

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.