory safeguarding zones as issued under the Town and Country Planning (Safeguarded Aerodromes, Technical Sites and Military Explosives Storage Areas) Direction 2002, or when wind developments where any turbine would have a maximum blade tip height of, or exceeding, 11m above ground level and/or has a rotor diameter of, or exceeding, 2.0m.

The list of statutory consultees is considered suitable for regulations, rather than being placed on the face of the Bill as information on consultations with a wide range of public bodies will present a significant level of detail and will also need to be flexible to respond to any future changes in procedure or organisational responsibilities.

Question 5

In question 6 of our letter to you on 27 July 2023 we queried the ability to “legislate swiftly” as a justification for the application of the negative procedure to a number of delegated powers in the Bill. You provided a response in respect of section 127(2)(c) and 127(4). Could you confirm for the record how the need to act “swiftly” is relevant to the choice of procedure for the direction power in section 127(3)?

Response:

Section 127(3) clarifies that directions may relate to specific applications or authorities or to applications or authorities generally. For example, the Welsh Ministers may issue a direction on the way notification is carried out on a particular type of infrastructure project due to changes to a website where the applications register is hosted, or amendments to the statutory consultee list.

It would be beneficial for all parties involved that any adjustments are carried out promptly, otherwise the process may continue to pose an unnecessary burden to those involved. The ability to act swiftly will help ensure there are no unnecessary delays or duplication of work.

Question 6

Section 128 includes a power for the Welsh Ministers to direct that requirements under the Bill do not apply in specified circumstances. Why is it appropriate to include this regulation-making power rather than to make provision on the face of the Bill which set out the specific circumstances?

Response

The consenting regime introduced by the Bill is intended to provide for one process to be used for consenting a wide range of infrastructure developments and in a wide range of different circumstances.

I set out in the Statement of Policy Intent why we need this power and that due to the wide variety of projects and circumstances a level of flexibility would be vastly beneficial to the process.

This power is not uncontrolled, it is limited to areas specified in regulations. This will mean that all stakeholders can influence where this power should or should not be used., It enables the power to respond to changes in the system, or reflect evidence that comes forward during the operation of the system. I believe it is appropriate to use subordinate legislation to limit this power subject to draft affirmative procedure.

Question 7

In your letter of 11 September your written answer in relation to section 128 states that “under no circumstances is it intended the subordinate legislation will enable a direction to be issued to disapply requirements which protect rights or ensure no offences are committed”. Will this provision in the Bill, if and when enacted, prevent a future Minister from using this power to disapply requirements which protect rights?

Response

The direction making power is limited to areas specified in Regulations, with these regulations subject to the draft affirmative procedure. The consultation and Senedd scrutiny of those regulations will provide appropriate safeguards. As I detail above, I do not think it is possible to set out provisions on the face of the Bill where a direction may be issued but if you have suggestions for improvements to this section, I would be happy to consider them.

Question 8

Section 137 provides for restrictions to apply to the making of regulations and orders under the Bill. What is the purpose of the drafting of this provision and why has it been included given the operation of section 154 of the *Government of Wales Act 2006*? Why does section 137 only refer to some of the provisions of Schedule 7B to the 2006 Act and not others?

Response

Section 137 of the Bill sets out the restrictions on the scope of the subordinate legislation powers when making provisions that could confer functions on, or modify or remove the functions of, a Minister of the Crown, government department or other reserved authority.

The restrictions in paragraphs 8, 10 and 11 of Schedule 7B to the Government of Wales Act 2006 mentioned in section 137 are of fundamentally different character to other restrictions in Schedule 7B. Most restrictions in Schedule 7B to GOWA 2006 rule things out completely. The restrictions in paragraphs 8, 10 and 11 say that certain things cannot be done unless consent is obtained or consultation is carried out. This has consequences for how best to achieve clarity in the drafting of provisions in Senedd Acts that confer functions on public authorities generally, modify or remove functions of public authorities generally or confer powers to do those things in regulations.

Whilst section 154 of the Government of Wales Act 2006 would have the same effect if section 137 were not in the Bill, it would not be possible to work out from reading the Bill, in combination with GOWA 2006, whether any power in the Bill that appears to authorise the conferral, modification or removal of functions could be used to confer functions on, or modify or remove the functions of, reserved authorities.

In order for a person to understand the scope of the regulation making powers they would need to search for evidence of whether consent had been obtained or

consultation undertaken, and if it had been they would also need to review the correspondence between the Welsh Ministers and the relevant Minister of the Crown to fully understand the provision that could be made in subordinate legislation under the Bill.

By including section 137, the extent of the Welsh Ministers' power to make subordinate legislation is clear from reading the Bill alone and more accessible to users of the legislation.

Question 9

Should the Bill be passed and enacted, when do you envisage all provisions of the Bill and the accompanying subordinate legislation being fully in force?

Response:

The principles of the Bill (i.e. the creation of Significant Infrastructure Project) and the powers to make regulations to implement the Bill will come into force the day after the Bill receives Royal Assent. We anticipate the implementation period will take a year, subject to the outcome of consultations on subordinate legislation.

Question 10

In your view, will further primary legislation be required in the near future in the field of planning? What are the timescales for the preparation and introduction of this proposed legislation?

Response:

This Bill sits outside Town and Country planning, however there is no intention to introduce any other primary planning legislation in this Senedd term other than the Consolidation Bill.

The planning consolidation Bill will bring together provisions from the multiple pieces of legislation that currently set out the legislative framework for planning in Wales. It is hoped that this will enable people using the planning system in Wales to refer to a single, fully bilingual act containing all the relevant law. It is anticipated that the Planning Consolidation Bill will be introduced to the Senedd during 2024.

Question 11

What consideration has been given to accessibility and alignment of legislation in this area, particularly given the future legislative landscape includes a planning consolidation Bill?

Response:

The Bill is a standalone piece of legislation and therefore the language used has been drafted with accessibility in mind.

The drafting of the Bill will ensure that the existing planning system and associated legislation are largely unaffected.

The Bill contains consequential provisions to amend existing legislation to ensure alignment within the area of planning and infrastructure. The exercise of these consequential modification powers cannot be used widely and are limited. It cannot be used to do anything contrary to the provisions of the Bill that the Senedd will have considered and approved.

The Planning Consolidation Bill will incorporate any changes to wider legislation made by this Bill which are within the scope of the consolidation project.

Question 12 (in cover letter)

[please explain] How the Bill will enable the Welsh Government to take on further devolved powers and what policy areas those powers will cover?

Response

The Bill is designed so that there is sufficient flexibility to take account of new and emerging technology or were the Senedd received legislative competency above the existing thresholds.

The reference in the Explanatory Memorandum over aspirations for further devolved powers was not intended to refer to any specific matters but reflects that the process established by the Bill is fit for purpose and ensures that Wales can deal with large scale infrastructure projects in a timely and effective manner.

Notwithstanding that, my letters to the UK Government clearly set out two areas which the Bill could cover.

Offshore region

The Bill does not extend beyond the territorial sea, which is approximately 12 nautical miles offshore as the Senedd only has legislative competence in relation to 'Wales', as defined in the Government of Wales Act.

The Welsh Ministers retain executive competence in the Welsh zone (an area between roughly 12 and 200 nm from the coast of Wales) to consent to energy generating stations up to 350MW under the process set out in the Electricity Act 1989. There is therefore no fundamental difference in 'who' will consent a generating station offshore – however the procedure will be different depending on where the project is located.

My request for legislative competence in this area was to address this issue and to enable the Bill to function effectively in streamlining and modernising the consenting process in this region?.

Battery storage

In terms of Energy storage, the Senedd's legislative competence where it concerns the consenting of energy is capped at 350MW (excluding onshore wind).

Above this threshold the UK Nationally Significant Infrastructure Project (NSIP) regime would be the consenting mechanism. However, in 2020 storage was removed from the NSIP process which resulted in an anomaly between the operation of the two regimes.

Therefore, where a scheme which either solely or mainly generates electricity from storage exceeds 350MW, it is not clear whether the Senedd would have power to legislate how such schemes are consented. The Welsh Ministers, through Local Planning Authorities, would retain executive competence to consider such schemes under the Town and Country Planning Act 1990 onshore, which may not be appropriate for all such schemes.

Again, my request to the UK Government was seeking clarity in this area.

Question 13 (in subsequent letter)

[Can you] provide us with an update on intergovernmental discussions and agreements reached relating to the UK Government's Energy Bill since the Senedd voted and did not agree to provide legislative consent for the relevant provisions in the Bill.

Response

I met with Minister Bowie on 13 September 2023 following the vote in the Senedd to withhold consent to the UK Energy Bill. I repeated my concerns with respect to the UK Government legislating on matters within our devolved competence without the consent of the Senedd. However, it was clear that the UK Government intend to continue the progress of the Bill and their intention for the Bill to receive Royal Assent in October.

During the meeting I was clear that in terms of policy direction set out in the Bill the Welsh Government is broadly aligned with the UK Government. Given this I highlighted my desire to work constructively to implement the Bill to ensure that the needs of Wales are appropriately taken into account. Minister Bowie stated his ambition to work constructively with the Devolved Governments and fulfil the requirements in the Bill for consultation before new regulations and polices come into effect.



Llywodraeth Cymru
Welsh Government

Justice System Impact Identification

Form

Overview

Welsh Government officials are submitting this form

- ~~• For information and discussion about the implications~~
- For assessment by the Ministry of Justice
(Delete the statement which does not apply)

The Welsh Government’s assessment of the impacts of this legislation on the justice system is that it has

- ~~• No or negligible potential impact~~ (in this case complete the JSII form only up to and including question 4.5)
- Low potential impact
- ~~• Medium or High potential impact~~
(Delete those which do not apply)

This is because:

The proposed legislation, although it introduces new offences and civil proceedings, brings together existing consenting processes under one, consistent process and therefore the proposed approach would redirect existing proposals into a new consenting regime. The new form of consent will be known as an ‘Infrastructure Consent’ (“IC”) for development or works with the objective of constructing and/or changing use to create a ‘Significant Infrastructure Project’ (“SIP”). The categories of infrastructure which the process is mainly expected to capture are energy, transport, waste and water, with minimum thresholds requiring only the most significant of such infrastructure to be captured by the process.

The number of enforcement cases is anticipated to be minimal based on the current understanding that there have been no equivalent prosecutions or enforcement in relation to Developments of National Significance and Development Consent Orders which are the regimes the proposed powers are based upon. It is also estimated that there would only be around five Infrastructure Consent applications a year and therefore enforcement figures are likely to be low.

The Civil Procedure Rules would need to be updated to reflect the timescales for Judicial review. There are no planning specific sentencing guidelines and so there would not be a need to update guidance. It is considered that there would be no cost associated with the proposals to the justice system.

1. Bill Title

1.1. Working title of Bill

Infrastructure Consent and Planning (Wales) Bill

2. Policy lead contact details

2.1. Name / Job Title

2.2. Department / office /
business area

Planning Directorate

2.3. Telephone number

2.4. Email address

2.5. a) Date of submission of
this form

Date of Submission: 20 January 2023

2.6. b) When is a response
required?

Response Requested by: 24 March 2023

3. Additional contact details

3.1. Legal Contact

3.2. Telephone number

3.3. Email address

4. General information

- 4.1. Please provide a) contact details of your lead official for the appraisal of costs or savings and;
b) the Justice Policy lead if known.

- 4.2. Have you notified the judicial office of your proposals by completing Desk Instruction 7? (please seek advice from your legal advisors)

Yes

No (please explain why)

- 4.3. In brief, what is your proposal? (no more than half a page) *(This information is provided to help MoJ officials to understand the intent of the proposed change in order to be able to comment as fully as possible on its potential impacts).*

Legislation is required for the purpose of establishing a unified process for the consenting of the development of infrastructure in Wales and in Welsh waters. This primary legislation would create a bespoke and flexible consenting process for infrastructure projects in Wales, detaching their consenting from current arrangements and into a new form of consent, which contains the full range of authorisations required to enable a development. This would simplify the process for developers, communities and consultees as the current procedures often vary according to the different consenting regimes.

The new form of consent will be known as an 'Infrastructure Consent' ("IC") for development or works with the objective of constructing and/or changing use to create a 'Significant Infrastructure Project' ("SIP"). The categories of infrastructure which the process is mainly expected to capture are energy, transport, waste and water, with minimum thresholds requiring only the most significant of such infrastructure to be captured by the process.

As decisions made on an IC will be made by the Welsh Ministers, all decisions will be final. The only available avenue for challenge will be through the courts, which is the current mechanism for planning appeals and applications called in by the Welsh Government. This provides a 6 week period by which the decision may be challenged in the High Court under judicial review.

Local Planning Authorities are proposed to be the main onshore enforcement authority, with the Welsh Ministers as the relevant authority offshore. Enforcement provisions will be mainly based on existing enforcement provisions for large infrastructure developments within the Planning Act 2008, and partially the Town and Country Planning Act (TCPA) 1990 and the Local Government Act 1972. The proposed offences and civil proceedings are set out in further detail within this form.

Current consenting regimes have differing levels of consistency and the processes are spread over a series of Acts which have been modified significantly, which can be confusing for the user and duplicate work. This can significantly increase the costs of applications and can act as a barrier to bringing forward proposals and cause frustration and confusion.

The legislation will impact upon all those involved in the planning system, including applicants, determining authorities, consultees and communities. The objective is to improve access to the planning system for all by simplifying and consolidating the existing fragmentary planning regime.

4.4. Please indicate when you will be undertaking a post-implementation review of this legislation and the enforcement actions arising from it?

It is anticipated that the proposed consenting regime will be fully operational by Mid-2025.

The monitoring and evaluation of the legislation will be undertaken in a number of ways including:

- Research, evaluation and data collection techniques;
- Evaluation project within 3 years of implementation of the regime to measure outcomes;
- Statutory targets set for the determination of applications for Infrastructure Consent;
- Formal monitoring of Planning and Environment Decisions Wales (PEDW) in relation to Infrastructure Consent applications.

4.5. Is this legislative proposal similar in any way to legislation being brought forward in England? If so, please name that legislation and identify below any ways in which the legislation brought forward in Wales will differ.

If the legislation has no substantive difference from that in England, there may be no need to complete all parts of the JSII form.

No.

4.6. Please specify the name of any other related legislation. How do you expect the relevant provisions of this (new) legislation to be enacted?

The aspects of the Bill covered in this JSII will be brought into force by commencement order(s). Subordinate legislation in relation to offences will be subject to the negative procedure. There is no procedure for the statutory instrument in section 82(4) [J511(4)].

4.7. Please indicate the anticipated date when a) the legislative changes are expected to come into force and b) the date when the first anticipated impact on the justice system will arise.

- a) It is anticipated that all aspects of the legislation to enable the new consenting regime to operate will be in force by Mid-2025. This is dependent on the date of Royal Assent.
- b) This is unknown as this will depend on compliance with the various powers but would not be before the consenting regime is operational.

4.8. If altering or introducing an offence, sanction or penalty, which of the following groups will the proposal affect and in what circumstances? (Tick all that apply)

- Individuals
- Private Institutions (e.g. Businesses)
- Public Institutions (e.g. Government Departments)

The persons affected by these provisions include applicants, the landowner (if not the applicant), any occupier of the land and any person carrying out operations on the land or using it for any purpose.

The proposals will give local planning authorities powers to undertake enforcement action, including rights to enter land and issuing notices.

The proposals will give Welsh Ministers powers to undertake enforcement action, including rights to enter land, issuing notices, applying for injunctions and creating offences. The creation of offences is limited to being in connection with non-payment of tolls, fares or other charges, failure to give person's details relating to penalty fares, enforcement of byelaws or construction, improvement, maintenance or management of a harbour.

4.9. Does your legislation only have impact in Wales or are you working jointly with other administrations? Tick all that apply and provide brief details as appropriate, including whether your proposal will create different laws in Wales compared to England, Scotland and / or Northern Ireland.

Please note that, with the exception of the devolved tribunals, the MoJ administers the justice system in England and Wales only. Please talk directly to the MoJ devolution unit if you anticipate your proposal could have an impact on courts or prisons in Scotland or Northern Ireland.

- Wales only
- England
- Scotland
- Northern Ireland

Other (Please Specify)

The legislation will only apply to Wales.

4.10. If your legislation could directly impact visitors to Wales or other people not normally resident in Wales, or if your legislation is significantly different from elsewhere in England, Scotland or Northern Ireland;-

- a) what arrangements have you made to ensure ongoing awareness raising of the different legislative approach on this issue in Wales?
- b) what will be the implications on the enforcement agencies of taking forward action against individuals not usually resident in Wales?

The provisions will apply to both those resident to, and those living outside of Wales, as enforcement action is essentially taken out against the landowner, applicant, or those undertaking any unauthorised works regardless of residence. This reflects the current legislative approach.

A communications plan supporting the Bill outlines the various methods to ensure relevant stakeholders are aware of the legislation and its implications for them.

4.11. What are the options under consideration and how does this change the existing situation?

There are 4 options under consideration, which are set out below:

Option 1 - Do nothing. Applications for infrastructure to be determined according to the current legislative arrangements. No change to the current justice system, this option would retain a fragmented consenting regime which does not provide the one-stop shop the development industry seeks.

Option 2 – Establish a new form of ‘Welsh Infrastructure Consent’ for development or works with the objective of constructing and/or changing use to create a ‘Welsh Infrastructure Project’. This is the preferred option and the details of this are included in this form.

Option 3 – Establish an independent consenting body to determine ‘Welsh Infrastructure Consents’. This option would use the same approach to the justice system as Option 2.

Option 4 – Establish a streamlined regime to be determined by a consenting unit within Welsh Government. There would be no change to the current justice system in this option.

The anticipated scale of impact is anticipated to be minimal due to nature and scale of Infrastructure Consent applications. This is discussed in more detail in the sections below.

4.12. If you are creating a new civil sanction or penalty which court or tribunal, in your opinion, should deal with it?

It is proposed that disputes in relation to compensation including:

- Whether compensation should be paid;
- How much compensation should be paid;
- Apportionment of compensation;
- Compensation in relation to damage to land or property.

are to be referred to and dealt by the Upper Tribunal.

Criminal Offences and Civil Penalties and Sanctions

4.13. Which of the following are you creating / amending? (Tick all that apply)

- Civil Sanctions
- Fixed Penalties
- Civil Orders
- Criminal Sanctions
- Criminal Offences
- Other (Please Specify)

4.14. If you are creating a criminal offence, is it:

- Summary Only (heard before a bench of lay magistrates / judge only)
- Triable Either Way
- Indictable Only (heard before a judge and jury)

In cases where the maximum penalty is to be an unlimited fine, and a triable either way offence is warranted, please explain why a summary only offence is not considered appropriate. This is especially relevant if few, if any, cases are anticipated.

Four of the offences are proposed to be triable either way, see section 4.17 below. The proposals are to bring together existing consenting processes under one, consistent process and therefore the proposed approach would redirect existing proposals into a new consenting regime. The proposed approach reflects the existing legislation in the Planning Act 2008, TCPA 1990 and the Local Government Act 1972 because enforcing authorities are familiar with those existing processes, there would be no need to train those authorities in enforcing authorities in dealing with different types of offence, and those existing methods of enforcement have been relatively successful to date in acting as deterrents in the context of major infrastructure projects. The changes from summary only to triable either way reflect the analysis undertaken following the Law Commission report for the consolidation of planning law in Wales¹.

4.15. Who will be responsible for the enforcement of your legislative proposal and how will they take this role forward? Will there be an increased / reduced need for enforcement action? Please also include the anticipated costs of enforcement and how it will be funded.

Local planning authorities and the Welsh Ministers will be responsible for undertaking enforcement action. There is not expected to be an increased need for enforcement action as the policy proposals seek to bring various existing consenting processes under one, consistent process. Therefore, there will likely be no change to levels of enforcement action already undertaken.

4.16. What is the anticipated number of cases per year? Please provide details of any evidence of assumptions on which estimates are based.

The proposed provisions replicate existing provisions in the Planning Act 2008 and TCPA 1990. We are not aware of any prosecutions under the existing legislation in relation to Developments of National Significance or Development Consent Orders.

The number is anticipated to be low, due to the potential size and scale of development captured under the unified consenting process resulting in few applications being submitted each year (estimated at around 5 per year) and the fact that any formal enforcement action undertaken via the planning system is generally a last resort (in the first instance, the enforcing authority would usually attempt to rectify and potential breaches of planning control through informal discussions).

4.17. Do you expect proceedings to be heard in the Magistrates' Court, the Crown Court, or a Civil Court? What will the proportions be?

¹ Planning Law in Wales - Law Commission
Justice System Impact Identification (version 14 October 2022)

This means that seven of the offences are summary only, to be heard by the Magistrates' court. Four of the offences are summary or indictment, to be heard either by the Magistrates or Crown Courts, we anticipate the vast majority of cases (if they do go court) would be heard in the Magistrates' Court.

Proposed Offence	Proposed Mode of Trial	Existing legislation (Planning Act 2008 unless otherwise stated)
26(5)[J225]	Summary	Same as 52(9)
26(6)[J225]	Summary	Same as 52(9)
41(6)[J042A]	Either Summary or Indictment	Change from summary to either way and removed power of imprisonment. s.250(3) (Local Government Act 1972)
104[J460]	Either Summary or Indictment	Same as s.160
105[J461]	Either Summary or Indictment	Same as s.161
109(2)[J465]	Summary	Same as s.165(2)
112(3)[J468]	Summary	Same as s.168
112(5)[J468]	Either Summary or Indictment	Change from summary to either way s.168
115(2)[J470]	Summary	Same as s.170(6)
120[J478]	Either Summary or Indictment	Same as s.171G (Town and Country Planning Act 1990)
125(6)[J450]	Summary	Same as s.53(5)
Sch.1 Para 30[J504s]	Summary	Same as Sch. 5 Para 32B
Sch. 3 Para 10[J]	Not applicable - disapplying offences	

4.18. Please state the maximum associated fine and/or custodial penalties. In the case of offences involving penalties of a fine or custody, please indicate and explain the circumstances which would result in a custodial sentence upon conviction and the proportion of custodial penalties which will be at the maximum level.

s.26(5)[j225]

A person convicted of non-compliance with a notice requiring information about interests in the land, or providing false information is liable (on summary conviction) to a fine.

s.26(6)[j225]

A person convicted of providing false information to notice requiring information about interests in the land is liable (on summary conviction or conviction on indictment) to a fine.

s.41(6)[J042A]

A person convicted of non-compliance with a summons to a local inquiry, or they alter, suppress, conceal or destroy a required document is liable (on summary conviction or conviction on indictment) to a fine.

s.104[J460]

A person convicted of undertaking development without the required infrastructure consent is liable (on summary conviction or conviction on indictment) to a fine.

s.105[J461]

A person convicted of breach of an infrastructure consent order or failure to comply with an infrastructure consent order is liable (on summary conviction or conviction on indictment) to a fine.

s.109(2)[J465]

A person who intentionally obstructs a person who has the right of entry is liable (on summary conviction) to a fine.

s.112(3)[J468]

A person convicted of non-compliance with an information notice within 21 days, unless they have a reasonable excuse is liable (on summary conviction) to a fine.

s.112(5)[J468]

A person convicted of providing false or misleading information when complying with a requirement of an information notice is liable (on summary conviction or on a conviction on indictment) to a fine.

s.115(2)[J470]

A person convicted of intentionally obstructing a person who has the power to enter the land and take steps, following the period within a notice of unauthorised development, is liable (on summary conviction) to a fine.

s.120[J478]

A person convicted of non-compliance with a temporary stop notice, which may be in relation to one or more period for the same notice, and they could not prove they did not know or reasonable be expected to know about it, is liable (on summary conviction or on conviction on indictment) to a fine. In determining the amount of the fine, the court must have regard to any financial benefit which has accrued or appeared to accrue to the person convicted.

s.125(6)[j450]

A person convicted of wilfully obstructing a person who is authorised by the Welsh Minister to enter land in connection with an infrastructure consent order is liable (on summary conviction) to a fine.

Sch.1 Para 30[J504s]

The creation of offences (under Sch. 1 Para 30) in connection with non-payment of tolls, fares or other charges, failure to give person's details relating to penalty fares, enforcement of byelaws or construction, improvement, maintenance or management of a harbour would be liable (on summary conviction) to a fine not exceeding level 3 on the standard scale. The person would not be liable to imprisonment.

5.

Summary Table

Proposed Offence	Proposed Fine	Existing legislation (Planning Act 2008 unless otherwise stated)
26(5)[J225]	Unlimited	Change from not exceeding level 5 on standard scale. s.52(6)
26(6)[J225]	Unlimited	Change from not exceeding level 5 on standard scale. s.52 (7)
41(6)[J042A]	Unlimited	Change from not exceeding level 3 on standard scale. s.250 (Local Government Act 1972)
104[J460]	Unlimited	Change from not exceeding 50,000 for summary trial, no change for trial by indictment. s.160
105[J461]	Unlimited	Change from not exceeding 50,000 for summary trial, no change for trial by indictment. s.161
109(2)[J465]	Unlimited	Same 165(2)
112(3)[J468]	Unlimited	Same 168
112(5)[J468]	Unlimited	Change from not exceeding level 5 on standard scale. s.168
115(2)[J470]	Unlimited	Same as 170(6)
120[J478]	Unlimited	Same as 171G (Town and Country Planning Act 1990)
125(6)[J450]	Unlimited	Same as 53(5)
Sch.1 Para 30[J504s]	Not exceeding level 3 on standard scale	Same as Sch. 5 Para 32B

5.1. Please itemise details of any proxy or current offences and / or penalties on which the proposed penalties are based. If mirroring / comparing existing legislation, ensure that reference is made to the most recent versions of the legislation (via Westlaw, the online legal research service) as this is not always available online. Please refer to page 8 of the JSII guidance on how to obtain data relating to the number of cases brought forward under the legislation you have identified.

The proposed offences and the existing legislation that they are based upon are set out in the table below. See also section 4.19.

Proposed Legislation Section	Existing Legislation based on	Offence
26(5) [J225]	52(6) Planning Act 2008	Non-compliance with a notice requiring information about interests in the land
26(6)[J225]	52(7) Planning Act 2008	Providing false information to notice requiring information about interests in the land
41(6) [J042A]	250(2) – (3) Local Government Act 1972	Non-compliance with a summons to a local inquiry, or they alter, suppress, conceal or destroy a required document.
104 [J460]	160 Planning Act 2008	Undertaking development without the required infrastructure consent.
105 [J461]	161 Planning Act 2008	Breach of an infrastructure consent order or failure to comply with an infrastructure consent order.
109(2) [J465]	165(2) Planning Act 2008	Intentional obstruction of a person who has the right of entry.
112(3) [J468]	168(1) Planning Act 2008	Non-compliance with an information notice within 21 days, unless they have a reasonable excuse.
112(5)[J468]	168(4) Planning Act 2008	Providing false or misleading information when complying with a requirement of an information notice.
115(2) [J470]	170(6) Planning Act 2008	Intentional obstruction of a person who has the power to enter the land and take steps, following the period within a notice of unauthorised development.
120 [J478]	171G Town and Country Planning Act 1990	Non-compliance with a temporary stop notice, which may be in relation to one or more period for the same notice, and they could not prove they did not know or reasonable be expected to know about it.
125(6) [J450]	53(5) Planning Act 2008	Wilful obstruction of a person who is authorised by the Welsh Minister to enter land in connection with an infrastructure consent order
Sch. 1 Para 30 [J504s]	Sch.5 Para 32B Planning Act 2008	Creation of offences in connection with non-payment of tolls, fares or other charges, failure to give person's details relating to penalty fares, enforcement of byelaws or construction, improvement, maintenance or management of a harbour. This is limited by s.58(7)[J504(7)] which means that an Infrastructure Consent Order cannot create an offence, give a power to create an offence or change an existing power to create offences.
Sch. 3 Para 10	58(4) & 118(2) Historic Environment (Wales) Bill as introduced 4 July 2022.	Exception to offences of damaging certain monuments of special historic interest. Disapplication of offence of intentionally damaging a listed building.

5.2. Please provide details of the relevant legislation (where appropriate) and confirm whether the creation or amendment of criminal offences and penalties has been agreed in line with the guidance available at <https://www.gov.uk/government/publications/making-new-criminal-offences>.



The equivalent existing power for offences is set out in the table above (para 4.19). The impacts to Civil proceedings are set out below:

Proposed Legislation Section	Existing Legislation based on	Civil proceedings
92[J139]	Sch. 6 Para 7 Planning Act 2008	Compensation - Disputes in relation to apportionment of costs as a result of a revocation made to the Upper Tribunal
95[J142]	Sch. 6 Para 7 Planning Act 2008 (varied)	Compensation - Disputes in relation to compensation for revocation made to the Upper Tribunal
98[J513]	118 Planning Act 2008	Legal challenges relating to applications for orders granting development consent
100(5)[J207]	106C Town and Country Planning Act 1990	Legal challenges relating to infrastructure consent obligations.
103(4)[J601]	152 Planning Act 2008	Compensation in case where no right to claim in nuisance
108[J464]	164 Planning Act 2008	Power for a justice of the peace to issue a warrant to enable entry to land for enforcement purposes.
109(6)[J465]	165(5) Planning Act 2008	Rights of entry – disputes in relation to compensation for rights of entry
114[J472]	170 (via regs under (4)) Planning Act 2008 s.276, 289, 294 Public Health Act 1936	Execution of works required by notice of unauthorised development – order requiring steps to be taken in relation to a notice of unauthorised development
122[J481]	171 Planning Act 2008	Injunctions – against an actual or expected activity which is an offence under j460 or j461
124(4)[210]	95(4)&(5) Planning Act 2008 250 Local Government Act 1972	Orders relating to costs of parties on examination proceedings and recovery of costs.
125(9)[J450]	53(8) Planning Act 2008	Rights of entry – disputes over costs, damage to land

Creation of the offences and civil proceedings is considered to be both proportionate and necessary to deliver the Infrastructure Consent and Planning (Wales) Bill objectives. The proposed penalties reflect existing legislation in the Planning Act 2008, the TCPA 1990, the Local Government Act 1972 and the Public Health Act 1936. The proposals are to bring together existing consenting processes under one, consistent process and therefore the proposed approach would redirect existing proposals into a new consenting regime which would otherwise be subject to the offences and penalties within the existing legislation as outlined in this form. It is therefore considered that this would not result in additional costs to the justice system. The approach taken in s.124(4) reflects the powers in the Planning Act 2008 and the Local Government Act 1972, reflects the drafting style for the equivalent provisions in the emerging Historic Environment (Wales) Bill², which is currently in the Senedd to ensure consistency and reflect modern drafting.

- 5.3. What will be the short, medium and lifelong implications for an individual found guilty of this offence, and how is this proportionate to the offence created?

The impact on an individual found guilty reflects the current situation for the planning related offences these are based upon, including criminal record, fines etc.

- 5.4. Does this legislation impose any duty on the public sector? If so, please provide your assessment of the likelihood of individuals or businesses taking action against the public sector for non-compliance with this legislation.

There is a duty for the public sector in the infrastructure consenting process under the Bill, including enforcement. There is the opportunity for individuals or businesses to challenge the process using judicial review.

6. HM Courts & Tribunals Service and the Welsh Tribunals Service

Estimating the change to caseload of the Courts and Tribunals Service (including devolved tribunals)

- 6.1. Do you expect there to be a change in Court or Tribunals process or an increase / decrease in applications / cases to HM Courts and Tribunals Service and / or the Welsh Tribunals through the creation or amendment of this law? Please provide an estimate of the change to volumes of cases going through the court system as a whole, explain any changes in process and outline the evidence and sources that support these estimates.

It is anticipated that there is unlikely to be an impact on the number of cases being taken to court or through the Upper Tribunal due to the proposals seek to bring various existing consenting processes under one, consistent process.

- 6.2. Please confirm if the courts / tribunals would be under any duty to inform any regulatory authorities of any convictions made under this offence.

- No
 Yes (please provide details)

The proposals are not introducing a new duty in this manner.

Appeal Rights

- 6.3. Does your proposal create a new right of appeal or expand an existing jurisdiction in the Unified Tribunals System or route to judicial review? If so, how do you expect these to be handled (i.e. administered by HM Courts & Tribunals Service or Welsh Tribunals)?

The Bill allows appeals to the Administrative Court through judicial review as there are numerous decisions in the Bill made by a public body. The Bill also allows for a reduction of time limits in which to bring proceedings for JR contained in CPR 54(1) from 3 months to 6 weeks, in line with the planning system. Although this is a new right of appeal under the legislation, the effect is that the proposals seek to bring various existing consenting processes under one, consistent process. These will be handled by HM Courts & Tribunals Service rather than Welsh Tribunals as is currently the case.

- 6.4. Do you expect to establish a new tribunal jurisdiction? If so, has this been discussed with the Welsh Tribunals Unit / Ministry of Justice?

No.

Alternative Dispute Resolution

- 6.5. To what extent could the use of alternative dispute resolution (ADR) procedures (including mediation) be appropriate? How will success in ADR be measured?

This already occurs in planning enforcement related matters. Formal enforcement action is often considered to be a 'last resort' by the enforcing authority, who will often use more informal / mediation tactics, depending upon the scale / type of offence. For example, if a local planning authority is notified of an unauthorised development, they may consider it more appropriate in that particular circumstance to request the developer submit a retrospective planning application, rather than immediately issue an enforcement notice, or any other type of enforcement action. However, they are also provided with the tools necessary if it is considered development should stop immediately for certain reasons, such as temporary stop notices.

Prosecution and Enforcement

- 6.6. If the proposal is to add a new offence, will the Crown Prosecution Service act to prosecute defendants? If not, please identify who will prosecute.

It would likely be the Local Planning Authority that would bring any prosecutions. The Counsel General will also have powers to bring any prosecutions under section 67 of the Government of Wales Act 2006.

- 6.7. Will the proposal require enforcement mechanisms for civil debts, civil sanctions or criminal penalties? If yes, who do you expect to enforce these?

Yes, an individual can apply to High Court Enforcement Offers to recover that debt which reflects current practice.

HMCTS Procedural Rules, Sentencing and Penalty Guidelines

- 6.8. Do you anticipate that Court and/or Tribunal procedural rules will have to be amended? If so, when is the likely date for the changes?

The Bill allows for a reduction of time limits in which to bring proceedings for judicial review contained in Civil Procedure Rule 54(1) from 3 months to 6 weeks, in line with the planning system. The timescales for the implementation and operation of the proposals are set out in section 4.7.

- 6.9. Will the proposals require sentencing and / or penalty guidelines to be amended?

No.

7. Legal Aid and Court Fees

- 7.1. What evidence is there that individuals affected by your proposal will be able to secure and afford:

- legal representation and legal advice in order to secure a fair hearing of their case
- associated court fees

What legal costs for a typical case could each party bear and what provisions exist for a party found innocent to recover all or any of their legal costs?

It is unlikely that Legal Aid would be available, however this would depend on the complexity of the case. The award of costs would be issued by the judge. Estimates of complexity, length and costs of cases are no possible due to the current understanding that there have been no equivalent prosecutions or enforcement in relation to Developments of National Significance and Development Consent Orders which are the regimes the proposed powers are based upon. It is also estimated that there would only be around five Infrastructure Consent applications a year and therefore enforcement figures are likely to be low.

7.2. Once implemented, is your proposal likely to require individuals to seek legal advice and to apply for legal aid in any of the following areas? In each case please provide supporting evidence.

- Criminal
- Civil (including Family)
- Asylum
- Legal aid not available (please provide supporting evidence)

7.3. If legal aid may be affected, would legal aid costs increase or be reduced (and by what margin)?

N/A

8. Prisons and Offender Management Services

Impact on HM Prison Services

8.1. Will the proposals result in a change in the number of offenders being committed to custody (including on remand) or probation (including community sentences)? If so, please provide an estimate and reasoning behind it, an estimated timeframe to reach this number of sentences, what evidence this is based on, and the source for your information.

No.

8.2. Does the proposal create, remove or change an existing offence with a custodial or probationary sentence, or change the way offenders go through the prison / probation service? If so, please provide details, including the expected impact on probationary services.

No.



9. Main Justice System Impacts Identified

9.1. Volumes and Costs or Savings (please lengthen if necessary):-

NB in all cases, assume an average annual figure or make clear if a different timespan is being considered. Where there may be significance variance from average in the first years of implementation, please add additional information in the notes below.

Identify the court or tribunal or MoJ service that will be affected by this proposal?	Volumes (please provide both numeric estimates and min-max ranges)	Type (e.g. prison place, tribunal hearing, fixed penalty, etc.)	Estimated recurring annual costs or savings (both numeric estimate and min-max range) (£)	Estimated initial set up costs (£)	Additional Information
Criminal Offences and Sanctions	_____	_____	_____		
	_____	_____	_____		
	_____	_____	_____		
Civil Penalties	_____	_____	_____		
	_____	_____	_____		
	_____	_____	_____		
HM Courts & Tribunals Services	_____	_____	_____		
	_____	_____	_____		
	_____	_____	_____		
Welsh Tribunals	_____	_____	_____		
	_____	_____	_____		
	_____	_____	_____		

Identify the court or tribunal or MoJ service that will be affected by this proposal?	Volumes (please provide both numeric estimates and min-max ranges)	Type (e.g. prison place, tribunal hearing, fixed penalty, etc.)	Estimated recurring annual costs or savings (both numeric estimate and min-max range) (£)	Estimated initial set up costs (£)	Additional Information
Legal Aid	_____	_____	_____		
	_____	_____	_____		
	_____	_____	_____		
Notes:-					

9.2. Prisons and Offender Management Services (lengthen if necessary, only complete if maximum penalty is something other than a fine):

Offence	Maximum Penalty	No. of prosecutions brought per annum (numeric estimate and min-max range)	Likely proportion sentenced to immediate custody	Likely average custodial sentence length given	Estimated costs or savings p.a. (£) ³ (please provide numeric estimate and min-max range)
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
Notes:					

Please be aware that any costs or savings identified as a result of any changes to the justice system /additional work must be factored in to the financial assessment of your legislation.

³ The MoJ publish statistics on "Prison cost per place and cost per prisoner:" - see <https://www.gov.uk/government/statistics/announcements/prison-cost-per-place-and-cost-per-prisoner-2017-to-2018>