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Y Gweinidog Newid Hinsawdd
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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA-JJ-3057-23

Llŷr Gruffydd MS
Chair
Climate Change, Environment, and Infrastructure Committee
Senedd Cymru
Cardiff Bay
Cardiff
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15 December 2023

Dear Llŷr

Thank you for the Climate Change, Environment, and Infrastructure Committee Report in relation to the Infrastructure (Wales) Bill, published on 24 November 2023.

Please see my responses to the set of recommendations within the report in Annex 1. I am copying this letter to the Chair of the Finance Committee and the Chair of the Legislation, Justice and Constitution Committee for information.

Yours sincerely

A handwritten signature in blue ink that reads "Julie James". The signature is written in a cursive, flowing style.

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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 1

Infrastructure (Wales) Bill

Responses to the Climate Change, Environment and Infrastructure Committee recommendations

Recommendation 1. The Committee recommends that the Senedd supports the general principles of the Bill.

I accept this recommendation.

Thank you for supporting the general principles of the Bill.

Recommendation 2. The Welsh Government should publish a detailed timetable for the preparation, publication, and, where appropriate, consultation, of the subordinate legislation arising from the Bill.

I accept this recommendation.

I will provide an update on the implementation plan during the Bill's passage. This will be set out in a letter to the Committee.

Recommendation 3. The Welsh Government should publish in draft key pieces of subordinate legislation and consult stakeholders before final versions are taken forward.

I reject this recommendation.

I understand the importance of engaging stakeholders and local communities early in the legislative process in an inclusive and meaningful way.

I want stakeholders to be involved in setting the provisions, ensuring that as well as certainty, all stakeholders consider the provisions to be workable in practice. The danger of consulting on draft regulations is stakeholders may perceive that we have already decided on our proposals and may lead to less meaningful engagement.

Recommendation 4. The Minister should ensure there is sufficient time available for Senedd committees to consider the key pieces of subordinate legislation in the Bill that will follow the affirmative procedure.

I accept this recommendation.

It is my intention to follow Standing Orders.

Recommendation 5. The Minister should ensure that digital versions of the secondary legislation arising from the Bill, and associated guidance and documents, are available in one place on the internet that is easily accessible to the public, public bodies and developers.

I accept this recommendation.

I will seek to ensure all subordinate legislation and guidance published to supplement the Bill is as accessible as possible for all stakeholders.

Recommendation 6. The Minister should publish an indicative timetable setting out when the transitional arrangements to the new regime will be determined.

I accept this recommendation.

In response to Recommendation 2, I have agreed to provide an implementation plan in relation to the programme of subordinate legislation. Transitional arrangements will follow the same timeline.

It is also my intention to provide further clarity on transitional arrangements prior to the wider consultation on subordinate legislation. I intend to publish a revised statement of policy of intent which will set out in detail our current proposals. I intend to undertake focused engagement on these proposals prior to the wider consultation. The result of these consultations will help inform the final form and content of the transitional provisions taken forward.

Recommendation 7. The Welsh Government and public bodies must work together to find the most effective means of delivering the specialist advice necessary across different geographical locations. The Minister should report back to this Committee on progress within the next 6 months.

I accept this recommendation.

I will ensure that Welsh Government and public bodies work together with regard to delivering specialist advice. An update on the progress of this will be provided in 6 months.

The skills and expertise can be very specialised depending on the nature of the scheme. There is potential to pool or share this expertise to help in the consenting process, through formal and informal means.

I continue to engage with stakeholders on the Bill and will work with local authorities to ensure there is adequate resource available.

Recommendation 8. The Welsh Government should engage with stakeholders on the criteria in Part 1 to resolve concerns before the Bill completes its passage through the Senedd.

I accept this recommendation.

My officials are continuing engagement with stakeholders, in particular with Natural Resources Wales and the energy industry with regards to hydrogen production and other means to store energy.

Currently, hydrogen use is captured by the Bill either as a means to generate energy or as an energy carrier associated with a different type of energy generation.

There is no specific threshold for hydrogen production because to date we do not have enough evidence to understand what an appropriate threshold for these types of projects would be. Currently, hydrogen production will be captured by the Bill as associated development of a Significant Infrastructure Project (“SIP”), or, it could be directed to be a consented in the new regime under section 22 of the Bill.

With regards to pipelines, following a review of the evidence brought to the attention of this committee, I am considering bringing forward amendments to Part 1 to the Bill to include pipelines, subject to the limitations imposed by the Wales Act 2017.

I am happy to confirm that, the 50MW thresholds for solar farm will be the inverter rating (AC).

With regards to the concerns expressed by Dwr Cymru, I will engage further with them.

Recommendation 9. The Minister should clarify her position on the inclusion of an “opt-in” provision to the SIP regime and explain whether she considers that the power in section 22 of the Bill could be used to facilitate such a procedure.

I accept this recommendation.

I do not intend to include an “opt-in” provision in the Bill as I believe it would bring less clarity to the new consenting regime.

Section 25 of the Bill allows developers to submit a qualifying request to the Welsh Minister. The form of the request will be set in regulations and it will allow the developer to explain why they think their project should or should not be considered a SIP, similarly to other qualifying requests such as EIA screening request. It will then be for the Welsh Ministers to determine if a project is of national significance and should be SIP.

Recommendation 10. The Minister should clarify why the fields in section 17 do not have their associated criteria included on the face of the Bill.

I accept this recommendation.

Section 17 of the Bill is intended to amend Part 1 should there be a need to add a new significant infrastructure project or to amend the existing thresholds in the future. This section is to future proof the Bill in line with technological advances. To place criteria and thresholds in section 17 of the Bill would defeat the purpose of this power.

Recommendation 11. The Minister should bring forward amendments to section 25 to mandate the publication of guidance in relation to the circumstances when Welsh Ministers can use the section 22 or 24 powers of direction.

I accept this recommendation in part.

I fully intend to publish guidance on how these powers of direction will be applied but I do not believe this should be placed on the face of the Bill. It would also be inconsistent with the rest of the Bill.

Recommendation 12. The Minister should bring forward amendments to section 25 to specify a time limit within which the Minister must respond to a qualifying request from a developer for a direction under section 22 or 24.

I accept this recommendation in part.

Section 26 of the Bill already states that regulations may make provision about the time limits for making decisions following a request for directions. Therefore, there is no need to amend section 25 of the Bill.

Recommendation 13: The Minister should bring forward amendments to the Bill to provide more clarity in relation to consultation and publicity processes. The Minister should consider as a starting point, the provisions of the Planning Act 2008.

I accept this recommendation in principle.

I note the Committee's comments regarding the need to provide more clarity in relation to consultation and publicity processes. I have set out in detail the minimum requirements for consultation and engagement which would likely be included in subordinate legislation in the Statements of Policy Intent which accompany the Bill.

These statements are a starting point, which will be subject to wider public consultation as the subordinate legislation is developed. Therefore the detailed requirements may change based on any representations received from stakeholders.

I have adopted the approach of setting a minimum standard in subordinate legislation as it applies minimum requirements to all proposed developments captured by the Bill. This provides certainty and clarity to stakeholders and local communities on what they can expect as part of a consultation and engagement exercise. It also allows us to change and adapt to any new and emerging methods of engaging and consulting which could be incorporated into the new consenting process as a minimum standard at the earliest opportunity.

This goes beyond the Planning Act 2008, which sets no minimum standards and offers little certainty and consistency from one application to another.

However, I acknowledge the merit in prospective applicants holding discussions with relevant local planning authorities (“LPA”) on how they could potentially go beyond any minimum consultation and engagement requirements, particularly as they have knowledge of local community groups, suitable venues for events and other information which may be useful when undertaking consultation and engagement. Therefore, subject to identification of suitable body for offshore developments, I can commit to requiring prospective applicants to engage in discussions with the relevant LPA.

The Bill provides the power to specify in subordinate legislation minimum requirements for engagement and consultation. Given this, the requirement for a developer to engage with the LPA (and possibly another body) would be best placed in subordinate legislation, along with the minimum requirements.

Furthermore, I have always acknowledged the importance of engaging and consulting with as wide a range of stakeholders as possible, which is why I have requested any specific recommendations from the Committee and others. Unfortunately, such recommendations have yet to be made.

To make you aware I have also commissioned Planning Aid Wales to undertake research into this matter, with a view that specific recommendations will be made and incorporated into the consenting process.

Recommendation 14: The Minister should, in her response to this Report, set out the timelines for making regulations under section 30. Given the centrality of public consultation to the new regime, the Minister should publish and consult on the draft regulations.

I accept this recommendation in part.

Please see my response to recommendations 2 and 3 of the report which set out my proposals for providing a timetable for making and consulting on regulations, including those made under section 30 of the Bill.

Recommendation 15: The Minister should publish guidance for stakeholders on best practice and expected standards for community consultation.

I accept this recommendation.

I am committed to publishing guidance for prospective developers on best practice when undertaking consultation and engagement with communities and other stakeholders.

Recommendation 16. The Minister should, in response to this Report, set out the circumstances where she considers that an application could be determined by means of an inquiry.

I accept this recommendation.

I expect the majority of infrastructure applications to be examined by the written representations or hearing procedure. The written representation procedure is appropriate where the issues are not complex, can be clearly understood from the documents, do not need to be tested at an oral event and there is limited public interest.

For more complex applications a hearing provides an informal setting for addressing any issues identified by the Inspector. Those attending may bring professional advisors with them, however there will be no formal presentation of evidence, cross-examination or formal submissions.

An inquiry is the most formal of the procedures and is only likely to be arranged where there are complex issues or technical evidence. Although it is not a court of law, the proceedings will often seem to be quite similar. An inquiry is open to the public and provides for the investigation into, and formal testing of, evidence, usually through the questioning (cross examination) of expert witnesses and other witnesses. Parties may be formally represented by advocates. Therefore, this is likely to only be required for the largest or most technical of projects.

Recommendation 17. The Minister should bring forward amendments to ensure that Welsh Ministers are the default decision-makers for significant infrastructure projects. Notwithstanding this, the Minister should ensure the Bill contains provisions to enable the Welsh Ministers to direct that an examining authority has the function of deciding the application in certain, specified circumstances. Regulations should specify the criteria that must be applied in making such a direction.

I reject this recommendation.

The Welsh Ministers are already the default decision-makers for significant infrastructure projects.

Section 52(1) of the Bill provides that the examining authority has the function of deciding an application for infrastructure consent for a development of a kind specified in regulations. Section 52(2) of the Bill provides that the Welsh Ministers have the function of deciding any other application for infrastructure consent.

The effect of these provisions means that only projects specified in regulations are to be determined by the examining authority. If no regulations are made then all applications would be for the Welsh Ministers to determine.

Section 52(4) of the Bill specifies that the Welsh Ministers may direct that an examining authority has the function of deciding an application for infrastructure consent instead of the Welsh Ministers, or visa-versa. The effect of this provision means that only projects directed on an individual case-by-case basis would not be determined by the Welsh Ministers. If no Directions are made then all applications would be for the Welsh Ministers to determine.

Should evidence indicate that a certain type of application can, in the majority of instances, be determined by the examining authority then this application type can be specified in regulations, and it would not be reliant on an individual direction being made in each case.

I do not consider that regulations should specify the criteria that must be applied in making a direction under 52(4). The matters that must be considered would include:

- proposals giving rise to substantial controversy beyond the immediate locality;
- proposals which raise novel planning issues;
- proposals which raise significant legal difficulties;
- proposals to which a Central Government Department has objected.

Given the nature of these matters I consider they are more appropriate for guidance, which I intend to publish.

Recommendation 18. The Minister should publish the criteria for deciding on a direction under section 52.

I accept this recommendation.

I will publish the criteria for deciding whether to issue a direction under section 52 of the Bill. Similar criteria in relation to deciding whether to recover an appeal in the planning system is already published.

Recommendation 19. The Minister should explain why the issue of the primacy of infrastructure policy statements over national plans was still being considered after the introduction of the Bill.

I accept this recommendation.

I have carefully considered the various approaches available to provide a robust policy framework against which infrastructure applications can be considered, which has included a review of the evidence presented to the Committee.

During this review, further consideration was given to the relationship between the Wellbeing of Future Generations Act 2015 (“WFG Act”), the existing national plans and policies and any future infrastructure policy statements. In line with the principles of the WFG Act, my clear preference is for holistic rather than thematic policy documents and we already have a comprehensive suite of national planning policy. If new planning policy is required to help consider these schemes, the best place to provide this is in our existing policy documents.

These statements will be as supporting documents, filling policy gaps for new or novel issues. Given this, the likelihood of conflict between documents is low, and it is more appropriate for the decision maker to make a balanced judgement should one exist.

On this basis I am looking to bring forward an amendment that will provide the decision maker with the ability to make a balanced judgement on policy. This process of making balanced judgements on policy considerations for the determination of infrastructure applications is established practice, including for those schemes submitted to the Welsh Ministers under the current ‘Developments of National Significance’ process.

Recommendation 20. The Welsh Government should engage with stakeholders to address concerns about the need for infrastructure policy statements under section 53 to fill policy gaps in national plans.

I accept this recommendation.

We have a comprehensive suite of national policy in the form of the National Development Framework, the Marine Plan, Planning Policy Wales and supporting Technical Advice Notes. Existing planning policy provides a holistic approach which is well established whereby local issues and impacts are accounted for by decision makers weighing up the different thematic policy considerations on a case-by-case basis.

This provides for the necessary flexible and pragmatic approach to allow for infrastructure schemes to come forward in the right locations across Wales. If any gaps are identified which require the production of infrastructure policy statements in accordance with standard practice, all relevant stakeholders will be consulted.

Recommendation 21. The Minister should bring forward amendments to ensure that infrastructure policy statements are subject to consideration and agreement by the Senedd.

I reject this recommendation.

The intention is these statements will be prepared in exceptional circumstances where our existing plans and policies cannot be updated within required timescales to support the new infrastructure consenting regime. Where they may be prepared in future, they are not intended to be a long-term measure and existing policy documents will eventually be updated to incorporate their content.

The preparation of policy statements would follow a similar route to that taken for updates to Planning Policy Wales. Given the need to respond to new or novel issues and advancements in technology rapidly as well as the short lifespan of these documents, I do not consider it appropriate to require their consideration or approval by the Senedd.

Recommendation 22. Where the Welsh Ministers, in accordance with section 124, determine to designate a document as an infrastructure policy statement for the purpose of the Bill, the Minister should notify the Senedd. The Minister should ensure that the Senedd has considered and agreed the document before any such designation can be made.

I accept this recommendation in part.

I accept that Welsh Ministers should notify the Senedd when a policy statement is designated. I do not accept that these statements should be agreed by the Senedd for the reasons outlined in response to recommendation 21.

Recommendation 23. The Minister should bring forward amendments to set out on the face of the Bill a detailed timetable for the 52-week period for deciding on an application.

I accept the principle of this recommendation.

I believe the committee recognise that flexibility is needed in terms of the timetable for deciding on an application, as in recommendation 24 you have identified the need to consult on timeframes. The Bill already contains an overall timescale of 52 weeks and sub-timescales will be set in subordinate legislation.

I note the Committee in recommendation 24, suggest a Henry VIII power to change the timescale in future, mirroring the Planning Act 2008. However, the same effect can be achieved by setting sub-timescales in subordinate legislation, without using a Henry VIII power.

Recommendation 24. The Minister should consult stakeholders at the earliest opportunity to ensure that the timelines on the face of the Bill are appropriate. If, as a result of the consultation, she believes they need to be changed, that can be achieved through subordinate legislation.

I accept this recommendation in part.

I accept engagement with stakeholders on sub timescales should be undertaken. I do not agree with the recommendation to place a new Henry VIII power in the Bill when the overall timescale for deciding an application is already in the Bill.

Subordinate legislation will set sub-timescales and the same level of certainty will be achieved.

Recommendation 25. If the Minister determines to extend the 52-week period in accordance with section 56(2), the Minister must notify the Senedd by means of a written statement. The Minister should bring forward amendments at Stage 2 to give effect to this.

I agree with the recommendation.

An amendment to this effect will be prepared.

Recommendation 26: The Minister should set out the assistance that will be available to local planning authorities where enforcement proceedings are necessary.

I accept the recommendation.

I note the concerns raised by stakeholders during the evidence sessions and my officials contacted those bodies to gain further understanding of their concerns. I can confirm detailed and robust guidance will be made available to provide assistance to LPAs when carrying out any enforcement action.

Recommendation 27. The Minister should consider whether provisions on so-called “padlock powers” in relation to temporary stop notices should be included in the Bill.

I accept this recommendation.

I will consider the need for a padlock power in relation to temporary stop notices.

Recommendation 28. The Minister should clarify in guidance the routes that are open to the public to raise concerns about unauthorised development.

I accept this recommendation.

I will ensure guidance clarifies when enforcement action may be appropriate and necessary, as well as how members of the public can report any perceived breaches to the relevant enforcing authority.

Recommendation 29: The Minister should provide an update during the Stage 1 debate on discussions with consultees, local planning authorities, and other stakeholders about how full cost-recovery will be achieved.

I accept this recommendation.

During the Stage 1 debate I provided an update to the Senedd.

Discussions with all stakeholders has been ongoing throughout the development of the Bill, and during Stage 1 of Senedd scrutiny. I am committed to full cost recovery, and I anticipate this will be achieved through the provisions of chargeable services. I have no further detail at the moment on costs, as this is something that will be formally consulted on alongside subordinate legislation.

I welcome any views that stakeholders or Senedd members may have on this issue.

Recommendation 30. The Minister should explain her understanding of the meaning of a project of “real substance” in section 122, and set out her position on the level of fine that may be given for an offence under this section.

I accept this recommendation.

To demonstrate that the applicant is ‘considering a project of real substance’ the applicant, could, by way of example, provide the following information:

- Whether the applicant has given notification under section 29 of the Bill;
- Whether the applicant has requested pre-application Advice.
- Details about what stage in the pre-application consultation the Applicant has reached on the project; or,
- whether the applicant has requested a screening or scoping opinion.

In addition, to demonstrate that the proposed project is one ‘genuinely requiring entry onto the land’ the applicant should provide an explanation as to why entry is required. Evidence that the applicant may wish to provide to demonstrate this may include details about the proposed surveys and works.

There are no limits to the fine which may be imposed. However, the sentencing guidelines will provide information on the levels of fine to be imposed for a particular offence.