Welsh Parliament
Legislation, Justice and Constitution Committee

Report on the Infrastructure (Wales) Bill

November 2023

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About the Committee

The Committee was established on 26 May 2021. Its remit can be found at **www.senedd.wales/SeneddLJC**

Current Committee membership:

Committee Chair:
Huw Irranca-Davies MS
Welsh Labour

Alun Davies MS
Welsh Labour

James Evans MS
Welsh Conservatives

Adam Price MS
Plaid Cymru

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1. Introduction

On 12 June 2023, Julie James MS, Minister for Climate Change (the Minister) introduced the Infrastructure (Wales) Bill (the Bill),[1] and accompanying Explanatory Memorandum (the EM).[2]

1. The Minister's Written Statement on 12 June 2023 states:

> *"The Bill is vital to the timely delivery of significant infrastructure projects in Wales and is an important step towards supporting Government commitments to delivering on renewable energy targets as we move towards 'net zero' emissions by 2050."*[3]

2. The Minister also made an oral statement to the Senedd on 13 June.[4]

3. The Minister states in the EM:

> *"The Infrastructure (Wales) Bill establishes a unified consenting process for the development of infrastructure in Wales and in Welsh waters, replacing several statutory regimes. The new form of consent will be known as an 'Infrastructure Consent' ("IC") and will be issued in relation to projects which are prescribed as a 'Significant Infrastructure Project' ("SIP"). Categories of infrastructure ascribed SIP status include energy, transport, waste and water, among other infrastructure types. Developers must obtain an IC for a SIP, and the IC is intended to contain the full range of authorisations required to enable development to be implemented."*[5]

4. The Senedd's Business Committee referred the Bill to the Climate Change, Environment and Infrastructure (CCEI) Committee, and set a deadline of 24 November 2023 for reporting on its general principles.[6]

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[1] Infrastructure (Wales) Bill, as introduced
[2] Infrastructure (Wales) Bill, Explanatory Memorandum, June 2023
[3] Welsh Government, Written Statement: Introduction of the Infrastructure (Wales) Bill, 12 June 2023
[4] Plenary, 13 June 2023
[5] EM, paragraph 1.1
[6] Business Committee, Timetable for Consideration, June 2023

5. On 12 June 2023, the Minister wrote to the CCEI Committee, providing a copy of the Welsh Government's Regulatory Impact Assessment (RIA) Methodology Paper. The Minister notes that it supplements the RIA contained in the EM.[7]

6. On 1 September 2023, the Minister issued a statement of policy intent for subordinate legislation to be made under the Bill.[8]

The purpose of the Bill

7. The long title of the Bill states that it is a Bill to:

> *"reform the law governing the development of significant infrastructure in Wales and the Welsh marine area; and for connected purposes."*

8. The Explanatory Memorandum states:

> *"The overall objective and purpose of the Bill will be to unify existing consenting regimes on the following basis:*
>
> *• Consistency – To enable the public and developers to engage with a single process across all infrastructure types, providing administrative efficiency for decision-makers and familiarity with those who engage with it, which will reduce delays.*
>
> *• Certainty – To provide certainty in terms of timescales for all involved, so that the public are clear on when decisions are made, and proceedings are not unnecessarily prolonged, and to enable developers to plan projects with more accuracy.*
>
> *• Chances of success – To provide a clear strategic and policy framework on which decisions are made, to enable a developer to know their prospects of success in advance of an application for consent being made.*
>
> *• Quality of applications – To provide minimum bars in terms of pre-application consultation and submission requirements to enable decision-makers to better ascertain the impacts of development from the outset, while providing more informed information to the public.*

[7] Letter from the Minister for Climate Change to the Climate Change, Environment and Infrastructure Committee, 12 June 2023
[8] Welsh Government, Statement of Policy Intent, September 2023

· Confusion – To provide a more consistent and inclusive process, which enables those who are not familiar with engaging with the planning process to engage more effectively.

· Complexity – To enable a developer to obtain all the authorisations and consents it needs to implement a project, removing the need for the public to engage with multiple consenting processes, and lowering overall costs for all."[9]

The Committee's remit

9. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

10. In our scrutiny of Bills introduced in the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter we consider relevant to the quality of legislation.

11. We wrote to the Minister on 27 July 2023 with a series of questions.[10] The Minister responded on 11 September 2023.[11]

12. We took oral evidence from the Minister on 25 September 2023[12], following which we wrote to the Minister with further questions.[13] The Minister responded on 3 October 2023.[14]

[9] EM, paragraph 3.5
[10] Letter to the Minister for Climate Change, 27 July 2023
[11] Letter from the Minister for Climate Change, 11 September 2023
[12] Legislation, Justice and Constitution Committee, 25 September 2023
[13] Letter to the Minister for Climate Change, 27 September 2023
[14] Letter from the Minister for Climate Change, 3 October 2023

Recommendation 1. The Minister should respond to the conclusions and recommendations we make in this report at least two working days before the Stage 1 general principles debate takes place.

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.[15]

13. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act).

14. The Minister states in the EM:

> *"Senedd Cymru ("the Senedd") has the legislative competence to make the provisions in the Bill pursuant to Part 4 of the Government of Wales Act 2006 ("GoWA 2006") as amended by the Wales Act 2017."*[16]

15. The Llywydd, the Rt Hon. Elin Jones MS, in her statement on legislative competence, stated that "most of the provisions" of the Bill as introduced would be within the legislative competence of the Senedd. She stated:

> *"The following provisions would not be within competence because they require the consent of the Secretary of State and such consent has not been obtained at this time:*
>
> *Section 30 – Pre-application consultation and publicity;*
>
> *Section 33 – Notice of accepted applications and publicity;*
>
> *Section 45 – Access to evidence at inquiry;*
>
> *Section 46 – Payment of appointed representative where access to evidence restricted;*
>
> *Section 60 – What may be included in an infrastructure consent order;*
>
> *Section 87 – Power to change or revoke infrastructure consent orders;*

[15] EM, paragraph 2.1. See also LJC Committee, 25 September 2023, RoP [6].
[16] EM, paragraph 2.1

Section 121 – Fees for performance of infrastructure consent functions and services; and

Section 126 – Power to consult and duty to respond to consultation."[17]

16. On 27 June 2023 the Minister wrote to the CCEI Committee confirming that the Bill contains provisions which require the consent of the appropriate UK Minister. The Minister's letter also notes that other provisions in the Bill require consultation with the appropriate UK Minister, that she has sought the transfer of legislative competence for the consenting of energy generating stations offshore between the edge of the territorial sea and the edge of the Welsh zone, and that she has sought to clarify the Senedd's ability to legislate in respect of energy storage. The Minister enclosed three relevant letters to the Rt Hon Michael Gove MP, the Secretary of State for Levelling up, Housing and Communities, dated 7 January 2022, 11 January 2023 and 12 May 2023. In her letter of 27 June 2023 the Minister notes that she has not received a response to the letters she sent in January 2022 and January 2023.[18]

17. On 6 July 2023, the Minister told the CCEI Committee that there had been "radio silence"[19] as regards her request relating to the transfer of legislative competence, stating that she had not received a response from the Secretary of State and had been unsuccessful in getting relevant UK Government officials to engage.[20] The Minister also told the CCEI Committee that she was "in the process of discussing with the Counsel General and the First Minister escalation processes".[21]

18. When the Minister gave evidence to us on 25 September 2023 she confirmed that neither the issue of the outstanding Ministerial consent or the transfer of legislative competence had been resolved.[22] The Minister also referred to an exchange of correspondence between the UK Government and the CCEI Committee which highlighted "some confusion going on here".[23] The Minister told us:

[17] Presiding Officer's Statement on Legislative Competence, Infrastructure (Wales) Bill 12 June 2023
[18] Letter from the Minister for Climate Change to the Chair of the Climate Change, Environment and Infrastructure Committee, 27 June 2023
[19] Climate Change, Environment, and Infrastructure Committee, 6 July 2023, RoP [240]
[20] CCEI Committee, 6 July 2023, RoP [225]
[21] CCEI Committee, 6 July 2023, RoP [233]
[22] LJC Committee, 25 September 2023, RoP [8]
[23] LJC Committee, 25 September 2023, RoP [8]. See Letter from the CCEI Committee to the Secretary of State for Levelling up, Housing and Communities, 25 July 2023, and Email

> *"I'm actually shortly going to write again and say, 'What on earth is going on? Please get on with it.' (…) as far as we're concerned, that's not resolved. But I will say nor is it in dispute as yet, although we might now—. I might accelerate it up the chain. So, at the moment, we've discussed it in one-on-one meetings with the Minister, but I might accelerate it to what's called an inter-ministerial group, which is the next tier up, if I don't get a satisfactory response shortly."*[24]

19. On the outstanding Minister of the Crown consents, the Minister said:

> *"I have had absolutely nothing to do with that at all. That's been done at official level, and I'm informed by the officials—and please feel free to add to this—that it's all going fine and they're not expecting it to be a problem, although it's not yet resolved."*[25]

20. One of the requirements which must be met for a Bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act and requires all provisions of a Bill to comply with the ECHR (the Convention rights).

21. The EM does not discuss human rights. We asked the Minister what account had been taken of human rights in preparing the Bill. The Minister told us:

> *"… we've done an assessment of the Bill, as always, to ensure that it's compatible with human rights and the usual tests of proportionality, justification and reasonableness in balancing the rights of individuals—the normal assessment that we would do. We've taken into account whether a fair balance has been struck, and they include compensation to property owners for interference with property rights where appropriate, and procedural safeguards to provide individuals an opportunity to challenge anything that happens that affects their property rights".*[26]

22. Section 43 enables regulations to make provision for powers of entry to inspect land owned or occupied otherwise than by the applicant. We asked the

correspondence from the Department for Levelling up, Housing and Communities to the CCEI Committee, 1 August 2023.

[24] LJC Committee, 25 September 2023, RoP [8]

[25] LJC Committee, 25 September 2023, RoP [9]. See also RoP [46] to [49].

[26] LJC Committee, 25 September 2023, RoP [57]. See also RoP [58] to [61] and [65] to [68].

Minister what principles will be relevant to these powers to have access to that land, and why are those principles not on the face of the Bill. The Minister said:

> *"... these replicate powers that already exist in the planning system, and this is to ensure that it's a discretionary thing, where you can't get consensus, you can still go and inspect for various purposes and so on, but it is intended to make sure that you're not, I don't know, disrupting a wedding that's taking place in a particular—just to pluck a random private event. You're not overly disrupting the peaceful occupation of the land in question, but that the landowner cannot refuse absolutely to allow you access. Those are existing rights in planning law now, so this just replicates them. We wouldn't expect to put those on the face of the Bill, because we're not replicating the whole of planning law on the face of the Bill, we're looking at the changes, and there'll be powers to look at that through secondary legislation."*[27]

23. A Welsh Government official accompanying the Minister added:

> *"I think, particularly at examination stage, it's essential that the examining authority actually has access to the land, so to go out and do site visits. We're looking very much at how we can limit that power, accepting that it's already there at the moment. So, if the committee's got a view on whether there are other ways things could be done, I think it's a case of letting us know as well. But this is long established, certainly when it comes to the examination, ensuring that that inspector actually understands how that development sits within that particular landscape and taking different perspectives within a landscape is essential. So, yes, it's something historically that we've dealt with by regulation, and I think that does allow us an element of flexibility. Particularly again—it's back to this issue of how we future proof this—if there are new ways where you don't actually need to enter the land but you can inspect it, that's something which could be covered as well in that way."*[28]

24. We also asked the Minister if a justice impact assessment had been undertaken for the Bill. The Minister confirmed that a justice impact assessment

[27] LJC Committee, 25 September 2023, RoP [63]
[28] LJC Committee, 25 September 2023, RoP [64]

was submitted to the Ministry of Justice in January 2023 and a response was received in April that concluded that the Bill would have a nil-to-minimum impact on the justice system and so no amendment to the Welsh Government's approach was needed.[29] The Minister shared with us on 3 October 2023 a copy of the justice impact assessment.[30]

Our view

25. We note the Llywydd's statement that, in her view, most of the provisions of the Bill would be within the legislative competence of the Senedd.

26. We also note the evidence in relation to matters of legislative competence from the Minister.

Conclusion 1. It is disappointing to hear evidence from the Minister that intergovernmental discussions about the Bill have not been successful to date. It is also of concern that a formal request from the Welsh Government to the UK Government on matters relating to legislative competence appears to have not received a response when, at the time of writing this report, some 10 months has passed.

Recommendation 2. The Minister should update the Senedd on the Welsh Government's discussions with the UK Government regarding the outstanding Minister of the Crown consents and the transfer of legislative competence for the consenting of energy generating stations offshore between the edge of the territorial sea and the edge of the Welsh zone.

27. We also note the Minister's response regarding powers of entry and comment separately on section 43 later in Chapter 4 of the report.

[29] LJC Committee, 25 September 2023, RoP [70]
[30] Letter from the Minister for Climate Change, 3 October 2023

3. General observations

Development of and need for the Bill

28. The Welsh Government ran a consultation exercise on "Changes to the consenting of infrastructure: Towards establishing a bespoke infrastructure consenting process in Wales" from 30 April to 23 July 2018.

29. Given the Bill was not introduced into the Senedd until June 2023, we asked the Minister to what extent the Bill has developed since the consultation has taken place, whether the Minister had consulted on any such changes, and to what extent the Minister considered that the consultation which took place five years ago was still relevant today. The Minister told us:

> *"So, it's an immensely technical Bill. So, obviously, we don't get much response from Mrs Jones up in the Valleys, like, but we had one or two, but not very many. Mostly we're consulting with local planning authorities, planning officials, people who are technically enabled to understand what the process is and what we're trying to do. The majority of respondents fully agreed with and supported all of the proposals. So, it's not controversial in any way; it's very processy, as you know. We did review and amend the compulsory purchase powers as a direct result of the consultation responses, and then some of the other details that came back in consultation responses will be in the subordinate legislation, so cost recovery details, for example, came up in the consultation. We've had—the officials will tell you about it—but we've basically had a whole series of ongoing meetings with the various stakeholders, so with planning society Wales, with the local planning authorities, and I've had meetings with cabinet members and various other things. There's just been a whole series of consensual meetings with all of the people who would be required to actually implement the Bill, once it's gone ahead, and we've developed it very much in that vein. So, I don't think there's any kind of issue with it. We've spoken with Natural Resources Wales, we've spoken with Planning and Environment Decisions Wales, we've spoken with planning officers—everybody who might be interested, really."*[31]

[31] LJC Committee, 25 September 2023, RoP [26]

30. We also asked the Minister why there had been a five year period between the consultation on the proposals and the introduction of the Bill to the Senedd. The Minister told us:

> *"Well, it's partly resource, to be fair. So, it's the same people who are also doing all of the other stuff that we're doing in this area. (...)*
>
> *... but it's also just the legislative timetable. So, this happens to be the slot that it's fallen into for various complicated reasons to do with other Bills, not necessarily this Bill."*[32]

31. In the Minister's oral statement to the Senedd on 13 June 2023 she said that the proposals in the Bill "support multiple commitments in our programme for government".[33]

32. We asked the Minister to provide a narrative explaining in broad terms how the new infrastructure consenting process will work and how it differs from the existing process. The Minister told us:

> *"The Infrastructure (Wales) Bill builds on procedures established as part of the Developments of National Significance procedure in the Town and Country Planning Act 1990 in Wales and those in the Planning Act 2008 for Nationally Significant Infrastructure Projects."*[34]

33. In her letter of 11 September 2023 the Minister provided a summary of the stages within the process, and a table of comparison to existing consenting processes currently used by the Welsh Ministers.[35]

34. The Minister states at paragraph 3.9 of the EM that "the differences between [infrastructure consenting] regimes have perpetuated and further widened with devolution of energy infrastructure under the Wales Act 2017".

35. In the Minister's oral statement to the Senedd on 13 June 2023 she added:

> *"The need for this Bill has arisen as a result of the Wales Act 2017, which devolved further powers to Wales for the consenting of energy generation projects, overhead electric lines, ports and harbours and other infrastructure works. As a*

[32] LJC Committee, 25 September 2023, RoP [28] and [30]. See also RoP [31] to [34].
[33] Plenary, 13 June 2023, RoP [170]
[34] Letter from the Minister for Climate Change, 11 September 2023, response to question 1
[35] Letter from the Minister for Climate Change, 11 September 2023, response to question 1

> *consequence of the way these powers were devolved, we've been placed into older and outdated consenting processes by the UK Government that are not fit for purpose."*[36]

36. At paragraph 3.19 of the EM the Minister states that having a unified consent process "would enable the Welsh Ministers to include other consents and authorisations required in a 'one stop shop' approach". We asked the Minister if she could explain further what this means, and provide additional explanation.

37. The Minister told us that for large infrastructure projects, such as marine licences, "further consents, licences or authorisations under different regimes to the one which would grant consent are often required to implement a scheme".[37] The Minister said that this can cause duplication, may significantly increase costs, and can act as a barrier to proposals being brought forward.[38] As regards the 'one stop shop', the Minister said:

> *"This will enable other authorisations or licences necessary for the development to be considered at the same time and form part of the same consent. This will provide a consistent and administratively efficient process for determining major energy, waste, water and transportation infrastructure in Wales. Furthermore, there are certain development types which straddle both the onshore and offshore areas (such as tidal lagoons and alterations to harbours) and are subject to separate jurisdictions. Having a unified process would enable the Welsh Ministers to include other consents and authorisations required to facilitate development in a 'one stop shop' approach.*
>
> *Section 60 of the Bill specifies what may be included in an infrastructure consent order, with provision relating to, or matters ancillary to, development set out in Schedule 1. The list has been compiled comprehensively and is considered to be exhaustive at this point in time.*
>
> *Similarly, section 81 of the Bill provides for certain consent requirements to be removed and deemed instead. This allows authorisations, permissions and consents to be deemed without the consent of the relevant authority who would usually*

[36] Plenary, 13 June 2023, RoP [171]
[37] Letter from the Minister for Climate Change, 11 September 2023, response to question 3
[38] Letter from the Minister for Climate Change, 11 September 2023, response to question 3

> *issue them. The intention is for the specific details be set out in subordinate legislation, but an example may include extinguishing any requirement under the Hedgerow Regulations 2017."*[39]

38. In the EM, at paragraph 3.18, the Minister states that the Bill will "establish aspirations of the Welsh Government to take on further devolved powers in relation to energy and other infrastructure". We asked the Minister to provide some further detail on this. In her letter to us on 3 October 2023, the Minister told us:

> *"The Bill is designed so that there is sufficient flexibility to take account of new and emerging technology or [where] 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 [namely the offshore region and battery storage]."*[40]

39. Should the Bill be passed and enacted, we asked the Minister to confirm when she expects that all provisions of the Bill and the accompanying subordinate legislation will be fully in force. Acknowledging that Part 1 of the Bill and the powers in the Bill to make regulations will come into force the day after the Bill receives Royal Assent (as per section 143 of the Bill), the Minister said she anticipated that "the implementation period will take a year, subject to the outcome of consultations on subordinate legislation".[41]

Delegated powers and the balance between what is on the face of the Bill and what is left to subordinate legislation

40. Table 5.1 of the EM summarises powers in the Bill delegated to the Welsh Ministers to make regulations and orders. Table 5.2 of the EM summarises a

[39] Letter from the Minister for Climate Change, 11 September 2023, response to question 3
[40] Letter from the Minister for Climate Change, 3 October 2023, response to question 12. See also LJC Committee, 25 September 2023, RoP [18] to [24]
[41] Letter from the Minister for Climate Change, 3 October 2023, response to question 9

further 17 powers to make directions or set published criteria; no Senedd procedure will apply to the exercise of these powers.

41. Given the volume of delegated powers, we asked the Minister if she would confirm the number and break down by type all of the delegated powers in the Bill (including whether a power is a Henry VIII power), including regulation-making powers, direction-making powers and order-making powers, and the scrutiny procedure attached to each.

42. In her letter dated 11 September 2023, the Minister indicated that Bill contains 59 powers for the Welsh Ministers to make regulations and seven powers to make orders. The Minister said there are also 14 powers to make directions.[42]

43. Of these 80 powers listed by the Minister in her letter, she states that:

- 14 are Henry VIII powers,
- 10 powers will be subject to the affirmative resolution procedure,
- 49 powers are subject to the negative resolution procedure,
- 1 power (contained in section 141(2)) will be subject to either the affirmative or negative procedure depending on whether the power is used to amend primary legislation, and
- 21 powers are subject to no procedure.

44. When the Minister gave evidence to the CCEI Committee she described the Bill as a 'headline Bill'. We asked the Minister to explain this description and asked what the differences are between a headline Bill and a framework Bill. The Minister responded:

> *"A framework Bill is traditionally one where there is very little policy in detail on the face of the Bill, with wide executive powers—Henry VIII powers, typically—which can be used in a wide variety of ways, typically with no further scrutiny. This is a headline Bill, because it sets out a detailed structure of the process and what will be caught by the Bill, and also contains a number of quite narrowly drawn regulation-making powers, which allow appropriate detail to be put in. But all the detail isn't on the face of the Bill. So, I was trying to distinguish between one that broadly just says, 'The Minister can do what*

[42] Letter from the Minister for Climate Change, 11 September 2023, response to question 4

> *they like—please sign here,' and one that sets out quite a detailed set of processes and constrains the executive power therein, but doesn't contain the whole thing on the face of the Bill…".*[43]

45. The Minister added that there were "really good reasons for not setting out very detailed, administration-type things on the face of the Bill" and that she "absolutely [did] want somebody who read the Bill end to end to be able to understand the process by which they would get their application looked at".[44]

46. The Minister told us that she did not have any concerns that the number of delegated powers contained within the Bill will mean that the law in this area may become more inaccessible than if more information was contained on the face of the Bill. She said:

> *"… what I've tried to do, as I say, is strike the balance between having a Bill that's manageable, understandable and accessible, so that you can understand the process, and one that's flexible enough not to need primary legislation to amend it in two or three years' time…*
>
> *… we're trying to get the balance between a Bill that has all of the appropriate scrutiny from its committees in it, that has regulation-making powers that have the right balance of affirmative processes in it, where we think that the Senedd will have a view as to what should be contained within the regulation-making powers…".*[45]

47. On the issue of accessibility more broadly, the Minister told us that the language used in the Bill "has been drafted with accessibility in mind", and that the drafting of the Bill will ensure that the existing planning system and associated legislation are largely unaffected. The Minister added:

> *"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*

[43] LJC Committee, 25 September 2023, RoP [94]
[44] LJC Committee, 25 September 2023, RoP [97]
[45] LJC Committee, 25 September 2023, RoP [99] and [100]

used to do anything contrary to the provisions of the Bill that the Senedd will have considered and approved."[46]

48. The Bill includes 14 Henry VIII powers. In the EM, the Minister states that the rationale for many of these powers is that some matters will require adjustment more often than it would be sensible for the Senedd to legislate.[47] We asked the Minister why she considered it appropriate, and what consideration has she made, for the Bill giving these powers to the Welsh Government to decide how often the Senedd should change the legislation in this area. The Minister told us that this issue was "a really difficult one". She said:

"... if you think about one of the powers that we have: we want to be able to disapply some parts of the process to a particular application. Well, that's because the process can be quite onerous, and we might want to help somebody that every one of us in this room would think requires assistance through the process. So, I might want to assist a community energy development, for example, by taking out some parts of the process that are particularly onerous or expensive. It's impossible to say, though, unless we do that by regulation, how that might work. I would genuinely not be able to do that on the face of the Bill."[48]

49. Sections 56(6) and 129(2) of the Bill contain Henry VIII powers which will be subject to the made negative procedure. Sections 24(1), 56(2), 60(6), 87 and 128(1) contain Henry VIII powers which require no scrutiny procedure in the Senedd. We asked the Minister how the choice of procedure in each of these cases provides for sufficient safeguards and Senedd oversight. The Minister told us that she "absolutely [got] that this has to be Minister-proof" and that she acknowledged our questioning was "about the ability of a Minister determined to push the power to the limit not to be able to do so".[49]

50. Further commentary on each of these powers is set out in Chapter 4.

Interaction with other legislation

51. The Bill was introduced to the Senedd at the same time as the UK Government's Energy Bill was concluding its passage through the UK Parliament.

[46] Letter from the Minister for Climate Change, 3 October 2023, response to question 11
[47] See, for example, EM, pages 18 to 21 in relation to sections 17(1)(a), 17(1)(b) and 21(1)(a).
[48] LJC Committee, 25 September 2023, RoP [103]
[49] LJC Committee, 25 September 2023, RoP [105]

We asked the Minister to what extent the Bill and the broader Welsh Government policy interact or are affected by the Energy Bill. The Minister said:

> *"Broadly, the UK Energy Bill and our policies are aligned. There are a couple of areas where we're not quite aligned, but the broad thrust of it is the same. The reason we weren't keen on the [Energy] Bill itself is because of the issues around consent or consult. So, they've put, as a result of a conversation we've had subsequent to the LCM being refused by the Senedd, having another conversation with the Minister—. And they were at great pains to put a kind of consultation plus thing in, where they have to formally show what notice they've taken of our consultation, because I was very concerned that they wouldn't say, 'We've consulted them and now we're going to do the thing we were going to do anyway.' So, they've now got a formal report-back mechanism, where they have to say what our response to the consultation was and how and whether they took it into account and so on. So, we've had some robust discussions since then. But, broadly, the policy thrust is the same."*[50]

52. When we asked if Bills both fit together effectively, the Minister said:

> *"Yes. If we could get the legislative competence thing sorted out, they would fit together even better."*[51]

53. When scrutinising the Bill, we were mindful of the Welsh Government's commitment to introduce a Consolidation Bill in the area of planning during the Sixth Senedd. On this matter the Minister told us:

> *"... 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*

[50] LJC Committee, 25 September 2023, RoP [36]. See also Letter to the Minister for Climate Change 27 October 2023 and Letter from the Minister for Climate Change, 3 October 2023, response to question 13.
[51] LJC Committee, 25 September 2023, RoP [38]

anticipated that the Planning Consolidation Bill will be introduced to the Senedd during 2024. (…)

The Planning Consolidation Bill will incorporate any changes to wider legislation made by this Bill which are within the scope of the consolidation project."[52]

Our view

54. We note that the Welsh Government undertook a consultation during the first half of 2018 on its proposed changes to the infrastructure consenting process in Wales. Public consultation on legislative proposals are to be welcomed. However, we are mindful that a five-year gap between the consultation exercise and the introduction of the Bill does not represent best practice.

55. We acknowledge the Minister's evidence regarding the balance between the detail on the face of the Bill and what is left to subordinate legislation.

Conclusion 2. We accept that having certain information on the face of a Bill may be unnecessary and could make the piece of primary legislation unwieldy. However that has to be balanced against people having a broad understanding of what is expected of them by the new law. We are not persuaded that the balance is right within this Bill.

56. While we recognise the Minister's reasoning that it may not be appropriate to set out very detailed, administration-type matters on the face of the Bill, we are not persuaded that a person with a relevant interest could read the Bill and fully grasp or understand the processes involved in a significant infrastructure project.

57. In numerous places throughout the Bill there are references to certain matters being specified in regulations: for example, persons[53], requirements[54], functions[55], development of a kind,[56] information,[57] steps of a kind,[58] operation of a kind,[59] activity of a kind,[60] and "things".[61] Yet some of this information already appears to be known, given the responses the Minister provided to us in

[52] Letter from the Minister for Climate Change, 3 October 2023, responses to questions 10 and 11
[53] For example, section 33
[54] For example, section 34
[55] For example, section 45
[56] For example, section 52
[57] For example, section 88
[58] See section 91
[59] See section 92
[60] See section 115
[61] See section 127

correspondence and during our evidence session, and could therefore reasonably be expected to appear on the face of the Bill.

58. As demonstrated by the Minister's evidence and the detail included in the Statement of Policy Intent for Subordinate Legislation, we believe further detail could be added to the Bill without hindering its readability, particularly where the Minister is taking delegated powers through the Bill to place, as yet, unconfirmed requirements or functions on unknown persons.

Recommendation 3. The Minister should review the Bill and put on its face information already known about, for example, the requirements on or the functions of people, and who those people are, so that there is a better balance between what the Senedd is being asked to approve, and consequently what detail will be found in the Act, and what will be left to subordinate legislation.

59. In making recommendation 3, we acknowledge that such detail on the face of the Bill could require amending as new evidence emerges. It is in these situations that a power to amend such detail could be appropriate. In line with long-standing parliamentary principles, any power to amend the face of primary legislation should be subject to parliamentary scrutiny and, therefore, the draft affirmative procedure should apply to any such regulation-making power. In addition, there may be circumstances when it may be appropriate to add to additional matters through regulations, an approach the Welsh Government has followed in section 110(8).

60. We highlight specific examples where more detail could be added to the face of the Bill in Chapter 4.

61. The fact that the Bill delegates approximately 80 powers to the Welsh Ministers cannot go un-noted. Should the Senedd approve the Bill, this will represent a significant delegation of power by the legislature to the executive.

62. Unfortunately, we are not convinced by the data provided by the Minister in her letter to us on 11 September 2023 about the number and type of delegated powers contained in the Bill. The request for this information was made after we found that the information in the EM required clarifying. The number of delegated powers in the Bill remains unclear to us. It appears to us that the tables of information provided in response to question 4 in the 11 September letter potentially confuse whether a section contains a single or multiple regulation-making powers.

63. For example, entries in Table 1 state as follows:

Regulation making power	Is it a Henry VIII power? Y/N	Procedure
Section 37(2) and (3)	N	Negative
Section 125(6) and (7)	N	Negative
Section 127	N	Negative

64. We believe the Minister is indicating that section 37 contains two regulation-making powers, in subsections (2) and (3), and similarly that section 125 contains two powers in sections (6) and (7). However, the entry in relation to section 127 suggests there is a single regulation-making power in that section but we believe there may be two, in subsection (2)(c) and in subsection (4).

Conclusion 3. The Minister is asking the Senedd to delegate vast numbers of powers to be exercised by the executive and the Senedd should know the exact number, location and type.

Recommendation 4. The Minister should provide to the Senedd a clear, full and detailed list of each and all delegated powers in the Bill, by reference to specific location, type and scrutiny procedure.

65. The fact that the Minister has identified 14 of these delegated powers – nearly one in five – as being Henry VIII powers, permitting the Bill (if and when enacted) to be changed by the Welsh Ministers, is also a significant point which must be highlighted.

66. We accept that Henry VIII powers can be appropriately included in primary legislation. However, in our view, their exercise by Ministers must be suitably overseen by the legislature.

67. We have concerns that five of the 14 Henry VIII powers in the Bill (if enacted) could be exercised by the Welsh Government without the Senedd having any knowledge that the law which it approved has been modified.

68. In some cases, direction-making powers allow the Welsh Ministers to change the effect of the provisions of the Bill, which will have been approved by the Senedd. For example, section 128 of the Bill enables regulations to provide for a direction-making power for the Welsh Ministers to disapply requirements imposed by the Bill, in circumstances to be specified in those regulations.

69. We consider that there is an important difference between the scrutiny of legislation and the ability of the Welsh Ministers, and other authorities, to work with autonomy within the confines of that legislation. The role of the Senedd is to scrutinise legislation, including in the area of planning. It is then for decision makers to decide how to deal with applications within the parameters set by the Bill and, if enacted, the Senedd. Giving the Welsh Ministers direction-making powers which can themselves blur this difference is problematic.

70. There is potential for the Welsh Ministers to change the application of the Bill in particular circumstances, which the Senedd would not have considered or consented to. Were these direction-making powers more specific, and provided for certain situations and circumstances where such directions could be made, this could allow the Senedd to understand and consent to these circumstances as part of the scrutiny process for the Bill and ultimately its passing into law.

Conclusion 4. We do not consider that the Bill as drafted constrains the executive power as fully as it should within some provisions and as suggested by the Minister.

Conclusion 5. On the delegation of powers generally, we do not consider that the Bill as introduced is as clear as it could be.

71. We discuss the individual direction-making powers in the next Chapter of the report.

Conclusion 6. We have some concerns that the vast delegated powers contained within the Bill have the potential to cut across the Minister's aim for a ‘one stop approach’ and will not provide an appropriate level of clarity to readers of the Bill about the application process.

72. During our evidence gathering, we have had to seek further information from the Minister in relation to the justification for the use of scrutiny procedures attached to delegated powers.

Conclusion 7. We remind the Welsh Government that explanatory material accompanying Bills should provide full and adequate justification for the taking of delegated powers and the procedures attached to them.

73. We also do not consider it appropriate to use a Bill as a vehicle to avoid a future Bill where the use of primary legislation would be the constitutionally appropriate approach. We have repeatedly commented on the ‘futureproofing’ justification often put forward by the Welsh Ministers. In our view, including many

regulation-making powers to 'futureproof' a Bill takes away powers from future Seneddau and is not an acceptable practice.

74. We would also respectfully remind the Minister that it is not for the Welsh Government to suggest or second guess where the Senedd is likely to take a view on a particular matter. The foremost question should always be is the procedure applied appropriate and justifiable.

75. Our comments above indicate that a different approach to the Bill, with more detail on its face, would make the Bill more accessible. We would welcome clarity as to why an opportunity was not taken to use overview sections in the Bill, particularly for Parts 1 to 7, to describe what each part is seeking to achieve and how they relate to each other. We believe that this would be helpful to the reader and provide a clearer, more accessible picture of what the legislation is seeking to achieve.

Recommendation 5. The Minister should clarify why the Bill does not include overview sections, particularly for Parts 1 to 7, to describe what each part is seeking to achieve and how they relate to each other.

76. We also acknowledge the Minister's comments about a forthcoming planning-related Consolidation Bill, and welcome the confirmation that it is due to be introduced to the Senedd during 2024.

77. Further detailed examination of specific provisions of the Bill, and delegated powers therein, follows in the next Chapter.

4. Specific observations on particular Parts and sections of the Bill

78. The Bill comprises 144 sections and 3 Schedules. It is split into 9 Parts.

79. We have already commented in Chapter 3 of the report on the significant number of delegated powers in the Bill.

80. The following comments focus on specific sections of the Bill and delegated powers within those sections that we wish to highlight and, accordingly, draw to the attention of the Senedd.

Part 1 of the Bill: Significant infrastructure projects

81. Part 1 of the Bill identifies the types of developments which, for the purposes of the Bill, may be significant infrastructure projects. The developments fall under the following heading categories: energy, transport, water, waste water, and waste.

82. Section 17 of the Bill enables the Welsh Ministers, via a Henry VIII regulation-making power which will be subject to the draft affirmative procedure, to add, vary or remove types of significant infrastructure projects.

83. In addition to the fields (or types) of development categorised on the face of the Bill in sections 2 to 16, section 17(4) also lists projects relating to flood prevention and minerals as types of project which may be added to the scope of the Bill via the regulation-making power in subsection (1) of section 17.

84. The EM does not set out a clear narrative or reasoning as to why flood prevention and minerals have been listed as types of project in section 17(4).

Our view

85. We are unclear why no information on significant infrastructure projects relating to flood prevention and minerals appears on the face of the Bill as it does for the other infrastructure projects listed in section 17(4).

86. As matters currently stand developments falling under the heading categories of energy, transport, water, waste water, and waste are detailed on the face of the Bill and through primary legislation, while those relating to flood prevention and minerals are to be set out in secondary legislation.

87. We are also unclear therefore as to the justification for the inclusion of flood prevention and minerals (in section 17(4)(b) and (c) respectively) as types of project which may be added to the scope of the Bill (if and when enacted) via subordinate legislation. The difference in approach appears neither appropriate or acceptable.

88. We note that in evidence to the CCEI Committee, NFU Cymru commented that there would be greater clarity if provision was included in the Bill to define the criteria for the type of development that would fall under these fields and, in the absence of defined parameters, it would suggest that the section 17 power should only be used following consultation with stakeholders.[62]

Recommendation 6. The Minister should

- provide clarity and detailed justification for the inclusion of flood prevention and minerals (in section 17(4)(b) and (c) respectively) as types of project which may be added to the scope of the Bill (if and when enacted) via subordinate legislation;
- explain why criteria for the type of development that would fall under the fields of flood prevention and minerals were not included on the face of the Bill on introduction.

Recommendation 7. As suggested by stakeholders, to enable public consultation the Minister should consider the use of a super-affirmative procedure in respect of the making of regulations under section 17(1) which make provision for projects relating to the fields of flood prevention and minerals.

89. We discuss section 17 of the Bill further in the next section of the Chapter and how it links with section 22.

Part 2 of the Bill: Requirement for infrastructure consent

90. Part 2 of the Bill imposes a requirement for infrastructure consent for development which is or forms part of a significant infrastructure project, and the effect on other statutory regimes.

91. Section 22 of the Bill deals with directions specifying a development as a significant infrastructure project. We asked the Minister to confirm the purpose of,

[62] Climate Change, Environment and Infrastructure Committee, Infrastructure (Wales) Bill, Evidence from NFU Cymru

and requirement for, the direction and regulation-making powers contained within section 22 of the Bill.

92. The Minister told us that, for certain types of significant infrastructure projects, "a simple compulsory quantitative threshold may not be sufficient to determine whether a project is of such significance and complexity that it merits consenting through a unified consenting process". Therefore, the Minister said that, where a development is of national significance to Wales, the Welsh Ministers may give a direction to specify that a proposed development is a Significant Infrastructure Project and she provided two examples: when the project falls under compulsory criteria and when the project contains new technology or novel circumstances.[63]

93. We also noted that there is a separate power to add, vary or remove significant infrastructure projects in section 17 of the Bill. We asked the Minister why the powers in section 22 will be required, given that the powers in section 17 are also provided to the Welsh Ministers. The Minister responded:

> *"The scope of the regulations making powers in section 17 and in section 22 is different. Subsection 22(2)(c) limits the Welsh Ministers power of give a direction…. Section 17 allows subordinate legislation to change the face of the Bill to add projects which will automatically be classed as a Significant Infrastructure Projects. These regulations are subject to draft affirmative procedure.*
>
> *Part 1 of the Bill contains projects where there is evidence that they will be significant on a national level. New evidence may emerge that different types of project should be included, or a threshold of the existing projects should be amended. Section 17 provides this power to make this change."*[64]

94. Section 24 enables the Welsh Ministers to give a direction specifying that a development is not a significant infrastructure project.

95. As noted in Chapter 3, the direction-making power in section 24(1) is a Henry VIII power which requires no scrutiny procedure in the Senedd.

[63] Letter from the Minister for Climate Change, 11 September 2023, response to question 7
[64] Letter from the Minister for Climate Change, 11 September 2023, response to question 7

96. Subsection (3) of section 24 limits the direction-making powers to developments which (when completed) will be partly in Wales or the Welsh marine area.

Our view

97. We note the Minister's evidence in relation to Part 2 of the Bill.

98. As regards section 22 of the Bill, while we note the Minister's reasoning as to why the power in section 22 is required in addition to the power in section 17, we have yet to be convinced and would welcome further clarity.

99. The Minister gave us the example of a new significant infrastructure project containing a new technology or novel circumstance as something which would require the power in section 22 to be used by the Welsh Ministers. However, we are unclear why the power in section 17 would not be used to accommodate such matters.

100. We believe further clarity on this matter is needed in order for the Senedd to be satisfied that it is not delegating an unnecessary power to the executive.

Recommendation 8. The Minister should provide additional detail and reasoning as to why the regulation-making power in section 22 is needed in addition to the power in section 17.

Recommendation 9. In conjunction with recommendation 8, the Minister should explain the consequences if section 22 were removed from the Bill, and what would the Minister be prevented from doing that could not be achieved with section 17.

101. Specifically in relation to the no procedure direction-making Henry VIII power in section 24(1), the reasoning for the Minister's approach to the direction-making power remains unclear to us. While we note that section 24(3) contains some details what a direction may do, it is important that the Senedd is aware and approves of the parameters of a Ministerial power to issue directions.

Recommendation 10. Section 24 should be amended to include details of what a direction made under subsection (1) may include. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

Recommendation 11. Section 24 should be amended to require that a direction made under subsection (1) must be laid before the Senedd, and there should be an accompanying statement to all Members of the Senedd.

Part 3 of the Bill: Applying for infrastructure consent

102. Part 3 of the Bill sets out the pre-application procedure, how an application for infrastructure consent is to be made to the Welsh Ministers, and the requirements for publicity and notification. It also sets out procedures that relate to the compulsory acquisition of land as part of an infrastructure consent.

103. Section 29 of the Bill relates to pre-application procedures. In relation to section 29(5), in the EM the Minister states that matters relating to a notice "may be subject to change in the future to benefit the consenting process".[65] We asked the Minister to explain how future changes, which are as yet unknown, can be said to be beneficial to the consenting process. The Minister responded:

> *"So, the one that comes to mind is the local newspaper. So, at the moment, you'd have to advertise in a local newspaper. Well, very tragically, many places don't have a local newspaper, and it's very likely that in the future it may be actually impossible to do that, so it would allow you to do so electronically, or you might even be specifying that you need to do it on an app that most people have access to. There's one called Nextdoor that I'm familiar with, for example. I'm sure all of you have got them as well. It might actually be better to specify that you advertise in an electronic format of that sort; you'd likely reach more people than, sadly, a local newspaper. So, it's that kind of thing that we're thinking of. Or, again, some widget that nobody has ever heard of yet appears, and everybody uses it, and our regulations say that you've got to use the local newspaper. So, it's trying to adapt to future changes of that sort. So, what it does is it specifies that you have to have a notification, that it has to have some content, that it has to be accompanied by various things, but what it doesn't tell you is how to do the notification, because that's the thing we think will very likely need futureproofing. So, it's trying to hit that balance, really. (...)*
>
> *So, the Bill—and the committee may have a view on this—sets out what we think a notification absolutely should have, and*

[65] EM, page 24

then it leaves the regulations to tell you exactly how that might be."[66]

104. Section 30 of the Bill deals with pre-application consultation and procedure. In relation to section 30(2) and (3), the EM, in describing the appropriateness of the delegated power, states the requirements set out in the regulations will accommodate "a significant level of detail which would encumber the reading of the Bill".[67] The EM also describes the requirement to undertake pre-application consultation as "a minor procedural matter".[68] We asked the Minister to explain further what this means, and she responded:

"We envisage the minimum requirements will include procedural matters such as the display of site notices and publicising notice of an application in a newspaper circulating in the vicinity of a proposed development. However, these matters will require specific and substantial details attached to them, such as what will need to be included in a notice, where they must be displayed and for how long. For example, we envisage different requirements for the display of site notices will likely be required for linear routes (such as electric lines or railways), compared to developments contained on a clearly contained site.

We also need to consider any alternative arrangements for developments in the inshore region, where proposed requirements for development on land would not be suitable or practical. For example, it would not be possible or beneficial to display a site notice in these circumstances.

The regulations will specify significant detail on any minimum pre-application consultation requirements, the inclusion on the face of the Bill would encumber its reading. Further, matters will detail procedural requirements, including different procedures for developments on land and in the inshore region, as well as the necessary flexibility to adapt these requirements and respond to change. Given this, we have concluded such

[66] LJC Committee, 25 September 2023, RoP [129] and [131]
[67] EM, page 25
[68] EM, page 25

specific and procedural matters are more appropriately specified in subordinate legislation."[69]

105. We also asked the Minister why she has taken the view that a requirement to undertake pre-application consultation is a minor matter. The Minister told us that the requirement to undertake pre-application consultation "is not considered to be a minor matter in the wider consenting process". However, the Minister said that any specific procedural requirements, for example publicising a notice in a local newspaper, are considered to be minor technical and procedural matters.[70]

106. In relation to section 31(5) relating to applying for infrastructure consent, the EM, in describing the appropriateness of the delegated power, also states the list of potential functions will present "a significant level of detail which would encumber the reading of the Bill". The regulations will be subject to the negative procedure, and may confer a function on any person, including the exercise of a discretion. We asked the Minister if she could further explain her approach to this section and the power therein. The Minister responded:

"The power at section 31(5) of the Bill provides that regulations made under subsection (4), may include a discretion to disapply requirements. This discretion will help ensure that procedural requirements do not cause an unnecessary burden.

This is because the processes and procedures for obtaining infrastructure consent are particularly prescriptive and it is recognised that legislation may oblige parties to fulfil requirements which may be excessive in some limited circumstances. For example, regulations made under subsection (4) will state what other information, documents or other materials must be submitted with an application form. However, if once validated, the applicant recognises an error in the application form that does not materially affect the proposed development (such as an incorrect address) and there is a requirement to re-submit the application form with correct details, the legislation would obligate the applicant to also re-submit all the supporting documentation. The timeframe for decision making would also the align with the date the application was considered valid. This power could

[69] Letter from the Minister for Climate Change, 11 September 2023, response to question 8
[70] Letter from the Minister for Climate Change, 11 September 2023, response to question 8

> *enable a discretion to enable minor changes to the application form of this type without re-starting the application process.*
>
> *This is considered a minor technical matter as the power at section 31(5) to confer functions, including a those involving the exercise of a discretion are restricted to regulations made under that section. As this section prescribes matters specifically relating to the application process (for example, how an application is to be made, what supporting information and documents must be submitted with one and how applications are validated), it is considered a minor procedural and technical matter in the wider consenting process.*
>
> *However, whilst the regulation making power in Section 128 will also prescribe matters of detail, as set out in question 5, the legislation, if made, will confer further powers on the Welsh Ministers. Therefore, it is considered appropriate for regulations prescribed under Section 128 to be subject to the draft affirmative procedure."*[71]

107. Section 33(5) of the Bill provides that a deadline by which the Welsh Ministers must receive representations on an application for infrastructure consent must be after the end of the minimum representation period specified in regulations. We asked the Minister what is the minimum representation period expected to be, and the Minister told us that, at the moment, she was "thinking to replicate the development of national significance process, so that's 30 days if there's an environmental impact assessment and 21 days if there isn't".[72]

108. Section 34 deals with regulations about notices and publicity. Section 34(1)(b) states that regulations may impose requirements on persons specified in the regulations to respond to a notice under section 33(2). We asked the Minister what requirements will be imposed, and are there any requirements that could not be imposed. The Minister responded:

> *"The persons specified in regulations in these circumstances are anticipated to be statutory consultees. Who is considered to be a statutory consultee will vary on a case-by-case basis, depending on the type of development being proposed.*

[71] Letter from the Minister for Climate Change, 11 September 2023, response to question 9
[72] LJC Committee, 25 September 2023, RoP [135]

Because these consultees will have knowledge and expertise in certain areas, their input and opinions on a proposed development are considered vital. Therefore, where a statutory consultee is given notice of a proposed development, they will be required to respond to the notice in the form of a substantive response, which must also be submitted to the Welsh Ministers within a specified period.

It is anticipated a substantive response will state the statutory consultee:

• Has no comment to make;

• Has no objections;

• Has concerns regarding the proposed development and how these concerns can be addressed; or

• Has concerns regarding the proposed development and would be minded to object.

The Regulations may only impose a requirement where it is falls under one of the categories specified in section 34(1)(a) to (d)."[73]

109. We followed-up on this matter when the Minister came to our meeting on 25 September and asked her to explain where the statutory consultees are included in legislation. The Minister told us:

"So, they're going to be set out in the regulations, as I understand it, but there'll be all the list that you're familiar with. So, Natural Resources Wales will be a consultee for absolutely everything; the Ministry of Defence will be a consultee if there's Ministry of Defence land or some security, just to pick two at random. There'll be other consultees—you know, local authority planning authorities, various other people, depending on where and how the thing is. It's one of the reasons we want Minister of the Crown consents, because we want Natural England, for example, to be one of the listed ones there if there's a cross-border issue on a river, for example. You can think of several cross-border issues where transmission lines might be crossing

[73] Letter from the Minister for Climate Change, 11 September 2023, response to question 10

> *the border and so on. So, that's one of the reasons we want it. But the idea is to put a list of all of the public bodies—and quasi-public bodies—that might be statutory consultees into the regulations, so that they can be updated. So, if Natural England suddenly changes its name to something else, we can update it."*[74]

110. Section 37(2) of the Bill requires an applicant to provide the Welsh Ministers with a notice specifying the names and such other information as may be specified in regulations of each person the applicant knows to be interested in land to which a compulsory acquisition request relates. We asked the Minister what 'other information' does she envisage being captured by this provision. The Minister said:

> *"The name and address of the person whose land it is, for example, is the obvious one. If you're going for a compulsory purchase order, you'd want to know all of the people with a title in the land. If you were doing some sort of land assembly, for example, you might have several landowners who needed to have their land interests compulsorily acquired, and that might actually include a highway authority as well, or various other people—I mean, who knows with some of the land that we have to deal with. So, it's a list of all of the people affected, I think."*[75]

111. An official accompanying the Minister added:

> *"But what we will try and do with all these regulations is group them into a series of grouped regulations. So, if you're dealing with compulsory purchases, you'll be dealing with other procedural matters as well—it won't be just a case of, 'Here's one on compulsory purchase, here's one on pre application'. It'll be grouped in a logical way. What we're trying to achieve is that grouping. The regulations will set out in detail anyone who may have an interest in the land. It gets a bit technical when you get into things like agricultural tenancies and things like that. So, there are all sorts of other interests you may have in land—common land and all those sorts of things that are very, very difficult to put on the face of a piece of legislation."*[76]

[74] LJC Committee, 25 September 2023, RoP [137]
[75] LJC Committee, 25 September 2023, RoP [141]
[76] LJC Committee, 25 September 2023, RoP [142]

112. Section 37(4) defines an 'affected person' for the purpose of that section. It states that a person is an 'affected person' if the applicant 'after making diligent inquiry' knows that the person is interested in the land to which the compulsory acquisition request relates. We asked the Minister to explain what is meant by 'diligent inquiry', and how it will be tested. We also asked whether this is an established concept in the current law relating to applying for infrastructure consent and/or compulsory acquisition requests. The Minister responded:

> *""Diligent inquiry" means for the applicant to undertake reasonable diligence in investigating land interests. The carrying out of diligent inquiry is an established concept for compulsory acquisition requests as prescribed by the Compulsory Purchase Act 1965 and Acquisition of Land Act 1981. Its meaning is noted in case law[1] and it is an established term prescribed under the Planning Act 2008 as part of the regime for determining nationally significant infrastructure projects by the UK Government where there is to be compulsory acquisition of land. (...)*
>
> *The carrying out of diligent inquiry will be considered by the determining body for the application during the assessment of whether to grant compulsory acquisition. This will be considered on a case-by-case basis and supplemented by guidance that will assist both the applicant and the determining body. The guidance is likely to contain information on methods of best practice including research on title information, land interest questionnaires, companies house searches, site investigations and web based research to assist in ensuring diligent inquiry has been undertaken."*[77]

113. Section 38 enables the Welsh Ministers to make regulations which will require consultation in relation to compulsory acquisition. It is our understanding that subsection (1) contains the regulation-making power in this section. We asked the Minister to clarify how subsections (2) and (3) will operate and, in particular, confirm that the reference to subsection (2) in subsection (3) is correct. We also asked under what circumstances will consultation not be required.

114. In her letter to us on 11 September, the Minister said:

[77] Letter from the Minister for Climate Change, 11 September 2023, response to question 11

> *"There are two distinct regulation making powers in Section 38. Subsection (1) allows regulations to made requiring an applicant to carry out consultation where the application for an ICO contains a request for compulsory acquisition. Subsection 2 is a separate regulation making power allowing for regulations to specify the circumstances when that consultation will take place and to make other provisions in connection with the consultation. Subsection (3) provides examples of what may be contained in regulations made under subsection (2). The reference to subsection (2) is therefore correct. (...)*
>
> *At this point in time, we anticipate further consultation under regulations prescribed by Section 38 would only be required where additional land interests are identified following the submission of an application for infrastructure consent that includes a compulsory acquisition request."*[78]

115. We followed-up on this matter when the Minister came to our meeting on 25 September. The purpose of our questioning was to understand the Minister's position on this matter, given our understanding is that section 38 contains just one regulation-making power, in subsection (1). The Minister told us "We think you're right and we'll change it. We think the committee's right; the drafting is less than splendid. I will put an amendment in to address it."[79]

Our view

116. We note the Minister's evidence in relation to Part 3 of the Bill.

117. In relation to section 31(5) and the regulation-making power therein which may be used to confer a function on any person, including the exercise of a discretion, we acknowledge the Minister's views but have concerns that this power is broad and the section contains little detail as to what the functions conferred could entail.

Recommendation 12. Section 31 of the Bill should be amended so that details of the functions referred to in subsection (5) which may be included in regulations made under subsection (4) are listed on the face of the Bill. The Bill may also be

[78] Letter from the Minister for Climate Change, 11 September 2023, response to question 12
[79] LJC Committee, 25 September 2023, RoP [148]

amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

118. We sought to gather further detail from the Minister about the regulation-making power in section 34(1)(b) which can be used to impose requirements on persons specified in the regulations to respond to a notice under section 33(2) of the Bill.

119. We note the Minister's comments that the specified persons are "anticipated to be statutory consultees" and that her plan is to "put a list of all of the public bodies–and quasi-public bodies–that might be statutory consultees into the regulations, so that they can be updated".

120. Given that the Minister has confirmed that "Natural Resources Wales will be a consultee for absolutely everything", we are unclear as to why Natural Resources Wales is not named on the face of the Bill. This would provide certainty to all involved in the application procedure, not least National Resources Wales.

121. If there are other bodies/persons whom the Minister knows will be specified persons for the purpose of section 33, we believe they too should be listed on the face of the Bill.

Recommendation 13. Section 33(2)(a) of the Bill should be amended to state that Natural Resources Wales, and any other known body/person, must be given a notice of any application for infrastructure consent.

122. Also in relation to section 34, we note the Minister's comments that regulations made under section 34(1) "may only impose a requirement where it is falls under one of the categories specified in section 34(1)(a) to (d)". We believe further clarity is required because we are unclear what "categories" the Minister is referring to, given that section 34(1) (a), (c) and (d) provide for other matters which may be addressed in regulations and do not appear to be solely linked to paragraph (b) which is the provision enabling the regulations to impose requirements.

Recommendation 14. Section 34 of the Bill should be amended to add details of the requirements which may be imposed and on whom by regulations under subsection (1)(b). The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

123. Section 34(2) of the Bill enables regulations under 34(1) to confer a function, including a function involving the exercise of a discretion, on any person. We

believe that the relevant functions intended to be conferred by this provision should be set out on the face of the Bill. This will add much needed clarity for the reader as to the extent of the regulation-making power, and the sorts of functions which are being referred to.

Recommendation 15. Section 34 of the Bill should be amended so that details of the functions referred to in subsection (2) which may be conferred by regulations made under subsection (1) are listed on the face of the Bill. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

124. In relation to section 38 of the Bill, and as we highlighted in Chapter 3, the purpose of our questioning on this section was to understand the Minister's reasons for stating that section 38 contains two distinct regulation-making powers, given that we are of the view that it contains just one regulation-making power, in subsection (1). We acknowledge the Minister's follow-up comments that she is now in agreement with our assessment of the power in section 38.

Recommendation 16. The Minister should clarify the change she will seek to make to section 38 of the Bill, in line with our comments that this section contains one regulation-making power in subsection (1). In particular, the Minister should clarify whether an amendment is proposed to change the reference in subsection (3) from a reference to subsection (2) to instead be a reference to subsection (1), or if a more substantial amendment will be required to make the necessary changes to section 38.

Part 4 of the Bill: Examining applications

125. Part 4 of the Bill sets out the processes and procedures for examining applications for infrastructure consent.

126. Section 39(3) requires the Welsh Ministers to publish a document setting out the criteria to be applied in deciding whether to appoint a person or panel of persons under section 39(2). We asked the Minister what are these criteria and why are they not provided for on the face of the Bill. The Minister said:

> *"Because, again, it's the detail, isn't it, of how many, how they'd be appointed, how they're notified of their appointment, how you revoke the appointment, how you get rid of somebody, or what happens if they die or all that sort of stuff. And so you need a set of regulations that set out how the panel is formed, how many it is, what the quorate number is, all of that kind of*

stuff. You wouldn't expect to see all of that on the face of a piece of primary legislation. And there might be other efficiency improvements for all of that as well. So, we might say that you have to have, I don't know, some e-mail address, or you might have to be contactable by blah—there's all that kind of stuff. So, as we do for all public appointments, there's a huge raft of things that goes alongside it about how you apply, and whether you're paid, and at what rate of remuneration, and how that's reviewed. This is hugely detailed, and I think it would not sit happily on the face of the Bill."[80]

127. Section 42 enables regulations to be made that will make provision about the procedure to be followed in connection with the examination of an application under Part 4 of the Bill. We asked the Minister to provide further explanation and clarity regarding the direction specified in subsection (3), and confirm which power will be relied upon in order to 'switch' the decision maker (from the Welsh Ministers to the examining authority, and vice versa). The Minister responded:

"The power for the Welsh Ministers to issue a direction, transferring the undertaking of proceedings from the examining authority to themselves, or vice versa is provided by Section 52, Subsection (4) of the Bill.

The direction making power is intended to provide flexibility to ultimately ensure the final decision on an application is made by the appropriate body. A change to the determining body may be appropriate where an examining authority is examining an application and matters may arise which are, for example, particularly controversial and it would be more appropriate for the Welsh Ministers to take over and undertake the proceedings. Similarly, the Welsh Ministers may be examining an application and may come to view the proceedings would be more appropriately dealt with by the examining authority; for example where no representations or objections have been received to the application. The Regulations under Section 42 will specify the procedure to be followed in these circumstances. This will include matters such as (but not limited to) who is to be notified of a direction and

[80] LJC Committee, 25 September 2023, RoP [151]

> *the timeframe within which such notification must occur so as to not unduly impact on the decision making process."*[81]

128. Similar to the explanations which accompany the regulation-making powers in sections 30 and 31, the EM, in describing the appropriateness of the regulation-making power in section 42, also states the details in the regulations will accommodate a "significant level of detail which would encumber the reading of the Bill".[82] The regulations will be subject to the negative procedure. We asked the Minister for a further explanation and she responded:

> *"Section 42 provides the Welsh Ministers with a power to make regulations about the procedure to be followed in connection with the examination of an application under Part 4. This does not only cover the procedures where a direction in respect of the decision maker is to be issued. The regulations may make provision about the procedure to be followed in connection with making a determination under Section 41, about how an application is to be examined, about matters preparatory and subsequent to an examination, about the conduct of an examination, including the procedure for transferring the examination of an application to another body. The regulations will therefore prescribe a significant level of detail that would encumber the reading of the Bill. In addition, the content is both very technical and relatively minor in nature, and may need to be amended and therefore is subject to the negative procedure.*
>
> *Conversely, the regulation making power in Section 128 will confer further powers on the Welsh Ministers. Therefore it is considered appropriate for regulations prescribed under Section 128 to be subject to the draft affirmative procedure."*[83]

129. Section 43 of the Bill enables regulations to make provision for powers of entry to inspect land owned or occupied otherwise than by the applicant. We asked the Minister to explain what principles will apply to the powers to enter land and why are they not on the face of the Bill. We also asked who is covered by the phrase 'a person, alone or with others' for the purpose of section 43. The Minister responded:

[81] Letter from the Minister for Climate Change, 11 September 2023, response to question 13
[82] EM, pages 33 to 34
[83] Letter from the Minister for Climate Change, 11 September 2023, response to question 13

"The principles applying to the powers to enter land will be prescribed through subordinate legislation. At this time we envisage they will be:-

- The land must relate to the application which is being examined;

- The Welsh Ministers or examining authority who will enter land as part of an examination are to notify the applicant and other persons considered necessary of their intention to do so. Other persons will likely include the owner/occupier of the land and providing them with a period of notice. The notification will be in writing and will include the proposed date and time of the inspection; and

- The timetable for examining an application will not be delayed as a result of a site visit. Subordinate legislation will provide that the Welsh Ministers or examining authority will not be required to defer an inspection where any person (including the applicant) is not present at the time of an inspection.

The principle to enter land as part of examination will be established by the Bill. The details are not on the face of the Bill as they relate to technical procedural matters for the entering onto land. Prescribing them in subordinate legislation will ensure flexibility to account for a potential need to amend those detailed requirements in future. This is similar to what currently occurs under the regime for determining nationally significant infrastructure projects by the UK Government. The principle to enter land as part of the examination of applications under that regime is established by Section 97, Subsection 3 of the Planning Act 2008. Detailed matters for the entering onto land and undertaking site inspections are prescribed by Rule 16 of the Infrastructure Planning (Examination Procedure) Rules 2010. The procedure for undertaking site inspections as part of the 'Developments of National Significance' regime is also established by subordinate legislation, under Regulation 16 of the Developments of National Significance (Wales) Regulations 2016. (...)

The phrase "a person, alone or with others" for the purpose of Section 43 covers those persons who would be required to carry

> *out an assessment of the site to inform the examination, for example the Inspector assigned to examine the application. It is recognised it may be necessary for more than one person with different specialisms to assess the site where it has a range of considerations (for example where a site may have ecological and highways considerations)."*[84]

130. We followed-up on the matter of the phrasing 'a person, alone or with others' when the Minister attended our meeting on 25 September and specifically asked why the Minister considered that the negative procedure was appropriate for this regulation-making power. The Minister told us:

> *"This is just whether the inspector wants to go on their own or whether they want to take a cast of thousands as a result of a particularly intensive application that requires expertise, and so on. It's the regulations around making sure that you give the right notification for that. If the committee feels strongly that that should be affirmative, then I'm not going to die in a ditch over it—it just seems quite technical to us, that it is literally just saying, 'I would like to come alone as the inspector', or, 'On this occasion, I would like to bring a cast of thousands'."*[85]

131. Section 45 relates to access to evidence at a local inquiry. Subsection (6) contains a regulation-making power which will enable regulations to make provisions about procedures to be followed and the functions of an appointed representative. In the EM, in describing the appropriateness of the delegated power, the Minister states that this matter is considered suitable to be included in regulations "as arrangements need to be flexible to respond to future changes in procedure".[86] The justification does not appear to address subsection (6)(b) which will enable the regulations to provide for the functions of an appointed representative, and which does not relate to procedures. We asked the Minister to provide further clarity, including an explanation of what the functions of an appointed representative are and how they might change over time. The Minister responded:

> *"Regulations to specify the functions of an appointed representative will include, but are not limited to, the following:*

[84] Letter from the Minister for Climate Change, 11 September 2023, response to question 14
[85] LJC Committee, 25 September 2023, RoP [155]. See also Letter from the Minister for Climate Change, 11 September 2023, response to question 14.
[86] EM, page 34

- Representing the interests of the affected person by, for example, taking instructions from the affected person before receiving copies of closed or potentially closed evidence, dealing with preliminary matters, making submissions and cross-examining witnesses;

- Ensuring that the copies of the closed evidence or potentially closed evidence are returned to the person who supplied them as soon as practicable after inquiry proceedings; and

- To make applications to the Court in respect of any of its functions.

Similar legislation listing the functions of an appointed representative for the purposes of giving evidence in the planning system is prescribed under Regulation 4 of the Planning (National Security Directions and Appointed Representatives) (Wales) Regulations 2006.

It is considered there is a need to allow for flexibility in specifying functions of an appointed representative in the regulations as it is possible certain functions may no longer be required in future or there may be a need to add additional functions due to changes in examination procedure. For example, if in future it is considered advances can be made to improve the efficiency of how an examination is carried out (this could be through use of technology), the functions of the appointed representative may need to be modified in order to reflect an updated process."[87]

Our view

132. We note the Minister's evidence in relation to Part 4 of the Bill.

133. Section 42(3) provides direction-making powers to include the procedure for situations where the decision-making body is to be changed from the examining authority to the Welsh Ministers, and vice versa. It is unclear to us why this procedure cannot be provided for on the face of the Bill. Given that the Minister was able to describe circumstances in which this issue may arise, we cannot see why it is not possible to provide that clarity for the reader in the Bill itself.

[87] Letter from the Minister for Climate Change, 11 September 2023, response to question 15

Recommendation 17. The Minister should clarify, and provide the necessary detail of, the powers contained within section 42 of the Bill.

Recommendation 18. Section 42 of the Bill should be amended to set out the details of the procedure for situations where the decision-making body is to be changed from the examining authority to the Welsh Ministers, and vice versa.

134. We note the Minister's evidence in relation to section 43, specifically as regards who is covered by the phrase 'a person, alone or with others' and why the Minister considers that the negative procedure is appropriate for the regulations that will set out this detail.

Conclusion 8. As a general rule, while acknowledging that the relevant powers in section 43 may replicate existing law, that does not of itself justify their inclusion in the form set out in the Bill. We believe that it would be good practice and appropriate to make some provision on the face of the Bill in connection with powers of entry, rather than doing so solely through regulations. We do not believe that the Minister has adequately justified the approach taken in the Bill.

135. Furthermore, given that a power of entry to land is a significant power to use, we are not convinced that the negative procedure is the appropriate scrutiny procedure to be attached to the power.

Recommendation 19. Section 43 of the Bill should be amended so that the principles relating to the power of entry, as well as any limitations or criteria that should apply to the making of the regulations, should be on the face of the Bill.

Recommendation 20. The Bill should be amended so that the draft affirmative scrutiny procedure applies to the exercise of the regulation-making power in section 43.

136. In relation to section 45 and the regulation-making power therein which may be used to make provision about the functions of an appointed representative, we acknowledge the Minister's views but again have concerns that this power is broad and the section contains little detail as to what the functions could entail.

Recommendation 21. Section 45 of the Bill should be amended so that details of the functions of an appointed representative referred to in subsection (6) which may be conferred in regulations are listed on the face of the Bill. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

Part 5 of the Bill: Deciding applications for infrastructure consent

137. Part 5 of the Bill contains provisions about deciding applications for infrastructure consent. The Part makes provision about who decides an application for infrastructure consent made under section 31 (an "application"), about what the decision maker has to take into account when deciding an application, about the timetable for making the decision, and the making of the decision.

138. Section 52 of the Bill relates to deciding applications. In accordance with section 52, the examining authority has the function of deciding an application for infrastructure consent for a development of a kind specified in regulations. We asked the Minister to which developments does this refer and why is it not possible to make provision for this on the face of the Bill. The Minister said "At the moment, we haven't got anything in our heads that might require this".[88] She added:

> *"... I have to think of hypothetical examples to give you, I'm afraid. For example, if you wanted to include the alteration of a railway line as a result of a particular application, then we might need to have something specific for that. We don't have anything in our mind at the moment, we just think there may be things that we haven't thought of that might require, I don't know, to change the entire drainage system for somewhere, or something."*[89]

139. Section 55 enables the Welsh Ministers to make regulations which specify matters that the examining authority or the Welsh Ministers may disregard in deciding an application for infrastructure consent. We asked the Minister to explain what the purpose of this provision is, and what matters may be disregarded. The EM provides no detail about what this provision seeks to achieve, only that the matters "will present a significant level of detail and will also need to be flexible to respond to any future changes in procedure".[90] The Minister responded:

> *"This provision is included in recognition of the significant volume of evidence and information that will likely have to be considered by the determining body for an application for infrastructure consent. The purpose of this provision is to help to*

[88] LJC Committee, 25 September 2023, RoP [162]
[89] LJC Committee, 25 September 2023, RoP [164]. See also RoP [165] to [180].
[90] EM, page 36

> *ensure an efficient decision-making process by disregarding matters that do not provide appropriate or robust evidence in informing the decision on a proposed infrastructure consent. At this time it is considered such evidence and information could include vexatious or frivolous representations, and representations which dispute established national policy prescribed by the Welsh Ministers in the National Development Framework, or Marine Plan. However, during the operation of the new regime it may become necessary to amend the list to make clear what information may be disregarded. For example, policy statements of the UK Government could be added if considered necessary."*[91]

140. We followed-up on the matter of something being "vexatious or frivolous" when the Minister attended our meeting on 25 September and suggested to her that this could be a subjective analysis. The Minister responded:

> *"The person would always have a legal right to challenge that, of course. We can all probably think of examples. I'm not going to say one here, but one immediately springs into my mind where you have somebody who is very, very, personally concerned about something in a way that has, perhaps, overtaken their lives a little bit, and is no longer providing help to the inspector but is actually causing a huge amount of work, and the issue isn't one that's new, it's just constantly reiterated…*
>
> *The regulations will set this out, but I would very much argue that somebody who's simply made a frivolous interjection, and the inspector doesn't think it's a material consideration, is not likely to fall foul of this. It's going to be somebody who's persistently making non-material interjections that's going to fall into this."*[92]

141. Section 56 relates to the timetable for deciding an application for infrastructure consent.

142. As noted in Chapter 3, section 56(2) contains a direction-making power, specifically enabling the Welsh Ministers to extend the timetable. This is a Henry VIII power and is subject to no Senedd scrutiny procedure.

[91] Letter from the Minister for Climate Change, 11 September 2023, response to question 16
[92] LJC Committee, 25 September 2023, RoP [182] and [186]

143. In relation to the Henry VIII power in section 56(2), the Minister said:

> *"You might want to make it longer or shorter or whatever. The regulations will set out some parameters for that, and so on. I don't think that's particularly contentious or difficult. It's obvious why you don't want to put it on the face of the Bill, to my mind. We could know in a year's time that, actually, we've left far too long for various parts of it and not long enough for others, and we might want to adjust that."*[93]

144. The Minister said that the exercise of such a direction would be because "there's a legitimate reason why the application hasn't been able to proceed at the normal pace".[94]

145. When we pursued this issue further and suggested the exercise of the direction could be subject to a Senedd scrutiny procedure the Minister also added:

> *"I think that's mixing up, I'm afraid... the legislative and the executive functions of the Bill. So, I think the legislative, scrutiny function there is to take it up with the Minister, that they think the Minister's abused their power in some way, or whatever. I think, if the Minister had to be subject to a Senedd piece of scrutiny prior to making the decision, you're effectively inserting a legislative process into the decision-making process, which we've never done before, and which I am not very keen on doing—well, I won't—and I'm not going to do that now. So, I think that's—. You've got to look at what the decision-making process is, and then what the scrutiny of the decision is. If you put one in the front, then you've effectively given the Senedd some part of the decision-making process, which, I would argue, is not the idea, and I would not be very keen on."*[95]

146. Section 56(6) provides an additional power for regulations to amend section 56(1)(a). This is also a Henry VIII power enabling the amendment of primary legislation and it will be subject to the negative scrutiny procedure. This power is not limited to the extension of the timetable, as would be permitted by the direction-making power in section 56(2). We asked the Minister why regulations

[93] LJC Committee, 25 September 2023, RoP [105]
[94] LJC Committee, 25 September 2023, RoP [191]
[95] LJC Committee, 25 September 2023, RoP [216] and [218]

made under section 56(6) are not required to follow the affirmative procedure. The Minister responded:

> *"The Bill enables the Welsh Ministers to amend the statutory time period through secondary legislation under subsection 56(6). At this time it is not envisaged the time period will be amended, however evidence may emerge through operation of the process that indicates a shorter or longer timescale may be more appropriate.*
>
> *This regulation making power can only amend subsection 56(1)(a). As this is a procedural matter, i.e. changing the number of weeks the Welsh Ministers have to decide an application, it is not believed that the draft affirmative procedure is necessary."*[96]

147. Section 57 deals with the granting or refusal of infrastructure consent. Subsection (6) enables regulations to be made which will make provision regulating the procedure to be followed if the Welsh Ministers propose to make an infrastructure consent order on terms which are 'materially different' from those proposed in the application. Such regulations are to be subject to the negative scrutiny procedure. Given that 'materially different' could include changes which are more than minor in nature, we asked the Minister if she could clarify why she considers the negative procedure to be appropriate for such regulations. The Minister responded:

> *"In respect of the Welsh Ministers proposing "materially different" changes to an application. We envisage subordinate legislation will specify that the Welsh Ministers must only make an order which contains minor changes to what was originally applied for in the application for infrastructure consent. This will ensure parity between what types of amendments and variations are considered to be acceptable where they are requested via a separate application to vary or amend an existing infrastructure consent. For example, they can only be non-material or minor material. Therefore, 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 by the Welsh Ministers in an order should only be minor in nature. As the regulations will specify a technical*

[96] Letter from the Minister for Climate Change, 11 September 2023, response to question 17

> *matter of detail on the procedure to be followed for changes the Welsh Ministers can make to an application, they are considered suitable to be subject to negative procedure."*[97]

148. We later asked the Minister to clarify why, if changes are to be minor, is the power drafted much wider than is necessary to achieve its purpose. The Minister told us:

> *"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."*[98]

149. The Minister also told us that the EM will be amended to note that section 57(1)(a) "contains the order-making power to make an order granting infrastructure consent ("an infrastructure consent order") where it is a statutory instrument."[99]

150. Section 59 of the Bill relates to the reasons for a decision to grant or refuse infrastructure consent. We asked the Minister if there are any persons who will always be provided with a copy of a statement by the Welsh Ministers under section 59(3).

151. The Minister responded:

> *"Subordinate legislation provided under section 59(3) will specify those persons who must be provided with a copy of a statement of reasons. At this time, we anticipate the applicant will always be provided with the statement of reasons. Other persons notified will vary depending on the type or category of development to which an application relates. We anticipate such persons could include relevant LPAs and community councils, statutory consultees who were consulted as part of the application process, any person who made representations on an application and any other persons considered appropriate by the examining authority or the Welsh Ministers."*[100]

[97] Letter from the Minister for Climate Change, 11 September 2023, response to question 18
[98] Letter from the Minister for Climate Change, 3 October 2023, response to question 1
[99] Letter from the Minister for Climate Change, 11 September 2023, response to question 22
[100] Letter from the Minister for Climate Change, 11 September 2023, response to question 19

152. On 25 September, an official accompanying the Minister at our meeting also told us:

> *"So, anyone who puts in an application at the moment, you know, when you get your decision, you get the reasons for that decision as well. So, what we're doing is replicating that process here. It states that it will always go to the applicant. In practice, it will go to the local planning authority and other statutory consultees as well. What it doesn't say, it doesn't say that in the legislation at the moment. So, essentially we're operating in the same way as the planning system operates at present."*[101]

Our view

153. We note the Minister's evidence in relation to Part 5 of the Bill.

154. As regards section 52 of the Bill, we have concerns that the Minister is seeking a new delegated power for the Welsh Ministers for which she has told us the Welsh Government "haven't got anything in our heads that might require this".

Conclusion 9. We do not consider that the Minister has provided robust reasoning for the delegation of the power in section 52 and we do not consider it to be appropriate that the Senedd will have no role in approving its use.

Recommendation 22. The Minister should provide further detail and clarity as to why the regulation-making power in section 52 is necessary.

Recommendation 23. If section 52(1) is retained, the Bill should be amended to require regulations to be made under section 52 to be subject to the draft affirmative procedure.

155. We note the evidence from the Minister in relation to section 55 of the Bill, specifically as regards the power enabling the examining authority or the Welsh Ministers, when examining an application, to disregard evidence and information which could include vexatious or frivolous representations. In many cases, decisions about whether matters are vexatious or frivolous will be subjective, and may depend on both the circumstances in which those matters arise and the person making the decision.

156. As we highlight above, the EM contains no detail about what this provision is seeking to achieve.

[101] LJC Committee, 25 September 2023, RoP [200]

Conclusion 10. The regulation-making power in section 55 is broad but without clear aims or limitations. We do not consider this to be acceptable.

Recommendation 24. Section 55 of the Bill should be amended to include details about the matters that the examining authority or the Welsh Ministers may disregard in deciding an application for infrastructure consent. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

Conclusion 11. As regards section 56 of the Bill, we have concerns that it introduces an unwelcome level of opaqueness and therefore uncertainty about the process and timetable for deciding an application for infrastructure consent.

157. We note that section 56(1)(b) enables the person applying for infrastructure consent and the Welsh Ministers to agree a period within which an application must be decided. We are unclear if there are any limitations to this provision and how this process is and will be transparent.

Recommendation 25. The Minister should clarify why section 56(1)(b) is required, and amend the Bill to provide more details about the limitation of this provision and how the period agreed will be made public.

158. Specifically in relation to the power in section 56(2), the reasoning for the Minister's approach to the direction-making power remains unclear to us. The relationship between section 56(1) and section 56(2), and how they work together, is also unclear. As we said earlier in this Chapter, in our view it is important that the Senedd is aware and approves of the parameters of a Ministerial power to issue directions.

Recommendation 26. The Minister should clarify why the approach adopted in section 56(2) as regards the direction-making power is necessary.

Recommendation 27. Section 56 should be amended to include details of what a direction made under subsection (2) may include. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

Recommendation 28. Section 56 should be amended to require that a direction made under subsection (2) must be laid before the Senedd, and there should be an accompanying statement to all Members of the Senedd.

159. We note that section 56(3)(b) enables a direction made under subsection (2) to be given after the end of the periods mentioned in subsection (1). We are again unclear if there are any limitations to this provision.

Recommendation 29. The Minister should clarify why section 56(3)(b) is required and amend the Bill to provide more details about the limitations that apply to this provision, including in particular the restrictions that apply to the time-period during which a direction under section 56(3)(b) may be given.

160. As regards section 56(6) which provides a regulation-making power, subject to the negative procedure, enabling the Welsh Ministers to amend the statutory time period for deciding applications, we are not convinced that such a power is simply a "procedural matter". It is our understanding that a clear time period is critical to the successful functioning of an infrastructure consenting system. We have some concerns that, if the time period is too open to change, it could undermine the rationale for having a time period at all. As such we do not consider it reasonable or appropriate that this power is not subject to the approval of the Senedd.

Recommendation 30. The Bill should be amended to require regulations to be made under section 56(6) of the Bill to be subject to the draft affirmative procedure.

161. We note the Minister's evidence in relation to section 57. Having heard that evidence, it would appear that the regulation-making power in section 57(6) is drafted more widely than is necessary to achieve the Minister's objective.

162. The Minister will be aware that we always consider the way a provision may be used and not what a current Minister intends to do with a delegated power.

Recommendation 31. Section 57(6) should be amended to constrain the power to what is necessary and in line with how the Minister has stated the power is intended to be used.

163. We also welcome the Minister's commitment to update the EM at the next available opportunity to reflect the existence of the order-making power in section 57(1)(a).

164. We note the Minister's evidence in relation to section 59 of the Bill, specifically as regards the persons who will always be provided with a copy of a statement by the Welsh Ministers under section 59(3).

165. We acknowledge the Minister's comments that she anticipates the applicant will always be provided with the statement of reasons and that other persons notified will vary depending on the type or category of development to which an application relates. We also acknowledge the evidence we heard that these provisions will operate "in the same way as the planning system operates at present".

166. Nonetheless, as with other views we express in the report, to give certainty to all those involved and to improve the accessibility of the legislation, we are unclear why it cannot be specified on the face of the Bill that the applicant will always be provided with a statement.

Recommendation 32. Section 59 should be amended to make it a requirement for a statement prepared under subsections (1) or (2) to be provided to the applicant of an infrastructure consent order.

Part 6 of the Bill: Infrastructure consent orders

167. Part 6 of the Bill contains provisions which relate to infrastructure consent orders.

168. Section 60 specifies what may be included in an infrastructure consent order. As noted in Chapter 3, section 60(6) contains a Henry VIII order-making power that requires no scrutiny procedure in the Senedd and which sets out some detail of what an infrastructure consent order may do.

169. Section 81 of the Bill relates to removing consent requirements and deeming consents. We asked the Minister what specific consents are covered by section 81(1)(a), and what are the exceptions mentioned under section 81(4) and why they cannot be placed on the face of the Bill. The Minister responded:

> *"In order to implement and develop a Significant Infrastructure Project, consent would normally be required for a number of ancillary matters. To implement a true unified consenting process, the Infrastructure Consent issued by the Welsh Ministers may also have the effect of giving permission, authorising, approving, consenting, licensing or granting these ancillary matters.*
>
> *There are no specific consents on the face of the Bill because subsections 81(1) (a) and (b) allow an infrastructure consenting order to include any ancillary consent issued by a relevant authority and not listed in part 2 of the Bill.*

The Bill adopts a qualified approach, which requires that a relevant consenting authority has given authorisation for the use of its consent/licence/authorisation within the Infrastructure Consent. This is specified on the face of the Bill at sections 81(2) and (3). (...)

Section 82(4) allows the Welsh Ministers to specify in subordinate legislation authorisations/permissions/consents which will not be subject to sections 81(2) and (3). This has the effect of allowing the Welsh Ministers to deem a consent without the consent (explicit or silent) of the relevant authority.

These regulations will be subject to further consultation, but they may for example:

• deem a consent to establish a safety zone around renewable energy installations under section 95 of the Energy Act 2004.

• extinguish any requirement under the Hedgerow Regulations 1997.

The exceptions are not on the face of the Bill as they will be subject to further consultation with relevant stakeholders and may need to be amended during the operation of the consenting process."[102]

170. Section 82 of the Bill relates to the publication and procedure for infrastructure consent orders. Subsection (4) requires the Welsh Ministers to lay a copy of a statutory instrument, a plan and a statement of reasons before the Senedd. We asked the Minister to clarify the scrutiny procedure attached to the making of this statutory instrument. The Minister responded:

"Section 138(5) of the Bill applies to negative procedure to any regulations made under the Act which are not listed in section 138(4). This does not apply to infrastructure consent orders as they are not regulations. Infrastructure consent orders are not subject to either the negative or affirmative procedure, however where the criteria in section 82 are met and the order is contained in a statutory instrument, it must be laid before the

[102] Letter from the Minister for Climate Change, 11 September 2023, response to question 20

Senedd along with the latest version any plan and the statement of reasons for granting the order."[103]

171. By virtue of paragraph 29 of Schedule 1 to the Bill, an infrastructure consent order made in accordance with section 82 can create a criminal offence. As such we asked the Minister why the affirmative procedure not been attached to this power. The Minister said:

"The Order that is made relates to the granting of an individual development and any criminal office 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 Minsters to issue an order without offences that are in the order that was applied for using the power in section 57 of the Bill."[104]

172. We asked the Minister to confirm our understanding that section 84(4) contains an order-making power, and that the Explanatory Memorandum will be amended accordingly at the next available opportunity. The Minister responded:

"Section 84(4) does include an order-making power for the making of an Infrastructure Consent Order (where it is a statutory instrument) due to the correction of an error in a decision document. Thank you for bringing this matter to our attention, the Explanatory Memorandum will be amended at the next opportunity to reflect this order-making power."[105]

[103] Letter from the Minister for Climate Change, 11 September 2023, response to question 21
[104] Letter from the Minister for Climate Change, 3 October 2023, response to question 2
[105] Letter from the Minister for Climate Change, 11 September 2023, response to question 22

173. Section 87 enables the Welsh Ministers, via order, to change or revoke infrastructure consent orders.

174. As noted in Chapter 3, the order-making power in section 87(1) is a Henry VIII power and it requires no scrutiny procedure in the Senedd.

175. Subsection (7) of section 87 sets out some detail of what the power in subsection (1) includes. For example, a power to impose new requirements or remove or vary existing requirements.

176. In relation to section 88, which relates to the procedure for changing and revoking infrastructure consent orders, in the EM, when describing the appropriateness of the delegated power, the Minister states the regulations will accommodate a "significant level of detail which would encumber the reading of the Bill". As highlighted earlier in the report, similar reasoning has been given in relation to the delegated powers in sections 30, 31 and 42. The regulations will be subject to the negative procedure. We asked the Minister to explain further what this means and why she takes the view that this is a minor matter. The Minister responded:

> *"The power at section 88 of the Bill provides the Welsh Ministers with a power to make regulations about the procedure for changing and revoking infrastructure consent orders.*
>
> *The Regulations will prescribe matters specifically relating to the changing and revoking process, for example, how an application is to be made, what supporting information and documents must be submitted with an application, what consultation is undertaken and details of the decision-making process. The extent of these procedures would encumber the reading of the Bill and are considered a minor procedural and technical matter in the wider consenting process.*
>
> *The negative procedure is considered appropriate for this section, as it relates to procedural elements of the process for changing and revoking an infrastructure consent. The negative procedure for these regulations also allows for flexibility, and the opportunity to respond to changes in a timely manner to ensure the infrastructure consenting system is kept up to date,*

for example, should we decide to amend the publicity requirements to account for changes in technology."[106]

177. We later asked the Minister what persons will always be given notice of a change to or revocation of an infrastructure consent order under section 88(6). The Minister told us:

"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."[107]

178. Section 92 deals with when a development begins, for the purposes of the Act. Section 92(2) states that a "Material operation" means any operation except an operation of a kind specified in regulations. We asked the Minister to clarify what operations will not be material operations.

179. The Minister responded:

"Section 92 states that development is taken to begin on the earliest day that any material operation is undertaken. Subsection (2) enables regulations to set out the kinds of operations that are not a "material operation" for the purposes of commencement.

The exclusion of certain operations from the definition of material operation enables clarity. For example, it is

[106] Letter from the Minister for Climate Change, 11 September 2023, response to question 23
[107] Letter from the Minister for Climate Change, 3 October 2023, response to question 3

anticipated the regulations will specify that soil and water sampling will not constitute a material operation on its own thus it will not be taken as beginning of development for the purpose of the duration of an infrastructure consenting order."[108]

Our view

180. We note the Minister's evidence in relation to Part 6 of the Bill.

181. Section 60(6) enables an infrastructure consent order, amongst other things, to "apply, modify or exclude an enactment which relates to any matter for which provision may be made in the order" (see section 60(6)(a)). It can also make amendments, repeals or revocations of enactments of local application, where this appears appropriate to the Welsh Ministers (see section 60(6)(b)).

182. The provision in section 60(6) creates wide Henry VIII powers, but provides no opportunity for scrutiny by the Senedd. It is unclear what enactments would need to be modified, for what purpose, and to what extent..

183. In addition to being a wide power that lacks clear parameters and whose purpose is unclear, we have concerns that this power could have negative effects in respect of clarity and consistency. We note that each modification would only be for the purposes of an individual development. As such, two separate infrastructure consent orders could make different provision on similar facts. The lack of Senedd oversight of the use of these Henry VIII powers increases the risk of an inconsistent approach, as provision does not exist which would allow for effective monitoring of the use of these powers.

184. ,Whilst section 82(3)(b) requires infrastructure consent orders which include provision made using the powers in section 60(6)(a) or (b) to be contained in a statutory instrument, no Senedd procedure is required to be followed in respect of such an order.

Recommendation 33. The Minister should explain why, in respect of section 60(6)(a) and (b), it is appropriate that an infrastructure consent order may amend, modify or exclude enactments without any scrutiny or oversight by the Senedd.

Recommendation 34. Section 60 should be amended to require that an order made in accordance with the section must be laid before the Senedd, and there should be an accompanying statement to all Members of the Senedd.

[108] Letter from the Minister for Climate Change, 11 September 2023, response to question 24

185. In relation to section 82, we note that an infrastructure consent order made in accordance with this section can create a criminal offence (see section 82(3)(a)), and that the order will be subject to different procedures depending on what is included in it. If such an order creates a criminal offence, it would appear that there is no procedure for the Senedd to scrutinise it. We do not consider this to be acceptable. Where the criteria in section 82 are met, and the infrastructure order is contained in a statutory instrument, we note that it will only be required to be laid before the Senedd (see section 82(4)).

Recommendation 35. The Bill should be amended so that orders made under section 82 which create criminal offences must be subject to the draft affirmative scrutiny procedure.

186. As regards section 84, we welcome the Minister's commitment to update the EM at the next available opportunity to reflect the existence of the order-making power in subsection (4).

187. The provision made by section 87 enables the Welsh Ministers to change or revoke an infrastructure consent order. This appears to be a wide Henry VIII power, and it will not be subject to any scrutiny in the Senedd. The procedure for obtaining infrastructure consent provided for in the Bill is detailed in nature. An application will be considered in detail and a decision will be made as to whether or not infrastructure consent should be granted for a particular application and a particular project. We have concerns that the ability to change or revoke the infrastructure consent order after it is made impacts upon the consistency and predictability of the consenting process.

188. We note that the power to change or revoke the infrastructure consent order can be made following an application by the applicant, a person with an interest in the land, or someone else for whose benefit the infrastructure consent order has effect (see section 87(3)).

189. We further note that section 87(4) allows the Welsh Ministers to revoke an infrastructure consent order, made in accordance with the provisions in the Bill, in certain circumstances (for example, the abandonment of a development) where an application is made by a planning authority. The Welsh Ministers can also change or revoke an infrastructure consent order without an application being made (see section 87(6)). We have concerns that where changes to, or the revocation of, an infrastructure consent order occur without an application or consultation, there may be unforeseen consequences for both the developer and for stakeholders.

190. We believe it is important that the Senedd is aware of the exercise of the no procedure order-making Henry VIII power in section 87.

191. Section 88 provides for procedural matters to be set out in regulations. However, these powers do not specifically make provision for consultation or publicity. It is unclear from the Bill as drafted what safeguards will be put in place to ensure that decisions are made properly and with sufficient information. We have concerns that there is a risk that unforeseen consequences may arise from the modification or revocation of an infrastructure consent order, which was itself granted after the process outlined in the Bill.

192. We note the Minister's evidence in relation to section 88 of the Bill, specifically in relation to what persons will always be given notice of a change to or revocation of an infrastructure consent order under section 88(6).

193. We acknowledge the Minister's comments that "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" and, as such, she concluded it would not be necessary to place this requirement on the face of the Bill.

194. If there would always be a requirement to provide notice to the person who originally applied for the infrastructure consent order, we are of the view that it would improve the accessibility of the legislation if this detail was specified on the face of the Bill.

Recommendation 36. Section 87 should be amended to require that an order made under subsection (1) must be laid before the Senedd, and there should be an accompanying statement to all Members of the Senedd.

Recommendation 37. The provisions contained in sections 87 and 88 relating to the change or revocation of infrastructure consent orders should be amended to include details of the safeguards that will be in place in respect of the use of the power in section 87(1) so as to ensure there are no unintended consequences.

Recommendation 38. Section 88 should be amended to make it a requirement for a notice issued under subsection (6) to be provided to the person who originally applied for the infrastructure consent order.

195. We note the Minister's evidence in relation to section 92 of the Bill but are unconvinced by the reasoning as to why more detail about what may not be a "material operation" cannot be included on the face of the Bill. The Minister

provided examples of certain operations that she considers would fall outside of this definition and we are unclear why such matters cannot be listed in section 92.

Recommendation 39. Section 92 should be amended to include details of what may be considered as an operation that is not a "material operation". The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

Part 7 of the Bill: Enforcement

196. Part 7 of the Bill contains provisions about offences relating to development without infrastructure consent and a breach of, or failure to comply with, the terms of an infrastructure consent order and the ability to serve notices of unauthorised development. The Part makes provision about what enforcement tools are available to local authorities and the Welsh Ministers to aid in undertaking enforcement duties, in addition to the time limits within which any enforcement action may be taken.

197. Section 115 deals with restrictions on the power to issue a temporary stop notice. We asked the Minister to explain what activities will not be prohibited by a temporary stop notice under section 115(1). The Minister responded:

> *"The main purpose of restricting the use of a temporary stop notices is to ensure certain rights an individual may have are not affected, or where the issuing of such a notice would have other negative implications, for example on health and safety or national security.*
>
> *This power mirrors section 171F(1)(b) of the Town and Country Planning Act 1990 and certain restrictions may be introduced in the wider planning system which would also be relevant to applications for infrastructure consent. Therefore, this provides the necessary flexibility to align with the wider planning system, where relevant."*[109]

[109] Letter from the Minister for Climate Change, 11 September 2023, response to question 25

Our view

198. We note the Minister's evidence in relation to Part 7 of the Bill.

199. While we acknowledge the response the Minister provided to our question asking what activities will not be prohibited by a temporary stop notice under section 115(1), we believe further clarity is needed.

Recommendation 40. The Minister should provide additional detail and clarity as to what activities will not be prohibited by a temporary stop notice under section 115(1).

Part 8 of the Bill: Supplementary functions

200. Part 8 of the Bill provides a number of supplementary functions, mainly for the Welsh Ministers, to facilitate the operation of the system established by the Bill and to give the Welsh Ministers powers to adjust the system by disapplying its requirements or making special provision for applications by the Crown (which includes Crown offices and bodies).

201. Section 121 deals with fees for performance of infrastructure consent functions and services. We asked the Minister which public authorities will be permitted to charge fees, and the Minister told us:

> *"The Bill provides the Welsh Ministers power to make regulations in relation to the charging of fees by a specified public authority providing functions in relation to an infrastructure consent. To achieve a fee regime that is simple and transparent, it is envisaged fees will be combination of fixed and variable rates. Costs can vary depending on size, scale and location of a proposed development and other factors such as inflation can impact on costs. The existence of a variable rate within the process allows for such flexibility.*
>
> *I have already mentioned in the Climate Change, Environment and Infrastructure Committee session on the 6 July that I am keen that fees are charged on a cost-recovery basis. This power will enable me to achieve this by allowing public bodies to charge fees.*
>
> *I anticipate the public authorities that will be specified by regulations are:*

- *Welsh Ministers;*

- *Local Planning Authorities, Natural Resources Wales; and*

- *Certain Statutory Consultees."*[110]

202. We also asked the Minister what are the functions detailed under section 121(5) and on who will they be conferred. The Minister responded:

> *"The public authorities that will be permitted to charge fees in relation to infrastructure consent orders are also the bodies on which functions can be conferred. Nevertheless, a public body undertaking a function or service as part of the Bill does not necessarily mean that a fee can be charged. The charging of fees must be reasonable and appropriate.*
>
> *Welsh Ministers*
>
> *The Welsh Ministers, or those appointed on their behalf (such as PEDW), will be required to undertake the following functions in relation to an application for infrastructure consent:*
>
> - *Provide pre-application services (where requested);*
>
> - *Respond to a pre-application notification form;*
>
> - *Validate an application once submitted;*
>
> - *Undertake any relevant publicity and notification requirements;*
>
> - *Consider variations to an application (if requested by an applicant);*
>
> - *Undertake the examination of an application; and*
>
> - *Making a decision on application.*
>
> *The Welsh Ministers could potentially be required to undertake similar functions where an amendment is requested to an infrastructure consent order following the grant of consent, as well as functions relating to the revocation of an infrastructure consent order. It is our intention for Welsh Ministers to charge a*

[110] Letter from the Minister for Climate Change, 11 September 2023, response to question 26

fee for the processing and determination of an infrastructure consent order.

Local planning authorities

Local planning authorities ("LPA") will be required to undertake the following functions in relation to an application for infrastructure consent:

• Provide pre-application services (where requested);

• Submit a local impact report; and

• Attendance at examination (where relevant).

Natural Resources Wales

Natural Resources Wales ("NRW") will be required to undertake the following functions in relation to an application for infrastructure consent that contains provision for a deemed marine licence:

• Submit a marine impact report (MIR)

• Attendance at examination (where relevant).

Statutory consultees

Statutory consultees will be required to undertake the following functions in relation to an application for infrastructure consent:

• Responding to consultations in the form of a substantive response; and

• Attendance at examination (where relevant).

Regarding the conferring of functions on statutory consultees, you may be aware that I have sought Minister of Crown consent for these provisions to apply to certain statutory consultees. (…) Discussions between officials are on-going on this matter."[111]

203. Section 126 relates to the power to consult and a duty to respond to a consultation. We asked the Minister which public authorities will be consulted

[111] Letter from the Minister for Climate Change, 11 September 2023, response to question 26

under section 126(1) and why are they not included on the face of the Bill. The Minister replied:

> *"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."*[112]

204. Section 127 deals with Welsh Ministers' directions to public authorities. We asked the Minister to confirm our understanding that section 127(3) contains a direction-making power, and that the EM will be amended accordingly at the next available opportunity. The Minister responded:

> *"The direction-making power requiring public authorities to undertake any relevant matters in respect of infrastructure consent applications made to the Welsh Ministers is provided under Section 127(1). Section 127(3) provides clarification on*

[112] Letter from the Minister for Climate Change, 3 October 2023, response to question 4

> *how such directions are to be given. We note there is an error in the subordinate legislation table which suggests that section 127(3) contains a regulation making power. This is incorrect and we will amend the Explanatory Memorandum accordingly at the next opportunity."*[113]

205. We also asked the Minister to confirm how the need to act "swiftly"[114] is relevant to the choice of procedure for the direction power in section 127(3). The Minister told us:

> *"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."*[115]

206. Section 128(1) provides a regulation-making power to the Welsh Ministers which will enable them to direct that requirements under the Act do not apply in cases specified in the direction. The regulations will be subject to the draft affirmative procedure. The EM, in justifying the procedure, states that "Subordinate legislation will limit this power".[116]

207. As noted in Chapter 3, section 128(1) also contains a Henry VIII direction-making power which requires no scrutiny procedure in the Senedd.

208. The directions will be able to disapply requirements imposed by the Bill, if and once enacted, and may apply to a particular case or cases generally. We asked the Minister why is this power appropriate and necessary, and the Minister told us:

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[113] Letter from the Minister for Climate Change, 11 September 2023, response to question 27
[114] EM, page 46
[115] Letter from the Minister for Climate Change, 3 October 2023, response to question 5
[116] EM, page 46

"The consenting process introduced by the Bill is intended to be a one stop shop for the consenting of infrastructure in Wales. A single process will be used for a wide range of infrastructure developments and in a wide range of different circumstances.

The process is intended to be prescriptive, for example, subordinate legislation will prescribe in detail how consultations must be conducted, or how the examining authority will notify interested parties upon receiving a valid application.

In being prescriptive, it is recognised that legislation may oblige parties to fulfil requirements which may be excessive in some limited circumstances. The Bill aims to ensure a transparent and fair examination process but also to be efficient and timely. In order to continue to expedite the consenting process, the Welsh Ministers have the power to dispense with certain procedural requirements but only where they believe there would be no detriment to procedural fairness.

The following are examples of circumstances where dispensing requirements may be considered.

For example, subordinate legislation will set out publicity requirements. In the instances of a linear route, such as a railway or a new road, this may include multiple notices. However, where additional publicity occurs for a relatively minor amendment to the scheme, the Welsh Ministers may see no reason to publicise this amendment in the same way.

Another example is where subordinate legislation will set requirements that applicant will have to fulfil during the pre-application consultation. If the regulation requires public events to consult on a proposed development, there might be instances where this will not be physically possible, for example during a pandemic.

A final example is where subordinate legislation will set consultation requirements associated with the correction of errors in a decision. Depending on the nature of the correction, it may be appropriate to dispense on some consultation requirements.

> *In such instances, it would be helpful and proportionate for the Welsh Ministers to exercise a power which enables them to dispense with a procedural requirement or requirements set out in the Bill or regulations. In the interests of transparency, where requirements are dispensed, it would be important for the reasons for those requirements to be dispensed are published."*[117]

209. We also asked the Minister how will subordinate legislation be used to limit the power. The Minister said:

> *"Due to the nature of this power, it is intended to limit its scope through subordinate legislation which must specify the requirements that may be dis-applied by direction.*
>
> *At this time, it is anticipated this power will be limited to pre-application procedures, to some application procedures, and the procedure for correcting errors in a consent or changing or revoking an infrastructure consent.*
>
> *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, such as procedures relating to compulsory purchase.*
>
> *Regulations will also place a duty on the Welsh Ministers to publish any direction which dispenses a requirement and to specify the reason behind the dispensation."*[118]

210. We noted that, in her letter to us on 11 September, the Minister said "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". We asked the Minister to confirm whether this provision in the Bill, if and when enacted, would prevent a future Minister from using this power to disapply requirements which protect rights. The Minister responded:

> *"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*

[117] Letter from the Minister for Climate Change, 11 September 2023, response to question 28
[118] Letter from the Minister for Climate Change, 11 September 2023, response to question 28

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."[119]

211. Section 129 relates to applications by the Crown. As regards the Henry VIII power in section 129(2), which is subject to the negative procedure, an official accompanying the Minister told us that "Crown developments is one of those areas where we think it's important to have this sort of power" and added that, for example, there could be sensitive information linked to national security.[120]

212. Section 137 provides for restrictions to apply to the making of regulations and orders under the Bill. We asked the Minister what is the purpose of the drafting of this provision and why has it been included given the operation of section 154 of the 2006 Act. We also asked why section 137 only refers to some of the provisions of Schedule 7B to the 2006 Act and not others. The Minister told us:

"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

[119] Letter from the Minister for Climate Change, 3 October 2023, response to question 7
[120] LJC Committee, 25 September 2023, RoP [106]. See also RoP [108].

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."[121]

Our view

213. We note the Minister's evidence in relation to Part 8 of the Bill.

214. As highlighted above, section 121(5) includes a regulation-making power that will enable the Welsh Ministers to confer a function, including one which involves the exercise of a discretion, on any person in connection with the charging of fees for the performance of infrastructure consent functions and services.

215. We have concerns that this power is broad and the Bill itself contains little detail as to what the functions conferred could entail. In her evidence, the Minister cited several examples of what these functions would be. As such, we are unclear why that detail is not on the face of the Bill.

Recommendation 41. Section 121 of the Bill should be amended so that details of the functions referred to in subsection (5) which may be contained in regulations made under subsection (1) are listed on the face of the Bill. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

216. In our questioning about section 126 (and similar to our interest in sections 33 and 34), we sought to gather further detail from the Minister about which public authorities will be consulted under section 126(1).

217. We acknowledge the Minister's comments that she intends that "the list of authorities and bodies to be identified as statutory consultees will be set out in

[121] Letter from the Minister for Climate Change, 3 October 2023, response to question 8

subordinate legislation following a consultation exercise". We are unclear why listing public authorities which will be consulted "will present a significant level of detail".

218. Given that the Minister has confirmed that "It is envisaged that Natural Resources Wales would be consulted in all instances", we are unclear as to why Natural Resources Wales is not a named consultee on the face of the Bill. As we said in relation to sections 33 and 34, this would provide certainty, not least to National Resources Wales.

Recommendation 42. Section 126 of the Bill should be amended to require Natural Resources Wales, and any other known body/person, to be consulted about a valid application for infrastructure consent.

219. We note the Minister's evidence in relation to section 127, which gives the Welsh Ministers a power to give directions to public authorities. The power in section 127(1) for Welsh Ministers to direct a public authority to "do things" in relation to an application is imprecise. The drafting does not enable the reader to understand what action a public authority may be expected to take in relation to an application.

Recommendation 43. The Minister should clarify the details of the "things" a public authority may be required to do as directed by the Welsh Ministers using the power in section 127(1), and the Bill should be amended to set out this detail.

Recommendation 44. The Minister should provide further detail and clarity as to why the direction-making power in section 127(1) is necessary, and why the statutory requirements to be placed on a public authority are not included on the face of the Bill.

220. We welcome the specific reference to planning authorities and Natural Resources Wales on the face of the Bill in section 127(2). This gives the reader an indication of the sorts of public authorities which are being considered. However, we believe that the reliance on regulations to specify one or more further devolved Welsh authorities in section 127(2)(c) is unsatisfactory. If the Welsh Government knows which bodies these will be, then we consider that this list should instead be included on the face of the Bill. We acknowledge that there may be a requirement to modify the list in future to add or remove devolved Welsh authorities from it. As such, we consider that a regulation-making power enabling the amendment of the list may be appropriate. Such regulations should be subject to the draft affirmative procedure.

Recommendation 45. Section 127 should be amended to include the list of relevant devolved Welsh authorities to which the section will apply. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

221. Subsection (4) of section 127 contains a regulation-making power enabling provision to be made in connection with the recovery of costs incurred by public authorities for things done in pursuance of a direction made under subsection (1). We are unclear as to why the draft affirmative procedure does not apply to regulations which may be made under subsection (4).

Recommendation 46. The Bill should be amended so that the draft affirmative scrutiny procedure applies to the exercise of the regulation-making power in section 127(4).

222. On section 128, we note that it provides a regulation-making power to the Welsh Ministers which will enable them to direct that requirements under the Bill (if and when enacted) do not apply in cases specified in the direction. We further note that the regulations will be subject to the draft affirmative procedure and the direction-making power will be subject to no procedure.

Conclusion 12. Our overall concern with section 128 is it will enable the Welsh Ministers to disapply provisions that will have been scrutinised by the Senedd. This means the Senedd is being ask to approve the provisions and requirements in the Bill while knowing that the Welsh Ministers can subsequently change them. It also creates a lack of certainty and accessibility for stakeholders.

223. Specifically in relation to the no procedure direction-making Henry VIII power in section 128(1), the reasoning for the Minister's approach to the direction-making power remains unclear to us. As we said earlier in this Chapter, in our view it is important that the Senedd is aware and approves of the parameters of a Ministerial power to issue directions.

Recommendation 47. The Minister should clarify why the approach adopted in section 128(1) as regards the direction-making power is necessary.

Recommendation 48. Section 128 should be amended to include details of what a direction made under subsection (1) may include. The Bill may also be amended to include a regulation-making power that is subject to the draft affirmative procedure which enables the amendment of this list.

Recommendation 49. Section 128 should be amended to require that a direction made under subsection (1) must be laid before the Senedd, and there should be an accompanying statement to all Members of the Senedd.

224. Finally, we note the Minister's evidence in relation to section 129 of the Bill. Specifically we note that subsection (2) contains a Henry VIII power. While we acknowledge the stated reasons for the necessity of this power, we believe that a higher scrutiny procedure should be attached to its use.

Recommendation 50. The Bill should be amended to require that regulations made under section 129(2) of the Bill are subject to the draft affirmative procedure.