Infrastructure 46, Kelvin MacDonald

Senedd Cymru | Welsh Parliament

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

Bil Seilwaith (Cymru) | Infrastructure (Wales) Bill

Ymateb gan Kelvin MacDonald | Evidence from Kelvin MacDonald

General principles

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

Overall, the Bill serves a number of potentially very worthwhile purposes. The Explanatory Memorandum lists these as including; establishing a unified (and simplified and efficient) consenting process, providing a clear strategic and policy framework on which decisions are made and providing a more consistent and inclusive process. All these are laudable aims and I would not query the rationales underlying any of them.

There is also clearly the need for primary legislation to be introduced in order to effect the changes necessary to bring about necessary change. My only caveat on this is that the Bill does rely heavily on secondary legislation both to implement its intentions and, on occasion, to show how parts of an aim will be achieved.

Some of the points made below do suggest parts at which the Bill may need to be more explicit. More generally, the Committee may wish to consider whether the balance between material on the face of the Bill and material to be set out at a later date in Regulation or Guidance is correct.

My evidence focuses mainly on whether the Bill does serve to achieve these four aims and I deal with aspects of each of these in the following sections of this response:

- establishing a unified (and simplified and efficient) consenting process (Parts 2 and 5 of the Bill);
- providing a clear strategic and policy framework on which decisions are made (Part 5);
- providing a more consistent process (Parts 1 and 2); and

· providing a more inclusive process (Parts 3 and 4).

In this evidence, I do not address the – albeit important – issues of compulsory acquisition (Part 6), enforcement (Part 7) nor that item of the Committee's terms of reference that deals with the financial implications of the Bill.

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

Part 1 - Significant infrastructure projects

providing a more consistent process

I equate the desire with consistency with a desire to achieve greater certainty for all those involved – not purely about possible outcomes but about the process that is required to be followed.

In this context, I am not querying the list of SIPs set out in this Part.

However, I note that in a number of cases (such as airports) the operating limits set are, very understandably, lower than those set in the 2008 Planning Act.

As shown below, there are aspects of the regime proposed in the Bill, such as the ability to summons and to require a public authority to give a substantive response within specified timescales (c126) that are different from the 2008 Act regime and it could be that an applicant will be faced with slightly different requirements and procedures for the same class of scheme in Wales as opposed to in England.

I would draw the Committee's attention to those parts where the wording of the Bill can give rise to a degree of uncertainty.

For example, clause 7(3) states that:
'Alteration or improvement of a highway is within this subsection only if … (c) the alteration or improvement is likely to have a significant effect on the environment.'

This leaves open the question as to who decides whether the scheme is likely to have a significant effect on the environment and at what stage this is done. If this is to be done at the screening stage of a habitats regulation assessment, does this require that all highway alterations or improvements are screened and treated as

SIPs until found otherwise?

Similarly, clause 16(3)(c) dealing with radioactive waste geological disposal facilities states as one criteria that:
'... the natural environment which surrounds the facility is expected to act, in combination with any engineered measures, to inhibit the transit of radionuclides from the part of the facility where radioactive waste is to be disposed of to the surface.'

If there is not this expectation, then is a scheme not a SIP and, is not the only way to test whether there is such a valid expectation through the examination process, thus requiring it to be a SIP anyway?

A related uncertainty is potentially provided by the provision in Clause 22 that Welsh Ministers may give directions specifying development as a significant infrastructure project even though the development will be 'partly in Wales' (22(2)(a)).

This appears to conflict with the statutory tests for SIPs set out in Clauses 7 to 16 in which, in every case, the scheme must be '... in Wales ...', '... wholly in Wales ...' or, in the case of railways, '... will ... start, end and remain in Wales.'.

The existence of these statutory test could render clause 18 on Cross-border projects redundant. However, the existence of Clause 22 does introduce the possibility of cross-border projects into the IC regime and could be seen to go against the geographic specificity expressed in Clauses 7 to 16..

Part 2 - Requirement for infrastructure consent

establishing a unified consenting process

Clause 20 lists those consents which would no longer require separate approval under the infrastructure consent regime. I do not wish to comment on this list.

Two significant areas of consent that are not included are environmental (https://naturalresources.wales/permits-and-permissions/environmental-permits/?lang=en) and protected species (https://naturalresources.wales/permits-and-permissions/species-licensing/apply-for-a-protected-species-licence/?lang=en#:~:text=You%20must%20apply%20for%20a%20licence%20from%20Natural,restoring%20a%20pond%20or%20building%20a%20housing%20development) permitting.

This omission is similarly found in the Planning Act 2008 regime and it may be that a true 'one-stop shop' cannot be achieved in these respects. However, it may be worth examining whether these permitting regimes can be brought within the Welsh IC regime, thus achieving even greater coherence, transparency, certainty and efficiency.

This reflection is drawn in part from my own experience of dealing with applications in which delays by Natural England or the Environment Agency in issuing such permits can lead to uncertainty as to whether the Examining Authorities recommendation is robust.

Part 3 - Applying for infrastructure consent

establishing a simplified and efficient consenting process

Clause 32 deals with decisions on the validity of an application. It does so in two fairly short sub-clauses (32(1) and 32(2)) – although it is noted that clause 31 does deal with the possibility of secondary legislation adding to the criteria to be fulfilled for acceptance.

However, I note that the relevant provisions in the 2008 Planning Act (s55 - https://www.legislation.gov.uk/ukpga/2008/29/section/55) set a higher bar for acceptance of an application and include, potentially importantly, a test 'that the application (including accompaniments) is of a standard that the Secretary of State considers satisfactory' (s55(3)(f)). This test allows an Examining Inspector to make a judgement as to whether the material submitted is of a standard and comprehensive enough to allow a meaningful examination of it to take place and a sound recommendation to be made to, in that case, the relevant Secretary of State.

In my previous experience as an Examining Inspector, I have used this provision to reject two applications as requiring more detail to be provided before they can be certified as being valid. The Bill does not contain this provision and this could lead to an unsatisfactory or even aborted examination (and to an increased chance of judicial review) if an unsatisfactory application is accepted.

The existence of s55 in the 2008 Act has led to the publication of a 's55 checklist' (https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010129/EN010129-000162-Slough%20-%20s55%20checklist%20INTERNAL.pdf) by the Planning Inspectorate which can

serve to provide more certainty to an applicant as to what the Inspectorate is looking for.

Part 4 - Examining applications

providing a more inclusive process

Clause 41 provides the examining authority with the ability to choose one, or a combination, of a local inquiry, a hearing and/or on the basis of representations in writing.

First, it is noted that these terms are not defined in clause 140 (General interpretation). Second, it is noted that the Bill gives the power to make Regulations as to the conduct at local inquiries and at hearings and requires Welsh Ministers to publish criteria against which a choice of hearing will be determined.

The Explanatory Memorandum does not appear to justify this clause. The Memorandum does state, with reference to the consultation that:
'There was overall support to remove inquiries from determining ICs and for hearings only to be held in their place, for reasons of providing fair and inclusive participation, as well as the belief among some respondents that inquiries can be long and protracted, impact project programmes and are costly. However, there was a preference amongst some respondents for cross-examination to be retained.'

However, I feel that one of the defining attributes of Nationally Significant Infrastructure Projects system of examination is that it is inquisitorial rather than adversarial. This is shown most directly by the fact that in this system, it is the examining authority that does questioning and cross-examination (except in one specified circumstance) rather than the legal representatives of the parties present.

In my experience, this leads to a more focussed and more inclusive system and helps to achieve the stated objective of providing a more inclusive process with the Minister telling your Committee that, "... one of the things I very much like about this new system is it gives communities more involvement and more opportunity to be heard."

However, I also note that clause 44 gives the Examining Authority the power both to summons witnesses to attend an inquiry and to take evidence on oath. This is a

provision that is missing from the 2008 Act and may, on very rare occasions, have been useful in the hearings that I held. I do recognise that, in such cases, despite what I have stated above, an inquiry may become more inquisitorial.

I also note that the Bill contains the power to direct further examination (clause 50). This power too is missing from the 2008 Act and may, on occasion, have been beneficial in a number of key complex cases. The absence of this power in current legislation has led to the situation where the relevant Secretary of State has themselves called for further evidence and for comments on that evidence after the examination period has closed in a way that may be seen as being less accessible and transparent than the process of examination by an Examining Authority. Clause 50 may serve to rectify this anomaly and to make any post report period more open.

Finally, I note that the Bill does not contain a provision that I have found to be useful in my working experience. S87(1) of the 2008 Planning Act states that, 'It is for the Examining authority to decide how to examine the application'. This provision is useful if, as has happened in my experience, a party queries an action by the Examining Authority, for example, during a hearing.

Part 5 - Deciding applications for infrastructure consent

providing a clear strategic and policy framework on which decisions are made.

Clause 53 places a duty on decision makers to decide applications in accordance with statutory policies.

I feel that this is one of the most important parts of the Bill but one which risks leading to confusion and challenge in practice.

The Clause specifies relevant infrastructure policy statements, the National Development Framework for Wales and marine plans with relevant policy statements taking policy precedence in cases of policy incompatibility.

This gives rise to a number of interrelated points. First, there are clearly and understandably no examples of infrastructure policy statements as yet but, importantly, whilst the Bill allows for Regulations in this respect, there is no indication on the face of the Bill as to what they should contain with Clause 124 setting a low bar as to what may constitute an infrastructure policy statement.

One of, if not the, key features of national policy statements (NPS) produced under

the 2008 Act is that they are designed to establish the need for a particular type of development, thus avoiding very lengthy examination of need during the examination period. Where a 2008 Act NPS does not establish need, as is the case with the Airports NPS beyond Heathrow Third Runway, an examination and post-examination processes can get bogged down around this issue – as I know from experience.

The issue of establishing need was one of the drivers for introducing a new regime for dealing with major infrastructure projects through the 2008 Act as too many inquiries under the previous system were taking many months arguing whether there was the need for a project or not.

It is worth considering, therefore, whether the Bill should specify that an infrastructure policy statement should, at a minimum, cover the issue of need.

Secondly, the Bill does not specify the process through which infrastructure policy statements are adopted and, specifically, does not require that these are considered by the Senedd as part of their adoption process. Given the importance of these documents, the Committee may wish to consider whether such a requirement should be on the face of the Bill.

Third, an initial and non-rigorous search of 'Future Wales – The National Plan 2040 (https://www.gov.wales/sites/default/files/publications/2021-02/future-wales-the-national-plan-2040.pdf), which states that it is the national development framework for Wales, shows that a number of categories of SIPs, such as ports and radioactive waste geological disposal are not covered in policy terms. Therefore, unless a comprehensive set of infrastructure policy statements are produced, there will be a policy void.

There could also be a policy void if Welsh Ministers exercised their powers under clauses 22 or 23 to bring other schemes into the regime of a type for which no infrastructure policy statement existed.

There also remains the question of the status of other published national policy guidance, notably Planning Policy Wales (https://www.gov.wales/sites/default/files/publications/2021-02/planning-policy-wales-edition-11_0.pdf) but also including Technical Advice Notes (https://www.gov.wales/technical-advice-notes) and Circulars (https://www.gov.wales/planning-circulars) (whilst noting in passing that the collection of extant Circulars includes one that is 55 years old

(https://www.gov.wales/sites/default/files/publications/2022-07/planning-inquiry-commissions-circular-5968-v2.pdf) advising on the setting up of a new system for dealing with major infrastructure projects …).

Finally in this Part, the timetable set out in s56(1)(a) may seem to be ambitious. Whilst current moves are being made to streamline some examinations, the English system has normally allowed six months for the inquiry, three months for the EA's report and three months for SoS decision – equalling a year. However, this does not include a period between validation and the start of the examination (the period for the receipt of representations etc.) and this should be included in any timescale.'

Part 6 - Infrastructure consent orders

My evidence does not directly cover this Part of the Bill.

Part 7 - Enforcement

My evidence does not directly cover this Part of the Bill.

Part 8 - Supplementary functions

My evidence does not directly cover this Part of the Bill.

Part 9 - General provisions

My evidence does not directly cover this Part of the Bill.

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

Some of these are covered within the evidence given above under Parts 1 to 5.

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

My evidence does not directly cover this question.

Are any unintended consequences likely to arise from the Bill?

Some of these are covered within the evidence given above under Parts 1 to 5.

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

My evidence does not directly cover this question.

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

No.