Welsh Parliament
Legislation, Justice and Constitution Committee

Report on the Historic Environment (Wales) Bill

December 2022

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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

Peredur Owen Griffiths MS *
Plaid Cymru

*Peredur Owen Griffiths MS was not a member of the Committee during the scrutiny of the Bill.

The following Member was also a member of the Committee during the scrutiny of the Bill.

Rhys ab Owen MS
Independent Plaid Cymru

Contents

Recommendations and Conclusions

1. Introduction

On 4 July 2022 Mick Antoniw MS, the Counsel General and Minister for the Constitution (the Counsel General) introduced to the Senedd the first Welsh Consolidation Bill, the Historic Environment (Wales) Bill (the Bill)[1], and an accompanying Explanatory Memorandum (the EM)[2].

1. Alongside the Bill and EM, the Counsel General also laid Explanatory Notes[3], a Table of Origins document[4], a Table of Destinations document[5], an explanation of changes made to existing provisions (known as the Drafters' Notes)[6] and correspondence from the Law Commission.[7]

2. The Senedd's Business Committee referred the Bill to the Legislation, Justice and Constitution Committee (the Committee) on 4 July 2022, and set a deadline of 16 December 2022 for reporting on its initial considerations.[8] The reporting deadline was subsequently revised to 23 December 2022.[9]

The purpose of the Bill

3. The long title of the Bill is:

> *"An Act of Senedd Cymru to consolidate certain enactments relating to the conservation of the historic environment of Wales."*

4. The Counsel General states in the EM:

[1] Historic Environment (Wales) Bill, as introduced
[2] Welsh Government, Historic Environment (Wales) Bill Explanatory Memorandum, July 2022
[3] Welsh Government, Explanatory Notes, July 2022
[4] Welsh Government, Table of Origins, July 2022
[5] Welsh Government, Table of Destinations, July 2022
[6] Welsh Government, Explanation of changes made to existing provisions within the Historic Environment (Wales) Bill (Drafters' Notes), July 2022
[7] Correspondence from the Law Commission to the First Minister, 13 May 2022
[8] Business Committee, Timetable for consideration: The Historic Environment (Wales) Bill, July 2022
[9] Letter from the Business Committee, 23 September 2022; Letter to the Business Committee, 30 September 2022; Business Committee, Revised timetable for consideration: The Historic Environment (Wales) Bill, October 2022

> *"The purpose of the Historic Environment (Wales) Bill ('the Bill') is to consolidate legislation relating to the historic environment in Wales.*
>
> *Consolidation involves bringing together all or most of the (generally primary) legislation on a specific subject so that it can be easily found, and by modernising the form and drafting of the law to make it easier to understand and apply. Consolidation will often bring together several existing Acts on a subject, updating and harmonising the provisions, to eventually create a new, single, Act."*[10]

5. The Bill comprises 213 sections and 14 Schedules, and has seven parts:

- Part 1 – Overview
- Part 2 – Monuments of special historic interest
- Part 3 – Buildings of special architectural or historic interest
- Part 4 – Conservation areas
- Part 5 – Supplementary provision about buildings of special interest and conservation areas
- Part 6 – Other heritage assets and records
- Part 7 – General provisions

The Committee's remit and approach to scrutiny

6. The remit of the Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. We 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.

7. The role of the Committee as regards Consolidation Bills, specifically at Initial Consideration, is set out in Standing Order 26C.16 and is to consider and report on whether the Bill should proceed as a Consolidation Bill.

8. In considering whether a Bill should proceed as a Consolidation Bill or not, Standing Order 26C.17 sets out that the responsible committee may consider:

[10] EM, paragraphs 1 and 2

- whether it is satisfied that the scope of the consolidation is appropriate;
- whether it is satisfied that the relevant enactments have been included within the consolidation;
- whether the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent allowed by Standing Order 26C.2;
- whether the Bill consolidates the law clearly and consistently;
- any other matter it considers relevant to Standing Order 26C.

9. On 4 July 2022[11], we considered our approach to Initial Consideration and agreed to scrutinise the Bill in line with Standing Order 26C.17.

10. We took oral evidence from a number of witnesses. The schedule of oral evidence sessions is included at Annex A. In addition to appearing before us on two occasions, we also exchanged detailed correspondence with the Counsel General. Due to its significance in our consideration of the Bill, we have taken the decision to include the correspondence with the Counsel General in full in Annexes B to D to this report. We also wrote to relevant stakeholders to ask for views on the consolidation exercise. A list of the organisations and individuals from whom responses were received, and links to that published evidence, is included at Annex E.

11. Our attention in this report is focused on matters which we believe are key to our role in recommending to the Senedd whether the Bill should proceed as a Consolidation Bill.

12. We would like to thank all those who have contributed to our work and helped inform our consideration of the Bill.

13. In particular, we would like to thank the Counsel General, Welsh Government Legislative Counsel and other officials for their engagement during the scrutiny process and for their thorough responses to our questions.

[11] LJC Committee, 4 July 2022

2. The first Welsh Consolidation Bill

The Legislation (Wales) Act 2019

14. In June 2016 the Law Commission recommended[12] that significant areas of Welsh law should be consolidated and codified. The Welsh Government accepted these recommendations, and introduced the **Legislation (Wales) Bill**, which requires it to keep the accessibility of Welsh law under review.

15. Our predecessor Committee in the Fifth Senedd scrutinised the Legislation (Wales) Bill (in accordance with Standing Order 26), before it was enacted as the **Legislation (Wales) Act 2019** (the 2019 Act) in September 2019. It was also responsible for considering, more broadly, matters relating to the **consolidation and codification** of Welsh law.

Senedd procedures for the consideration of Welsh Consolidation Bills

Background

16. When reporting on the Legislation (Wales) Bill, our predecessor Committee recommended that the **Business Committee** should seek its views when the Business Committee prepared new Standing Orders for Consolidation Bills. The Business Committee agreed, and our predecessor Committee was able to provide comments on the draft Standing Orders before they were eventually approved by the Senedd.[13]

Standing Order 26C, the Responsible Committee, and a role for other Senedd committees

17. Standing Order 26C was approved by the Fifth Senedd on 24 March 2021.[14] As mentioned in Chapter 1, our Committee is the responsible committee for the purpose of Standing Order 26C for Consolidation Acts of the Senedd.

18. There are no specific requirements in Standing Orders governing the way in which we should undertake scrutiny of the Bill at Initial Consideration. However, as highlighted in Chapter 1, we agreed to scrutinise the Bill in line with Standing Order 26C.17.

[12] Law Commission, Form and Accessibility of the Law Applicable in Wales Law, October 2016
[13] See Letters from the Fifth Senedd Business Committee, 10 July 2019 and 3 March 2021; and letters to the Fifth Senedd Business Committee, 11 October 2019 and 4 December 2019
[14] Plenary, 24 March 2021, RoP

19. There is also no requirement for the Senedd to consider a financial resolution for a Consolidation Bill. This does not mean that a Consolidation Bill cannot give rise to some additional expenditure, and any such rise should be considered by the responsible committee (in accordance with Standing Order 26C.17(v)).

20. Under Standing Order 26C.9(vii), the Explanatory Memorandum accompanying a Consolidation Bill must confirm that the provisions of the Bill give rise to no additional significant expenditure payable out of the Welsh Consolidated Fund (WCF), and where it does give rise to some additional expenditure, set out the best estimates for this.

21. On this occasion, Part 2 of the EM sets out an analysis of additional expenditure associated with the Bill, and confirms there are no provisions in the Bill which charge expenditure on the WCF.

22. Following our evidence session with the Counsel General on 11 July[15], we wrote to seek clarification regarding the transitional costs for the Bill.[16] The Counsel General responded on 17 August and his answers to our questions regarding transitional costs are outlined in paragraphs 45 to 48 of the letter.[17]

23. Given that the Bill does not give rise to significant costs, the Senedd's Finance Committee agreed it was appropriate for us to consider the financial implications of this Bill as part of our scrutiny.[18]

24. Having considered the Counsel General's evidence to us, the Finance Committee confirmed it was "satisfied with the details provided and believe that the estimates are thorough and robust."[19]

The Senedd's consideration of our report

25. As we highlighted in the first Chapter, our role at Initial Consideration is to consider and report to the Senedd on whether the Bill should proceed as a Consolidation Bill.

26. Following the publication of this report we anticipate that a debate will take place in Plenary, following a proposal by the Counsel General as Member in Charge that the Senedd agree that the Bill should proceed as a Consolidation Bill. If agreed, the Bill will progress to

[15] LJC Committee, 11 July 2022
[16] Correspondence to the Counsel General and Minister for the Constitution, 19 July 2022
[17] Correspondence from the Counsel General and Minister for the Constitution, 17 August 2022
[18] Correspondence from the Finance Committee, 18 July 2022
[19] Correspondence from the Finance Committee, 13 October 2022

Detailed Committee Consideration, which involves the consideration and disposal of amendments by the Committee.

The future of Welsh law – the Welsh Government's programme for 2021–2026

27. Under the 2019 Act, the Welsh Ministers and the Counsel General must prepare and lay before the Senedd a programme to improve the accessibility of Welsh law.

28. Each programme must make provision to consolidate and codify Welsh law, maintain codified law, promote awareness and understanding of Welsh law, and facilitate use of the Welsh language.

29. In September 2021 the Counsel General published the first programme to improve the accessibility of Welsh law.[20]

30. In the Foreword to the Programme, the Counsel General states:

> *"We know that the task ahead is not easy, nor will it happen quickly, but we must make a start and start as we mean to go on."*[21]

31. The Counsel General has said that consolidating several different existing acts into one "well-drafted and bilingual act will be one of our most effective tools to improve the accessibility of Welsh law."[22]

32. The Bill is listed as one project in the Programme for 2021–2026, along with a Consolidation Bill on planning, and projects to implement the subordinate legislation necessary to support the consolidation of historic environment and planning law.[23]

The Historic Environment (Wales) Bill as the first Welsh Consolidation Bill

33. In the EM, the Welsh Government states:

> *"If the historic environment is a precious resource, it is also a fragile one. It must be protected so that present and future generations of Welsh citizens and visitors to our nation can continue to be inspired by it, learn from it and*

[20] Welsh Government, The future of Welsh law: A programme for 2021 to 2026, September 2021
[21] The future of Welsh law: A programme for 2021 to 2026, Foreword
[22] Plenary, 21 September 2021, RoP [216]
[23] The future of Welsh law: A programme for 2021 to 2026, Summary

> *enjoy its many benefits. However, it cannot be frozen in time. Change is inevitable as the passage of years will take its toll on even the most substantial monuments or buildings and sometime change is necessary so that the historic environment can be carefully and sustainably conserved and managed."*[24]

34. In the EM it is noted that, on behalf of the Welsh Ministers, Cadw has published **Conservation principles for the sustainable management of the historic environment in Wales (2011)**, and that these principles for protection and conservation are underpinned by the legislation that is set out in the Bill.[25] It is also noted that the current legislation is accompanied by advice and guidance documents, notably **Technical Advice Note 24: the Historic Environment (2017)**.[26]

35. In the EM, the Welsh Government states:

> *"Together, the legislation and these advice and guidance documents provide the framework for the protection and conservation of the historic environment, and the management of change affecting historic places in Wales."*[27]

36. At paragraphs 8 and 9 of the EM, the Welsh Government summarises the history of the framework for protection and conservation, stating:

> *"The very first schedule of monuments in the UK was put in place by the Ancient Monuments Protection Act of 1882 and this included three Welsh prehistoric monuments. The "schedule" of monuments was joined by a "list" of buildings of special architectural or historic interest in 1947, and there are now more than 30,000 listed buildings and more than 4,000 scheduled monuments in Wales. The schedule and the list were subsequently supplemented by conservation areas in 1967 and most recently, as a consequence of the Historic Environment (Wales) Act 2016 ("the 2016 Act"), by a statutory register of historic parks and gardens and a statutory list of historic place names.*
>
> *However, this very long history, and the frequent need to update and strengthen the legislation, has made historic environment law particularly*

[24] EM, paragraph 4
[25] EM, paragraphs 4 and 5
[26] EM, paragraph 6
[27] EM, paragraph 6

> *complex. This complexity has been added to by amendments made to particular provisions by the different nations of the United Kingdom."*

37. The Welsh Government's reasons and objectives for introducing the Bill, as stated in the EM, are as follows:

- There are concerns about the complexity of the law in the United Kingdom (where it is now common for the law to be different in England, Scotland, Wales and Northern Ireland) which is a problem caused by the volume of primary, secondary and quasi-legislation which is amended, re-amended and re-made in inconsistent ways over time. The Welsh Government believes historic environment legislation is no exception.[28]

- The objective is to improve the accessibility of the historic environment legislation for Wales by providing a single modern and bilingual Act for Wales in order to promote consistency in the language, form and operation of the legislation supporting the effective protection and management of the historic environment. The Welsh Government considers this will ensure that the historic environment can continue to contribute to the well-being of Wales and its people.[29]

- The Bill (if and when enacted), together with subordinate legislation made under it, will form a code of Welsh law on the Historic Environment (see Chapter 7 for further commentary). More widely, the Welsh Government states that the Bill is the first of a series of planned projects to consolidate the law applicable in Wales, and such projects form part of the Government's Future of Welsh Law programme and are central to the task of making Welsh law more accessible.[30]

38. The Counsel General and his officials came to our meeting on 11 July to discuss the Bill for the first time.[31]

39. We asked him how he and his team in the Welsh Government had approached the consolidation exercise. The Counsel General said he was pleased to be introducing "this first bespoke consolidation Bill". He told us:

> *"Although we've taken the opportunity on a few occasions in the past to restate existing law alongside reform, this is really the first of our Bills that's*

[28] EM, paragraph 10
[29] EM, paragraph 22
[30] EM, paragraphs 22 and 23
[31] LJC Committee, 11 July 2022

> *purely designed to make the law more accessible. It's taken a lot of work and I'm very grateful to the team of people that have worked so hard on this to get us to this point. I suppose it's fair to say that the process of preparing this Bill has been quite different from the usual process for preparing a Bill. As you know, policy reform Bills normally begin with an idea for a new policy that requires a change in the law, but the purpose to this legislation is to take all the existing law in a particular area that would benefit from consolidation to bring it together in a new form of legislation, a new piece of legislation."*[32]

40. The Counsel General added:

> *"Traditionally, when some of this has been done in Westminster in the past, it's normally adopted quite a conservative approach and has often been just a renumbering, a rescheduling. This, I think, goes far deeper; I think it is a far more genuine form of consolidation, because it also has to not only bring the bits of legislation together, but it has to make them understandable in a modern workable piece of legislation. So, it has to reflect devolution and other changes that have taken place since past Acts have gone. The language has to be updated and made more consistent. We've had to rearrange materials so that the structure of the provisions about each topic is more logical and more consistent. There had to be a movement about of certain materials from subordinate legislation to the consolidation Bill and vice versa. There are some provisions that have either never been used or have just become unnecessary for a variety of reasons, and so they've been removed from the legislation. All of this results, hopefully, in a consolidation Bill that sets out the law in a way that is much clearer and much more logical than in the past."*[33]

41. The Counsel General was accompanied by Dylan Hughes, First Welsh Legislative Counsel in the Welsh Government's Office of the Legislative Counsel (OLC). Mr Dylan Hughes told us:

> *"As the Counsel General mentioned, we've taken an approach here where we have involved far more people. James and one of our colleagues has been leading on the drafting, but it's been much more than that. We've been involving officials from the legal services department and from Cadw, and their input in particular has been important. You can do a consolidation as a technical exercise whereby legislative counsel like us look at the legislation,*

[32] LJC Committee, 11 July 2022, RoP [9]
[33] LJC Committee, 11 July 2022, RoP [10]

> *replicate what we see are the words on the page, renumber it, tidy it up, reproduce it bilingually, but there is a limit to how valuable that can be, because the older the legislation is, the more difficult it is, as I say, to understand it. What is crucial is to have an understanding of how the law is applied in practice, and this is where Cadw and other people come in. The end result that we have, we hope, is something that reflects reality, as well as being a legal exercise, and that's particularly important to make the law accessible."*[34]

42. The EM states that consolidation projects are central to the task of making Welsh law more accessible. In evidence in November 2021[35], the Counsel General told us that the Welsh Government's aim was for citizens of Wales to be able to access and interpret Welsh legislation. We asked the Counsel General how will people be able to access this Bill, if and when it is enacted, and did he expect people to be able to interpret it themselves. The Counsel General told us:

> *"This really goes to the core, I think, of what the purpose behind consolidation actually is. It is about accessibility (...)*
>
> *At the end of the day, this is about whoever needs to access the law for whatever purpose being able to find a law in one place, that they will be able to read that and it will be in as clear English and as open English, and Welsh indeed, as is possible—that it'll be as understandable, I think, as is appropriate to do.*
>
> *So, if you take the situation now, that if you are, for example, the owner of a listed building or a scheduled monument, or you had a historic monument or artefact on your property, and you wanted to know what the law was with regard to that, what can you do, what can't you do, well, without consolidation, what you have is really quite a confusing jumble of legislation that I suspect even professionals will have considerable difficulty in understanding. (...) So, the purpose of this Bill, the Historic Environment (Wales) Bill, is about pulling that together in a way that people can use, can be understandable, so those who need to access the law will know where it is. It's in one place, you don't have to look all over the place for it.*

[34] LJC Committee, 11 July 2022, RoP [13]
[35] LJC Committee, 29 November 2021, RoP [14]

> *The thing that follows on from it as well, though, that I think is important is that it then means that the various help sites that you would have, Cyfraith Cymru and other sites, would be updated and they would be able to direct people to just one single piece of legislation, one single code that would enable them to go through it and know where the law is. So, that's really my understanding of what the purpose is in terms of accessibility, and that will probably be the measure of success, that if we achieve if we achieve that through this legislation, this will be the first step of, hopefully, many over the years to making Welsh law a lot clearer."*[36]

43. We also asked the Counsel General, in order to understand the entire law that applies to the historic environment in Wales, what other Acts or codes will people have to look at. We provided the Counsel General with an example in section 79(2) of the Bill, where it says that the *Town and Country Planning Act 1990* (the 1990 Planning Act) applies to buildings captured by the Bill. The Counsel General told us this was a valid point because:

> *"There are one or two areas where it is necessary to make reference to other legislation. I think the intention has been to try to keep this to a minimum, to keep the consolidation Bill as self-contained as is possible. But you did refer specifically to section 79, and, of course, that's one that has specifically been addressed and is referred to in the legislation."*[37]

44. Dr James George, Senior Legislative Counsel in the OLC, added:

> *"I think on the specific issue of links to the planning legislation, we've reduced that a lot in the Bill because it's particularly an issue for listed buildings in conservation areas that the legislation actually all originates from the same Act. (...) But as part of doing that, there were various general provisions left behind in the Town and Country Planning Act that then applied across to the other Acts. So, if you read those other Acts, you still need to read the Town and Country Planning Act as well. We've got rid of that as far as we can so that rather than having to refer you to the Town and Country Planning Act, we've just set things out in full in the Bill. So, it should be a lot more self-contained than it was previously.*
>
> *On the specific issue about section 79 of the Bill, the issue there is that it's about buildings that are treated as being listed due to various proposals to*

[36] LJC Committee, 11 July 2022, RoP [46] to [49]
[37] LJC Committee, 11 July 2022, RoP [51]

> *list them, and that has consequences under the planning legislation that somebody making a decision about whether to give planning permission has to take into account the importance of preserving listed buildings. So, it's a duty that's specifically about functions in the planning legislation, so we couldn't really put that entirely in our Bill, but we've got to reference across. That duty in the planning legislation currently sits in the Planning (Listed Buildings and Conservation Areas) Act 1990, which is a bit odd, because it's all about decisions about things under the Town and Country Planning Act. So, we are in our consequential amendments moving that duty to take account of the importance of listed buildings into the Town and Country Planning Act. So, we're also making the Town and Country Planning Act slightly more self-contained than it is at the moment. So, I think the whole exercise has been an opportunity to rethink how we divide things up. So, we have moved a few things around in that way."*[38]

45. Mr Dylan Hughes also added his view that, while the Welsh Government was trying to divide the law by subject, it is not always possible to be completely neat. He told us there will "inevitably be some overlaps between the legislation" and the Welsh Government was trying to minimise the amount of times you have to cross-refer. He said "the reality is that it's not always possible to eliminate that entirely".[39]

46. Specifically as regards conservation areas, the Counsel General and his officials told us that they had aimed to restate the existing legislation so as to 'tell the story' in the clearest and most certain way. They added:

> *"In doing so, judgments have been made about which matters need to be set out expressly and which can be assumed. In some cases, different judgments have been made from the drafters of the existing legislation, for example because existing provisions do not reflect modern drafting practice. However, the approach of applying listed building provisions with modifications has been retained to avoid repetition and damaging the overall accessibility of the legislation."*[40]

47. The Counsel General told us that there had been engagement with specialist groups and individuals, particularly Cadw which set up a task and finish group in preparation for the Bill's

[38] LJC Committee, 11 July 2022, RoP [52] and [56]
[39] LJC Committee, 11 July 2022, RoP [56]
[40] Letter from the Counsel General, 17 October 2022, paragraph 120

introduction. We asked the Counsel General whether this pre-introduction consultation and work with stakeholders would be made public. The Counsel General said:

> *"Cadw worked with a task and finish group composed of individuals drawn from across the historic environment sector. The nature of the interaction was that specific questions or the drafting was shared with the group to glean an understanding of how the provisions worked in practice or the extent to which the effect of the law remained unchanged. The exchanges were never intended to be made public."*[41]

48. We discuss this matter later in the Report in Chapter 4.

49. As we highlighted in Chapter 1, we wrote to relevant stakeholders to ask for views on the consolidation exercise. The questions we asked were based around the scope of consolidation, whether the law is consolidated clearly and consistently, and whether changes keep within those permitted under Standing Order 26C.2.

50. All of the responses we received welcomed the consolidation exercise, with the improved accessibility of Welsh law widely cited as a key benefit.

51. The Association of Local Government Archaeological Officers (ALGAO:Cymru), Historic Houses (Wales), and Natural Resources Wales (NRW) all stated that they were satisfied with the scope of the consolidation, and that the Bill kept to what is permissible under Standing Order 26C.2.[42]

52. Both NRW and Historic Houses (Wales) said that the Bill consolidates the law clearly and consistently, while ALGAO:Cymru said it "supports the proposed consolidation and welcomes the opportunity to contribute to this process".[43]

53. The Royal Town Planning Institute (RTPI Cymru) listed "easier terminology, clear unambiguous provisions, identifying redundant provisions and enabling a comprehensive Welsh language translation of single legislation" as particular benefits that would be welcomed by its members.[44]

[41] Letter from the Counsel General, 17 October 2022, response to question 82
[42] Letter from the Association of Local Government Archaeological Officers (ALGAO: Cymru), Letter from Historic Houses (Wales), and Letter from Natural Resources Wales (NRW)
[43] Association of Local Government Archaeological Officers (ALGAO: Cymru), Historic Houses (Wales), and Natural Resources Wales (NRW)
[44] Letter from the Royal Town Planning Institute (RTPI Cymru)

54. While welcoming the Bill and the general aim of ensuring that Welsh law is more accessible, clear and user friendly in both the official languages of Wales, Gwenith Price, the Deputy Welsh Language Commissioner, told us:

> *"This consolidation exercise is taking place in a legislative context where the Welsh language has official status in Wales. There is no reference currently to the Welsh language in the Bill as introduced. Indeed, references to the Welsh language are rare in the Acts of the Senedd in general, as highlighted in the Commissioner's 5 year report (see p.29), and this national consolidation project could be an opportunity to rectify this."*[45]

55. We heard from representatives of the Law Commission on 26 September. The Rt Hon Lord Justice Green spoke with us as Chair of the Law Commission. He was joined by Nicholas Paines KC, the Commissioner responsible for Welsh law, and Dr Charles Mynors, the senior Commission lawyer working on the planning law consolidation exercise and an expert in the law concerning the historical environment.[46]

56. Sir Nicholas Green provided some general comments on the Bill and said "as individuals we think it's an impressive piece of work… we think it's a very high-quality piece of work."[47]

57. Dr Mynors described the drafting of the Bill as "excellent", and added that he was "generally pleased that this is the first step towards dealing with a consolidation of planning and the historic environment" and that he was "delighted with the quality of what's being done."[48]

58. A number of changes taken forward in the Bill stem from recommendations contained in the Law Commission's Planning Law in Wales (2018) report[49] which concerned the 1990 Planning Act. However, the Welsh Government has made changes in respect of the *Planning (Listed Buildings and Conservation Areas) Act 1990* (the 1990 Listed Buildings Act) instead. We asked the Law Commission representatives whether they had any concerns with this approach. Mr Paines KC said:

> *"…we recommended merger of the regimes. Welsh Government rejected that recommendation, but they are making all our technical reforms in this Bill,*

[45] Letter from the Deputy Welsh Language Commissioner, 17 October 2022 (English translation by the Senedd Commission.)
[46] It was confirmed during the evidence session that Dr Mynors is on secondment to the Welsh Government, from the Law Commission, to assist in taking forward the forthcoming planning consolidation Bill. See LJC Committee, 26 September 2022, RoP [128] and [129]
[47] LJC Committee, 26 September 2022, RoP [96]
[48] LJC Committee, 26 September 2022, RoP [98]
[49] Law Commission of England and Wales, Planning Law in Wales (2018)

> *and in due course will make them in the planning Bill as well. So, from the point of view of the adequacy of the law, we have no concerns. Obviously, we still feel, having favoured it, that merging the regimes would have saved a lot of legislation, saved a lot of duplication of paperwork, but there were counter-arguments, which the Welsh Government found more compelling."*[50]

59. Dr Mynors added:

> *"The listed buildings Act is near as... or, actually, totally identical, and so it would be wholly illogical not to make the same amendment, and so that's why that change has been made. In practice, in a number of cases, I'm aware of all, or I've looked through all of them in detail, and also on a number of cases where I was actually asked personally, 'Are you satisfied with what we've done with your recommendation 1, 2, 3, 4, 5?' So, yes, I have absolutely no problem at all."*[51]

Our view

60. We recognise, and wish to highlight, the importance of the Bill as the first of its kind for the Senedd and for Welsh law. We acknowledge fully the importance attached to the consolidation of Welsh law, not least because of the practical effect it will have in making such law available in both official languages. In parallel, the consolidation of Welsh law has the potential to significantly improve accessibility to the law which applies in Wales. Furthermore, knowing what law applies, and improving how that law is found and presented, has the added benefit of contributing to better access to justice in Wales.

61. Our role in the Senedd's consideration of this first Consolidation Bill has therefore taken account of these potential benefits and we hope that our approach demonstrates the importance we attach to this task.

62. We welcome the way the Welsh Government has approached the Bill, and acknowledge the significant amount of work and time it will have put into preparing the Bill.

63. The Bill marks the start of the Welsh Government's ambitious plans for the consolidation of Welsh law. It is an endeavour that should be strongly welcomed, as has been shown by the positive and supportive comments provided to us by stakeholders with an interest in the Bill.

[50] LJC Committee, 26 September 2022, RoP [124]
[51] LJC Committee, 26 September 2022, RoP [126]

64. The following Chapters address specific matters we have assessed and focused on during our initial consideration of the Bill.

65. In the final Chapter – Chapter 7 - we look at the Welsh Government's plans for the implementation of the Bill (if enacted) and the Welsh Government's wider plans for codes of Welsh law. We also consider how the Welsh Government may best evaluate the success of this first Consolidation Bill within the context of its longer term plans to consolidate other areas of Welsh law.

3. General observations

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.[52]

Legislative competence

66. We considered this 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).

67. In her statement on legislative competence, the Llywydd, Elin Jones MS, stated:

> *"Most of the provisions of the Historic Environment (Wales) Bill, introduced on 4 July 2022, would be within the legislative competence of the Senedd.*
>
> *To the extent that Schedule 13 of the Bill, read with sections 178 and 201, removes Minister of the Crown functions in the Regulatory Enforcement and Sanctions Act 2008 and Lord Chancellor functions in the Town and Country Planning Act 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990, those provisions of the Bill would not be within competence. This is because consent is required from the UK Government to bring them within the Senedd's competence and this necessary consent has not been obtained at this time."*[53]

68. In our first evidence session with the Counsel General, he told us:

> *"...bringing a piece of legislation together raises a number of contradictions in terms of previously existing ministerial consents, and so on, and the need to update those. There are a number of areas where I've had to write to the Secretary of State for Wales—on 13 May this year, in fact—seeking consents over these. We're awaiting a response."*[54]

69. On 14 November we asked the Counsel General for an updated position. He said:

> *"...disappointingly we've still not received a response. I will be writing again. I think my letter was on 13 May 2022, so I'll be following that through with the*

[52] EM, Member's Declaration, page 5
[53] Presiding Officer's Statement on Legislative Competence, 4 July 2022
[54] LJC Committee, 11 July 2022, RoP [26]

new Secretary of Wales, the Rt Hon David Davies MP, on this matter. I don't anticipate that there should be any issues. The two areas where consent is involved, one relates to civil sanctions, which is a concurrent function and has never been used in that area, and the other one is the national security issues, which are now redundant in any event. Maybe because of events in Westminster it's taken longer to get it than might have been the case, but I will press on with that."[55]

Human rights

70. 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 be compatible with human rights.

71. The Explanatory Memorandum for the Bill describes assessments the Welsh Government undertook regarding the Welsh language, equality, children and justice in preparation for the Bill's introduction.

72. We asked the Counsel General if he had undertaken a broad assessment of human rights implications, particularly as regards the changes the Bill is making to existing law. He told us:

"The answer is 'yes'. In respect of all legislation, it's necessary for me to give a statement of competence, and competence obviously requires compliance with the convention on human rights and any other international obligations that there are. So, we've given the same level of care, and I am content that the provisions in the Bill have been assessed adequately to ensure that they are convention compliant."[56]

73. Section 152 of the Bill sets out the different circumstances when a person authorised in writing by the Welsh Ministers or a planning authority can enter land in association with Part 3 (Buildings of special architectural or historic interest) and Part 4 (conservation areas) of the Bill.[57]

74. A new power of entry has been created in subsection (4). We asked the Counsel General if he had considered the human rights implications of creating this new power of entry. He said:

"Yes. I've had a look at section 152 and it has the effect, doesn't it, of adding a power to enter land to determine whether a temporary stop notice should be

[55] LJC Committee, 14 November 2022, RoP [8]
[56] LJC Committee, 14 November 2022, RoP [13]
[57] Further comments on section 152 of the Bill can be found in Chapter 4 of the Report.

issued. We consider the matter to be very minor because there's already a power to enter land to assess whether unauthorised works are taking place, so its only effect is that the person entering the land can also assess whether the work should be made to stop immediately. And I'm satisfied that, within that context, it's justified and convention compliant. It is also the equivalent of provisions that already exist in the provisions about planning control and scheduled monuments."[58]

Our view

75. We note the evidence in relation to matters of legislative competence from the Counsel General. We also note the Llywydd's statement that, in her view, while most of the provisions of the Bill would be within the legislative competence of the Senedd, to the extent that Schedule 13 of the Bill (as read with sections 178 and 201) removes Minister of the Crown and Lord Chancellor functions in the *Regulatory Enforcement and Sanctions Act 2008* (the 2008 Act), the 1990 Planning Act and the 1990 Listed Buildings Act, those provisions of the Bill would not be within competence.

Recommendation 1. The Counsel General should use the Initial Consideration debate to confirm to the Senedd whether the required consent from the UK Government in relation to Schedule 13 (as read with sections 178 and 201) has been received.

76. We also note the evidence from the Counsel General on matters relating to any human rights implications of the Bill.

[58] LJC Committee, 14 November 2022, RoP [15]

4. Is the scope of the Bill appropriate?

In accordance with Standing Order 26C.17 our consideration of the Bill has included assessing whether we are satisfied that the scope of the consolidation is appropriate.

Background

77. As explained in the EM, the Bill brings together legislation currently set out in a number of Acts, including:

- the *Historic Buildings and Ancient Monuments Act 1953* (the 1953 Act);
- Parts 1 and 3 of the *Ancient Monuments and Archaeological Areas Act 1979* (the 1979 Act);
- the 1990 Listed Buildings Act;
- Part 4 of the 2016 Act.

78. The Bill also restates some planning legislation:

- provisions in Parts 14 and 15 of the 1990 Planning Act which are applied to the 1990 Listed Buildings Act by sections 89(1) and 91(2) of that Act;
- Part 5 of the *Planning and Compulsory Purchase Act 2004* (the 2004 Act), so far as it applies to decisions under the 1990 Listed Buildings Act.

79. As noted in the EM, both the 1979 Act and the 1990 Listed Buildings Act were themselves consolidation exercises. The EM states:

> *"a. Previous Acts of the UK Parliament on the protection of ancient monuments were the Ancient Monuments Protection Act 1882; the Ancient Monuments Consolidation and Amendment Act 1913; the Ancient Monuments Act 1931; and the Historic Buildings and Ancient Monuments Act 1953.*
>
> *b. The 1990 Listed Buildings Act mainly restated the provisions about historic and listed buildings contained in the Town and Country Planning Act 1971*

> *("TCPA 1971"), as amended by later Acts.*[59] *TCPA 1971 had been a consolidation of the Town and Country Planning Act 1962 ("TCPA 1962") and later Acts. TCPA 1962 had in turn been a consolidation of the Town and County Planning Act 1947 and other Acts.*
>
> *Part 1 of the 1990 Listed Buildings Act contains provisions that were first enacted at various times from 1947 onwards. For example, the requirement for a list of buildings was first enacted in TCPA 1947, the offence of intentionally damaging a listed building originated in the Civil Amenities Act 1967, and the requirement for listed building consent and the power to issue enforcement notices were introduced by the Town and County Planning Act 1968.*
>
> *Part 1 has been amended by a number of later Acts. The main amendments that apply to Wales have been made by the Planning and Compensation Act 1991, the 2004 Act and the 2016 Act. Amendments have also been made which apply only to England, in particular by the Enterprise and Regulatory Reform Act 2013."*[60]

80. The Welsh Government's view is that, as a result of this history, differences and inconsistencies between provisions have developed over time and previous consolidation exercises made very few changes to language so differences have been maintained.[61]

81. In the EM, the Welsh Government highlights that in drafting the Bill:

> *"…efforts have been made to identify and remove as many inconsistencies as possible, unless there are reasons for preserving them.*
>
> *Given the age of a number of these Acts, they are not as clear and accessible as they could be. Some of the provisions are ambiguous or have caused problems in practice, some are arguably redundant, and some are simply out of date. They would therefore benefit from modernisation. For example, the Bill has simplified the provisions about the publication of the list of buildings of special architectural or historic interest to reflect the availability of digital services."*[62]

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[59] The EM notes that the rest of TCPA 1971 was consolidated in the 1990 *Planning Act and the Planning (Hazardous Substances) Act 1990.*

[60] EM, paragraph 13

[61] EM, paragraph 14

[62] EM, paragraphs 14 to 15. See also Letter from the Counsel General, 17 October 2022, response to question 20

82. In addition to consolidating primary legislation, the Bill also incorporates some provisions of subordinate legislation made under the Acts being consolidated, and "some case law and practice which is important in understanding the operation of those Acts."[63]

Effect of devolution on the legislation being consolidated

83. Most of the Acts being consolidated pre-date devolution in Wales. In the EM, it is noted that:

> *"This means some of the rules, requirements and definitions in use are not relevant to law applying to Wales only. For example, the 1979 Act contains some provisions which apply to England, Wales and Scotland, some which apply only to Wales, and some only to England and only to Scotland. Additionally, some of the bodies referred to in the legislation do not reflect the institutional and constitutional arrangements applicable in Wales. The Bill restates the provisions only applicable to Wales, and updates the terminology and references, making it significantly easier for users of the legislation to understand the law as it applies to them."*[64]

84. The Welsh Government has also highlighted a concern that, with the exception of the 2016 Act, the remaining primary legislation being consolidated by the Bill is set out in Acts of the UK Parliament, and, as such, it is enacted in English only. In the EM, the Welsh Government states:

> *"Overall, there is a very little bilingual legislation relating to the historic environment in Wales, which means the law is not as accessible as it should be. This is also an obstacle to those seeking to use the Welsh language as a language of the law."*[65]

85. The Drafters' Notes accompanying the Bill state:

> *"Most of the Acts that are being consolidated conferred functions on the Secretary of State, or in a few cases other Ministers of the Crown. The National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672) transferred nearly all those functions to the National Assembly for Wales established by the Government of Wales Act 1998, so far as they were exercisable in relation to Wales. The functions were then transferred to the*

[63] EM paragraph 18. The EM also notes that Annex C to the EM explains where material of these kinds has been included.
[64] EM, paragraph 16
[65] EM, paragraph 17

Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006 ("GoWA 2006").

The Planning and Compulsory Purchase Act 2004 ("the 2004 Act") made various amendments to the 1990 Listed Buildings Act and other planning legislation, including amendments which were expressed as conferring additional functions on the Secretary of State. Section 118(3) of the 2004 Act provided that the references to those Acts in SI 1999/672 were to be treated as referring to the Acts as amended, meaning that any new or amended functions were exercisable by the Assembly established by the Government of Wales Act 1998. Part 5 of the 2004 Act (which is partly restated in this Bill) was expressed as conferring functions on the Secretary of State, but section 59(9) provided that in relation to Wales the references to the Secretary of State were to be read as referring to the Assembly. All of these functions of the Assembly were transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to GoWA 2006.

The Bill reflects the effect of these changes by restating the transferred functions as functions of the Welsh Ministers. These notes do not identify all those changes separately but do identify changes made to clarify the effect of functions having been transferred "in relation to Wales"."[66]

86. When the Counsel General and his officials appeared before us in July, Mr Dylan Hughes provided further information on how the Welsh Government had approached the consolidation of legislation which pre-dates devolution in Wales, and confirmed that bringing together legislation that pre-dates devolution has meant making sure that the Bill and its provisions are within the legislative competence of the Senedd.[67]

Changes made upon the recommendation of the Law Commission in accordance with Standing Order 26C.2(v)

87. The Bill gives effect to a number of recommendations made by the Law Commission in its final report on Planning Law in Wales. As noted in the EM, some of the Law Commission's recommendations relate specifically to provisions that are restated in the Bill, while others relate

[66] Drafters' Notes, paragraphs 10 to 12
[67] LJC Committee, 11 July 2022, RoP [13]

to provisions of planning legislation that are "identical or very similar to provisions of the legislation that is consolidated in the Bill".[68]

88. In addition, and in accordance with Standing Order 26C.2(v), the Law Commission has made further recommendations to the Welsh Government about specific matters which it considers would be appropriate for inclusion in the Bill. The Law Commission's views are set out in a letter to the First Minister from the Chairman of the Law Commission, Sir Nicholas Green, and is included as Annex D to the EM laid before the Senedd.[69]

89. In the EM, the Welsh Government states:

> *"The fact that a change was recommended in the Law Commission's report does not necessarily mean that reliance is being placed on paragraph (v) of Standing Order 26C.2, which allows a consolidation Bill to make changes in the law which the Law Commission recommends "are appropriate for inclusion within a consolidation Bill". A recommendation under paragraph (v) was sought only where the Welsh Government considered it likely that a change in the Bill could not be made under any other paragraph of Standing Order 26C.2 without such a recommendation. The notes provided at Annex C identify the changes within the Bill that rely on a recommendation under paragraph (v)."*[70]

90. The Law Commission recommended that four matters are appropriate for inclusion in the Bill, relating to:

- powers to appoint assessors;
- notification of purchase notices;
- applications by planning authorities for conservation area consent;
- notifying owners of applications for consent.

91. We asked the Counsel General about the Welsh Government's engagement with the Law Commission and the four matters which it recommended for inclusion in the Bill. He told us:

> *"...we've had a lot of engagement with the Law Commission in a number of areas, and, of course, one of the future areas of consolidation that we'd hope*

[68] EM, paragraph 19
[69] EM: Annex D – Correspondence from the Law Commission
[70] EM, paragraph 21. See also the Drafters' Notes, paragraphs 7 to 9

> *to bring in the future will obviously be in respect of planning, and that's something again I think is an extremely important area to bring at some stage in the future. There is, of course, some overlap between this consolidation Bill and aspects of planning law in Wales that were covered by the Law Commission's report. So, what was felt necessary was that those areas where there might be minor changes forming part of the consolidation Bill—. It was necessary, I think—again following from the guidance from the Standing Orders that the Llywydd has provided—to ensure that the Law Commission was satisfied that those minor changes that we were making were—. Well, I think it's set out in the letter, which I hope you may have before you; if not, we can make a copy available. There's a letter where they said:*
>
> *'We therefore recommend that such a change would be beneficial, would not represent a significant new policy, and would not be controversial.'*
>
> *So, it's ensuring that they were satisfied that these were things that it was appropriate to do within a consolidation Bill. So, I think their guidance and their assistance in this has been important."*[71]

92. As mentioned earlier in the report, we heard from representatives of the Law Commission on 26 September.

93. Mr Paines KC described the Law Commission's engagement with the Welsh Government on consolidation of Welsh law in its entirety as follows:

> *"...our formal engagement I think takes three forms: first of all, in our report on planning law, we made a couple of recommendations about aspects of other historic environment law, to which planning law cross refers. We recommend tightening up a definition and abandoning some unused provisions. That's the first category. Secondly, we made, obviously, a number of technical reform recommendations in relation to planning control. In tandem with that, we recommended that the system of listed building consent be merged with planning control. What we proposed was that what is currently regulated as an alteration to a listed building would become a form of controlled development. The protection would be identical, but taking these recommendations together, the various technical reforms that we were*

[71] LJC Committee, 11 July 2022, RoP [39] to [41]

> *making, we envisaged would apply to listed building control as well. In the event, the Welsh Government didn't accept the recommendation to merge the regimes. I'll accept at once that it was controversial. It wouldn't have changed the substance of the protection, it would have got rid of duplicative law, but a lot of people felt it was diminishing the importance of listed buildings as an aspect of our history and that the regime should be kept for that reason. Anyway, the Welsh Government didn't adopt that merger recommendation; instead, what they have done in the Bill is to implement, as aspects of new historic environment protection, those technical reforms that we recommended would apply across the board. (...)*
>
> *And then, thirdly, there's the letter that Sir Nick wrote to the Counsel General in May of this year, recommending four additional technical reforms, which the Welsh Government had asked us to consider."*[72]

94. We asked Dr Mynors for his views on whether the Bill's provisions were a proper reflection of the four matters which the Law Commission recommended were suitable for inclusion in this consolidation Bill. As regards all four matters, Dr Mynors was content and said they had been "properly incorporated".[73]

95. Specifically as regards applications by planning authorities for conservation area consent, Dr Mynors said:

> *"I think, oddly, that's an example where the change has been made by not including what was a previously rather confusing provision, and so you're not looking for a needle in the haystack, you're looking for the bit of the haystack where the needle has been removed. (...) It basically just applies to conservation area consent the listed building consent regime, and that includes amongst many, many other things, the application by planning authorities, which was always an oddity. It was an oddity for which there was no obvious point. I've no idea why it crept in whenever it did. It has now just vanished in this, and that's fine."*[74]

96. In respect of provisions relating to powers to appoint assessors, Dr Mynors told us:

[72] LJC Committee, 26 September 2022, RoP [91] and [93]
[73] LJC Committee, 26 September 2022, RoP [104]
[74] LJC Committee, 26 September 2022, RoP [110]

> *"That is an example of a proposal that we made in relation to the planning Bill, and we basically were saying that when the planning legislation started out, every decision was made by the Secretary of State. Of course, now, 99 per cent of decisions are made by inspectors, and it seems tiresome that the Secretary—or, of course, in the Welsh context, Welsh Ministers—that they should have the power to appoint assessors but not inspectors. So, we said, 'Just do that.' That was the sort of sensible tidying up that was incorporated into our report on planning. If it applies to planning, then logically it applies to listed building consent as well, and so that has been done. That's an example of where we made a recommendation in relation to the planning code. Also, alongside that, at that time, we were making a recommendation that that would apply to listed buildings anyway, and therefore the inevitable logical consequence of that is that what applies to one applies to the other, and that has in fact come through and that's fine."*[75]

The application and understanding of current law and Welsh Government's reasoning and justification for making changes

97. Throughout our consideration of the Bill we have been mindful of what a Consolidation Bill should and should not seek to do and, where the Welsh Government is proposing making changes in accordance with what is permitted by Standing Order 26C, we have set out to fully investigate the reasoning and justification.

98. We have challenged the Welsh Government and subsequently sought further clarity on the explanations we have received as regards a number of provisions in the Bill.

Section 2(3): Meaning of "monument" and "site of monument"

99. The Drafters' Notes describe the change proposed in section 2(3) of the Bill as "Reframing [the] exemption for ecclesiastical buildings" and note the addition of a new regulation-making power (subject to the draft affirmative procedure) to specify exemptions.[76] The Drafters' Notes also state that the "current effect of the provision is uncertain" and that the regulation-making power is there for reasons of flexibility in case further clarification is needed in the future. We asked the Counsel General and his officials why the effect of the current provision in the 1979 Act is uncertain. In response, we were told:

[75] LJC Committee, 26 September 2022, RoP [112]
[76] Drafters' Notes, page 12

"The power in section 2(3) of the Bill is in consequence of the change made in restating the opening words of section 61(8) of the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act), which appear in the opening words of section 2(3) of the Bill.

We are uncertain whether "ecclesiastical" in section 61(8) applies in relation to the Church of England only. It could have a broader meaning so that section 61(8) applies in relation to any religious building used for religious purposes.

"Ecclesiastical" is an expression used elsewhere in the 1979 Act in a context where it seems clear it is meant to be limited to the Church of England – see section 51, which deals with ecclesiastical property. But we consider this is not definitive in terms of accurately restating section 61(8) in a context where the legislation must be read so far as possible in a manner compatible with the rights contained in the ECHR. It's also the case that section 60 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Listed Buildings Act) uses the expression in a way that seems clearly to have been intended to go beyond the Church of England.

Section 2(3) of the Bill restates section 61(8) in the way we consider is most likely to be Convention compliant (to avoid the potential of unjustified discrimination), subject to a power for exceptions to the general position to be specified by regulations. We did not find relevant case law on this particular point, so the position arrived at in the Bill involved a degree of speculation on our part. In AG ex rel Bedfordshire County Council v Howard United Reformed Church Trustees (1976) (which related to listed buildings), the House of Lords found it unnecessary and unwise to decide whether "ecclesiastical buildings" was confined to Christian buildings. In practice, buildings which might otherwise be scheduled but which have not been after considering section 61 of the 1979 Act are all Christian ones. It is necessary to have flexibility to make provision to ensure buildings which should be protected can remain protected, if that is appropriate.

Standing Order (SO) 26C.2(iv) permits the addition of this kind of safeguard: the Llywydd's guidance on SO 26C specifically mentions the ECHR in the

> *context of the kind of changes to the law might need to be made in a consolidation Bill."*[77]

100. The response includes phrasing such as "seems" and "most likely", and that the position arrived at in the Bill "involved a degree of speculation". We pursued this further and asked the Counsel General if he was concerned that statements such as these do not provide robust enough evidence to us as the Committee responsible for recommending to the Senedd if the Bill can proceed as a Consolidation Bill. The Counsel General told us that "there are clearly judgments that have to be made along the way". He added to what we had been told in correspondence and said:

> *"...one of the classic areas, and it's not an area I'd been familiar with until we started looking, was between the concept of the word 'ecclesiastical' as opposed to 'religious', and, of course, there is some case law on it. Case law isn't necessarily definitive in these areas, so you have to make a judgment, particularly if you're ensuring that the legislation is human rights compliant, and, of course, if 'ecclesiastical' might possibly be construed legally as referring to the Church of England as opposed to 'religious', which then becomes inclusive, well you have to opt for the term 'religious' on the basis that otherwise the legislation you're consolidating then becomes discriminatory."*[78]

Section 39(2)(c): Appeal against enforcement notice

101. In relation to section 39(2)(c), the Drafters' Notes state that provision about securing safety or health by works of repair or works affording temporary support or shelter has been omitted. The Drafters' Notes also state that the ground of appeal in section 9ZE(3)(c) of the 1979 Act replicates equivalent provision for listed buildings but "seems to have been included by error in section 9ZE."[79] We asked for clarity as regards the reasoning offered in the Drafters' Notes that provision in the 1979 Act "seems to have been included by error", particularly as we noted that section 9ZE was inserted into the 1979 Act by the 2016 Act. In response we were told:

> *"Section 9ZE(3)(c)(i) of the 1979 Act is at odds with the prohibition in section 2 on carrying out works affecting a scheduled monument (this prohibits works of repair or alteration). That's because it suggests works of repair or the provision of temporary support would be permitted without consent.*

[77] Letter from the Counsel General, 17 October 2022, paragraphs 1 to 5
[78] LJC Committee, 14 November 2022, RoP [37]. See also RoP [38].
[79] Drafters' Notes, page 24

> *Although there is a defence in section 2(9) relating to works carried out for health and safety in breach of section 2(1) or (6), this doesn't refer to the possibility of carrying out temporary repairs or support. This is in contrast to the position under section 8 of the 1990 Listed Buildings Act in relation to listed buildings. We think the provision included in section 9ZE(3) mistakenly replicated the position for listed buildings.*
>
> *The dividing line between the different categories of change permitted by SO 26C isn't always clear. In this case, SO 26C.2(iv) is relevant because the Bill is correcting what appears to be a clear anomaly/error in the provision being restated."*[80]

102. Given the response included a reference to the Welsh Government 'thinking' a provision was added to the 1979 Act via the 2016 Act in error, we asked the Counsel General and his officials to confirm how the Welsh Government knew that a mistake was made and how it was certain that the action was not intentional. Dr George told us:

> *"We know there is a mistake because the section 9ZE(3) that was inserted in 2016 has a reference to 'works of repair or…support' that doesn't really make any sense, because it assumes that it would have been okay and permissible to do works of repair without needing scheduled monument consent, whereas, actually, that's not the case… because the list of things that require scheduled monument consent specifically includes repairs, so they definitely do need consent. So, really, that ground of appeal, and that bit of it, doesn't really make much sense. We don't know quite how that mistake came about, and I think, in the previous correspondence, it was suggested that it might have been because the provisions about listed buildings might have been copied, because, in that context, you can do repairs to a listed building without needing consent, so that's possibly how it came about. But I think, and I hope the committee would agree, that it doesn't really matter so much how it happened, but it's just the fact that we've identified it and we fix it."*[81]

Section 151(2): Acceptance by the Welsh Ministers of endowment for upkeep of building

103. Reference to a building of 'outstanding' interest has been changed to refer to 'special interest' in paragraph (a) of the definition of "relevant building" in section 151(2). The Drafters'

[80] Letter from the Counsel General, 17 October 2022, paragraphs 20 and 21
[81] LJC Committee, 14 November 2022, RoP [52] to [56]

Notes state that this change has been made for "consistency and clarity" and that the "tests of "special" and "outstanding" interest are not considered to be any different in practice".[82] We asked for clarity and confirmation on who has been consulted on whether the two terms are the same in practice, and whether there had been unanimous agreement. We were told that the drafting had been shared with Cadw's task and finish group and no issues were raised.[83]

104. We also asked the Counsel General if the Welsh Government's pre-introduction consultation work with stakeholders would be published and were told that "the exchanges were never intended to be made public".[84]

105. In the interests of transparency, and given that the views of the task and finish group are important in supporting the change from "outstanding" to "special interest", we followed-up on these matters and asked who had participated in the task and finish group and whether the Welsh Government would work with Cadw to ensure that the pre-introduction work with stakeholders could be made public. Mr Gwilym Hughes, Head of Cadw and Deputy Director at the Welsh Government, told us:

> *"This is unusual. There wasn't a formal consultation prior to the introduction of the Bill, and the task and finish group actually didn't comprise of organisations; it comprised of expert individuals—trusted individual experts, effectively, in particular bits of heritage practices, who were invited to consider particular elements of it and just to say was this going to change the practice. So, they were there as individuals rather than representing organisations. However, the majority of those people did work for professional organisations and stakeholder groups, such as local planning authorities, national parks, the Welsh archaeological trusts, the royal commission, the two UK-based archaeological organisations, CLA Cymru, the Church in Wales, the National Trust and Glandŵr Cymru. (…)*
>
> *But they effectively acted as an informal sounding board, a panel of experts, if you like, so we could understand how the current legislation was interpreted and applied in practice. They were there, really, to provide expertise, but also it was informal and in confidence. So, there weren't any formal meetings of this group; we were writing to individuals to ask them if they felt that this legislation was appropriate and suitable. There were no formal meetings, and*

[82] Drafters' Notes, page 49
[83] Letter from the Counsel General, 17 October 2022, paragraph 103
[84] Letter from the Counsel General, 17 October 2022, response to question 82

> *so it was never intended that they'd be public, because of that confidential nature. But just to follow up on what you've just said there, there's no doubt in my mind that, as a consequence of those interactions and the participation of some of those individuals, that has clearly helped some of the very helpful responses you've received, for example from the Country Land and Business Association and from the Association of Local Government Archaeological Officers Cymru. It's obviously been informed by their engagement with this exercise. So, I think it's been a successful exercise."*[85]

106. The Counsel General added:

> *"I think the problem is, if it's gone out to people in that particular way, unless you specifically said, 'We intend to—', et cetera, I think it's inappropriate retrospectively, probably, to do so."*[86]

Section 152(9): Powers to enter land

107. The Drafters' Notes state that a new provision has been inserted into section 152(9) to the effect that the power to survey land includes determining presence of minerals. The Drafters' Notes also state that the change makes the position consistent with the position for monuments under section 43(3) of the 1979 Act and "corrects [an] anomaly". The Drafters' Notes add that "Section 88(6) [of the 1990 LB Act] originally referred to minerals but the reference was repealed by the *Planning and Compensation Act 1991* [the 1991 Act]. It is unclear why, as the presence of minerals could be relevant to compensation under the 1990 [LB] Act".[87]

108. We asked for further explanation and clarity as regards the reliance on Standing Order 26C.2(iv), in particular how it is appropriate to use a Consolidation Bill to re-insert a provision which was repealed by the UK Parliament when it passed the 1991 Act, and how does this amount to a minor change to existing law. In response, we were told:

> *"As explained in the Drafters' Notes, the repeal made by the Planning and Compensation Act 1991 resulted in a difference between the powers to enter land in the 1990 Listed Buildings Act (which do not include a power to bore to determine the presence of minerals) and those in the other planning Acts and the 1979 Act (which do). The difference appears to be an anomaly and we have been unable to identify any reason for it.*

[85] LJC Committee, 14 November 2022, RoP [116]
[86] LJC Committee, 14 November 2022, RoP [118]
[87] Drafters' Notes, page 50

> *Schedule 3 to the 1991 Act amended the 1990 Listed Buildings Act by inserting more detailed provisions about the exercise of powers of entry, as well as repealing the reference to minerals in section 88(6). That Schedule was added to the Planning and Compensation Bill without any debate in Parliament.*
>
> *We do not think reinstating the reference to minerals is a significant extension of the powers in section 88 of the 1990 Listed Buildings Act, which already include boring to determine the nature of the subsoil."*[88]

109. It is well-known and can often be the case that decisions are taken by parliaments without debate. For that reason, we pursued this matter further when the Counsel General and his officials appeared before us in November and asked them to clarify why the inclusion of the provision in section 152(9) is appropriate when the policy it covers has not been part of the law for over 30 years. Dr George told us:

> *"I should say, on the point about it not having been debated in Parliament, obviously we accept that lots of sentences in Bills have not been debated, and I think the only reason that that was mentioned in the annex to the Council General's response was just to explain that we haven't identified any public explanation of what the reason was for the change that was made 30 years ago. And I think, because we don't know what the reason was, we've really just approached it by looking first of all at whether we can see any reason for this difference, because the Ancient Monuments and Archaeological Areas Act 1979 and the Town and Country Planning Act 1990 have powers of entry that do include the power to bore the land to see if there are minerals there. So, the question was: well, why would that not be the case for the Planning (Listed Buildings and Conservation Areas) Act 1990? We just can't think of any rationale there might be for that. We also looked at just what's the effect of this, and this is all about really going onto land to assess claims for compensation, and we think if there isn't a power to check for the presence of minerals under the listed buildings provisions, that potentially puts somebody who is claiming compensation at a disadvantage, because their land might be undervalued, because the minerals are ignored as part of valuing the land. So, I think, on that basis, we think this is an anomaly. We can't identify*

[88] Letter from the Counsel General, 17 October 2022, paragraphs 107 to 109

> *any reason for it, so we thought it was appropriate to put the position back to how it was before."*[89]

Section 163(1)(c)(i) and (2)(d): Application of Part 3 to conservation areas

110. The Drafters' Notes state that there has been an addition of provisions in section 163(1)(c)(i) and (2)(d) applying powers of entry for the purposes of conservation area consent, subject to exceptions. The Drafters' Notes also state that this clarifies that certain powers of entry in sections 152 to 155 must apply for the purpose of conservation area consent (while excluding others that are irrelevant) to reflect how the existing powers are understood to apply, while also correcting what appears to have been an oversight.[90] We asked for clarity regarding the explanation in the Drafters' Notes about 'correcting what appears to be an oversight' and, given that powers of entry are intrusive and likely to engage human rights, also asked why it was appropriate to extend this type of power by way of a Consolidation Bill. We were told:

> *"There is no intention to grant new powers of entry. Instead the intention is to state more clearly the powers of entry we consider must already apply in relation to conservation area consent. We cannot think of a reason why Parliament would have intended powers of entry to apply in the context of the listed building consent regime but not the conservation area consent regime; and we think the references in section 88 of the 1990 Listed Buildings Act to other sections of that Act would be read as including references to those sections as applied by section 74(3). But mentioning sections 88 to 88C in section 74(3) would have made it clearer they are intended to apply in relation to conservation area consent. That is the point now clarified in section 163(1)(c)(i) and (2)(d) of the Bill."*[91]

111. We asked the Counsel General how he could be confident that the UK Parliament did not intend for different powers of entry to apply to these different, even if similar, regimes. The Counsel General said:

> *"...what we're trying to do is to, I suppose, restate the position more clearly. And I think it would be, perhaps, a curious anomaly if powers of entry were not available in relation to conservation area consent in the same way as*

[89] LJC Committee, 14 November 2022, RoP [127]
[90] Drafters' Notes, page 56
[91] Letter from the Counsel General, 17 October 2022, paragraph 129

> *they are available in relation to listed building consent. I think also it puts us in conflict with some of the earlier legislation. (...)*
>
> *And we're not creating new powers of entry. I think what we're doing is clarifying and restating what those powers actually are, within a consolidated piece of legislation."*[92]

112. Dr George added:

> *"It's all because of the way that conservation area legislation works at the moment, which is mostly by applying provisions about listed buildings, and then you get into issues about exactly which provisions you need to mention. There's also a problem about the structure of the current legislation, in that some of the provisions that need to be applied come after the bit about conservation areas, so do they apply? And some come before. There are, throughout the legislation, lists of provisions that are applied to other things and, sometimes, the lists aren't quite right or sometimes maybe different approaches have been taken to whether you need to spell out that you're not talking just about section x, but that you're also talking about section x as it's been applied to conservation areas as well. So, it's all quite tricky interpretation. But, our interpretation is that we haven't changed anything here, that these provisions do apply to conservation areas as well."*[93]

Section 201: Making claims for compensation

113. Section 201 provides for the application of civil sanctions to offences committed under the Bill.

114. The Drafters' Notes state that a power to make provision for civil sanctions equivalent to what is permitted by Part 3 of the 2008 Act has been extended to cover all offences under the Bill. The Drafters' Notes also state that the powers in Part 3 of the 2008 Act apply to "relevant offences" that were in existence immediately before the day that Act was passed (see the 2008 Act, sections 37(2) and 38(2)).

115. Section 201 preserves the effect of Part 3 of the 2008 Act in relation to relevant offences restated in the Bill, but also brings in offences that were added to the 1979 Act and 1990 LB Act

[92] LJC Committee, 14 November 2022, RoP [138]
[93] LJC Committee, 14 November 2022, RoP [139]

by the 2016 Act, as well as a few offences from the 1990 Planning Act and 1972 Act included in the restatement. The Drafters' Notes state:

> *"This is considered appropriate to avoid gaps and ensure consistency. The added offences are all very similar to offences that were already relevant offences for the purposes of the 2008 Act. The failure to extend the 2008 Act to offences inserted by the 2016 Act was a missed consequential amendment."*[94]

116. We asked for a further explanation as regards the Welsh Government's reliance on Standing Orders 26C.2(ii) and (iv), particularly as to the application of the civil sanctions regime to more offences than already exist. In response we were told:

> *"The new offences inserted into existing Acts by the 2016 Act were the offences of breaching a scheduled monument enforcement notice and breaching a temporary stop notice (in relation to a scheduled monument or listed building). The offence of breaching a listed building enforcement notice was already included in the 1990 Listed Buildings Act and was therefore a "relevant offence" for the purposes of the Regulatory Enforcement and Sanctions Act 2008 (the 2008 Act), as were all the other offences relating to unauthorised works and causing damage to scheduled monuments or listed buildings. As explained in the Drafters' Notes, the need to apply Part 3 of the 2008 Act to the new offences inserted by the 2016 Act was missed during the drafting of the Historic Environment (Wales) Bill 2015.*
>
> *The other offences in the current Bill to which Part 3 of the 2008 Act does not already apply are those in sections 177 and 197 and paragraph 2 of Schedule 6 relating to the provision of information. Again, it would seem anomalous to exclude those offences from section 201 given all the other offences that are restated in the Bill, including offences relating to the provision information with applications for consent, are "relevant offences" for the purposes of Part 3 of the 2008 Act.*
>
> *These changes are made for the purposes of achieving a satisfactory consolidation under SO 26C.2(iv). On further consideration, SO 26C.2(ii) is not relevant and the Drafters' Notes will be updated in due course."*[95]

[94] Drafters' Notes, page 65
[95] Letter from the Counsel General, 17 October 2022, paragraphs 145 to 147

117. We again asked the Counsel General and his officials how they could be certain that the omission as regards offences was not intentional. The Counsel General told us that it was his understanding that most of the officials who were involved in the preparation of Historic Environment (Wales) Bill in 2015 are still working with Welsh Government, and that their advice and recollection has been sought.[96]

Section 208(3): Church of England land

118. Section 208 makes provision for the application of the Bill to land belonging to the Church of England. There are a small number of churches in Wales which are owned by the Church of England. If the churches are within the jurisdiction of the Church of England they fall within their faculty rules. Among other things, the section provides that where a notice or document is served under the Bill or regulations are made under the Bill on the Church of England as the owner of land, a corresponding notice or document must be served on the Diocesan Board of Finance for the area in question. Subsection (3) provides that any compensation payable to the Church of England under the Bill must be paid to the appropriate Board of Finance.

119. Through section 208(3), the provision about payment and use of compensation has been extended to apply to all compensation under the Bill. The Drafters' Notes state that this "Removes gaps" and that "Section 86(3) of the 1990 [LB] Act does not currently apply to all compensation payable under the Act, but that seems to be an error". We asked for clarity as regards the explanation in the Drafters' Notes regarding the removal of gaps in the current law and the extension of the provisions around compensation. We were told:

> *"Section 208(3) of the Bill restates section 51(3) of the 1979 Act and section 86(3) of the 1990 Listed Buildings Act. Section 51(3) applies to all compensation under the 1979 Act. Section 86(3) applies to compensation for loss caused by a building preservation notice (that is temporary listing) or the termination of a HPA. It does not apply to compensation for losses caused by interim protection, the revocation or modification of consent, a temporary stop notice or the exercise of a power of entry, even though section 51(3) of the 1979 Act applies to the compensation for the corresponding losses under that Act.*
>
> *We are unable to identify any reason for these differences. The 2016 Act amended section 51(3) of the 1979 Act to include compensation relating to interim protection and temporary stop notices, and the failure to make*

[96] LJC Committee, 14 November 2022, RoP [147]. See also RoP [148]

> *corresponding amendments to section 86(3) of the 1990 Act was an oversight. We think the Planning and Compensation Act 1991 should also have applied section 86(3) of the 1990 Act to compensation under section 88B(7) relating to powers of entry. The fact section 86(3) does not apply to compensation for the revocation or modification of consent derives from the Town and Country Planning Act 1968, which first introduced listed building consent. We are unable to tell whether that was a deliberate choice or an oversight, but it is another anomaly that should be corrected for the purposes of achieving a satisfactory consolidation."*[97]

120. Similar to our questioning as regards section 2(3) of the Bill, when the Counsel General and his officials appeared before us in November we asked them to expand further on the explanation and justification they had provided in correspondence. Dr George said:

> *"...the issue is that the freehold in Church of England property rests in the incumbent of the benefice, which is like the vicar or the rector, which can cause problems for quite convoluted legal reasons where legislation is referring to the owners of land, particularly if there's a vacancy in a benefice. So, to kind of overcome these problems, the legislation treats the diocesan board of finance as being the owner of the land. We are confident that the inconsistency, the fact that section 86 of the 1990 Act doesn't do this for all the compensation in the Act is an anomaly, because we just can't identify any reason why the board of finance should be treated as the owner for the purposes of some compensation but not other types of compensation. There's no logical reason for any different position. Also, there's no reason why the legislation about scheduled monuments, which does treat the board of finance as being the owner for all purposes, should be different from the legislation for listed buildings that has these gaps in it."*[98]

121. Dr George also said:

> *"So, again, going back to your point about the 2016 Act, having consulted our records and officials, we do think it was just an oversight not to add the new types of compensation created by the 2016 Act into this provision about the board of finance. We're not sure for the other ones, because they were created, I think, in 1968 and 1991, but, again, we just can't see any reason*

[97] Letter from the Counsel General, 17 October 2022, paragraphs 155 and 156
[98] LJC Committee, 14 November 2022, RoP [155]

> *why the legislation wouldn't have dealt with everything in the same way, and it's the kind of thing that's probably quite easy to miss, because this is a technical provision right at the end of the legislation and you might miss the need to change."*[99]

Changes to provisions introduced by the Historic Environment (Wales) Act 2016

122. The Bill makes a number of changes to current historic environment law only introduced to the statute book six years ago as part of the 2016 Act.

123. The most notable of these changes is the omission of sections 38 and 39 of the 2016 Act from the restatement, which provide for the establishment of an Advisory Panel for the Welsh Historic Environment.

124. In the EM, the Welsh Government states:

> *"The 2016 Act's provisions for the Advisory Panel have never been brought into effect. Subsequent years have seen changes in the governance of Cadw and the establishment of a Cadw Board which includes external members recruited through a process equivalent to the public appointments process. This can, if requested, provide independent advice to Ministers of the kind that was envisaged to be provided by the Advisory Panel. There is also a long-established Historic Environment Group that comprises representatives from a wide range of heritage stakeholders. Again, the Group frequently acts as a forum to provide advice to Ministers. With these two bodies in place, there is no realistic prospect that the Advisory Panel will be constituted."*[100]

125. We asked the Welsh Government to clarify why the decision has been taken not to restate sections 38 and 39 of the 2016 Act in the Bill when these provisions were only agreed by the Senedd and placed on the statute book six years ago. We also asked for clarity on how this decision meets the requirement of the Standing Orders given that it could be viewed as an action that is reforming the law which should equally require approval of the Senedd through a Bill subject to Standing Order 26. The Counsel General responded:

> *"I think, as you say, the panel has never been set up. I suppose the question is whether there was any realistic prospect that it ever would be set up, and I*

[99] LJC Committee, 14 November 2022, RoP [156]
[100] EM, paragraph 30

think the view that's been taken is that there was no realistic prospect that that would happen. So, it therefore fits within the prospect of legislation that is now remote or obsolete, or unlikely ever to be implemented. It really doesn't serve a purpose to incorporate within the consolidation Bill. And the main reason now is that, although Cadw is part of the Welsh Government, its board includes external members who are appointed through a public appointments process, and they provide that level of independent advice if the need arises.

This was considered by the Welsh language and culture committee some while back, and I think this was the sort of point that was considered by them, some time ago. And they made recommendations that have been accepted, which is, basically, that, if there was not likely to be a need for such a panel now for those very reasons, then there should be a change to the current law. So, in many ways, what we are doing is acting on the recommendation from the committee that basically said that we should change the law.[101] *And I think the Welsh Government's position at the time was that, well, when an opportunity arose, we would do so, and I think this is such an opportunity. That recommendation then was accepted. But equally so, this is one of those areas for the committee to scrutinise. I'd be very happy to see what the views of the committee are on this, and, obviously, it's one of those areas to be explored."*[102]

126. Section 5 of the Bill deals with consultation before adding or removing a monument to and from the schedule. Relevant to this section is the Welsh Government's decision to omit a power to make regulations to add to the list of consultees. The Drafters' Notes state that the experience of implementing amendments made by the 2016 Act has shown that the power is unnecessary, and that Cadw considers the list of consultees in the section to be comprehensive.[103]

127. We asked the Counsel General to provide further clarity as regards the reliance on Standing Order 26C.2(iii) and to confirm whether there was another delegated power available to the Welsh Ministers that could be used in future to add to the list of consultees. In response we were told:

[101] See Fifth Senedd Culture, Welsh Language and Communications Committee Report 'Past and Present: Inquiry into the Historic Environment', April 2018; and Welsh Government response
[102] LJC Committee, 11 July 2022, RoP [108] and [109]
[103] Drafters' Notes, page 14

> *"We have chosen not to restate section 1AA(6) of the 1979 Act to avoid including a provision that would never be used. This kind of omission is permitted by SO 26C.2(iii) on the basis the provision is of no practical utility or effect. We don't think this assessment is affected by the fact section 1AA(6) was added to the 1979 Act by amendment in 2016.*
>
> *We are not aware of any other power to amend the list of consultees.*
>
> *Cadw has no records of any complaints from people who say they should have been consulted on proposed schedulings or listings. Notices of consultation on proposed schedulings and listings are posted on Cadw's website."*[104]

128. Section 21 of the Bill deals with compensation for refusal of scheduled monument consent or grant of consent subject to conditions. Relevant to this section is the Welsh Government's decision to omit a power to specify exceptions by regulations. The power to specify exceptions was added to the 1979 Act by the 2016 Act. The Drafters' Notes state that section 7(4A) of the 1979 Act is not yet in force and the experience since 2016 suggests the power would never be used.[105]

129. We again asked the Counsel General to provide further clarity as regards the reliance on Standing Order 26C.2(iii) and the explanation provided in the Drafters' Notes. In response we were told:

> *"Section 7 of the 1979 Act makes provision for the payment of compensation on the refusal of scheduled monument consent under certain circumstances. Section 7(4) of the 1979 Act originally provided a person would be entitled to receive compensation for the refusal of scheduled monument consent, even if proposed works would involve the total or partial destruction of a monument, if those works were for the use of the monument for the purposes of agriculture or forestry. Section 7(4A) was introduced by the 2016 Act as there was no evidence to support preferential treatment for agriculture or forestry under section 7(4). There is no record in Wales of any such claims for compensation associated with agriculture or forestry works. The power in section 7(4A) was proposed as a replacement for section 7(4) in Wales in case there were grounds to make any distinction as to the right to compensation for any purpose. In the intervening period, no evidence has been forthcoming*

[104] Letter from the Counsel General, 17 October 2022, paragraphs 7 to 9
[105] Drafters' Notes, page 20

> *to indicate refusal of scheduled monument consent for the total or partial destruction of a monument in the circumstances set out in section 21(3)(b) or (c) of the Bill warrant compensation.*
>
> *There is no prospect of section 10 of the 2016 Act, which includes the prospective amendment of section 7 of the 1979 Act, being brought into force for the reasons set out above. These circumstances mean it is a change permitted by SO 26C.2(iii), and section 7(4A) is not restated on that basis."*[106]

130. Section 30 of the Bill deals with offences relating to unauthorised works or breaching conditions of consent. In relation to section 30(7)(b), the Drafters' Notes state that the requirement that knowledge exists before works were carried out has been omitted. The Drafters' Notes state that this omission corrects an error in the drafting of section 2(8A) of the 1979 Act. This provision was amended by the 2016 Act. We noted that the omission appears to be changing the elements of criminal defence in certain criminal proceedings. We therefore asked the Counsel General to confirm that the Welsh Government has carefully considered the changes to the defence. We were told:

> *"In revisiting section 2(8A) of the 1979 Act and the drafting of its predecessor – section 2(8) – it became clear the changes made by the 2016 Act had unintentionally altered the effect of the original defence. In the context of section 2, and this particular defence, a person's knowledge before works have been carried out is relevant only in relation to having to prove steps had been taken with a view to finding out whether land contained a scheduled monument. The separate question of a person's knowledge or belief ought to be a relevant factor throughout the process of planning and carrying out works for the purposes of the availability of the defence (as was clear before section 2(8) was amended). The alternative position is at odds with the public policy interest protected by the offences in section 2, because it would potentially offer a defence to a person who acquired knowledge of a scheduled monument's position after works damaging the monument began."*[107]

131. Section 31 of the Bill deals with temporary stop notices. In relation to section 31(5), the Drafters' Notes state that there has been an addition of references to persons permitting works and occupiers as potential recipients of a temporary stop notice. The Drafters' Notes also state

[106] Letter from the Counsel General, 17 October 2022, paragraphs 14 and 15
[107] Letter from the Counsel General, 17 October 2022, paragraph 16

that the addition ensures that a notice will be served on everyone who will be responsible for a breach of the notice under section 33, and the addition of occupiers is intended to clarify the effect of the existing law, as recommended by the Law Commission for the corresponding provision of the 1990 Planning Act.[108] The 2016 Act inserted provisions relating to temporary stop notices in both the 1979 Act and 1990 Listed Buildings Act. We asked the Counsel General to provide more clarity regarding the explanation in the Drafters' Notes. In response we were told:

> *"Section 171E(4) of the Town and Country Planning Act 1990 (the 1990 Planning Act), relating to temporary stop notices in respect of breaches of planning control, provides for notices to be served on an occupier as well as a person with an interest in the land. The provisions the 2016 Act inserted into the 1979 Act and the 1990 Listed Buildings Act do not make express provision for service on occupiers. That was because references to occupiers were thought to be unnecessary, rather than reflecting an intention occupiers should not be served. For the reasons given above, we now consider express references to occupiers should have been included.*
>
> *SO 26C.2.(ii) is relevant in this context, because it permits clarification of the way the law operates in practice. Also relevant is ensuring consistency across the Bill between equivalent provisions, including provision that will be restated in the planning consolidation project currently underway. For example, section 206 of the Bill (about service of documents) differentiates between occupiers and persons having an interest in monuments, buildings or other land."*[109]

132. Section 194 of the Bill states that the Welsh Ministers must maintain a historic environment record for every local authority area.

133. ALGAO:Cymru raised concerns about this section and told us:

> *"Section 194(1) The Welsh Ministers must maintain a historic environment record for every local authority area replaces Section 35(1) of the Historic Environment (Wales) Act 2016, The Welsh Ministers must compile and keep up to date a historic environment record for each local authority area in Wales.*

[108] Drafters' Notes, page 22
[109] Letter from the Counsel General, 17 October 2022, paragraphs 18 and 19

> *The explanatory notes state that this alteration to wording has been made because "records have already been compiled, and the requirement to maintain is consistent with other provisions of the Bill (the duty to maintain a schedule of monuments, for example)". However, the proposed provisions for scheduled monuments, listed buildings, registered historic parks and gardens, and historic place-names all include the requirement to maintain and publish the up-to-date schedule, list or register. Omission of this phrase is therefore inconsistent with the duties applicable to other assets.*
>
> *More importantly, however, Historic Environment Records (HERs) are complex information management systems with thousands of new entries added each year. They need active management, not only to incorporate new data, but to curate existing digital and archive material, and to advise enquirers on its usage. The requirement in existing legislation to 'keep up to date records' is crucial in securing the resources for HER staff and ensuring that the HERs are fit for purpose as the statutory evidence base for planning decisions and other activities by public bodies. Simplifying wording to 'maintain' – particularly set against the phrasing used elsewhere in the Bill - could be interpreted as meaning that the HERs are complete, or a static archive. With continuing pressure on public funds, this perception could result in HERs being mothballed or under-funded, causing potential loss of HER staff with associated expertise, and an inadequate evidence base for heritage management advice: this in turn would lead to increased threat to undesignated archaeology and increased risk to development through unforeseen discovery.*
>
> *ALGAO:Cymru would therefore urge the new Bill to retain the specific requirement to keep HERs up to date."*[110]

134. We asked the Counsel General and his officials to respond to these concerns. The Counsel General told us:

> *"...it's one of those areas, again, where we've had to look very, very carefully at what previous legislation has had, what it says, what it actually means. It's the difference between 'compiling and keeping up to date' and then 'maintaining'; what does 'maintaining' actually mean? So, I think the approach that we've taken is, really, that a duty to maintain a list or register*

[110] Letter from ALGAO:Cymru

> *is a duty to keep it going and to keep it up to date. And I think the reality is I don't think you could say you were maintaining it if you just compiled it once and then you let it go out of date..."*[111]

135. Mr Gwilym Hughes added that he did not share the concerns ALGAO:Cymru has expressed to us. He said:

> *"'Maintain' is a very active word. It does mean you're still working on it; you're managing that record and making sure that records are added as and when they become available, and in fact, it is supported by the statutory guidance for public bodies on how a historic environment record should be compiled and maintained and kept current, effectively."*[112]

136. We explore further changes proposed to be made by the Bill in accordance with Standing Order 26C.2(iii) in the next Chapter.

Legislation excluded from the consolidation exercise and the Bill

137. During his first appearance before us in July, we asked the Counsel General and his officials if decisions had been made to exclude relevant historic environment legislation from the consolidation exercise, and to provide details. The Counsel General told us:

> *"It's one of the things that, during the preparations of the consolidation Bill, we had to discuss from time for time. For example, there is a very small Act, it's only four sections long, that deals with a very specific issue of protecting certain wrecks that are thought to be historically, archaeologically or in other ways important. It was passed many years ago as stop-gap legislation, creating what was meant to be a temporary mechanism for the designation and management of sites of historic wrecks. And so, once a site a designated, a licence is required in order to dive or undertake activities on it. Despite there being thousands of wrecks around the UK, there have only been six that have been so designated [in Welsh waters]. So, effectively, the legislation has been used very little, and it hasn't been used for quite some time. So, things like that, I think, were not really considered to be a priority. They created certain complications that really would have, I think, created difficulties for the consolidation Bill, and also because of their territorial scope. There were some*

[111] LJC Committee, 14 November 2022, RoP [144]
[112] LJC Committee, 14 November 2022, RoP [145]

> *others. The Redundant Churches and Other Religious Buildings Act 1969 was one of those."*[113]

138. Mr Dylan Hughes added:

> *"I think the Protection of Wrecks Act 1973 that the Counsel General mentioned was probably the most difficult decision. It was probably the one that made us pause the most, because it could easily have been incorporated. I think, in respect of a few other provisions, the Redundant Churches and Other Religious Buildings Act 1969, and the Protection of Military Remains Act 1986 (...) generally speaking, we just felt that the subject matter—. Although it may appear as though it was relevant, once we dug into it, it was felt that it wasn't actually directly applicable to the protection of the historic environment, so it was decided not to incorporate it."*[114]

139. We also asked whether any decisions to exclude legislation had been as a result of concerns regarding legislative competence. Mr Dylan Hughes told us:

> *"I think, generally speaking, the subject matter hasn't been particularly problematic, but competence, of course, has a wider meaning. Convention rights have been considered in some detail and the territorial application, so there have been a couple of issues in that regard".*[115]

140. We followed up on these matters when we wrote to the Counsel General at the end of July. Given that the *Protection of Wrecks Act 1973* (the 1973 Act), the *Redundant Churches and Other Religious Buildings Act 1969* (the 1969 Act), and the *Protection of Military Remains Act 1986* (the 1986 Act) were provided as examples of Acts not consolidated in the Bill, we asked for the full reasons why provisions in these Acts have been excluded, along with details of any other relevant legislation which has been deliberately excluded from the Bill.

141. Paragraphs 1 to 10 of the Counsel General's letter to us on 17 August provide detailed evidence. In summary:

- The 1979 Act – The Welsh Government has omitted provisions from section 53 for legislative competence reasons. Part 2 of the Act is not being restated because it

[113] LJC Committee, 11 July 2022, RoP [15]
[114] LJC Committee, 11 July 2022, RoP [16]
[115] LJC Committee, 11 July 2022, RoP [16]. See also RoP [19]

makes provision about archaeological areas and it has never been used to designate areas in Wales.

- The 2004 Act – Section 54 of the 2004 Act enables a development order under the 1990 Planning Act to specify cases in which a person consulted about an application under the planning Acts is required to provide a response. This would include applications for listed building consent and conservation area consent. The power has never been used in relation to those applications and Cadw considers that there is no prospect of it being used, and so the Bill does not amend section 54 to cover applications under the Bill. The letter notes that this omission was inadvertently missed from the Drafters' Notes, which will be updated at a suitable opportunity.

- The 1990 Listed Buildings Act – The Drafters' Notes do not include reference to section 49 of the 1990 Listed Buildings Act, because that section will continue to apply to Wales after the consolidation. The Welsh Government considers that it would be more appropriate for section 49 to sit with the general law about compensation for the compulsory purchase of land, rather than with the law on the protection of the historic environment.

- The 1969 Act – The Welsh Government considers it "peripheral to the subject-matter of the consolidation" as the main provisions that are still in force relate to the powers of charities and the Charity Commission in connection with the disposal of land, rather than about the protection of the historic environment.

- The 1986 Act – Again, the Welsh Government considers it "peripheral to the subject-matter of the consolidation" because the 1986 Act is about preventing interferences with military aircraft that have crashed and vessels that have sunk. The Welsh Government considers that inclusion of provisions of this Act in the Bill would have had a negative effect on the accessibility of the restated legislation.

- The 1973 Act – The Welsh Government believes the "only realistic candidate for inclusion in the Bill was the provision about wrecks in the 1973 Act". However, it considers that incorporating the Act in the Bill would have required a number of new provisions to make it consistent with modern practices. Given that the legislation has not been used for 20 years, only six sites have ever been designated in relation to Wales, and that it applies off-shore rather than on land, the Welsh Government does

not consider its consolidation a priority, partly because "it is not a significant part of the system for the protection of the historic environment".[116]

142. When we wrote to the Counsel General in September we asked a follow-up question as regards the 1990 Listed Buildings Act. We asked for further clarity and explanation as to why section 49 of the 1990 Listed Buildings Act is not restated in the Bill. We highlighted that section 50 of that Act, which also relates to the amount of compensation in relation to a compulsory purchase, has been included in the Bill at sections 140 and 141. As such we also asked for more detail as to why the line was drawn between sections 49 and 50. In response we were told:

> *"Section 50 of the 1990 Listed Buildings Act specifically relates to compulsory acquisitions made under section 47 of that Act. Section 47 of the 1990 Act has been restated in the Bill (in section 137) and so section 50 is also restated. Section 50 is different in scope to section 49, which relates to any compulsory acquisition of land, not only those acquisitions provided for under the Bill. We have taken the view that restating it in this Bill, which does not deal with all such compulsory acquisitions, would not improve accessibility."*[117]

143. Both Dr Hayley Roberts and the RTPI Cymru raised concerns with us about relevant historic environment law which does not form part of this consolidation exercise and the Bill.

144. Dr Roberts specifically referred to the 1973 Act (PWA), the 1986 Act (PMRA) and the Marine and Coastal Access Act 2009 (MCAA). Dr Roberts told us that there is "little consolidation of the law relating to the marine historic environment" and , therefore, "accessibility remains an issue".[118] Dr Roberts added:

> *"For example, if a person wants to engage in an activity that involves a shipwreck, they will still need to look at the PWA if it is a protected or dangerous wreck, consult the PMRA if it is a military wreck, and check the MCAA to see if a marine license is needed for the activity.*
>
> *There is a separate but related argument to be made about whether Section 1 of the PWA should be repealed and the six Welsh protected wrecks re-designated, or rather, re-scheduled. (...)*

[116] Letter from the Counsel General, 17 August 2022
[117] Letter from the Counsel General, 17 October 2022, paragraph 165
[118] Letter from Dr Hayley Roberts

Scotland has already taken action by repealing Section 1 PWA and re-designating its protected wrecks as Historic Marine Protected Areas under the Marine (Scotland) Act 2010."[119]

145. On the 1973 Act, Dr Roberts went on to say:

"If the PWA has been excluded from the Bill due to the small number of wrecks in question and the likelihood that the PWA would not be utilised in future (i.e., if Welsh policy going forward will be to schedule subtidal monuments), then the need to retain that statute needs to be considered. If it can be shown that re-scheduling the protected wrecks can offer comparable protection and access as appropriate, it would be worth considering the repeal of Section 1 PWA. This could also remove any confusion between designation and scheduling, further improving accessibility of the law.

However, if there is no appetite to repeal Section 1 PWA, or it is determined that it offers greater benefits than scheduling for these wrecks, then it should be included in the Bill, and it could easily be incorporated.

It should also be noted that Section 2 of the PWA deals with the designation of wrecks as dangerous, which includes the SS Castilian off the coast of Anglesey as it contains munitions. This should be included in the Bill and again, could easily be incorporated. Scotland has not repealed Section 2 PWA."[120]

146. Specifically as regards the 1986 Act, Dr Roberts said:

"The PMRA is also a key statute. While the protection of human remains and wrecked warships may be separate but related issues, remains should also be considered cultural heritage. This is clear from the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, which makes it clear in Article 1(a)(i) that human remains, together with their archaeological and natural context, can constitute underwater cultural heritage where they have been submerged for at least 100 years.

While the UK has not yet ratified the UNESCO Convention, the rules in its Annex on activities directed at underwater heritage are internationally considered to constitute best practice. Much of the wreckage to which the

[119] Letter from Dr Hayley Roberts
[120] Letter from Dr Hayley Roberts

> *PMRA applies is very likely to constitute underwater cultural heritage, so the Act is directly applicable to the protection of the marine historic environment. For example, HMS H5 is a First World War submarine that lies off the coast of Anglesey and is designated as a controlled site under the PMRA. Further, the PMRA also applies to any aircraft which has crashed while in military service."*[121]

147. In conclusion, Dr Roberts stated:

> *"To aid accessibility of law relating to the marine historic environment, the Bill could include a specific part on the marine historic environment that consolidates the points above."*[122]

148. This matter was discussed when representatives of the Law Commission gave evidence to us in September. Sir Nicholas Green offered some broad comments about how the Welsh Government had approached and agreed what to include in the Bill. He said:

> *"The long and the short of it is that it's a complex judgment matter for Government, and, whilst there are invariably arguments on both sides of these sorts of issues, we absolutely understand why the Government have chosen to do what they've done".*[123]

149. On the issue of marine historic environment law, Mr Paines KC said:

> *"...it's a matter of judgment, and if somebody wants to know what the law on wrecks in Wales is, whether they go to the historic environment Act or whether they go to the separate wrecks legislation is, at the end of the day, not a huge issue. (...) the less frequently used the piece of legislation is, the stronger the arguments for not cluttering up with it a piece of legislation that is likely to be quite frequently used, because it means the reader has got additional pages to turn or scroll through."*[124]

150. Dr Mynors also told us:

> *"...it's noticeable that, when the matter was looked at in Scotland, the Protection of Wrecks Act has been repealed in Scotland and has been rolled up in not the Historic Environment Scotland Act or equivalent, but in the*

[121] Letter from Dr Hayley Roberts
[122] Letter from Dr Hayley Roberts
[123] LJC Committee, 26 September 2022, RoP [163]
[124] LJC Committee, 26 September 2022, RoP [162]

> *Marine (Scotland) Act 2010... they decided that it's something that is actually more appropriately dealt with in that way. Because it's not just wrecks, it's also other things that you find in odd places in the sea and there is a thing called a 'marine protection area'... under the Marine (Scotland) Act, which deals with, apparently, wrecks and other things. So, they made a judgment; they actually did think about it and they decided that they would go down that route."*[125]

151. We agreed to draw the Counsel General's attention to the views of Dr Roberts and asked him to specifically review the points about the exclusion of the marine environment from the Bill. In response, the Counsel General told us "there are no absolute divisions between subject matters in law and there will be connections between matters included in a consolidation Bill and others which are not".[126]

152. In addition to the comments he and his officials had provided to us in earlier correspondence, the Counsel General provided further views as regards the 1973 and 1979 Acts. He told us:

> *"Section 1 of the 1973 Act provides protection for wrecks designated because of their historical, archaeological or artistic importance, or for any objects contained (or formerly contained) within them. Diving at designated wreck sites in Wales is prohibited unless Cadw has issued an appropriate licence.*
>
> *Section 2 of the 1973 Act provides protection for wrecks that are designated as dangerous because of their contents. The subject-matter of section 2 is a reserved matter under paragraph 120 of Schedule 7A to the Government of Wales Act 2006 so it would not be possible to include it in the Bill.*
>
> *Dr Roberts raises the question of whether wrecks could be protected through scheduling under the 1979 Act rather than the 1973 Act, and the Bill instead repeal section 1 of the 1973 Act for Wales. It is possible to schedule wrecks and other underwater sites within the 12 nautical mile limit of territorial waters as well as those up to and above high water. The systems of protection offered by the two Acts are, however, different. If a wreck has been scheduled, there is no requirement for a licence to dive on a site; public access is permitted on a 'look but do not touch' basis. There are occasions where scheduling would not be appropriate. For example, a remote wreck*

[125] LJC Committee, 26 September 2022, RoP [164]
[126] Letter from the Counsel General, 28 October 2022

> *site, which is vulnerable to uncontrolled salvage or treasure hunting, or which is particularly fragile, might be better preserved through designation as a protected wreck. This means that the site remains as undisturbed as possible, minimising the risk of damage. Despite the acknowledged shortcomings of the 1973 Act, Cadw would be reluctant to lose the ability to designate a wreck under the 1973 Act if that is deemed the most appropriate protection."*[127]

153. The Counsel General added:

> *"As explained in my letter of 17 August, incorporating section 1 of the 1973 Act in the Bill would require a number of new provisions to make it consistent with modern practices. For example, the Act does not require a formal process of consultation before designation or an opportunity to review decisions to designate or refuse a licence to dive. If the provisions are compared to those, for example, in the Planning (Listed Buildings and Conservation Areas) Act 1990 and the 1979 Act, the lack of detail in the procedures is stark. Filling these gaps would entail introducing more than minor changes to legislation."*[128]

154. The Counsel General also provided further detail on the 2009 Act, the 1986 Act, and the *Merchant Shipping Act 1995* (the 1995 Act).

155. On the 2009 Act, he said that the marine historic environment is only one of many matters treated in the 2009 Act and so "it would not be appropriate to include it in the Bill".[129]

156. On the 1986 Act, the Counsel General told us that none of the Secretary of State's functions under the Act have been devolved to the Welsh Ministers and the purposes of the Act are not limited to the historic environment. As such, again the Counsel General does not feel the Act is "appropriate for this consolidation".[130]

157. On the 1995 Act, the Counsel General said that its subject matter is a reserved matter under paragraph 120 of Schedule 7A to the 2006 Act.[131]

158. In conclusion, the Counsel General told us:

[127] Letter from the Counsel General, 28 October 2022
[128] Letter from the Counsel General, 28 October 2022
[129] Letter from the Counsel General, 28 October 2022
[130] Letter from the Counsel General, 28 October 2022
[131] Letter from the Counsel General, 28 October 2022

> *"While the accessibility of the law for the marine historic environment is unquestionably an issue, there are good arguments that the 1973 Act's proper association is with legislation for the marine environment, where management and protection could be treated more holistically."*[132]

159. Given these remarks, when the Counsel General appeared before us in November we asked if it is not appropriate to pursue the consolidation of marine historic environment legislation in this Bill, when will he and the Welsh Government push for reforms to this area of law, and will he do it at the earliest opportunity. In response, the Counsel General said:

> *"Yes. It's an important part, because these are areas that I know have been considered very, very carefully because of potential overlaps with the legislation. You have to be careful in terms of areas that go into the marine area, areas that go into the planning area, and of course part of the purpose of consolidation and also the process of codification is to actually create workable units within which legislation can actually take place. I think it's one of those things we're going to have to think about further. Obviously, I can't make any hard-and-fast promises now as to when it will be done, because obviously we want to concentrate on this particular piece of legislation, but you're right that there are those particular areas."*[133]

Our view

160. Our consideration and discussion set out above, including on specific sections of the Bill, leads us to make the following conclusions and recommendations.

Conclusion 1. We are broadly satisfied with the scope of the Bill as a Consolidation Bill, including the changes made on the recommendation of the Law Commission in accordance with Standing Order 26C.2(v).

Recommendation 2. In our view, the Bill should proceed as a Consolidation Bill.

161. During our consideration of the Bill we have been mindful of our role as the Senedd Committee given responsibility for undertaking scrutiny of a Consolidation Bill for the first time. This has been a learning curve for us in the legislature, while we adjust to new procedures and processes. As the Committee responsible for the scrutiny of all Consolidation Bills that may be

[132] Letter from the Counsel General, 28 October 2022
[133] LJC Committee, 14 November 2022, RoP [28]

introduced into the Senedd, we will use this experience when we are tasked with the consideration of future Consolidation Bills.

162. Similarly, we expect that the Welsh Government has also had to adopt new ways of working and is likely considering how best it may learn from its first proposal for a Consolidation Bill. In this regard, there are two broad points we wish to highlight, and we encourage the Counsel General and the Welsh Government to adopt our suggestions in time for the next Consolidation Bill.

163. First, the Welsh Government and Cadw specifically worked with stakeholders to test and refine provisions in the Bill before it was introduced to the Senedd. It is unfortunate that this pre-introduction work was undertaken on terms which meant the Counsel General does not consider it appropriate to now make public the full details. We welcome the fact that the Welsh Government and Cadw undertook a form of pre-introduction consultation. However, we believe improvements could be made to this process to ensure more transparency and that consequently fuller and therefore more robust evidence can be provided to the Senedd.

Recommendation 3. The Welsh Government (and any other relevant arms-length body) should undertake any pre-introduction work ahead of the introduction to the Senedd of a Consolidation Bill with the known objective and expectation that full details will be made public at the same time the relevant Bill is laid before the Senedd.

164. Secondly, we have thought it necessary to challenge the Welsh Government on the explanations it has provided to us on why a number of provisions in the Bill (or indeed omissions from the Bill) are drafted in the way they have been.

Conclusion 2. We accept and acknowledge that this is the first time the Welsh Government will have prepared explanatory material to accompany the introduction of a Consolidation Bill. While we recognise and welcome the additional detail that was subsequently provided to us on request through correspondence and during formal evidence sessions, we believe the information set out in the required explanatory material on introduction (including the Drafters' Notes) could be improved.

165. In addition, the Drafters' Notes include several references to Cadw considering something to be the case, and this forms part of the justification for how provisions in the Bill are drafted (see for example in relation to section 5). Again, in the future we would welcome more robust and expansive reasoning to support such conclusions and to justify the approach adopted by the Welsh Government.

166. Specifically as regards the information provided in the Drafters' Notes in relation to section 54, we acknowledge the Welsh Government's statement that it has inadvertently missed an intended omission, and that the Welsh Government will look to update the Drafters' Notes at a suitable opportunity.

167. As regards section 201, we also acknowledge that the Welsh Government will be updating the Drafters' Notes to confirm its revised position that it no longer believes it necessary to rely on Standing Order 26C.2(ii) for the changes made via section 201.

168. In this Chapter, we have also highlighted two other matters which we believe to be important to our consideration of whether the scope of the Bill is appropriate: the first relates to changes to provisions in historic environment law introduced by the 2016 Act, and the second relates to relevant historic environment law that has been excluded from this consolidation exercise.

169. We noted earlier in the Report that the 2016 Act is the only Act being consolidated through the Bill which does not pre-date devolution in Wales. The Senedd itself scrutinised and passed this Act only six years ago. We believe this to be important because it was, therefore, the Senedd which only very recently agreed, through Standing Order 26 procedures, to reform historic environment law.

170. While we do not raise any objections to what the Bill proposes in respect of changes to or omissions from provisions introduced by the 2016 Act, we believe such changes should be highlighted to the Senedd in a more transparent way.

Recommendation 4. Where a Consolidation Bill seeks to change provisions that were introduced to the relevant area of law being consolidated by a Measure or Senedd Act, the explanatory material accompanying the Bill should highlight each specific occurrence and provide a thorough explanation.

171. The Counsel General and his officials noted that some changes are being made to provisions introduced by the 2016 Act because it has since realised that there were errors made in the drafting of that Bill before it was enacted. We believe this serves as a reminder of the importance of:

- the Welsh Government ensuring that policy is fully thought through before proposing legislation (including by amendment), and
- the Senedd undertaking timely post-legislative scrutiny of Bills it has passed.

172. As well as paying close attention to what is in the Bill, we also took a keen interest in the exclusion of relevant law from this Consolidation Bill, in particular the exclusion of marine historic environment law. While we are satisfied with the explanations provided by the Counsel General and his officials, we wish to make two specific recommendations.

Recommendation 5. Where the Welsh Government has taken a decision to deliberately exclude relevant law from a Consolidation Bill, full and detailed reasoning should be provided in the explanatory material accompanying the Bill, including any justification based on legislative competence and where the act of consolidating would involve more than what is permitted by Standing Order 26C.

Recommendation 6. The Counsel General and the Welsh Government should review marine historic environment law as it applies in Wales and seek the earliest opportunity to make the required reforms.

173. As highlighted at the start of the Chapter, most of the Acts being consolidated through the Bill pre-date devolution in Wales. We acknowledge the comments of both the Counsel General and his officials on how this affected the drafting of the Bill. Furthermore, we note that, with the exception of the 2016 Act, all other Acts being consolidated – as Acts of the UK Parliament - were enacted in English only. We commented in Chapter 2 on how the Bill would therefore add to the availability of Welsh law in both official languages and this is therefore to be welcomed.

5. Does the Bill correctly consolidate legislation, or change its substantive legal effect, only to the extent allowed by Standing Order 26C.2?

In accordance with Standing Order 26C.17 our consideration of the Bill has included as assessment of whether it correctly consolidates existing legislation, or changes its substantive legal effect, only to the extent allowed by Standing Order 26C.2.

Clarifying the application or effect of existing law

174. Standing Order 26C.2(ii) states that a Consolidation Bill may clarify the application or effect of existing law.

Incorporation of common law

175. Standing Order 26C.1 sets out that common law can be included in a consolidation Bill exercise.

176. As an example, according to the Drafters' Notes, section 76(5) includes additional wording to that which appears in the 1990 Listed Buildings Act to specify a date for determining which objects within the curtilage of a listed building are included in the listing. The Drafters' Notes state that this clarification is meant to reflect how the law is understood to operate, based on case law.[134]

177. We asked the Counsel General and his officials how has the common law influenced provisions in the Bill. The Counsel General told us

> *"I think there are a number of areas where there's been interpretation of legislation, which then is appropriate to incorporate into the actual legislation itself. And I think this is probably something that's going to emerge in subsequent consolidation Bills—maybe planning being one of those, for example."*[135]

[134] Drafters' Notes, page 30
[135] LJC Committee, 11 July 2022, RoP [103]

178. Dr George added:

> *"...we have incorporated case law in some places where there were cases about the interpretation of the legislation or how it applies. We've put in case law, really, because, without it, the restatement of the provisions wouldn't really be complete, or potentially could be misleading in some cases."*[136]

179. As regards the section 76(5) example, Dr George said:

> *"So, one example is section 76(5), which is the first section in Part 3 about listed buildings, and that defines a listed building, and the definition currently in the listed buildings Act includes the building itself and then objects that are within the curtilage of the building, which is a horrible technical term, but it's things like outbuildings in the garden, or possibly other features in the grounds of the building. We've included additional wording there that isn't in the current legislation to explain when you assess what was in the curtilage of the building to determine what counts as part of the listing. And there's case law about that that says that the question is decided at the time when you list the building. So, it's not whether it's there now, it's whether it was there whenever it was listed, which might be, obviously, 20 or 50, or however many years ago. That particular change was one that was recommended by the Law Commission. So, they looked at the case law, and I think it's not at all contentious what the effect of that case law is, in the sense that we should reflect it in the provisions. So, that's what we've done because, really, it fills in a gap that would otherwise be unclear if we hadn't done that."*[137]

180. Dr George also referred to other examples. He told us:

> *"If you look later on in that part of the Bill, there are provisions for things called 'purchase notices', which is where, if somebody's refused listed building consent, or has their consent revoked, and their land becomes unusable as a result, they can force the council that refused the consent to buy the land off them, and there were quite a few cases that have changed how those provisions operate that wouldn't be obvious from the face of the legislation. There are cases saying that certain words actually don't do anything and should be ignored. There are cases setting out additional tests for what land is unusable. There are cases about whether you can withdraw and amend*

[136] LJC Committee, 11 July 2022, RoP [104]
[137] LJC Committee, 11 July 2022, RoP [105]

> *these notices requiring the council to purchase your land. So, we've incorporated a number of bits of case law in that set of provisions because, otherwise, you wouldn't really get the full sense of how the system works."*[138]

Section 20: Modification and revocation of consent

181. Section 20 provides the Welsh Ministers with powers to revoke or modify a scheduled monument consent by order. The associated Schedule 4 establishes the procedure that must be followed in making these orders, and Schedule 6 sets out additional procedures relating to evidence at local inquiries and the costs of such proceedings.

182. The Country, Land and Business Association (CLA) Cymru told us that "modification or revocation of Scheduled Monument Consent (SMC) is potentially a very serious matter – you could spend months or years and thousands of pounds getting consent, and then see it suddenly revoked." It said:

> *"A vital practical check on that is compensation. There is compensation, but this section and the two accompanying schedules are unintentionally misleading because, detached from the compensation provision, they give the impression that SMC can be modified or revoked without compensation."*[139]

183. We asked the Counsel General if he was content with the situation as it is being restated at the moment and asked him to respond to the concerns of CLA Cymru. He told us that he was content and added:

> *"...the Bill doesn't change the position with regard to when compensation is available and where scheduled monument consent is revoked or modified, as long as the relevant conditions are satisfied.*
>
> *With regard to the concerns of the CLA that the drafting of the Bill is misleading, I think the provisions on compensation are clearly identifiable. I understand the point they're making; I don't agree with them, because if you read through—if you look at section 20 and then you follow through, immediately after you've got section 21 there, which is compensation for the refusal of scheduled monument consent, et cetera, and then it continues to follow through sections 23 and 24—I think it is there, and I think anyone who*

[138] LJC Committee, 11 July 2022, RoP [106]
[139] Letter from The Country, Land and Business Association (CLA Cymru)

is referring to that—. I think the compensation provisions there are clear. I don't think they do mislead at all."[140]

The meaning of "employed"

184. In section 46(3) and section 62(6), reference to being 'employed' as a caretaker has been omitted from the restatement of provisions from the 1979 Act. In both cases, the Drafters' Notes state that it is uncertain what 'employed' means in the context and, therefore, the omission avoids ambiguity.[141] We asked the Counsel General and his officials to provide further explanation and clarity. In response, we were told:

"It isn't immediately clear from the 1979 Act whether the expression "employed as" is referring to the contractual basis on which a person is acting as a caretaker, or whether it is a synonym for "engaged as" or "acting as".

What appears to matter for the purposes of the 1979 Act is whether a person is occupying a monument in the capacity of caretaker, not whether they're doing so under a particular contractual arrangement. This fits with our understanding of how this provision has been understood in practice (where the arrangements involving caretakers vary). We don't think the omission of the wording broadens the provision.

We think the change clarifies the application of the current law by removing ambiguity and is why we've relied on SO 26C.2(ii) and (iv)."[142]

Preservation vs conservation

185. Both Historic Houses (Wales) and CLA Cymru have highlighted that the Bill continues the use of the word "preservation" even though the Welsh Government's historic environment policy has been based on 'conservation'.

186. CLA Cymru told us there is a fundamental, even if unintended, conflict between Welsh Government policy and the Bill. It said:

"11. Since 2011, Welsh Government historic environment policy has been based on 'conservation', defined in its Conservation Principles as "the careful management of change". That policy was adopted after extensive public

[140] LJC Committee, 14 November 2022, RoP [46] and [47]
[141] Drafters' Notes, pages 25 and 28
[142] Letter from the Counsel General, 17 October 2022, paragraphs 22 to 24

consultation, and has been followed through ever since, notably in the major suite of Cadw guidance published in 2016-18.

12. The problem is that although the consolidation Bill adopts this 'conservation' approach initially in its Overview, all subsequent sections (especially the core "duties to preserve") still use a legacy term from the decades-old Westminster legislation, 'preservation'. That term is emphasised, and seemingly endorsed, because it occurs repeatedly in the Bill.

13. This is a fundamental problem, not a semantic point, because these two terms represent wholly different approaches to heritage. (...)

15. The conflict between the two terms would also of course be likely to confuse everyone using the new Act.

16. We have been told by the Counsel General and Minister for the Constitution that Welsh Government's policy of 'conservation' has not changed, but also that standing order 26C prevents the new Bill's terminology being updated to align with it.

17. If that is correct, it is clearly important that Welsh Government (i) uses a clause in a subsequent policy Bill to make this change as soon as possible, so that the new Act will from then use the term 'conservation'; and (ii) in the meantime, mitigates the problem by clarifying, in Bill communications and in the key policy document TAN 24, firstly that 'conservation' remains Welsh Government policy, and secondly that where the term 'preservation' is used in the legislation it should be interpreted as not conflicting with that 'conservation' approach.

18. We suggest therefore that your Committee should make those recommendations to Welsh Government. It would be regrettable if, after all the hard work put into the consolidation Bill, the resulting legislation is fundamentally incompatible with long established Welsh Government policy. Making it compatible would as above not involve any change in approach or policy: 'conservation' is well-established policy, set out extensively in Welsh Government guidance, on which there were about 10 public consultations between 2010 and 2018."[143]

[143] Letter from CLA Cymru

187. Historic Houses (Wales) told us it agreed with CLA Cymru's views, and added:

> *"It seems a shame that this change cannot be made now, as the alternative is to either insert a new clause when the opportunity arises or it will need to be consistently explained that the words 'preservation' and 'conservation' hold the same and interchangeable meaning. However, complications such as this are what has gradually given rise to the need for simplification and consolidation, which is why this Bill has been drawn forward."*[144]

188. In South Lakeland District Council Appellants v Secretary of State for the Environment[145], the House of Lords cited, with approval, the following:

> *"The ordinary meaning of 'preserve' as a transitive verb is 'to keep safe from harm or injury; to keep in safety, save, take care of, guard': Oxford English Dictionary… In my judgment, character or appearance can be said to be preserved where they are not harmed. Cases may be envisaged where development would itself make a positive contribution to preservation of character or appearance…The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved."*

189. We are not aware of any case law on the meaning of 'conservation' in the planning context.

190. We put a number of questions to the Counsel General and his officials on this issue.

191. We first asked the Counsel General to confirm the statement from CLA Cymru that the Welsh Government had said Standing Order 26C prevents the new Bill's terminology being updated to align with Government policy. In response, the Counsel General said "pretty much so".[146]

192. We then asked the Counsel General to confirm his understanding of the difference between 'preservation' and 'conservation' and, if there is a significant difference between the

[144] Letter from Historic Houses (Wales)
[145] Relevant case law: South Lakeland District Council Appellants v Secretary of State for the Environment [1992] 2 AC 141
[146] LJC Committee, 14 November 2022, RoP [66]

two terms, to explain why the Welsh Government's guidance and policy refer to 'conservation' when the law says 'preservation'. Mr Gwilym Hughes told us:

> *"We've done a lot of thinking and discussion, as you can imagine, on this, and, indeed, we've had conversations with the country landowners association, and I suppose I have a certain amount of sympathy for what they say, but what they're asking for is actually very difficult in the context of consolidation. The dictionary definitions of the two terms are actually very similar. The Concise Oxford English Dictionary describes 'conserve' as to protect from harm or destruction, whereas 'preserve' is to keep safe from harm or injury. That sounds, actually, very similar, but, in reality, in practice—and that's why I am responding to this—in the historic environment sector, they have come to mean different things. 'Preserve' and 'preservation' have come to mean maintain in its original existing state. Consequently, 'preservation' is regarded as a requirement to keep a building or a historic asset unchanged, frozen in time, unresponsive to the changing demands of modern life. 'Conservation', on the other hand, is now understood as the careful management of change. Back in 2011, Cadw published 'Conservation Principles', which forms the basis for our subsequent guidance and policy for managing the historic environment. But that guidance I've referred to does still use the term 'preservation' when making specific reference to the legislative provisions."*[147]

193. Mr Gwilym Hughes added:

> *"When treating the routine management of historic assets, our guidance uses conservation terminology, particularly in terms of the use of the term 'significance', because it reflects the current philosophy and practice as embedded in those conservation principles. So, the aim of conservation is, effectively, through the careful management of change, to preserve the significance of a historic asset, if that makes sense, and still allow change to take place for the future. For example, with reference to listed buildings, the intention is to preserve the special interest of that historic building. That doesn't preclude change from taking place to preserve the special interest. The supporting guidance that we've prepared sets this out and sets out how this can be achieved. In this way, what we're able to do, and what we've done*

[147] LJC Committee, 14 November 2022, RoP [69]

since 'Conservation Principles' was published, is maintain this current system where the policy of conservation can be achieved through the existing legislative structure that employs that language of preservation. (...)

...to go back to that dictionary definition and, indeed, case law, it doesn't mean that preservation doesn't allow change. Preservation can allow change. It's just that, over the decades, it's come to mean something that has this different connotation within the sector, as demonstrated, actually, by the comments of the Country Land and Business Association and the Historic Houses Association. But, again, I would stress that the supporting guidance and how we set it out sets out how preservation of the significance of historic assets can be achieved through conservation. (...)

...the explanatory note makes it very clear, I think, that the distinction and the intent is not to change. And, indeed, we will be restating the current arrangement, should this Bill proceed, within the guidance and the planning advice."[148]

194. Dr George confirmed that, in drafting the Bill, they had taken into account practice and case law. He added:

"I think, also, if you look at the context in which the legislation uses the word 'preservation'—. Well, 'conservation' is used to describe the overall aims of the management of heritage. 'Carefully managed changed' I think is how Gwilym described it. 'Preservation', when it's used in the legislation, is not talking about the aims of the entire system, it's used in particular contexts."[149]

195. Dr George also said:

"...as drafters of legislation who aren't heritage specialists, we were not at all sure what difference it would make if we changed 'preservation' to 'conservation' in the legislation, given that the dictionary definitions are similar. There's case law about preservation, but there isn't case law about conservation in the context of what effect it would have if we changed the words. We just were not at all sure what difference it would make. And although we have changed some of terminology to reflect the language that people use in the field when they're talking about listing buildings and so on,

[148] LJC Committee, 14 November 2022, RoP [71], [73] and [81]
[149] LJC Committee, 14 November 2022, RoP [77]. See also RoP [78]

> *we didn't think it was safe to do it here, because we just weren't sure what effect it would have. If it did have a major, dramatic effect, then it would definitely be outside a consolidation Bill. If it didn't, there probably wouldn't be any point."*[150]

Section 76(5): Duty to maintain and publish list of buildings

196. Section 76(1) places a duty on the Welsh Ministers to maintain a list of buildings in Wales and to publish the up-to-date list. The Welsh Ministers must include in the list every building in Wales which they consider to be of special architectural or historic interest. The Explanatory Notes state that, in practice, in determining whether a building is, in their opinion, of special architectural or historic interest, the Welsh Ministers will have regard to the **published non-statutory criteria** for listing.[151]

197. The Explanatory Notes to the Bill state that section 76(5)(a) clarifies that a "listed building" means a building which is included in the list and includes any structure or artificial object fixed to the building; this captures ancillary structures attached to a building and internal and external fixtures. On the other hand, movable furnishings, even of historic importance, are not part of the listing. For instance, subsection (5)(a) would apply to a fixed medieval masonry altar in a listed church, but not to a post-Reformation altar table (what constitutes a fixture has been the subject of case law).[152]

198. The Explanatory Notes to the Bill state that subsection (5)(b) provides that the listing of a building extends to include separate ancillary structures or artificial objects if certain conditions are met.[153]

199. CLA Cymru told us:

> *"We welcome the Bill's clarification and solution in section 76(5) of what was the '1969 problem', though this is only a problem in small minority of cases.*
>
> *The Bill text should also address a greater problem, the vagueness of 1990 Act section 1(5), which is misleading in implying that non-ancillary structures can be covered by listing when it is clear from 35 years of case law that they are not. The case law establishes that an attached structure, or an unattached structure within the curtilage of a listed building, is only covered*

[150] LJC Committee, 14 November 2022, RoP [79]
[151] Explanatory Notes, paragraph 311
[152] Explanatory Notes, paragraph 319
[153] Explanatory Notes, paragraph 321

> *by its listing if it is ancillary to it. This goes back at least to Debenhams in the House of Lords in 1987, and has been endorsed consistently and repeatedly in numerous subsequent cases, including most recently by the Court of Appeal in 2021 in Blackbushe Airport ("…in order to be treated as if it were part of the listed building, a freestanding structure within the curtilage must also be ancillary to that building" [paragraph 110]). This is long established case law, set in the House of Lords (now the Supreme Court) and endorsed repeatedly by courts including the Court of Appeal, and thus most unlikely to change.*
>
> *This point has already been clarified in the Bill's Explanatory Notes, but it would reduce confusion if the clarification was also brought into the text of the Bill itself. That simply requires the word 'ancillary' to be inserted before the word 'structure' in section 76 (5) (a), and in 76 (5) (b). That is not a change of policy; its effect is just, in the words of Standing Order 26C, to "clarify the application or effect of the existing law". Historic England uses similar wording in its 2021 Advice note on Listed Building Consent (paragraph 26): "The listing of a building applies protection not only to the building, both inside and out, but also to pre-1948 ancillary structures within its curtilage, and to ancillary objects or structures fixed to the building".*"[154]

200. The case law referred to by CLA Cymru is the House of Lords case of *Debenhams v Westminster City Council* [1987] AC 396 and the Court of Appeal case of *R (Hampshire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2021] EWCA Civ 398 (the Blackbushe Airport case). The Debenhams case set out the principle that only structures ancillary to a listed building are included in the listing by virtue of what is now section 1(5) of the Listed Buildings Act 1990. The Blackbushe Airport case provides a recent endorsement of this principle. Section 1(5) is the origin provision of section 76(5) of the Bill.

201. We asked the Counsel General whether he considered including the word 'ancillary' before the word 'structure' in section 76(5)(a) and (b) in order to clarify the effect of the law on the face of the Bill. He responded:

> *"This is an area that we've given some thought. Of course, the evidence from the CLA, I think, is very, very welcome. I think the detailed input that they've put has actually been very constructive and very useful. So, I suppose, just as a matter of record, I probably ought to formally be thanking them and the stakeholders who've actually taken the trouble to go through this and to look*

[154] Letter from CLA Cymru

> *at those details, because it expresses there, I think, their concern and the importance of this particular exercise that we're going through on consolidation. I'm just looking at section 76(5)(a). What I can say is that I think, in terms of the need to represent the case law that exists, that you've already mentioned, it is logical that the definition should also reflect that and for objects and structures to be ancillary. So I think this is an area that—. I suppose I can confirm now that it is an area I'm going to look at with regard to bringing forward an amendment with a view to inserting the word 'ancillary' into that particular part of section 76."*[155]

Section 90(4): Applying for listed building consent

202. Section 90 provides for the application procedure for listed building consent. Applications for listed building consent are ordinarily made to the planning authority in whose area the listed building is situated. However, certain applications, specified in section 90(1), are made to the Welsh Ministers.

203. Subsection (4) provides that the Welsh Ministers must make regulations to require an applicant to include with the application a statement about the impact of the proposed works on the character of the listed building and, depending upon the nature of the application, either or both of the design principles applied to the works and the handling of access issues. Such a statement, known as a heritage impact statement, is provided for by regulation 6 of the Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012 (SI 2012/793 (W. 108)) ("SI 2012/793").

204. CLA Cymru told us:

> *"26. During the Historic Environment Review, its External Review Group had a careful policy discussion about information requirements. It was then decided that (i) applicants should be required to produce proper analysis of heritage significance and impact, to be called Heritage Impact Assessments, and (ii) in recognition of the resource implications of that for applicants, the requirement for Design & Access Statements (D&ASs) added little and should be scrapped for LBC applications (except for major development). That was implemented via Regulations, but was not reflected in the 1990 Act, and is not yet fully reflected in the Bill, which uses the term "statement", and implies that D&ASs are required though they usually are not.*

[155] LJC Committee, 14 November 2022, RoP [87]

> *27. This suggests two logistically-small but important tweaks to the Bill. Firstly, the words 'statement about' in 90(4) (and in 90(5)(a)) should be replaced by 'assessment of…'. That would be consistent with the term 'Heritage Impact Assessment', which is what the Regulations require. Much more importantly, the term "assessment" was deliberately chosen so as to make it clearer that the applicant needs to provide genuine analysis of the building's significance, and of the impact of the proposals on that significance, because evidence suggested that the term 'statement' led most applicants to provide flannel which merely described the building and/or its history and/or the proposals, and did not substantively consider significance or impact.*
>
> *28. This is not a minor point, because an applicant needs to understand significance and impact to develop a competent application. If the applicant has not done that, the proposals and application are unlikely to be competent. Local planning authorities do not have the resource to do this themselves, and even if they did, that would come undesirably late in the process, after the proposals have been fixed by the applicant. Given that there are thousands of LBC applications each year, the local authority (and private) resource wasted by less-than-competent proposals and applications is damaging. This word change, in addition to making the statute consistent with current policy, therefore has substantial real-world benefits.*
>
> *29. Secondly, 90 4(b) needs slight change because it does not apply to all LBC applications, only to the minority which still require D&ASs (and in those cases this will not be 'either or both')."*[156]

205. We asked the Counsel General to respond to these concerns and asked whether changes to the Bill are going to be needed to address this point. The Counsel General told us that the Welsh Government does not agree that section 90(4) fails to reflect the current position.[157]

206. Mr Gwilym Hughes added:

> *"It's the distinction between an assessment and a statement. The regulations currently require a historic impact statement to be submitted in support of a consent application. A heritage impact assessment is really the process of getting to that statement, and, indeed, we explain this in quite a lot of detail*

[156] Letter from CLA Cymru
[157] LJC Committee, 14 November 2022, RoP [89]

in Cadw's supporting guidance on heritage impact assessments in Wales. It is actually all set out there quite clearly. So, we don't think it is needed, this change, because it's already there in regulations. It's the statement that is the important part, not just simply doing the assessment, if you see what I mean. I think that we're confident that paragraph (a) is based on the wording currently found in the regulations. It has been added to give a sense of what a heritage impact statement is all about, but it's not the full story, of course, and further detail on what a statement must contain continues to be set out in regulations."[158]

Section 97(5): Power to grant consent subject to conditions

207. Section 97 allows listed building consent to be granted subject to conditions.

208. Under subsection (5), a consent for demolition of a listed building must include a condition allowing for the recording of the building by the Royal Commission on the Ancient and Historical Monuments of Wales (Royal Commission). Under the terms of its Royal Warrant, the Royal Commission has a responsibility to survey and record "buildings, sites and ancient monuments of archaeological, architectural and historic interest" in Wales and the adjacent territorial sea. The Royal Commission must also compile and curate the National Monuments Record for Wales "as the basic national record of the archaeological and historical environment"; **Coflein** is the online database for the National Monuments Record of Wales.

209. ALGAO:Cymru told us:

"Section 97 (5) carries forward the legal right of the RCAHMW [Royal Commission] to be given the opportunity to record a listed building proposed for demolition, currently provided by Section 8(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990, but proposed to be enshrined as an obligatory condition. Whilst this may initially appear to be a strengthening of provision, there is a potential for conflict or duplication with current planning practice.

The principle of allowing access for archaeological recording in advance of development predates the inclusion of archaeology as a material planning consideration and the establishment of structured procedures for archaeological work in a development context. These procedures are set out clearly in both local and national policies, and include the ability for local

[158] LJC Committee, 14 November 2022, RoP [90]

authorities to require archaeological work at all stages of the planning process. In members' experience it has been relatively uncommon for the RCAHMW to undertake emergency recording through the planning and listed building consent process in recent years. It is however commonplace for conditions requiring archaeological building recording to be attached to consents, which would normally be undertaken by an archaeological contractor, commissioned by the applicant. This can often be more comprehensive and analytical than the RCAHMW emergency recording, where limited resources necessitate the prioritisation of high quality survey and images.

The explanatory notes for the change draw a parallel with the scheduled monument consent process (Section 18 Power to grant consent subject to conditions). The two are not directly comparable, because scheduled monument consent is independent of planning, and administered by Cadw rather than local authorities. In addition, the wording of the proposed Section 18 is more flexible, discussing what conditions may be applied and does not name a specific organisation. In practice, archaeological mitigation undertaken as a condition of scheduled monument consent is comparable to planning-led work, generally undertaken by archaeological contractors to an agreed programme and monitored by Cadw. It is not clear if an equivalent process would be followed for a listed building consent condition allowing access for recording by the RCAHMW. The scope of such work can vary considerably, and submission of a detailed project specification for prior approval by the local authority is normally required in order to meet the test of precision.

ALGAO:Cymru is concerned that including the right of access for the RCAHMW as a condition could prevent local authorities from attaching separate conditions for archaeological building recording, because this could be regarded as duplication and thus fail the test of necessity. Without this ability, were the RCAHMW to decline to record a threatened building, there would be no means of securing proportionate mitigation. The resulting loss to built heritage and archaeological evidence would conflict with objectives to manage the historic environment as a public resource for the benefit of current and future generations.

ALGAO:Cymru would therefore recommend that this matter is reviewed to ensure that there would be no reduction in powers to secure archaeological mitigation."[159]

210. We asked the Counsel General and his officials to respond to the concerns expressed by ALGAO:Cymru. Dr George told us:

"This one is quite a subtle point of statutory interpretation, and we think it probably is one that ought to be addressed in the Bill, if it proceeds. At the moment, the listed buildings Act has a provision that says the royal commission have to be given a chance to make a record of a building before it's demolished and the works are not authorised unless that happens. In the Bill, we've changed it slightly, and provided for that requirement to be included as a condition of the listed building consent and said it's got to be done that way. That's not meant to change the legal effect at all, but the way it's presented is then more consistent with how other requirements that apply to demolition are set out in the Bill.

But the question the association have asked is whether making it a mandatory condition of the consent might create an unhelpful implication that it's limiting the ability to impose other conditions in the consent as well, possibly limiting the ability of a planning authority to include conditions about recording by somebody else apart from the royal commission. We do feel they have a fair point there, that you might read that implication in, and there might be a risk that having this mandatory condition could limit other conditions, which is definitely not the intention at all. We're not trying to change anything about what conditions can be imposed otherwise. So, we do think it would be safer to put something into the Bill to spell out that that provision doesn't limit anything else that could be done in the consent."[160]

[159] Letter from ALGAO:Cymru
[160] LJC Committee, 14 November 2022, RoP [95] and [96]

The meaning of "demolition"

211. ALGAO:Cymru told us that it may be beneficial to clarify whether references in the Bill to demolition include partial demolition.[161]

212. There are references to "demolition" throughout the Bill. The majority of these are accompanied by additional words such as "or any damage to", "alterations or additions" (section 11(2)), "total or partial demolition or destruction" (section 21(5)) and "alteration or extension" (section 88(2)). The word "demolition" is used in isolation in section 161, in relation to the requirement for conservation area consent.

213. We believe ALGAO:Cymru's concern relates to section 161. According to case law[162], 'demolition' is the pulling down and complete destruction of a building. As far as we are aware, this does not necessarily require the pulling down of every single part of the building and could include, for example, retaining the façade while clearing the remainder of the site for redevelopment. The Courts have held that whether or not works amount to demolition is a question of fact and degree, to be decided in each individual case. TAN 24 provides guidance at paragraph 6.10 on the meaning of demolition in relation to conservation area consent under the current law.

214. We asked the Counsel General if the Welsh Government considered clarifying the meaning of 'demolition' as set out in case law on the face of the Bill, and whether the meaning of 'demolition' will be clearly set out in guidance. The Counsel General told us:

> *"In the case law on it, really the question as to whether the demolition of a building is partial or whole is a matter of fact and degree, so that's really the court saying, 'Well, to be honest, unless we can look at the actual facts of what actually happened, we can't define it one way or the other.' You have to interpret it on the basis of what has actually happened. Our intention in the legislation is not to change what demolishing a building means or how the conservation area consent system operates in practice."*[163]

215. Dr George added:

> *"...we couldn't really think of any way that you could add wording that would really make things much clearer, because what the courts have said, as the*

[161] Letter from ALGAO:Cymru
[162] Relevant case law: Shimizu (UK) Ltd v Westminster City Council [1997] 1 WLR 168 and Walter Lily & Co Ltd v Clin [2021] EWCA Civ 136
[163] LJC Committee, 14 November 2022, RoP [132]. See also RoP [133]

> *Counsel General has said, is effectively it's a common-sense judgment. They've said, 'Well, it's a question of has something been substantially demolished?' So, you can't say that, just because there are a few bricks left it's not totally demolished. And it's a question of fact and degree. But, I think that's really just saying that you look at the word 'demolition' and interpret it sensibly. So, that's why we haven't tried to say any more in the Bill."*[164]

The removal or omission of provisions which are obsolete, spent or no longer of practical utility or effect

216. Standing Order 26C.2(iii) states that a Consolidation Bill may remove or omit provisions which are obsolete, spent or no longer of practical utility or effect.

General

217. As set out in the EM, the consolidation exercise for the Bill has included removing or omitting provisions from the existing legislation where they are obsolete, spent or no longer of practical utility or effect. In the EM, the Welsh Government states that, for the most part, these are minor redundant provisions and detail on these changes are set out in the Drafters' Notes.[165] More significantly, the Welsh Government notes that there are two areas that have been removed as they are deemed to no longer be of practical utility or effect:

- Part II of the 1979 Act, which provides for the creation of archaeological areas, and
- sections 38 and 39 of the 2016 Act, which provides for the establishment of an Advisory Panel for the Welsh Historic Environment.[166]

218. As regards Part II of the 1979 Act, in the EM the Welsh Government states:

> *"Part II of the 1979 Act has never been used in Wales and it is unlikely that it will be in the future because in practice planning policy provides greater protection to the archaeological heritage. Partly as a result of this the Law Commission has recommended that the 1979 Act should be amended to revoke Part II in Wales."*[167]

[164] LJC Committee, 14 November 2022, RoP [135]
[165] EM, paragraph 28
[166] EM, paragraph 28
[167] EM, paragraph 29

219. We have commented on the omission of sections 38 and 39 of the 2016 Act in the previous Chapter.

220. Examples of other omissions include:

- Section 22: Omission of requirement for claim to exceed £20 – The £20 threshold currently set out in section 8(2)(a) of the 1979 Act has been omitted from the restatement of that Act's provisions because, according to the Drafters' Notes, "The amount is so low as to be meaningless in practice."[168]
- Section 47: Omission of definition of "maintenance" and "maintain" – The definition currently set out in section 13(7) of the 1979 Act has been omitted from the restatement of that Act's provisions because, according to the Drafters' Notes, the definition does not add anything to the ordinary meaning of the expressions.[169]
- Section 61(3)(a): Omission of reference to compensation orders under the *Powers of Criminal Courts (Sentencing) Act 2000* – The reference currently set out in 5(1) of the 1979 Act has been omitted from the restatement of that Act's provisions because, according to the Drafters' Notes, the reference is spent as the 2000 Act was repealed by the *Sentencing Act 2020* with effect from 1 December 2020.[170]

221. The Drafters' Notes include a table which identifies provisions which have been omitted from the Bill in reliance on paragraph (iii) of Standing Order 26C.2 because they are obsolete, spent or no longer of practical utility or effect. The Drafters' Notes state:

> *"This table deals with omissions which are not related to provisions that are restated in the Bill, including a number of omissions of whole sections or Schedules."*[171]

222. For example, a current power in section 5 of the 1953 Act enabling the Welsh Ministers to acquire buildings of outstanding historic or architectural interest by agreement has been omitted from the consolidation exercise. The Drafters' Notes state that this power is not used and does not add anything to the general powers of the Welsh Ministers under Part 2 of the 2006 Act.[172]

[168] Drafters' Notes, page 20
[169] Drafters' Notes, page 26
[170] Drafters' Notes, page 27
[171] Drafters' Notes, paragraph 33
[172] Drafters' Notes, page 71

Removal of executive powers

223. In consolidating current law and restating provisions in existing Acts, the Welsh Government is proposing to give up existing executive powers to make secondary legislation. We questioned the Counsel General and his officials about a number of examples.

224. We asked the Counsel General to confirm that the Welsh Government is content with the losing or narrowing of powers as a result of the Bill. The Counsel General confirmed that the Welsh Government is content with the effect achieved by the Bill in this regard.[173]

225. Specifically in relation to section 64(1) to (3), the Drafters' Notes state that current powers available to the Welsh Ministers in relation to expenditure by local authorities on archaeological investigation have been omitted. The Drafters' Notes also state that the practice is to use general powers available under the 2006 Act. [174]

226. We asked the Counsel General to provide further clarity on how the Welsh Government decided which powers to include in the Bill and which ones to omit because they could be dealt with under the 2006 Act. In response we were told:

> *"The 1979 Act predates Welsh devolution, and there are powers currently available to the Welsh Ministers under the Act that overlap entirely with the general powers available to Ministers under Part 2 of GoWA 2006. Our approach to restating section 45 was to omit any powers where that overlap existed. This is consistent with SO 26C.2(iii) – omitting provision that is unnecessary.*
>
> *Our general approach to the powers of the Welsh Ministers is to omit provision from the restatement only where the same effect could be achieved using general powers, taking into account any controls over the way in which the powers in the 1979 Act are exercisable. Where the exercise of powers is conditional on meeting certain tests or subject to other express restrictions, the powers in the Bill are restated instead of relying on the functions conferred by GoWA 2006."*[175]

227. We also asked a specific question about section 207(3). Here, the power to specify additional interests as Crown interests have been omitted from the restatement. The Drafters' Notes state that there is no equivalent power in the 1979 Act and that the power in section

[173] Letter from the Counsel General, 17 October 2022, page 1
[174] Drafters' Notes, page 28
[175] Letter from the Counsel General, 17 October 2022, paragraphs 33 to 34

82C(3)(c) has not been used in relation to any land in Wales and Cadw does not think it is required.[176]

228. We asked for clarity on the removal of the existing power, and asked the Counsel General to address a 'what if' scenario where it may be later discovered that the power is needed. In response, we were told:

> *"We cannot envisage any scenario in which it would be necessary to amend the definition of "Crown interest" in the Bill. The Crown and Duchy interests in land covered by section 207(3) and (4) of the Bill are the same as those covered by definitions in many other Acts (see, for example, section 10(2) of the Wild Animals and Circuses (Wales) Act 2020). We do not think there are any other Crown interests in land that could be added.*
>
> *The only order made under section 82C(3)(c) of the 1990 Listed Buildings Act is SI 2006/1469, which relates to the Houses of Parliament and is not relevant to Wales. The Senedd is dealt with differently, in an order under GoWA 2006 whose effect has been incorporated into section 207 of the Bill.*
>
> *In the unlikely event it did prove necessary to amend the definition of "Crown interest" because of a legislative change, we would expect the relevant legislation to make any consequential amendments to section 207. If an amendment was needed for some other reason, it is likely a Senedd Bill would be required."*[177]

229. Changes to the procedures attached to the making of subordinate legislation, the movement of provisions between subordinate and primary legislation, and new regulation-making powers provided to the Welsh Ministers are discussed later in the Chapter.

Making minor changes to existing law for the purpose of achieving a satisfactory consolidation

230. Standing Order 26C.2(iv) states that a Consolidation Bill may make minor changes to existing law for the purposes of achieving a satisfactory consolidation.

[176] Drafters' Notes, page 68
[177] Letter from the Counsel General, 17 October 2022, paragraphs 150 to 152

Replacement of terms

231. The Drafters' Notes state that the Bill uses many of the same terms as the legislation it consolidates, and continues to refer to scheduled monuments, listed buildings and conservation areas. However, the Bill replaces some significant terms used in the existing legislation with new terms. The Drafters' Notes state that these changes "do not have any substantive effect but are intended to ensure that the terminology is more accurate or helpful".[178]

232. We asked the Counsel General and his officials to explain why they believe the new terms used in the Bill are more accurate and helpful, and what consultation was undertaken with stakeholders.

233. The Counsel General told us:

> *"Language changes incredibly quickly—words that have been used and descriptions that have been used over the years—and when you're going back over legislation over quite some decades, sometimes even further, over centuries, when you're bringing together a consolidation Bill, certainly the approach taken with this, that if you're trying to clarify the language, make it clearer, more understandable and modernise it, you've actually got to look at the use of some of the terms that are there. So, it is very much a matter of, I think, judgment in doing that, and, of course, one of the functions, of course, of your scrutiny, would be to look at where that judgment has been exercised and if it is the case that the committee thinks that some of the terminologies are not appropriate or that you have views on that—well, of course, as I say, this is a learning curve for all of us."*[179]

234. The Counsel General spoke specifically in relation to the replacement of 'ancient monument' with 'monument of special historic interest', which he described as being much clearer and more modern. He also said:

> *"There was some concern, for example, over 'ecclesiastical buildings' and whether that is a specific reference to an older use of the term 'ecclesiastic' to refer to, for example, the Church of England, the Church in Wales. But that has been replaced by the term 'religious buildings'."*[180]

[178] Drafters' Notes, page 6
[179] LJC Committee, 11 July 2022, RoP [58]
[180] LJC Committee, 11 July 2022, RoP [59] and [60]

235. Dr George added:

> *"The 'ecclesiastical' one is an interesting one, because the existing legislation uses it in different ways in different places. We have 'ecclesiastical land', which does just mean the Church of England, and we have references to 'ecclesiastical buildings', which actually, probably, means any religion. It was actually unhelpful the way things were worded at the moment, so we've made the distinction clearer by talking about Church of England land or religious buildings."*[181]

236. Mr Dylan Hughes told us that one significant matter is the use of the words 'listed' and 'scheduled', which he said are terms which derive from a drafting technique. He said:

> *"...in the original legislation, there was a list of buildings. That's how it was referred to in the Act of Parliament. And then, similarly, there was a schedule of monuments. We considered whether it would be appropriate to change those terms, because it's an accident of history, really, as to how those expressions have come about and, arguably, you could say that they're not particularly helpful as a description of what they are. But I think Cadw, in their discussion with their stakeholders, took the view that, strangely, despite the etymology, if you like, despite the history of these terms, they had become part of the common parlance. 'Listed building' is probably a very good example of something that people understand and, therefore, they were very reluctant to change that term, despite the fact that our instincts, or my instinct, perhaps, more accurately, was to change it to something that was actually more reflective of what it meant. So, I think that's just an example of how it really does depend on the circumstances and depends on how people use these words in real life, as well as the technical aspect of it as well."*[182]

237. On consultation with stakeholders, the Counsel General confirmed:

> *"...there has been engagement with the specialist groups and individuals that are involved, particularly Cadw, who set up a task and finish group. That was composed of members drawn from across the sector who had a good knowledge of the legislation. They were able to test some of the changes in terminology with the task and finish group and feed back any concerns into the drafting process, which I think is reflected either in the legislation itself or*

[181] LJC Committee, 11 July 2022, RoP [61]
[182] LJC Committee, 11 July 2022, RoP [63]

> *in the explanatory notes. I think it was also tested on Cadw staff, those who actually have to make regular use of the legislation itself. My understanding is that that's been really quite a productive exercise…"*[183]

Schedule 7: End of interim protection or temporary listing for buildings

238. In relation to paragraph 2 of Schedule 7, the Drafters' Notes state that the current provisions in paragraph 2 of Schedule 1A and paragraph 2 of Schedule 2 to the 1990 Listed Buildings Act, which continue criminal liability after the end of the interim protection or temporary listing, have been extended to cover the offence of intentionally damaging a listed building under section 118 of the Bill. The Drafters' Notes also state that this removes an anomaly as the provisions should apply to all listed building offences.[184]

239. Given the seriousness of criminal convictions and penalties, we asked the Counsel General for further explanation as regards the reliance on Standing Order 26C.2(iv), and in particular asked for further reasons as to why this could be classed as a minor change to the law. We also noted that sections 79(2) and 83(4) of the Bill appear to expressly exclude the application of the section 118 offence in relation to buildings subject to interim protection or temporary listing. As such, we also asked for clarity as to how paragraph 2 of Schedule 7 will take effect.

240. In response, the Counsel General said he was grateful to us for drawing his attention to a mistake in paragraph 2 of Schedule 7. He said:

> *"This preserves any criminal liability arising under certain sections of the Bill while a building is subject to temporary listing or interim protection. Paragraph 2 of Schedule 7 should not mention liability under section 118, because section 118 does not apply to a building subject to temporary listing or interim protection. This is a matter I will seek to address at Detailed Committee Consideration if the Bill proceeds to that point."*[185]

Schedule 8: Procedures for orders modifying or revoking listed building consent, and Schedule 10: Procedure for orders terminating listed building partnership agreements

241. Schedule 8 sets out procedures that must be followed before an order made by a planning authority (Part 1), or an order made by the Welsh Ministers (Part 2), takes effect.

[183] LJC Committee, 11 July 2022, RoP [62]
[184] Drafters' Notes, page 31
[185] Letter from the Counsel General, 17 October 22, page 1

242. Schedule 10 puts in place the procedures for making termination orders. These procedures are derived from those for making an order to modify or revoke listed building consent in Schedule 8.

243. CLA Cymru suggested a possible change to the Bill and told us:

> *"35. In both these schedules, it would be highly desirable to include written representations as an option as well as a hearing, as elsewhere. While some aggrieved owners may want public hearings, others will feel intimidated by them, and (because there is usually a feeling that they require barristers and solicitors to be instructed) the costs for all parties are usually considerably higher."*[186]

244. The Counsel General was supportive of this suggestion and told us he thought it "makes perfect sense".[187]

245. The Counsel General later wrote to us on this matter and said:

> *"Ideally, if we were reforming historic environment legislation in Wales, then this is a matter we would have looked to include.*
>
> *However, as this is a consolidation Bill I recognise it would be a change from the existing legal position and one which some might consider to be more than a minor technical change. I would therefore welcome the Committee's view on this and whether it would be appropriate for the consolidation of the historic environment law to include this change."*[188]

Section 147: Steps for preservation of listed buildings in disrepair

246. Section 147 enables the Welsh Ministers to make regulations to confer power on local authorities or the Welsh Ministers to take steps for the proper preservation of listed buildings that have fallen into disrepair. In particular, the regulations may make provision for the service of a "preservation notice" on the owner of a listed building.

247. CLA Cymru told us:

> *"30. 'Preservation notices' have been carried forward from the 2016 Act, but have never been implemented. They are unlikely to be implemented because*

[186] Letter from CLA Cymru
[187] LJC Committee, 14 November 2022, RoP [99]
[188] Letter from the Counsel General, 25 November 2022

they would be very harmful to listed building protection, and it would be better if – like Areas of Archaeological Importance – they were removed from the Bill.

31. Cadw's guidance Managing listed buildings at risk in Wales correctly diagnoses the problem of heritage at risk as one primarily of use and economics, and in some cases ownership. As it says, the solution is a viable long-term use, because a building which is not used, viable, and relevant is unlikely to be put (or kept) in repair.

32. In contrast, the traditional approach to heritage at risk mis-diagnosed the problem as one solely of disrepair, soluble merely by telling local authorities to use a toolkit of aggressive statutory repair powers. That has not worked, because those powers are complex, ineffective, and often disproportionate, so LPAs do not use them, or focus them on the wrong targets, or fail. Even if the building was somehow repaired, without a viable use it would inevitably fall back into disrepair. Either a failure to act, or poorly targeted action, damage both individual historic assets and the reputation of the whole heritage protection system. 'Preservation notices' would make this worse, by making it even riskier for any rescuing purchaser to acquire a building at risk, a dangerous change. A report for Welsh Government concluded that there were extremely few cases where 'preservation notices' might make any effective contribution, and that other approaches were preferable (Advice to inform the development of preservation notices for listed buildings, Arcadis and Holland Heritage, 2017, section 4.7).

33. The solution is thus in two parts. The first, good advice based on a correct diagnosis of the problem, already largely exists in the Cadw guidance. Properly used, this provides solutions for heritage already at risk, and (more importantly) encourages prevention through viable use, so that buildings do not become at risk.

34. Secondly, in a small minority of often-prominent cases it is clear that there is a use and a viable solution, and repairing purchasers, but the owner is refusing to implement this. In these specific situations, the power to change ownership may need to be used, more assertively and effectively than now. It is not realistic to expect local authority staff to do that, and it needs to be organised centrally, potentially by a specific expert attached to Cadw. This would require only limited resource, and a few successful cases, effectively

> *publicised, would much reduce the problem. If Welsh Government wishes to solve this, it should act on these lines. 'Preservation notices' would make the situation worse, have not been implemented, for that reason, and should – like Areas of Archaeological Importance – be removed from the Bill."*[189]

248. We asked the Counsel General for his views on what CLA Cymru had told us. He said:

> *"The inclusion of the preservation notices was a late amendment to the Historic Environment (Wales) Act 2016. I think that, as an organisation, they have consistently argued against the introduction of preservation notices. They made it clear that they would—and I think they always have—welcome legislation that would change that. Of course, the removal of section 147 is what they are seeking. (...) I'd very much welcome getting this committee's views on that, and I think if your inclination or the conclusion that you come to is that that is a sensible recommendation, it is something that we could consider at the next stage."*[190]

249. Mr Gwilym Hughes added:

> *"When we were developing the Historic Environment (Wales) Act, or Bill as it was then, back in 2015-16, we tried to be very proactive about undertaking detailed research*[191] *about what the potential implications of particular measures might be. Because this was quite a late amendment, the research was rather retrospective, and it certainly highlighted, that research, a number of the unintended consequences accompanying the introduction of preservation notices, not least the potential for the active discouragement of individuals and organisations taking on listed buildings at risk, because there'd be the potential possibility of preservation notices and penalties if they did so. And that view was certainly endorsed by the Country Land and Business Association at the time, and other organisations representing owners of historic buildings. So, the research does offer quite a lot of support for their view and the potential impact on listed buildings at risk. Obviously, this provision, as they rightly say, hasn't been commenced and could*

[189] Letter from CLA Cymru
[190] LJC Committee, 14 November 2022, RoP [107]
[191] Advice to inform the development of preservation notices for listed buildings – Final report – September 2017

potentially be repealed, so as the Counsel General has said, we'd welcome the committee's views on this."[192]

Section 155(5): Supplementary provision about powers of entry

250. Section 155 of the Bill makes supplementary provisions associated with the use of the powers of entry conferred under section 152 or with a warrant under section 154.

251. In relation to section 155(5), the Drafters' Notes state that the Bill now includes an addition of a time limit for claiming compensation for damage. The Drafters' Notes also state that this corrects a gap and makes the position consistent with that for monuments (based on SI 2017/641, regulation 2(1)(e)).[193]

252. We asked the Counsel General to confirm the current time limit, and asked for further explanation regarding the reliance on Standing Order 26C.2(iv), in particular on how this change does not amount to a change in policy. In response we were told:

"No time limit is specified for claiming compensation under section 88B(7) [of the 1990 Listed Buildings Act], leaving the position unclear, but it cannot be the case the entitlement to make a claim lasts forever. Compensation claims for damage related to the exercise of powers of entry must be made in a timely manner so that evidence of damage can be presented.

Section 9 of the Limitation Act 1980 sets a 6-year limitation period for claiming any "sum recoverable by virtue of any enactment". That limitation period may apply to compensation under section 88B(7) of the 1990 Listed Buildings Act, and is obviously very different from the 6-month limitation periods for all other compensation claims under the legislation consolidated in the Bill.

The failure of the 1990 Listed Buildings Act to provide for a time limit for claiming compensation under section 88B(7) is clearly an anomaly – and it is interesting to note Cadw have no records of a claim being made. A 6-month time limit was included in section 155(5) of the Bill for consistency with the other compensation provisions, in the interests of achieving a satisfactory consolidation. This is not a change of policy but involves correcting an

[192] LJC Committee, 14 November 2022, RoP [108]. See also RoP [110].
[193] Drafters' Notes, page 51

anomaly by bringing claims under section 155(5) within the same general policy applying to all time limits for compensation claims under the Bill."[194]

[194] Letter from the Counsel General, 17 October 2022, paragraphs 110 to 112

Section 156(1): Exempt religious buildings

253. Section 156(1) enables the Welsh Ministers to make regulations to recognise a religious building used for religious purposes as an "exempt religious building".

254. The Drafters' Notes state that the default position in current law has been reversed, so that religious buildings are exempt only to the extent provided for in regulations, rather than being exempt unless regulations restrict or exclude the exemption. The Drafters' Notes also state that this better reflects the existing position under the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (Wales) Order 2018[195] which removes exemption entirely but then re-exempts some buildings.

255. We asked the Counsel General to confirm who had been consulted on this proposed change, and how reversing the current default position amounts to a clarification. We were told that drafting had been shared with Cadw's task and finish group and no issues had been raised. We were also told:

> *"The current legal position, set out in the 1990 Listed Buildings Act and SI 2018/1087, has been criticised by users as complicated and confusing.*
>
> *Section 60 of the Act gives the false impression all ecclesiastical buildings used for ecclesiastical purposes are exempt, when the effect of SI 2018/1087 is the exemption is relatively narrow. If the default position in primary legislation is reversed and regulations are made conferring the same exemption as SI 2018/1087, the result will be clearer and simpler legislation. In that respect, section 156 of the Bill helps to clarify the law under SO 26C.2(ii).*
>
> *The change of approach in section 156 could also be seen as moving the general provision that ecclesiastical buildings are not exempt, currently set out in article 3 of SI 2018/1087, onto the face of the Bill. Moving the provision from secondary to primary legislation could be described as a minor change appropriate to make for the purposes of achieving a satisfactory consolidation under SO 26C.2(iv)."*[196]

[195] SI 2018/1087

[196] Letter from the Counsel General, 17 October 2022, paragraphs 113 to 115

Section 207: Definitions relating to the Crown

256. Section 207 defines key terms used in the Bill relating to the Crown, including "appropriate Crown authority" and "Crown land".

257. With regards to section 207(3), (6)(c) and (9)(a), the Drafters' Notes state that the references to interest in the right of Her Majesty's[197] private estates in the 1979 Act and 1990 Listed Buildings Act have been applied to monuments. The Drafters' Notes also state that the change has been made for consistency with listed buildings and that section 50(4) of the 1979 Act is currently silent on this point but with no reason.[198]

258. We asked the Counsel General what discussions the Welsh Government has had with the UK Government on Crown-related matters, and asked for a further explanation on the impact of the change, including confirmation of the private estates that will be captured by section 207. In response we were told that no discussions have been had with the UK Government specifically on Crown-related land. We were also told that the Welsh Government has:

> *"...liaised with the UK Government on the Bill more generally and no concerns have been raised in relation to Crown-related land.*
>
> *The approach adopted to these interests means land in which these interests exist could be subject to Part 2 of the Bill, as applied by section 74. We don't think this is significant because section 74 allows interferences with that land only to the extent Crown interests are unaffected, and does not affect things done by or on behalf of the Crown. And as suggested in the Drafters' Notes, there seems no justification for restating the current inconsistency between the two principal Acts. The drafting would capture any interests in land held in right of His Majesty's private estates."*[199]

[197] This reference relates to the Drafters' Notes laid before the Senedd in July 2022, and before the death of Her Majesty Queen Elizabeth II.
[198] Drafters' Notes, page 68
[199] Letter from the Counsel General, 17 October 2022, paragraphs 153 and 154

Changes to subordinate legislation procedures, the movement of provisions between subordinate and primary legislation, and new regulation-making powers provided to the Welsh Ministers

Orders vs regulations

259. The Drafters' Notes state:

> *"The legislation being consolidated contains various powers for the Welsh Ministers to make subordinate legislation in the form of an order made by statutory instrument. Since 2014 it has been the practice of the Office of the Legislative Counsel that powers to make subordinate legislation by statutory instrument should normally take the form of powers to make regulations (see Writing Laws for Wales: A guide to legislative drafting, paragraph 9.2). The Bill therefore restates all powers of the Welsh Ministers to make orders by statutory instrument as powers to make regulations."*[200]

Changes to subordinate legislation procedures

260. Section 209 of the Bill relates to regulations that may be made under the Bill, if and when enacted.

261. Section 209(6) provides for the downgrading of scrutiny procedures – from affirmative to negative – attached to certain existing regulation-making powers relating to partnership agreements. We asked the Counsel General to clarify how this was in line with Standing Order 26C.2(iv). The Counsel General responded to this specific point but also commented more broadly on the approach adopted in the Bill. He said:

> *"This change has been made in the context of a change in the approach adopted by the Bill to what's covered on the face of the primary legislation. We have restated much more on the face of the Bill about key matters relevant to partnership agreements than currently appears on the face of the Ancient Monuments and Archaeological Areas Act 1979 and Planning (Listed Buildings and Conservation Areas) Act 1990. For example, provision about the termination of partnership agreements is covered exclusively by the Bill and not left to regulations (as is currently the case).*

[200] Drafters' Notes, paragraph 13

This difference in approach justifies a different procedure in our view, and this is something we think is permitted by Standing Order 26C.2. The matters we are leaving to regulations subject to negative procedure are the types of procedural matters that are also left to negative regulations elsewhere in the Bill; for example, in the provisions about applications for scheduled monument consent.

It's worth noting that any regulations modifying the effect of Part 2 of the Bill to partnership agreements would still be subject to the affirmative procedure. This is consistent with the Government's policy on determining the suitable procedure to apply to subordinate legislation."[201]

The movement of provisions between subordinate and primary legislation

General

262. We asked the Counsel General and his officials to confirm and describe what provisions of subordinate legislation are being consolidated in the Bill, i.e. what is being moved from regulations to the face of the primary legislation. Mr Dylan Hughes told us:

"Generally speaking, we have moved provisions from subordinate legislation into primary legislation. So, in that respect, it's a good thing, shall we say? The reason we felt able to do that is because, often, the reason the power is taken and provision is made in subordinate legislation is because it's felt that we need flexibility and an ability to change the law quickly, as and when required. But sometimes it doesn't turn out like that, and some of the examples are examples of situations where the law hasn't been changed after the event, and it's felt, therefore, that it is established, and in consequence that it should be in the primary legislation."[202]

263. Dr George added:

"One example is that, if you look at Schedule 3 to the Bill, that sets out what are called class consents, so cases where a scheduled monument consent is given for a whole category of works, without anybody needing to apply for it. Now, that's currently set out in an Order that was made under the 1979 Act, in 1994; it's not been amended since it was made nearly 30 years ago. And

[201] Letter from the Counsel General, 17 August 2022, paragraphs 28 to 30
[202] LJC Committee, 11 July 2022, RoP [116]

> *we took the view that, because it's an important part of the system, it would be more accessible to describe all those classes of works in the Bill so you can just see it all in one piece of legislation, and not have to go off to a separate Order. Another example would be that both the 1979 Act and 1990 Act have a lot of provisions under which people can claim compensation for various things that are done. They currently leave it to regulations to set out how long you've got to claim compensation, but it's a set six-month period in every case that's been set out in subordinate legislation that has never changed in many, many decades. So, we took the view, again, that it would be more helpful to just say this in the Bill, but keep flexibility for regulations to amend the time limits, if that proved necessary in the future."*[203]

264. When the Law Commission representatives gave evidence to us in September, Dr Mynors told us:

> *"In terms of the ancient monuments legislation, as it has been until now—monuments of special interest, as it will be—it's noticeable that the principal secondary legislation has been incorporated as a schedule of the new Bill—that is, the classes for which consent is automatically granted. And that is sensible, because that hasn't actually been changed much or at all since about 1980, so that makes sense to bring that into the primary legislation."*[204]

265. In section 100(4) of the Bill there is an example of a provision currently on the face of the 1990 Planning Act which is being moved to a regulation-making power. We asked why that has happened and whether the Welsh Government was content that this was in line with the Standing Order that says that only minor changes should be made. Dr George told us:

> *"...it's really about consistency. This is about cases where somebody applies for consent and doesn't get a decision, and, after a certain amount of time, if they hear nothing they can appeal, as if the application had been refused. So, there are three cases. In two of them, the period you have to wait is set in regulations, but in one of them, for no reason that we could really tell, it's set out in section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990, but the period is eight weeks in every case. We think it would be clearer just to have that set out in one place, rather than partly in the Act and partly in regulations. And we think it makes more sense for this to be dealt*

[203] LJC Committee, 11 July 2022, RoP [117]
[204] LJC Committee, 26 September 2022, RoP [197]

> *with in regulations along with other procedural matters and time limits and so on, in case it needs to change in the future."*[205]

266. We have already looked at some of these issues earlier in the Report, and consider some further examples below.

Section 81: Review of decision to list building

267. According to the Explanatory Notes, where the Welsh Ministers list a building, section 81 requires them to give any owner or occupier of the building an opportunity to request a review of their listing decision.

268. As regards section 81(2) and (6), the Drafters' Notes state that the existing ground for review has been moved from the Listed Buildings (Review of Listing Decisions) (Wales) Regulations 2017 (SI 2017/644)[206] to the Bill "with simplified wording" and that this is subject to a new power to amend the ground for review. The Drafters' Notes also state that the change ensures that the section deals with this important matter, while retaining flexibility for any future changes.[207] Previously, section 2D(6)(a) of the 1990 Listed Buildings Act gave Welsh Ministers the power to prescribe grounds in regulations. In the Bill, the grounds are set out in the primary legislation with a Henry VIII power to amend that list (via the affirmative procedure).

269. We asked for clarity as to how this new regulation-making power is within the scope of Standing Order 26C.2(iv). In response we were told:

> *"The main change here is moving the grounds for reviews from regulations into the Bill, to reflect the importance of the provisions. Retaining the power to amend them (with an enhanced Senedd procedure because any regulations would now be amending primary legislation) preserves flexibility that already exists. The combined effect of these changes is to make the provisions more coherent and accessible without significantly altering their practical effect. It is appropriate to make the changes for the purposes of achieving a satisfactory consolidation."*[208]

270. As regards section 81(3) and (4), the Drafters' Notes state that the requirement to carry out reviews and make decisions in section 2D(3)(a) and (b) of the 1990 Listed Buildings Act has been restated to reflect the requirement in regulations (SI 2017/644, regulation 3) for all reviews to be

[205] LJC Committee, 11 July 2022, RoP [120]
[206] SI 2017/644
[207] Drafters' Notes, page 32
[208] Letter from the Counsel General, 17 October 2022, paragraph 43

carried out by persons appointed by the Welsh Ministers, and that the existing regulation-making power to specify exceptions is being retained. The Drafters' Notes also state that the position under the existing regulations is "not expected to change" and that "section 2D(3) may be misleading".[209]

271. Under section 2D of the 1990 Listed Buildings Act the default position is that the Welsh Ministers must carry out the review, subject to exceptions set out in regulations. While in practice SI 2017/644 has the effect of requiring all applications to be treated as exceptions, we asked for a further explanation as to how inverting the existing position in primary legislation amounts to a minor change in the law. We also asked for a further explanation as to why the position is not expected to change. We were told:

> *"Section 81 of the Bill reflects the effect of regulation 3 of SI 2017/644, with a power to make exceptions derived from paragraph 1(2) of Schedule 1B to the 1990 Listed Buildings Act. This does not change the substantive law but reflects the existing effect of paragraph 1 of Schedule 1B and regulation 3. The only change is in the status of the provision for all reviews to be carried out by appointed persons, which has been moved from secondary to primary legislation. This is considered appropriate to achieve a more coherent piece of legislation.*
>
> *Since the Welsh Ministers are responsible for listing buildings, the use of an appointed person in designation reviews ensures a degree of independence and transparency, the need for which is unlikely to change in future."*[210]

Section 130: Order to permit steps required by enforcement notice

272. Section 130 allows an owner of land to apply for an order from a magistrates' court requiring another person who has an interest in the land to allow the owner to take steps required by an enforcement notice. The court may make such an order if it is satisfied that the other person is preventing the owner from taking the steps required by the enforcement notice.

273. In relation to section 130, the Bill omits powers to apply section 289 of the *Public Health Act 1936* (the 1936 Act) with modifications, and the Bill instead restates the effect of section 289 as modified. The Drafters' Notes state that the provisions have been moved because of the importance of the provision and because how section 289 applies has not changed for a long time (since at least the Town and Country Planning (Listed Buildings and Buildings in

[209] Drafters' Notes, page 32
[210] Letter from the Counsel General, 17 October 2022, paragraphs 44 and 45

Conservation Areas) Regulations 1972[211]). The Drafters' Notes also state that this change was recommended by the Law Commission for the corresponding powers in the 1990 Planning Act.[212]

274. We asked for further clarity as regards the omissions and modifications, and asked for a further explanation on the decision to apply the Law Commission's recommendations relating to the 1990 Planning Act to the 1990 Listed Buildings Act. In response, we were told:

> *"Section 42(3) of the 1990 Listed Buildings Act confers a power to apply certain sections of the Public Health Act 1936 (the 1936 Act) with modifications. That is currently done by regulation 15 of SI 2012/793. To understand the position, a reader must therefore consult section 42, regulation 15 and the 1936 Act. In the Bill, section 130 restates the effect of those provisions in one place, for the purposes of achieving a satisfactory consolidation.*
>
> *Section 42(4) specifies a particular purpose for which modifications of section 289 of the 1936 Act may be made. No modifications have been made for that purpose, and Cadw have not identified any that might be needed. That power is therefore omitted from the Bill as having no practical utility. The Drafters' Notes should have cited SO 26C.2(iii) for this omission and will be updated in due course.*
>
> *Section 178 of the 1990 Planning Act contains identical powers. Recommendation 18-13 in the Law Commission's report Planning Law in Wales was to restate those provisions in primary legislation, and is equally applicable to section 42 of the 1990 Listed Buildings Act."*[213]

Section 132(5): Recovery of costs of compliance with enforcement notice

275. Section 132 provides for the recovery from any owner of reasonable costs incurred by a planning authority after exercising the power in section 131 and entering land to take the steps required to comply with an enforcement notice. The section also allows for the recoverable costs to be a local land charge until such time as they are recovered (subsections (5) and (6)).

[211] SI 1972/1362
[212] Drafters' Notes, page 46
[213] Letter from the Counsel General, 17 October 2022, paragraphs 91 to 93

276. The Drafters' Notes state that a provision for costs of works to be a charge on the land has been moved from regulations to the Bill, and the regulation-making power is omitted.[214]

277. We initially asked the Counsel General to provide clarity as to why the power that was previously discretionary (and could be changed) is now to be made permanent on the face of the Bill, and for his views on whether this amounted to a policy change. We were told:

> *"Section 132(5) and (6) of the Bill do not involve a change of policy. Regulation 15(2) of SI 2012/793 is moved into the Bill for the purposes of achieving a satisfactory consolidation. Dealing with this issue in primary legislation is consistent with section 55(5C) of the 1990 Listed Buildings Act, restated in section 146(3) of the Bill."*[215]

278. Previously, regulations could – but did not have to – provide that the costs incurred for compliance with an enforcement notice were a charge on the land. As a result of the Bill, the primary legislation will now say that the costs incurred will always be a charge on the land, and there is no longer any power to change this.

279. As such, we subsequently asked the Counsel General and his officials if they were confident that it is not necessary to retain the power to change this position. Dr George told us:

> *"As you've said, what we've done is move a provision that is currently in regulations onto the face of the Bill. One of the reasons we did that was just to be more consistent. There are other provisions about recovery of costs being a charge on the land that are on the face of primary legislation already, so we wanted to make it a more consistent position. I think more generally, wherever we've left out a regulation-making power in the Bill, that's on the basis that we concluded with Cadw that we can't foresee any need to make regulations in the future. I don't think there's any significant likelihood of the power being used. We can't be 100 per cent certain that that's going to be the case, but I think the general approach has been that if things are well established and we can't foresee any need for change, then we shouldn't be keeping regulation-making powers just in case some need for them might turn up in the future. (...)*

[214] Drafters' Notes, page 46
[215] Letter from the Counsel General, 17 October 2022, paragraph 94

It doesn't change the current law, because the regulations do currently do that."[216]

New regulation-making powers provided to the Welsh Ministers

280. When the Counsel General first gave evidence to us in July we asked him where in the Bill we can find examples of powers being given to the Welsh Ministers to change policy. The Counsel General told us:

"...generally, I think the overall effect of this consolidation Bill is that we would be relying on subordinate legislation far less than we actually do now. We have, within the Bill, omitted some powers to make subordinate legislation that wasn't considered necessary, and have moved some important material that's currently in subordinate legislation, as has been said, now onto the face of the Bill. And, again, this is obviously one of those areas that the committee will want to look at, and, of course, there might be changes in the future. So, the Bill does include powers to amend some of the provisions in the future, but they're all subject to the affirmative Senedd procedure, even if the existing regulation-making powers are actually subject to the negative procedure. There's a small number of new regulation-making powers in the Bill: a power in section 2 to bring religious buildings within the definition of monument. That power's been included because the scope of the existing ecclesiastical exemption is not completely clear, so it's in case it's necessary to clarify the exemption in the future. So, there are a number of examples like that, and obviously, as the scrutiny process is under way, I'm happy, if any questions are raised, to provide further clarification, if there are any from the committee."[217]

281. We followed-up on this matter when we wrote to the Counsel General after the July evidence session and asked him to confirm if there are new powers included in the Bill that give the Welsh Ministers powers to make policy changes. The Counsel General told us:

"There are...examples in the Bill where provision has been moved from subordinate legislation into the Bill but changes might be needed in future. In those cases, the Bill includes powers to amend the provisions. One example is the power in Schedule 3 to the Bill to change the categories of class consents; this is something that the 1979 Act leaves entirely to subordinate legislation.

[216] LJC Committee, 14 November 2022, RoP [102] and [104]
[217] LJC Committee, 11 July 2022, RoP [121]

> *These examples do not involve the conferral of new powers and simply retain existing flexibility available to the Welsh Ministers to make adjustments to the system created by the Bill."*[218]

282. The Counsel General also confirmed the example discussed earlier in the report in relation to section 2(3) of the Bill.[219] This new regulation-making power in section 2(3) is not limited to providing clarity. It is a power to apply historic environment law to buildings (i.e. religious buildings) that have not previously been subject to historic environment law. The power can also be used to make incidental, supplementary, consequential, transitory, transitional or saving provision (read with section 209(2)). We were told that it is necessary to have flexibility to make provision to ensure buildings which should be protected can remain protected, if that is appropriate.[220]

283. When the Counsel General and his officials appeared before us on 14 November, we again asked for confirmation that our understanding of the effect of the new power was correct, and why it amounts to a minor change. Dr George told us:

> *"Yes, this picks up on the answer to the last question, really. We didn't want to keep the doubt about what 'ecclesiastical' meant, so we've adopted a reference to 'religious buildings used for religious purposes', but the effect of that is, potentially, that it has a slightly wider meaning than the current provision. Now, I think Cadw's intention is not to change the policy on this at all, but the regulation-making power there is in there in case any adjustments are needed in the future. So, if it turned out that, actually, we did need to deal slightly differently with different religious denominations, for example, then the regulation-making power would allow that to be done."*[221]

284. When we wrote to the Counsel General in September, we noted that it was unclear to us how many new delegated powers are in the Bill, and asked for clarity and confirmation. In response we were told that, in most instances, the delegated powers in the Bill are not new, but have been derived from existing legislation. We were also told:

> *"In some cases, the character of existing delegated powers has been altered, for instance from directions to regulations, but they are not new powers (see response to questions 29 to 31). In other cases, delegated powers have been*

[218] Letter from the Counsel General, 17 August 2022, paragraph 27
[219] Letter from the Counsel General, 17 August 2022, paragraphs 24 to 26
[220] Letter from the Counsel General, 17 October 2022, paragraph 4
[221] LJC Committee, 14 November 2022, RoP [41]

> *changed, frequently narrowed, to reflect that the provisions have now been incorporated in the Bill, rather than left to subordinate legislation.*
>
> *A new delegated power for the Welsh Ministers has been identified in the Bill in section 2(3); it allows the Welsh Minsters to except specified buildings from a general exclusion of religious buildings in religious use from scheduling (see response to question 1).*
>
> *No new delegated powers have been identified in the Bill for any other public bodies. In some instances, regulation-making powers for local authorities (including National Park authorities) have been changed to by-law-making powers."*[222]

285. We also asked specifically about powers in sections 105, 161, 163 and 209.

286. With regards to section 105(3), the Drafters' Notes state that a current power for regulations to require applications to be made to the Welsh Minsters is extended to Crown applications, and a power to provide for Ministers to serve notices is omitted.[223] We asked for confirmation that this is an extension of a delegated power, and further explanation as to how Standing Orders 26C.2(ii), (iii) and (iv) each apply to the provision. We were told:

> *"Section 105(3) of the Bill is not giving the Welsh Ministers a new power they do not have under section 82F of the 1990 Listed Buildings Act. But if section 105(3) only stated it applied to applications by planning authorities, that would be misleading as it might imply the power from section 82F was being narrowed. (…)*
>
> *On further consideration, we do not consider it is necessary to rely on SO 26C.2(iv) for either of these changes. The Drafters' Notes will be updated in due course to omit the reference to paragraph (iv)."*[224]

287. In section 161(2)(c) and (d) of the Bill, the Welsh Ministers' direction-making power regarding exempting buildings from the requirement for consent has been limited to cases involving individual planning authorities, and replaced with a power to make regulations (subject to the affirmative procedure, by virtue of section 209(5)(h)) conferring exemptions that apply generally. The Drafters' Notes state that regulations are considered more appropriate for making general exemptions given their potential effect on the scope of the conservation area

[222] Letter from the Counsel General, 17 October 2022, paragraph 159 to 161
[223] Drafters' Notes, page 39
[224] Letter from the Counsel General, 17 October 2022, paragraphs 75 and 77

consent regime.[225] We asked for further explanation as regards the reliance on Standing Order 26C.2(iv) and asked why regulations are considered more appropriate than a general direction-giving power. In response we were told:

> *"To the extent the existing power of direction enables provision to be made which will effectively alter the conservation area regime across Wales, the Welsh Ministers consider it is more appropriate for that to be subject to Senedd scrutiny. Section 161 provides the power must now be exercised by regulations. This is a change to the existing law: section 75(1)(d), (2) and (3) of the 1990 Listed Buildings Act enable the Welsh Ministers to make general directions (not regulations). We consider this is appropriate for the purposes of achieving a satisfactory consolidation."*[226]

288. Section 163 makes provision in relation to the application of Part 3 of the Bill to conservation areas. Section 163(3) provides the Welsh Ministers with a new Henry VIII power to amend section 163 to make additional or different provision about the application of Chapters 2, 4 and 6 of Part 3 in relation to buildings to which section 161 applies.

289. The Drafters' Notes state that modifications of provisions in Part 3 of the Bill as they apply in relation to conservation area consent have been moved from regulations into the Bill.[227]

290. The Counsel General and his officials told us:

> *"Moving modifications of provisions as they apply in relation to conservation area consent from regulations into primary legislation is a minor change to the current law; we are restating modifications that have already been made. But we think this change significantly improves accessibility. The fact many listed buildings provisions apply in modified form to conservation areas is an important matter, and it is more accessible to have the modifications set out in the conservation area part of the primary legislation than to oblige readers to locate those modifications in separate regulations.*
>
> *The change in the applicable Senedd procedure is a consequence of moving the existing modifications into primary legislation: in order to preserve the*

[225] Drafters' Notes, page 54
[226] Letter from the Counsel General, 17 October 2022, paragraph 126
[227] Drafters' Notes, page 55

> *Welsh Ministers' power to make modifications in future, it is necessary to provide a power to amend primary legislation."*[228]

291. Section 209(2)(b) contains the express powers for the Welsh Ministers to make ancillary provision in relation to all regulation-making powers in the Bill. Subsection (2)(b) provides that a power to make regulations under the Bill includes power to make incidental, supplementary, consequential, transitory, transitional or saving provision.

292. The Drafters' Notes state that this ensures powers to make ancillary provision are included for all powers from the 1990 Listed Buildings Act and the 1990 Planning Act and that, while such powers can generally be implied, the change ensures consistency.[229] The Drafters' Notes also state that "Clause 112 of the Levelling-up and Regeneration Bill introduced to the UK Parliament on 11 May 2022 would amend both Acts to include express ancillary powers, but this change does not depend on that Bill being passed".[230]

293. We asked for confirmation that this provision contains the creation of broader delegated powers for the Welsh Ministers, particularly as regards the additional 'supplementary' power. We were told:

> *"The 1990 Planning Act and 1990 Listed Buildings Act do not include general provisions conferring express powers for orders and regulations to make ancillary provision, but such powers are included in some sections. Modern drafting practice is to spell out that powers to make subordinate legislation include powers to make ancillary provision, although it is long established that even in the absence of such provision ancillary powers can be implied where they are needed: see Attorney General v Great Eastern Rly Co (1880) 5 App Cas 473. Accordingly, subordinate legislation under the 1990 Acts may make consequential, incidental and supplementary provision where appropriate or necessary.*
>
> *The inclusion of express ancillary powers in section 209(2)(b) of the Bill clarifies those powers are available and avoids the need to rely on implied powers. (Similarly, the Explanatory Notes to the Levelling-up and Regeneration Bill state the purpose of inserting express ancillary powers into the 1990 Acts is "to make the legal position clear and express".) It would be misleading and unhelpful for section 209 to provide that only certain powers*

[228] Letter from the Counsel General, 17 October 2022, paragraphs 127 and 128
[229] Drafters' Notes, page 69
[230] Drafters' Notes, page 69

in the Bill included ancillary powers, as that could suggest ancillary powers were available in some cases but not others."[231]

Our view

294. Our consideration and discussion set out above, including on specific sections of the Bill, leads us to make the following conclusions and recommendations.

Conclusion 3. We are broadly satisfied that the Bill correctly consolidates existing legislation, or changes its substantive legal effect, only to the extent allowed by Standing Order 26C.2.

295. We highlight above that Standing Order 26C.2(ii) states that a Consolidation Bill may clarify the application or effect of existing law.

296. In a broad sense, one example of what the Bill does in this regard is to include common (or case) law in the consolidation exercise (as permitted by Standing Order 26C.1). We note what the Counsel General and his officials told us on this matter.

297. We focused our attention, as set out in the first section of this Chapter, on several provisions in, and matters relevant to, the Bill that seek to clarify the application or effect of the current law.

298. As regards 'preservation' vs 'conservation', we acknowledge the concerns expressed by some stakeholders, and welcome them being drawn to our attention. We also welcome the detailed and thorough explanations provided by the Counsel General and his officials in response to the points raised. In particular, we note that, in drafting the Bill, account has been taken of both practice and case law. Further, we also note that the current supporting guidance sets out how preservation of the significance of historic assets can be achieved through conservation, and that this will be restated (should this Bill proceed) within the relevant guidance and planning advice.

299. With regards to section 76(5) (which relates to the duty to maintain and publish a list of buildings) we again value the input from stakeholders in drawing to our attention a potential issue. We acknowledge the commitment from the Counsel General to look again at this provision with a view to bringing forward an amendment (should the Bill proceed) to insert the word 'ancillary' into section 76.

[231] Letter from the Counsel General, 17 October 2022, paragraphs 157 and 158

300. Similarly, as regards section 97(5) (which relates to the power to grant consent subject to conditions), we further acknowledge that the Counsel General will also look again at this provision with a view to proposing amendments to the Bill (should it proceed) to mitigate against the potential for conflict or duplication with current planning practice as highlighted by stakeholders.

301. In accordance with Standing Order 26C, the consolidation process has also included removing or omitting provisions from the existing legislation where they are, in the Welsh Government's view, obsolete, spent or no longer of practical utility or effect.

302. We recognise that, in accordance with Standing Order 26C.2(iii), the Welsh Government is giving-up some regulation-making powers which it currently holds. We acknowledge that the risk in doing this falls on the Welsh Government. During our scrutiny, we sought to ensure that the Welsh Government has gone through due consideration and process in making such decisions. Nevertheless, at a time when concerns have been raised across parliaments about the balance of power tipping unfavourably towards governments and away from the legislatures, we welcome the fact the Welsh Government has identified what it considers to be unnecessary executive powers.

303. Standing Order 26C.2(iv) states that a Consolidation Bill may make minor changes to existing law for the purposes of achieving a satisfactory consolidation.

304. Again, we focused our attention on several provisions in, and matters relevant to, the Bill that seek to make changes in accordance with this Standing Order.

305. As regards Schedule 7, we drew the Counsel General's attention to a potential issue relating to how paragraph 2 of Schedule 7 will take effect given that sections 79(2) and 83(4) of the Bill appear to expressly exclude the application of the section 118 offence in relation to buildings subject to interim protection or temporary listing.

306. We acknowledge the evidence from the Counsel General, that there is an error in the Bill and that paragraph 2 of Schedule 7 should not mention liability under section 118, because section 118 does not apply to a building subject to temporary listing or interim protection. We welcome the Counsel General's commitment to address the issue at Detailed Committee Consideration (if the Bill proceeds to that point).

307. As highlighted earlier in the Chapter, Schedule 8 to the Bill deals with procedures for orders modifying or revoking listed building consent, and Schedule 10 deals with procedures for orders terminating listed building partnership agreements. We received evidence suggesting that the Welsh Government should use the Bill to make changes to existing law so that, in both

these Schedules, the ability for written representations is provided as an option as well as in-person hearings.

308. While we note that the Counsel General is supportive of the suggestion, the Counsel General himself acknowledges that "it would be a change from the existing legal position and one which some might consider to be more than a minor technical change". Given that we only heard this suggestion from a single stakeholder, we do not consider it appropriate for us to give a view or make a recommendation that such amendments should be pursued.

Recommendation 7. The Counsel General and the Welsh Government should review the procedures set out in Schedules 8 and 10 to the Bill and assess whether the evidence-base supports a change in the law to allow for written representations as an alternative to in-person hearings and, if so, should consider the most appropriate way to achieve this objective.

309. We have arrived at a similar conclusion as regards section 147 of the Bill which relates to steps for the preservation of listed buildings in disrepair. We acknowledge the evidence we received that existing provision for preservation notices should be removed from the Bill. Further, we note the evidence from the Counsel General and his officials on this matter. However, we again do not consider it appropriate for us to give a firm view or make a recommendation based on the very limited evidence we received and without the matter having been the subject of fuller scrutiny.

310. Given that the Welsh Government appears to have been aware for some time of the potential unintended consequences accompanying the introduction of preservation notices, it is unclear to us why work was not undertaken in preparation for the introduction of this Bill as it would have been an open and transparent way to address this matter.

Recommendation 8. The Counsel General and the Welsh Government should review the existing law and assess the evidence-base to support a change in the law such that provision for preservation notices is removed, and should consider the most appropriate way to achieve this objective.

311. The Counsel General has highlighted a number of areas where, should the Bill proceed to the amending stages, he will look to bring forward amendments to address issues which have been identified during our Initial Consideration.

312. We are aware that Standing Order 26C.82 sets out the admissibility criteria for amendments to Consolidation Bills and requires any such amendments to be, amongst other things, relevant to the Consolidation Bill or the provisions of the Consolidation Bill which it would amend. Such amendments may also not cause the Bill to cease to be a Consolidation Bill.

Recommendation 9. The Counsel General should, when tabling amendments to the Bill, provide a full and detailed explanation as to how, in his view, each amendment meets the criteria set out in Standing Order 26C.82.

313. Recommendation 9 should apply to all future Consolidation Bills introduced into the Senedd.

314. Standing Order 26C permits Consolidation Bills to include provisions that change subordinate legislation scrutiny procedures already set out in existing law, that move provisions between subordinate and primary legislation, and that create new regulation-making powers for the Welsh Ministers.

315. We acknowledge the changes which are being made to subordinate legislation scrutiny procedures via the Bill, and the movement of some existing provisions from subordinate legislation to primary legislation and vice versa.

316. We specifically wish to comment on the creation in the Bill of a number of new regulation-making powers.

317. We highlighted earlier in the Report that there is a new regulation-making power in section 2(3) of the Bill which is not limited to providing clarity. It is a power to apply historic environment law to buildings (i.e. religious buildings) that have not previously been subject to historic environment law.

318. In Chapter 4 we highlighted the Welsh Government's explanation that section 2(3) of the Bill restates section 61(8) of the 1979 Act in the way it considers is most likely to be compliant with human rights and that the regulation-making power is to ensure exceptions to the general position may be specified.

319. While we acknowledge the evidence given by the Counsel General and his officials in relation to section 2(3), we believe further clarity on the regulation-making power is warranted.

Recommendation 10. The Counsel General should clarify, in advance of the relevant Senedd debate on whether the Bill should proceed as a Consolidation Bill, whether section 2(3) of the Bill would still be compliant with human rights without the new regulation-making power and whether including a power that allows exceptions to the general position to be specified by regulations amounts to a minor change to existing law.

320. We acknowledge and wish to highlight that sections 81 and 163 of the Bill (which deal with reviewing of decisions to list buildings and the application of Part 3 of the Bill to conservation

areas, respectively) both contain new Henry VIII regulation-making powers. We note the evidence from the Counsel General and his officials on both these matters.

321. Finally, and as regards section 105(3), we acknowledge that the Welsh Government will be updating the Drafters' Notes to confirm its revised position that it no longer believes it necessary to rely on Standing Order 26C.2(iv) for either of the changes made in this section of the Bill.

6. Does the Bill consolidate the law clearly and consistently?

In accordance with Standing Order 26C.17(iv) our consideration of the Bill has included assessing whether it consolidates existing legislation clearly and consistently.

General

322. In the EM, the Welsh Government describes the UK's statute book as "disorganised" and "vast and sprawling", and states that layers of legislation make "the legislative landscape difficult for users to navigate".[232]

323. As highlighted earlier in the report, the Welsh Government has stated that the objective of this consolidation Bill is to:

> *"...improve the accessibility of the historic environment legislation for Wales, by providing a single modern, bilingual Act for Wales. This will promote consistency in the language, form and operation of the legislation supporting the effective protection and management of the historic environment."*[233]

324. In the EM, the Welsh Government states that, in preparing the Bill,

> *"...every effort has been made to express legal concepts in language that is comprehensible and accessible and that reflects current practice – both drafting and operational. This has sometimes proved to be a challenging task and has seen the replacement of some time-honoured terms. For example, the term 'ancient monument' was introduced in the first piece of UK legislation for the historic environment: the Ancient Monuments Protection Act of 1882. It described a small selection of largely prehistoric monuments accorded protection by that Act, so the term was appropriate to its use at that time. But over subsequent Acts, the term has come to encompass monuments of any period, from distant pre-history to the Cold War. As a result, it is not completely accurate and in some cases is misleading; the Bill*

[232] EM, paragraph 10
[233] EM, paragraph 22

> *therefore replaces this term with the more precise and informative label 'monument of special historic interest."*[234]

325. In July we asked the Counsel General to explain what was meant by the statement in the EM that expressing legal concepts in comprehensible and accessible language had proved to be a challenging task. The Counsel General told us

> *"...there have been quite a number of challenges, particularly when you come across provisions that are in some of the principal Acts that are relatively rarely used. (...)*
>
> *I know one of the examples was the use of the term 'owner' in legislation. In litigation, the legislation frequently doesn't make clear whether references mean any owner or every owner, and it can be quite significant. One of the unique parts, again, about this process is the drafters' notes, which set out, or try to establish, a clear and consistent practice in the Bill. So, for example, notices will be served on every owner, but the opportunities to exercise rights when making representations will be available to any owner."*[235]

326. Dr George added:

> *"In this exercise, we've had to look at all of the law on the subject, including all the bits that are very rarely used because they're only there just in case, or they deal with some quite obscure situation. Those are pieces that the lawyers and officials who deal with the areas have far less experience of, and far less knowledge, perhaps, of what was originally intended, especially when we're looking at things that are extremely old. I think that's partly why it's become challenging. For anything that's not at all clear, the exercise of trying to work out what was intended and how the legislation has evolved through multiple consolidations—because most of this has already been consolidated before—has involved quite a lot of digging and working out what words that have been in law for a long time actually mean."*[236]

327. In the Drafters' Notes accompanying the Bill, the Welsh Government states:

> *"The Bill uses many of the same terms as the legislation it consolidates, and in particular continues to refer to scheduled monuments, listed buildings and*

[234] EM, paragraph 27
[235] LJC Committee, 11 July 2022, RoP [67] to [68]
[236] LJC Committee, 11 July 2022, RoP [70]

> *conservation areas. However, it replaces some significant terms used in the existing legislation with new terms. These changes do not have any substantive effect but are intended to ensure that the terminology is more accurate or helpful."*[237]

328. In the Drafters' Notes, the Welsh Government also highlights changes that have been made throughout the Bill as regards:

- owners and occupiers of land;
- "for the time being";
- "expedient" and "appropriate";
- "subject to" and "without prejudice to";
- compensation claims.[238]

329. In relation to "expedient" and "appropriate" the Drafters' Notes state:

> *"The legislation being consolidated confers numerous powers and duties on the Welsh Ministers and local authorities. In some cases, provisions enable or require Ministers or authorities to do something where they consider it "expedient" or "appropriate" to do so. The two words have the same effect, and in most cases they do not add anything to the general requirements of administrative law for public authorities to act reasonably and with regard to relevant considerations, since it would be unreasonable for an authority to take steps that it considered "inexpedient" or "inappropriate". Most of the references to what is "expedient" or "appropriate" have therefore been omitted, but a few have been retained where they do appear to add something or where the provisions would not make sense without them."*[239]

330. Recent law reform Bills introduced to the Senedd under Standing Order 26 include these words. We therefore asked the Counsel General to provide further clarity on the approach adopted. The Counsel General offered a thorough explanation in his letter to us on 17 August and said that some references to what an authority considers "appropriate" have been retained in the Bill where the Welsh Government thinks the references are necessary because the

[237] Drafters' Notes, paragraph 22
[238] Drafters' Notes, paragraphs 24 to 31
[239] Drafters' Notes, paragraph 28

provisions in question would not work, or would be unclear, without them. The Counsel General also told us that the Welsh Government would be reviewing these references.[240]

331. During his final appearance before us we asked the Counsel General whether the review has resulted in the Welsh Government wishing to change any of the existing references to "appropriate" in the Bill. We also provided two examples in the Bill – in section 148(6) and section 180(5)(a) – and asked why the inclusion of "appropriate" was necessary in these cases. The Counsel General told us that, following a review, there are "a number of references that could potentially be removed if the Bill proceeds".[241] He also said:

> *"I'll give one example of that. Section 192(2) of the Bill requires Welsh Ministers to decide whether it would be appropriate for an entry in the register of historic parks and gardens to include any adjoining buildings, water or land, et cetera. I think the analysis is, really, there's no practical difference between requiring Ministers to decide whether it would be appropriate to include something in a register, and then simply requiring them to decide whether or not they would actually include it. So, removing the reference 'it would be appropriate' would probably achieve the same thing. This is something that I'd like to return to later on in the detailed committee consideration stage."*[242]

332. Dr George added:

> *"...having counted up, there are about 60 examples of 'appropriate' still in the Bill, because we think they are helpful in some way.*
>
> *On the examples you mentioned: in section 148 about loans, the reference to an authority being able to make a grant on any conditions it thinks appropriate is really to indicate that it's meant to be a very wide power. And it also introduces a specific example about conditions to do with public access, which is something that perhaps you might not expect, unless it was mentioned.*
>
> *In section 180, the thing about the appropriate proportion of costs is because if you've got somebody like a planning inspector working on an inquiry, there's a standard daily amount per day, and the reference to the*

[240] Letter from the Counsel General, 17 August 2022, paragraphs 34 to 38
[241] LJC Committee, 14 November 2022, RoP [17]
[242] LJC Committee, 14 November 2022, RoP [18]

appropriate portion is just saying that if somebody works for less than a whole day, they get an appropriate proportion of that standard amount. It is really just to indicate that it's meant to be a reasonable proportion that has some connection to how much work they've done. We just thought, in that context, it was helpful to keep in the words and give that flavour, rather than going into a lot of detail about how you would work out what to pay them."[243]

Effect on the Bill of the Interpretation Act 1978 and the Legislation (Wales) Act 2019

333. As set out in the Drafters' Notes, Part 2 of the 2019 Act sets out general interpretation provisions which apply to Acts of the Senedd enacted on or after 1 January 2020, and will therefore apply to this Bill. The Drafters' Notes highlight how Part 2 of the 2019 Act differs in some respects from the *Interpretation Act 1978* (the 1978 Act), which applies to nearly all of the legislation being consolidated (apart from some provisions taken from recent subordinate legislation). For example, the Drafters' Notes set out how the lists of generally applicable definitions in Schedule 1 to each interpretation Act are slightly different "meaning that some terms defined in the existing Acts do not need to be defined in this Bill while other terms not defined in the existing Acts do need to be defined in this Bill." According to the Drafters' Notes. the Bill has been drafted to take account of these differences.[244]

334. The Drafters' Notes also set out how Crown application differs between the 1978 and 2019 Acts, and highlight how the legislation being consolidated in the Bill was enacted in the context of the common law presumption that legislation does not bind the Crown. The Drafters' Notes state:

"The 1979 Act does not generally bind the Crown, although it makes some modifications to the default position. The 1990 Listed Buildings Act does generally bind the Crown, subject to certain exceptions and modifications, as a result of amendments made by the 2004 Act.

Sections 4 and 28 of the Legislation Act reversed the default position on Crown application for Acts of Senedd Cymru, by providing that those Acts do bind the Crown unless express provision is made to the contrary. Section 28(3) of the Legislation Act makes clear that this change does not impose

[243] LJC Committee, 14 November 2022, RoP [20] to [22]
[244] Drafters' Notes, paragraph 14

> *criminal liability on the Crown. The change applies to Acts that receive Royal Assent on or after 1 January 2020."*[245]

335. The Drafters' Notes later state:

> *"This Bill has been drafted to apply to the Crown to the same extent as the legislation being consolidated, but some of the provisions that are required to achieve that outcome are now different as a result of the change in the default position. For example, section 82A(1) and (2) of the 1990 Listed Buildings Act, which provide that the Crown is bound by the provisions of that Act other than the sections creating criminal offences, are mostly not restated because the same result is already achieved by section 28 of the Legislation Act."*[246]

336. We asked the Counsel General if he would provide further detail on the effect on the Bill of the both the 1978 and 2019 Acts. The Counsel General confirmed that the Bill will be subject to "slightly different interpretation provisions from nearly all of the legislation it consolidates".[247] He added:

> *"The main implications of this change are described in paragraphs 14 to 17 of the Drafters' Notes, and specific examples are given in the entries for sections 2, 3, 74, 160, 161 and 205 of the Bill and the entry for the omission of section 91(4) of the 1990 Listed Buildings Act. The Office of the Legislative Counsel also issued general guidance on the effect of the changes made by the Legislation Act in 2020: see* ***https://gov.wales/guidance-for-preparing-welsh-legislation***
>
> *The Schedules of generally applicable definitions in the two Acts are slightly different. In particular, the definition of "Wales" in the Interpretation Act does not include the territorial sea whereas the definition in the Legislation Act does. This has different implications for different Parts of the Bill. In Part 2, we have omitted provisions from the 1979 Act that give "Wales" the wider meaning, because they are not needed in a Bill that will be subject to the Legislation Act. In Part 3, we have added a provision giving "Wales" the Interpretation Act meaning; this preserves the effect of the silence in the 1990*

[245] Drafters' Notes, paragraphs 15 to 16
[246] Drafters' Notes, paragraph 17
[247] Letter from the Counsel General, 17 August 2022, paragraph 31

> *Listed Buildings Act about the meaning of "Wales" (which means the Interpretation Act definition applies)."*[248]

The status of subordinate legislation made under the Acts which are being consolidated

337. The Bill consolidates existing Acts under which subordinate legislation has been made by UK and Welsh Ministers for many years. Furthermore, the Bill consolidates some existing law that is currently set out in subordinate legislation.

338. We asked the Counsel General what will be the status of subordinate legislation made under the Acts that are being consolidated, and provided an example as follows. Regulation 4 of the Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017[249] currently sets out two grounds for review of certain decisions made by the Welsh Ministers. Only one of those grounds has been incorporated into the Bill, in section 9(2), and so we asked what will be the status of the other ground set out in regulation 4.

339. The Counsel General's initial response was that the Welsh Government's programme to improve the accessibility of Welsh law committed to a project considering a package of subordinate legislation to implement this Bill if passed, and that all associated subordinate legislation, including the Regulations we mentioned, will be considered as part of this project.[250]

340. We chose to pursue this matter further, and when the Counsel General appeared before us on 14 November we asked again why only one ground of review in regulation 4 of the Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017 is being consolidated and whether the ground not being consolidated will remain law. The Counsel General told us:

> *"I think in terms of the grounds of appeal, what the Bill actually does is bring them together. Our intention to provide a ground of appeal against this kind of decision was really for reviews to occur solely on the basis of whether a newly scheduled part of a monument was of national importance, and that's how regulation 4(b) in the Bill has been applied; it's understood to come into force. So, the approach adopted in the Bill reflects upon intention at the time of the 2017 regulations, when they were drafted, and current regulation 4(b) provides a ground of review that covers a material amendment to expand a*

[248] Letter from the Counsel General, 17 August 2022, paragraphs 32 to 33
[249] SI 2017/643
[250] Letter from the Counsel General, 17 October 2022, paragraph 162

scheduled area. The Bill in section 9(2) goes on to state that the ground for review is that a scheduled monument is part of, or a part of it, is not of national importance. So, this encompasses the regulation 4(b), and I think it means that the Bill is able to refer just to the single ground of review."[251]

Our view

341. Our consideration and discussion set out above leads us to make the following conclusions and recommendations.

Conclusion 4. We are broadly satisfied that the Bill correctly consolidates existing legislation clearly and consistently, in accordance with Standing Order 26C.17(iv).

342. We acknowledge the Welsh Government's view and aim that the Bill should improve the accessibility of the historic environment legislation for Wales, by providing a single bilingual Act which will promote consistency in the language, form and operation of the legislation.

343. As regards consistency in the language used, we welcome the Welsh Government's action to review the inclusion of the word "appropriate" in the Bill, and acknowledge the Counsel General's commitment to bring forward amendments (should the Bill proceed) to remove references to "appropriate" where they have now been deemed unnecessary.

344. In relation to the status of subordinate legislation made under the Acts which are being consolidated, we believe further information and clarity is required. In particular, we are still unsure as to how the two grounds of review in regulation 4 of the 2017 regulations have been applied in practice, and how that practice has been reflected in the Bill.

345. Our understanding from the explanation provided is that the original intention of the 2017 regulations was for reviews to be made only on the basis that a monument is of national importance, and it appears that is how the regulations have been applied in practice. However, we would welcome clarity on this, given the 2017 regulations set out two clear, and apparently separate, grounds of review.

Recommendation 11. The Counsel General should clarify how the Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017 have been applied in practice and confirm whether our understanding of the situation, as set out in paragraph 345 of our report, is correct.

[251] LJC Committee, 14 November 2022, RoP [25]

346. Finally, we acknowledge the effect on the Bill of both the 1978 Act and the 2019 Act.

7. Implementation, codes of Welsh law, evaluating success and future consolidation projects

As part of our consideration of the Bill we have looked at the Welsh Government's plans for the implementation of the Bill (if enacted) and the Welsh Government's wider plans for creating codes of Welsh law. We have also considered how the Welsh Government may best evaluate the success of this first Consolidation Bill within the context of its longer term plans to consolidate other areas of Welsh law.

Implementation

Timescales and resourcing

347. Part 2 of the EM sets out the estimated additional expenditure and transitional costs associated with implementing the Bill, should it be passed by the Senedd and enacted.

348. The EM describes the implementation period as 2023 to 2026.[252]

349. In the EM, the Welsh Government identifies a number of partners who will be responsible for the implementation of the Bill. For example:

- Local authorities and National Park authorities: Local authorities and National Park authorities will need to provide familiarisation sessions for council members and other relevant officials, and Cadw will provide the core materials for these. Staff time is estimated to come to approximately four days per authority, at a total cost of approximately £17,500 and will fall in the implementation period.[253]
- Third sector bodies / amenity societies: Third sector bodies and amenity societies currently disseminate information on the operation of the existing legislation, so they will need to update this to reflect the changes. Cadw will be providing updated

[252] EM, paragraph 56
[253] EM, paragraphs 41 to 43

information to such bodies, and the Welsh Government estimates that the burden of updating individual websites will be minimal, and probably in the region of one person for one day.[254]

- Private law firms and advice organisations: The EM states that it is not known how many private law firms or advice organisations such as Citizens Advice engage with historic environment legislation, however they are unlikely to incur any direct costs. The EM notes that they will be encouraged to be aware of the changes and new legislation. Cadw will provide the core information needed and, based on the estimate of the cost involved in doing this for other organisations, it is thought that it may take two hours for individuals to read the relevant material which will be available on the Cadw website. The information will also be signposted through the Law Society, Legal Wales News, and other representative organisations and publications.[255]

350. Referring to the planned implementation of the Bill, the Counsel General told us:

> *"…the Bill will not come immediately into force on the day of Royal Assent, because there's still a certain amount of work that needs to be done in respect of subordinate legislation that will need to be made. I think guidance and the websites will need to be updated, and there will probably need to be a certain amount of awareness raising to make people aware of the consolidation. As normal, I think, that engagement will take place with all of the partners—so, the courts, the Crown Prosecution Service and even, I think, the police as well."*[256]

351. RTPI Cymru raised concerns with us regarding the indicative timescale implications of the Bill, and specifically drew attention to the Welsh Government's estimates as regards third sector bodies and amenity societies. It said:

> *"We believe that this timescale is significantly underestimated given the extent of the legislation/new terminology/ new guidance which will need to be read, understood and embedded, at a time where resources and capacity are stretched in many sectors."*[257]

[254] EM, paragraph 44
[255] EM, paragraph 48
[256] LJC Committee, 11 July 2022, RoP [91]
[257] Letter from RTPI Cymru

352. We asked the Counsel General for his views on the concerns of RTPI Cymru. He told us:

> *"I'm not sure that should be an issue, because, with the consolidation process, we're not actually changing the law, or organisations or anything; it's not actually reforming the law. So, nothing should actually change in terms of what actually happens. There will be, of course, some changes, I suppose, in terms of forms, in terms of some of the terminology, and the same in terms of some of the guidance. I said early on, didn't I, that the intention is to, obviously, keep the expertise there for the purpose of an implementation strategy that would take place in 2023-26. I think, within that context, that's reasonable, so I don't share those concerns."*[258]

353. The Counsel General also said it was something the Welsh Government would "keep an eye on during the implementation process", but that it didn't cause him any significant concern or any need to change the strategy that already exists.[259]

354. Mr Gwilym Hughes added that Cadw was "already doing that process of active engagement now". He said:

> *"We've had an open invitation to stakeholders to just be briefed on the process, both the content of what we're doing and the timetable, both for this process and for the implementation, should it proceed. So, that process is already under way. We've had several, actually, workshops and invitations to provide briefings for key stakeholders. The general response has been very warm and very welcoming to the process. And, obviously, after the process has been completed, there will be a programme of support for the sector to acclimatise to the new terminology. But we don't envisage it to be a particularly challenging exercise. There'll be other things, like—I've already referred to this—updating guidance and advice with the new terminology to restate, to make sure that it still sits within the current management framework that we have for the historic environment."*[260]

[258] LJC Committee, 14 November 2022, RoP [181]. See also Letter from the Counsel General, 17 August 2022, paragraph 48
[259] LJC Committee, 14 November 2022, RoP [181]
[260] LJC Committee, 14 November 2022, RoP [183]. See also Letter from the Counsel General, 17 August 2022, paragraphs 42 to 44

Required subordinate legislation

355. In the previous Chapter we highlighted the Counsel General's statement that all subordinate legislation associated with the Bill will be considered as part of the project the Welsh Government has committed to undertake as part of its programme to improve the accessibility of Welsh law.[261]

356. Mr Paines KC offered a general comment about relevant subordinate legislation and told us that "When you're rationalising the primary legislation, it seems a good idea then to turn your attention to the secondary legislation, and rationalise that as well."[262]

357. Dr Mynors provided a view that there will not be a need to make much alteration to secondary legislation as a result of this consolidation, other than replacing the references to the 1979 and 1990 Acts with this Bill (if and when enacted). He said:

> *"But it's possible that this line of thinking arises from the comment by the Counsel General in the Senedd when, in outlining his programme of codification legislation, he said, in relation to planning, 'There will be, hopefully, new regulations for about four or five of the principal long-outdated pieces of secondary legislation, which are crying out to be updated.' So, hopefully, they will follow soon. I don't think, with the notable exception of tree preservation orders, which have to be done at the same time, the others will be sorted out because of the consolidation [correction: solely because of the consolidation]. It would obviously be sensible, at the same time [correction: at around the same time], to sort them out generally, and I think the intention is, as I understand it, to do that, although I also of course understand that there are resource constraints. So, it will happen, no doubt, over the next five years or whatever. So, I think though that, planning, there will be a number of new bits of secondary legislation over the following five years. Historic environment—I wouldn't expect there to be any of any consequence at all, other than the obvious tidying-up references."*[263]

358. We asked the Counsel General how long it will take to consider and bring forward the package of subordinate legislation needed to implement the Bill. The Counsel General told us:

[261] Letter from the Counsel General, 17 October 2022, paragraph 162
[262] LJC Committee, 26 September 2022, RoP [196]
[263] LJC Committee, 26 September 2022, RoP [197]

> *"...that is something that will be worked on. Work has already begun on the necessary analysis in terms of subordinate legislation and, of course, what's important is maintaining the continuity and expertise to enable that to happen, and I hope that's a stream in terms of all legislation that we bring forward. So, the majority of the work will be taking place after the Bill is passed, but during the implementation period, really: 2023 to 2026."*[264]

Engagement with the justice system

359. The justice impact assessment within the EM states that the impact on the justice system is not likely to be significant. It also notes that those in the justice system will need to familiarise themselves with the new legislation.[265]

360. We asked the Counsel General if he had been discussing the Bill with the judiciary and legal practitioners in Wales. The Counsel General acknowledged that it was important that the judiciary and lawyers know and understand the changes the Bill will bring about. He told us:

> *"...we notified the Lord Chief Justice's office; we informed them of the Bill. We've sent a copy of the justice impact assessment. That, I think, happened around 28 April, in accordance with our standard practice of engaging with the judiciary. We've also updated the Lord Chief Justice's office regarding the introduction of the Bill, and I think as we get closer to a coming-into-force date we will liaise with Her Majesty's Courts and Tribunals Service and, indeed, with the Judicial College—the judicial training college—to make them aware of the changes and allow them to update their guidance and instructions. (...)*
>
> *I've written to or been in touch with the Lord Chief Justice's office. We've not yet had a response, but that engagement will continue and we'll keep the Lord Chief Justice's office updated as necessary."*[266]

361. In the EM, the Welsh Government also acknowledges that work will be needed by HM Courts and Tribunals Services (HMCTS) to update their systems to reflect the new legislation.[267] We asked the Counsel General what discussions the Welsh Government has had with HMCTS

[264] LJC Committee, 14 November 2022, RoP [26]
[265] EM, paragraph 64
[266] LJC Committee, 11 July 2022, RoP [90] and [91]
[267] EM, paragraph 45

and if they were in agreement that such changes will be undertaken as part of their normal course of business. The Counsel General said:

> *"The Welsh Government has followed the agreed procedures to make the HM Courts and Tribunals Service and the Ministry of Justice aware of the Bill. A Justice System Impact Identification form was submitted to the Ministry of Justice who have confirmed that the Bill will have nil or minimal impact on the justice system. In addition, information has also been submitted to the Lord Chief Justice and no issues have been identified that will impact on HMCTS or the Judicial College."*[268]

Codes of Welsh Law, and potential future changes to the Senedd's Standing Orders

362. Section 1 of the Bill provides an overview of the Bill and, at subsection (1), states that the Bill (if and when enacted) will form part of a code of law relating to the historic environment.

363. In the EM, the Welsh Government states that the Bill (if and when enacted) together with subordinate legislation made under it, will form a code of Welsh law on the Historic Environment, and that the significance of this is twofold:

> *"The first is that the Welsh Government intends to publish all enactments that form part of the Code together. The second is that the Government also envisages, subject of course to the Senedd's agreement, a change to the Senedd's Standing Orders to seek to ensure that future changes to the law that forms part of a Code are made by amending or replacing the enactments rather than making different, "stand-alone", provisions that would again lead to a complex proliferation of laws."*[269]

Codes of Welsh law

364. We asked the Counsel General to provide more details on his plans for a code of Welsh law on the historic environment, and he told us:

> *"The intention is that this Bill will be the main piece of historic environment primary legislation, and any future drafting, changes or reforms would be to this Act as a stand-alone piece of legislation. We want to keep as much of the*

[268] Letter from the Counsel General, 17 August 2022, paragraph 39
[269] EM, paragraph 22

> *law as is possible in one place. So, basically, you're talking about a historic environment code.*
>
> *What will the code consist of? Well, I suppose it'll consist of this Bill, or it will be an Act when it is passed and then implemented, and any secondary or tertiary legislation under it. So, where it's necessary to introduce secondary legislation or further legislation, that will form part of the code. So, if you want to know anything about the historic environment, you go to the historic environment code, and there it is: the legislation and any other supporting or secondary legislation that is relevant that you would need to know about in order to have an understanding of what the legal position is.*
>
> *I think another impact of this as well, of course, is that, certainly for those who have to make the legislation available to people so that they can understand it and have to publish it, it makes it a lot easier for them as well, because again it's all there, it's all in that one place, et cetera. You don't have to have all the usual sub-notes and references and so on, because it's all in that piece of legislation."*[270]

365. The Counsel General confirmed our understanding that codes of Welsh law will each be, in effect, repositories of law which begin with the single piece of consolidated primary legislation, and sitting within the repository will be any delegated legislation made in consequence of the headline primary legislation, along with all relevant guidance.[271] The Counsel General added:

> *"Legislation which amends those substantive Acts will not form part of the Code and will not include the statement. They are simply the vehicle by which amendments to the, in this case, consolidated legislation is achieved.*
>
> *The Committee is also correct to say that sitting within that Code (or 'repository') will be delegated legislation and guidance. The substantive regulations will include a statement that they form part of the Code. And again subsequent amending regulations will not be part of the Code but the effects they create will take place within the Code."*[272]

366. As part of our overall remit, we consider any matter relating to legislation. One aspect of this broad responsibility is to consider all **legislative consent memoranda** laid before the

[270] LJC Committee, 11 July 2022, RoP [93] to [95]
[271] Letter from the Counsel General, 17 August 2022, paragraph 15
[272] Letter from the Counsel General, 17 August 2022, paragraphs 16 to 17

Senedd by the Welsh Government for UK Government Bills that make provision in relation to Wales for any purpose within the legislative competence of the Senedd (or which modify the Senedd's legislative competence).

367. Our work programme since the start of the Sixth Senedd has been dominated by the scrutiny of legislative consent memoranda and supplementary legislative consent memoranda, and we have seen a significant increase in primary legislation in devolved areas being made by the UK Parliament rather than by the Senedd.

368. It is within this context that we asked the Counsel General how he responded to concerns that, by pursuing provisions in UK Bills so extensively, the Welsh Government is undermining its own important programme to improve the accessibility of Welsh law. He told us:

> *"It is something, within the context of everything that is happening and with UK Government legislative programmes, that you have to continually monitor and keep an eye on in terms of what's happening. (...) I don't see that as being something that's going to impact in respect of our own consolidation programme. I think there's one area where possibly some issues have arisen or may arise; it's in respect of the levelling-up legislation, which may have some reference into and impact upon Welsh legislation or legislation that we might want to consolidate. What it won't do, though, is change the consolidation process and presentation itself."*[273]

369. Mr Dylan Hughes added in respect of the Levelling-up and Regeneration Bill:

> *"There is a technical issue there that might need us to change some of the consequential amendments that we've drafted, but that's something that we're talking to the UK Government about."*[274]

370. On the matter of the UK Government legislating in a devolved area of law which has already been consolidated, the Counsel General told us:

> *"...because we will create a historic environment code, and you will have within that this principal consolidation Act plus any subsequent secondary legislation or guidance, if there were to be something that came through that changed the law in this area, then it would need to actually change the principal legislation, the consolidated legislation itself. That is, it wouldn't*

[273] LJC Committee, 11 July 2022, RoP [74]
[274] LJC Committee, 11 July 2022, RoP [87]

> *mean that there was additional legislation in another place. So, whatever happened, for whatever reason and whatever judgments there are over what might happen, what might be consented to, what might be imposed as opposed to consented et cetera, it shouldn't change, and we would want to ensure that, in the way in which we are changing the law through its codification of consolidated legislation, bringing everything into one place, that would not happen. (…)*
>
> *…we would want to resist any external legislation that would go in any way contrary to that."*[275]

371. Mr Dylan Hughes added:

> *"Just to say that, usually, we would be discussing small issues. If the UK Government were to do something more significant, and if the Government would be willing to agree to that… Our first view would be to expect them to reform Welsh law and to do it bilingually, and there are plenty of examples of that happening already. But, if we had to, there would be a way for us then to re-address the consolidation process, and do it in the way that we're doing now. The sort of situation that could be difficult is a situation where the UK Government is preparing a law that applies to the whole of the UK, for example, on a specific matter, and perhaps that would make it more difficult for them to do that by reforming our legislation, rather than creating legislation that stands alone. But, we don't see that that is likely to happen."*[276]

372. We also asked if there was anything in the most recently announced legislative programme of the UK Government that causes the Welsh Government concern in terms of possibly impacting on this Consolidation Bill. The Counsel General told us that he was not aware of anything coming forward that was likely to impact the Bill but that it was a "moving feast".[277] The Counsel General also said:

> *"I think it's worth mentioning also, of course, that I am required to provide an annual report on accessibility, and I think things that might emerge that would impact in any way on our accessibility programme—obviously, incorporating the consolidation programme—would be things that I would*

[275] LJC Committee, 11 July 2022, RoP [75] and [76]. See also RoP [78]
[276] LJC Committee, 11 July 2022, RoP [81]. See also RoP [82] and [83]
[277] LJC Committee, 11 July 2022, RoP [85]

> *want to refer to in that report and bring to the attention of the Senedd in any event. But, for the purpose, I think, of your work—the work of this committee and this scrutiny—I'm not aware of anything. (...)*
>
> *Of course, there will, from time to time, be minor consequential amendments that don't impact on the substance of legislation, and that's, again, one of those things to be made aware of as and when they might emerge."*[278]

373. Given these responses to our questions, we followed-up on a number of points when we wrote to the Counsel General in July, and asked if he and his officials would give further consideration to a number of issues, including how the Welsh Government could ensure that amendments proposed by the UK Government to consolidated Welsh law will preserve that consolidation and whether the Welsh Government will consider any impacts on the consolidation of Welsh law when it discusses relevant legislation with the UK Government.

374. In his response, the Counsel General said that he understood and, to an extent, shared our concerns. He added:

> *"Officials in the Office of the Legislative Counsel have discussed the Government's programme to improve the accessibility of Welsh law with their counterparts in the other UK drafting offices. This includes explaining our ambitions for maintaining the law once consolidated and codified. Those drafting offices are already aware of our existing policy that amendments to existing Welsh law by other legislatures must make changes to both language texts. There are plenty of examples of that happening already.*
>
> *As explained in the evidence to the Committee, if the UK Government were to legislate for Wales on a matter for which the law had already been consolidated then the expectation would be that the consolidated law would be amended by that UK Bill. That is the approach, should this situation ever arise, that our officials would explain and discuss with the relevant policy, legal and drafting officials at the time.*
>
> *I believe that, should this ever come to pass, then it would be appropriate to draw the Senedd's attention to the drafting approach being taken by the UK Government in their legislative proposals as part of the LCM process."*[279]

[278] LJC Committee, 11 July 2022, RoP [86] and [88]
[279] Letter from the Counsel General, 17 August 2022, paragraphs 11 to 14

Future changes to the Senedd's Standing Orders

375. Given the statements in the EM about changes to the Senedd's Standing Orders, we asked the Counsel General to provide detail as regards his thinking and on any discussions that he has had with the Llywydd and the Business Committee. He told us that

> *"There will be a need for discussions. My intention is to certainly explore the ways in which the Senedd Standing Orders can be, I suppose, put into good effect, used to promote good practice. Because what we need to ensure as well is that the process of legislation that takes place, changing the law, has to actually the support the process of codification. What we don't want to see is that we codify the law now, and we consolidate the legislation, but then you lose all discipline in that area and you start legislating as we have done in the past. So, I think there'll need to be a review of Standing Orders to look at that.*
>
> *It could be, for example, a form of requirement for Members who introduce Bills before the Senedd to have to ensure that the drafting takes place within a particular format, a particular process, one that is supportive of the code. So, if you were bringing a piece of legislation forward and we're much further down the road of codification, it would have to be by amendment of the code rather than a completely stand-alone piece of legislation. So, if, for example, there was an individual Members Bill that had something to do with historic environment, it wouldn't be a completely separate piece of legislation, it would be basically an amendment to the code. So, I think we have to look at how that might work in practice, because obviously the Senedd has its own empowerment in terms of legislation and those processes. But, equally, what we do want is to create a framework, a fairly disciplined framework, that actually maintains and supports the codification process."*[280]

376. The Counsel General acknowledged that "Individual Members' Bills belong to the Members and to the Senedd itself" and, as such, "any changes in Standing Orders will inevitably have to engage the Members; they have to engage the parties within the Senedd, and there has to be, obviously, consent to those changes."[281]

377. We subsequently asked the Counsel General to provide more detail, particularly as regards his comments that such changes would have an impact on private Member proposals

[280] LJC Committee, 11 July 2022, RoP [97] and [98]
[281] LJC Committee, 11 July 2022, RoP [128]

for Bills to be introduced to the Senedd. We asked if he had given consideration to consulting backbench Members of the Senedd and Party Groups directly on his proposals, in addition to any evidence-gathering the Business Committee may undertake itself. The Counsel General said:

> *"The Senedd and this Committee have recognised the risks, and arguably the damage, to the accessibility of law that has been consolidated subsequently fragmenting and proliferating again if amendments are not made to the substantive Acts. That is why we need to find a way to help ensure that the Senedd itself has to agree to any future legislative proposals doing anything other than amending a Code. I don't think we can say there would never be a good reason why this might happen, but I do think we can say that the Senedd has to be content were that to be proposed.*
>
> *It seems to me that the best way to safeguard this principle is by including a provision on this in the relevant Standing Orders for Bills (and maybe also subordinate legislation if that was something the Senedd considered necessary).*
>
> *The Trefnydd and I will seek to raise this with the Llywydd and the Business Committee once the intentions of the Senedd are known in relation to this Bill, so that a suitable approach to engaging with Members and Party Groups on this matter can be established. To reiterate the point I made at the evidence session, this is a matter that all Members need to consider and be content with – this is because Committees, individual Members and the Commission can bring forward legislative proposals, not just the Government."*[282]

378. The Counsel General later confirmed that the Welsh Government would feel it appropriate to begin this work with the Senedd's Business Committee before the summer recess of 2023.[283]

379. We asked the representatives of the Law Commission for their views on the Welsh Government's proposals for codes of Welsh law and whether there are risks for maintaining the structure of consolidated law without making progress on the development of the codes.

380. Mr Paines KC told us:

[282] Letter from the Counsel General, 17 August 2022, paragraphs 21 to 23
[283] Letter from the Counsel General, 17 October 2022, response to question 84

> *"...when we reported on the form and accessibility, we proposed codes. We had a slightly different understanding of them from the way the Welsh Government's taken matters forward, but that's not an issue. (...) Internally, we called them code disciplines. What we meant by that is that, when you've got a code in place, if you want to change the law, you amend that code; you don't legislate in parallel. I don't think that's as yet covered by Standing Orders, but we recommended that there should be a Standing Order, if I recall accurately, to the effect that, if you're the Member presenting legislation that's going to sit alongside a code, you've got to give a reason. And I think we also recommended that, from time to time, if, in an emergency legislation is enacted alongside a code because there's a desire to get it in place quickly, there may need to be a mopping-up operation afterwards, and the subject matter should be brought into the code as soon as possible. I think we still feel, collectively, at the Law Commission, that those areas do need to be dealt with in Standing Orders."*[284]

381. Sir Nicholas Green added that there was a "fundamental principle of transparency and legal certainty" underlying this issue and said:

> *"If you're going to have a code, it should remain comprehensive, so that people know that there is only one document they need to look to, to determine what the law is. And the moment that discipline begins to fail and you have two, three, four, five pieces of legislation, you rather undermine the very rationale for having a code in the first place."*[285]

382. Dr Mynors therefore noted the importance of section 1(1) of the Bill. He said this may appear to be an innocuous statement but it is:

> *"...very important, because it is saying that this is actually not just another piece of legislation, this is actually a code. And it may be hoped that we will see a similar statement at the front, section 1(1), of the code on whatever it may be, on education or housing or whatever the next code is coming down the line, in each case. So, it's a signal to those who need to know these things, 'Wake up, this is the code; this is not just an ordinary Act.'"*[286]

[284] LJC Committee, 26 September 2022, RoP [199]
[285] LJC Committee, 26 September 2022, RoP [200]
[286] LJC Committee, 26 September 2022, RoP [201] to [203]

Evaluating success and future consolidation projects

383. In Plenary on 5 July 2022, the Counsel General told Members of the Senedd that the success of a Consolidation Bill "must be evaluated by reference to the extent to which it improves the structure and clarity of the existing law, while preserving its legal effect".[287]

384. We asked the Counsel General how the Welsh Government will be evaluating the success or otherwise of the Bill. The Counsel General told us that the Welsh Government would need to give thought to plans for evaluation "once this piece of legislation has been completed and gone through". He added:

> *"We have already begun to collect bits of informal feedback from, for example, members of the task and finish group amongst the Cadw staff and so on. We have had, again, some positive feedback on that, and this is the sort of work that needs to carry on, particularly from those who are experts in this field or who are engaged in this. The first step is getting a certain amount of informal responses from people to the legislation to evaluate that. I think, once the legislation is bedded in, what we plan to do is to collect opinions of users on the legislation's success, and of course that will take some time, and I suppose you'll have a number of stages. The first one is those engaged in the field who will have their views on their understanding of the new legislation in a consolidated format as to how it was previously, so that will give us a certain amount of feedback. I think secondly is where, in practice, the legislation has to be used and what the responses from the users of that are—whether it is found to be more effective, easier, better to understand. So, there's work on that and progress is on the way."*[288]

385. In terms of future consolidation exercises, we asked the Counsel General to outline how he saw the process going forward. He told us:

> *"...the issue of statute repeals is the more likely imminent one. But the big project, which is based on the work that the Law Commission has done, is in respect of planning law consolidation. That is certainly something that is considered will have very considerable advantages. It's a considerably difficult*

[287] Plenary, 5 July 2022, RoP [199]
[288] LJC Committee, 11 July 2022, RoP [125]

and complex area, but, again, I think a very important next step of substantial consolidation to take place."[289]

Our view

386. We noted at the start of the Chapter that our consideration of the Bill has involved looking at the Welsh Government's plans for the implementation of the Bill (if enacted) and the Welsh Government's wider plans for codes of Welsh law. We have also considered how the Welsh Government may best evaluate the success of this first Consolidation Bill within the context of its longer term plans to consolidate other areas of Welsh law.

387. We said in Chapter 2 that we acknowledge fully the importance attached to the consolidation of Welsh law, because of the practical effect it will have on the availability of bilingual law for Wales and the potential to significantly improve accessibility to the law which applies in Wales.

388. Implementation of the Bill (if and when enacted) is therefore clearly crucial to whether the potential benefits of consolidation will be achieved.

389. In this regard we note that the Welsh Government has set a final target date of 2026, including for the subsequent necessary subordinate legislation.

390. This will therefore mean it will have taken four years to complete the full consolidation of historic environment related primary and secondary law in Wales. This does not take into account the many years needed to prepare for the introduction of the Consolidation Bill to the Senedd. We highlight this because the historic environment is a relatively small area of Welsh law. This also serves to highlight how significant a piece of work it will be to consolidate planning law, which is a much larger area of law.

391. The Counsel General told us that work has already begun on the necessary analysis of the subordinate legislation but that the majority of the work will be taking place if and when the Bill is passed.

Recommendation 12. The Counsel General should provide, as soon as possible, a detailed plan on the likely timescales and volume of subordinate legislation which will be required as part of the full implementation of this consolidation of historic environment law.

[289] LJC Committee, 11 July 2022, RoP [124]

392. We acknowledge the concerns we have heard from stakeholders about the Welsh Government's plans for implementation of this legislation. While we note that Cadw has begun a process of active engagement and we welcome the Counsel General's commitment to "keep an eye on" the implementation process, the concerns of stakeholders must be addressed.

Conclusion 5. To ensure the maximum benefits from this consolidation exercise, the Welsh Government and Cadw should ensure there is full and proper communication and engagement with relevant stakeholders and key users of the legislation.

393. The Bill – and the Welsh Government's wider plans for codes of Welsh law – sits within the broad context of an increase in UK Bills making provision for Wales in devolved areas.

394. In our recent Annual Report for 2021/22[290] we highlighted our concern that too much legislation in devolved areas is being made in the UK Parliament, not only bypassing the Senedd's legislative scrutiny functions but also potentially leading to the undermining of the Senedd as a legislature and the underlying principles of devolution.

395. A further significant concern is that such UK-made legislation is monolingual and only serves to add to the 'disorganised, vast and sprawling' statute book which the Welsh Government has said has prompted the need for it to focus effort on the consolidation of Welsh law.

396. In Chapter 2 we noted that the Counsel General has said the task ahead to improve the accessibility of Welsh law is not easy but the Welsh Government "must make a start and start as we mean to go on". We fully support the Welsh Government in this endeavour. We are, however, concerned that decisions made by the Welsh Government as regards the use of UK Bills to make provision in devolved areas will undermine this worthwhile goal.

397. Linked to this, we acknowledge the Counsel General's view that the Senedd should consider its own Standing Orders so that a proper attempt can be made to ensure that efforts to consolidate Welsh law are not subsequently, and inadvertently, undone.

398. We welcome the Counsel General's commitment to begin engaging with the Llywydd and the Business Committee next year (once the Senedd's intentions as regards to the Bill are known). We also welcome the Counsel General's acknowledgment that legislative proposals in Wales can be put forward by individual Members of the Senedd, Senedd Committees and the Senedd Commission, as well as the Welsh Government. For that reason, we agree that a review of the Senedd's Standing Orders needs to be fully transparent and inclusive. Any such review

[290] Legislation, Justice and Constitution Committee, Annual Report 2021/22

should be informed by a clear and full understanding of how the Welsh Government envisages that codes of Welsh law should operate and be managed.

Recommendation 13. The Business Committee should, when conducting any review of the Senedd's Standing Orders which relate to new requirements or restrictions on how the Senedd considers legislative proposals within the context of a consolidated area of law, consult with Members of the Senedd, Senedd Committees and the Senedd Commission.

399. As regards the Senedd's Standing Order 26C for Consolidation Acts of the Senedd, we are aware that our predecessor Committee said[291], when commenting on the draft Standing Orders for Consolidation Bills, that the process should be reviewed to ensure the Standing Orders are fit for their intended purpose. We agree with that view.

Recommendation 14. The Business Committee should review Standing Order 26C after the first two proposed Consolidation Bills have been considered by the Senedd.

400. We note from the Welsh Government's first annual report (for 2021-2022) relating to the Future of Welsh Law programme for 2021 to 2026 that the Welsh Government is continuing its preparation of a Bill to consolidate planning law, which we believe will be the second Consolidation Bill to be introduced to the Senedd. We also note that the Welsh Government has stated that "this is a very large and time-consuming project that involves producing a Bill that is likely to be around 400 pages long (800 pages in both languages)."[292]

401. We acknowledge that preparation of a Consolidation Bill by the Welsh Government is time-consuming and involves a significant amount of detailed work. Equally, the scrutiny of every provision in a Consolidation Bill to ensure they comply with Standing Orders is a substantial task. We believe that our consideration of the Bill has demonstrated both the need for, and the value of, having the appropriate time and detailed information in order to undertake proper scrutiny of a consolidation exercise. As a matter of course it would never be our intention to seek to frustrate the Welsh Government's legislative timetable. Nevertheless, we do not believe that good scrutiny can or should be rushed. We acknowledge that the Welsh Government took on board our views when proposing a timetable for Initial Consideration of the Bill, and we are in no doubt that it will continue to do so in the future. We believe this will be particularly important given the comments the Welsh Government has made about the

[291] Letter to the Llywydd from the Fifth Senedd's Legislation, Justice and Constitution Committee, 4 December 2019
[292] The future of Welsh law: A programme for 2021–2026 – Annual report 2021-2022

planning Consolidation Bill and that it is likely to be more than double the size of this first Consolidation Bill.

402. Finally, we further believe that our consideration of the Bill has provided more evidence to support a general need for Senedd Committees to undertake post-legislative scrutiny of Bills passed by the Senedd.

Annex A: List of oral evidence sessions.

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed on the **Committee's website**.

Date	Name and Organisation
11 July 2022	**Mick Antoniw MS** Counsel General and Minister for the Constitution **Dylan Hughes** First Legislative Counsel, Welsh Government **Dr James George** Senior Legislative Counsel, Welsh Government
26 September 2022	**Lord Justice Green** Chair of the Law Commission **Nicholas Paines KC** Commissioner for the Law in Wales **Charles Mynors** Planning Law in Wales Project
14 November 2022	**Mick Antoniw MS** Counsel General and Minister for the Constitution **Gwilym Hughes** Head of Cadw and Deputy Director, Welsh Government **Dr James George** Senior Legislative Counsel, Welsh Government

Annex B: Correspondence with the Counsel General following our meeting on 11 July 2022

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Legislation, Justice and Constitution Committee

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Mick Antoniw MS
Counsel General and Minister for the Constitution

19 July 2022

Dear Mick

Follow-up to evidence session on the Historic Environment (Wales) Bill, 11 July 2022

Thank you for appearing before the Committee on 11 July and giving evidence on the Historic Environment (Wales) Bill (the Bill). We found our discussions on this first consolidation Bill to be productive and it will help our subsequent consideration of the Bill.

There are a number of issues we would like to pursue further. There are also some matters which we did not have the opportunity to raise during the meeting.

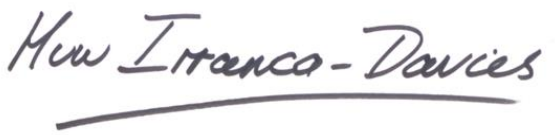
I would be grateful to receive your responses to the questions in the Annex by 17 August 2022 (references to the Record of Proceedings (RoP) for the evidence session are provided where necessary).

We have also been giving consideration as to how we may, during the course of our consideration of the Bill, best raise any questions which specifically relate to drafting style and the Drafters' notes which accompany the Bill. I asked you during our meeting whether you and the drafters in the Office of the Legislative Counsel would be content with the drafters themselves speaking with us should the need arise. As I said during the meeting, we would, of course, respect the boundaries of what is appropriate to ask of government officials. I take the opportunity to thank you again for your positive response. The Clerks will liaise with the drafters to identify a suitable date and time, should the need arise.

May I also take the opportunity to formally invite you to our meeting on Monday 14 November (p.m.).

This will be an opportunity for us to discuss with you the matters which have arisen during our full consideration of the Bill, including any matter which is raised with us by stakeholders.

Yours sincerely,



Huw Irranca-Davies
Chair

Annex

1. During the evidence session we asked you whether decisions had been made to exclude relevant legislation from the consolidation exercise and whether any such exclusions were because of concerns regarding legislative competence (RoP paragraphs 14-22). You and your officials provided some examples – namely the *Protection of Wrecks Act 1973*, the *Redundant Churches and Other Religious Buildings Act 1969*, the *Protection of Military Remains Act 1986*, and the *Ancient Monuments and Archaeological Areas Act 1979*. As discussed during the evidence session, we would be grateful if you would provide details as regards the full reasons why provisions in these Acts have been excluded from the consolidation exercise, along with details of any other relevant legislation which has been deliberately excluded from the version of the Bill introduced to the Senedd.
2. During the session, we also asked you what would happen if the UK Government legislates in a devolved area of law that has been consolidated. It was suggested to us that the Welsh Government would expect the UK Government to reform the law and to do it bilingually (RoP paragraphs 73-81). It was also suggested that this situation could be difficult where the UK Government is preparing a law that applies to the whole of the UK, for example, on a specific matter but the Welsh Government does not "see that that is likely to happen" (RoP paragraph 81). You will know that there have been several examples in recent years where the UK Government has sought to legislate on a UK-wide basis, with or without the input of the Welsh Government or the consent of the Senedd. As such, we would be grateful if you would give further consideration to this matter and confirm:

    - whether discussions have already begun with relevant UK Government counterparts regarding the Welsh Government's consolidation of law programme – and this Bill in particular – and the Welsh Government's expectation that any law to be proposed by the UK Government in an area that has been (or is being consolidated) will be done bilingually and any required amendments will be made to the Welsh law as consolidated;

    - how the Welsh Government considers that it could ensure that any amendments proposed by the UK Government to Welsh law which has been consolidated will be done in a way that will preserve the consolidation;

    - whether the Welsh Government will consider any impacts on the consolidation of Welsh law in any discussion it has with the UK Government on a relevant piece of legislation and how it would draw any such potential impacts to attention of the Senedd?

3. We also asked if you would provide more details on your plans for a code of Welsh law on the historic environment and you told us that the code will consist of the Act (if and when the Bill is

passed and then implemented) and any secondary or tertiary legislation under it (RoP paragraphs 92-95). Can you confirm our understanding that:

- 'codes of Welsh law' will each be, in effect, repositories of law which begin with the single piece of consolidated primary legislation, and sitting within the repository will be any delegated legislation made in consequence of the headline primary legislation, along with all relevant guidance;

- in practice, future amendments will, in effect, be made to specific law within a code;

4. What discussions have you had with The National Archives about the styling of legislation as codes on legislation.gov.uk and the need to update them quickly?
5. We asked you to provide more detail on your thinking as regards changes to the Senedd's Standing Orders to ensure future Bills and amendments are made within a code of Welsh law . You confirmed that such changes would have an impact on private Member proposals for Bills to be introduced to the Senedd (RoP paragraphs 96-98). As such we asked if you had given consideration to consulting backbench Senedd Members and Party Groups directly on your proposals, in addition to any evidence gathering the Business Committee may undertake itself. We would be grateful if you would provide clarification and confirmation of your intentions as regards this matter.
6. Are there any new powers included in the Bill that give the Welsh Ministers powers to make policy changes?
7. Section 209 of the Bill relates to regulations that may be made under the Bill, once enacted. Section 209(6) provides for the downgrading of scrutiny procedures – from affirmative to negative - for certain regulations relating to partnership agreements. Can you clarify how, in your view, this is line with SO26C.2(iv)?
8. Can you explain what has been the effect of the ***Interpretation Act 1978*** and the ***Legislation (Wales) Act 2019*** - both of which apply to Welsh law - on the Bill?
9. Changes have been made throughout the Bill as regards where existing Acts used the wording "expedient" and "appropriate", and most references to what is "expedient" or "appropriate" have been omitted from the Bill. In the Drafters' Notes we are told that "the two words have the same effect, and in most cases they do not add anything to the general requirements of administrative law for public authorities to act reasonably". We are aware that recent law reform Bills introduced to the Senedd include these words. Can you therefore offer some further clarity and explanation on this matter.
10. You have acknowledged that work will be needed by HM Courts and Tribunals Services to update their systems to reflect the new legislation. What discussions have you had with HMCTS and are they in agreement that such changes will be undertaken as part of their normal course of business?

11. The Bill makes changes to sentencing powers of Magistrates' Courts. In the Drafters' Notes which accompany the Bill you highlight that section 13 of the *Judicial Review and Courts Act 2022* further amends the *Sentencing Act 2022* so that the Lord Chancellor may change the "applicable limit" from 12 months to 6 months and back again. You note that the penalties for either-way offences have been restated to reflect these changes on the understanding that section 13 will come into force before this Bill. What is your understanding as regards when section 13 of that Act will come into force? What impact will there be on Bill if section 13 isn't in force before this Bill, and what action will you be required to take?
12. In the Explanatory Memorandum you note that the existing legislation is accompanied by a range of advice and guidance, include **Technical Advice Note 24**.

    - Are there plans to update this guidance as a result of this Bill ?
    - What progress has been made with the Cyfraith Cymru website?

13. The Standing Orders do not require a financial resolution to be considered or agreed by the Senedd for consolidation Bills. The total transitional costs for the Bill are estimated to be around £50,000, to be spread across a three year implementation period. That figure is higher than the cost estimates for other law reform Bills introduced to the Senedd where a financial resolution was required, for example the NHS Indemnities (Wales) Bill, where the estimated costs were £30,000. It is important that the cost estimates are accurate, robust and justifiable. Please can you explain how you arrived at the costs for the Bill, and provide details of the specific transitional costs involved?
14. Paragraph 43 of the Explanatory Memorandum notes the estimated costs per local authority or National Park authority will be approximately £17,500, approximately four days' work per authority. On what basis have you estimated that it will be four days of work for local and national park authorities to implement the legislation and were the authorities consulted on the estimates of potential costs?
15. Can you clarify that there will be no costs to land owners or private individuals?
16. Paragraph 44 of the Explanatory Memorandum states that costs for third sector bodies and amenity societies will be "minimal and probably in the region of one person for one day" but no actual costs are provided. Can you clarify why this is the case?
17. Can you clarify if the £1,400 cost estimated for holding familiarisation workshops for heritage crime officers includes both the costs to Cadw and the costs to police forces?
18. Paragraphs 50 and 52 of the Explanatory Memorandum set out the costs for Welsh Archaeological Trusts and the Royal Commission on the Ancient and Historical Monuments of Wales. On what basis were these costs calculated and were the Trusts and Royal Commission consulted on these costs?

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Huw Irranca-Davies, Chair
Legislation, Justice & Constitution Committee
Senedd Cymru
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17th August 2022

Dear Huw

HISTORIC ENVIRONMENT (WALES) BILL

Thank you for your letter of 19 July 2022 following my evidence to the Committee on 11 July. I found the Committee's approach to that first evidence session extremely helpful and I appreciate the opportunity to provide further information and detail through our correspondence.

Legislation excluded from the Bill

1. We omitted provision from section 53 of Part 3 of the Ancient Monuments and Archaeological Areas Act 1979 for legislative competence reasons. This is the provision in section 53(4) about bringing proceedings elsewhere in Great Britain for offences committed in the territorial sea adjacent to Wales. Because of the limitations of the Senedd's competence in terms of the extent of any changes to the law, we would have been unable to restate the effect of section 53(4) in the Bill.

2. Part 2 of the Ancient Monuments and Archaeological Areas Act 1979 is not being restated in the Bill. The decision not to restate this provision has been made for different reasons to the other examples of legislation mentioned in your question. Part 2 of the 1979 Act makes provision about archaeological areas, but Part 2 has never been used to designate areas in Wales. The Part is of no practical utility or effect, so the Bill makes amendments to Part 2 so that it will no longer apply in relation to Wales.

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3. In the other Acts that are wholly or partly restated in the Bill, various provisions have been omitted from the consolidation under Standing Order 26C.2(iii) because they are no longer considered necessary. Those provisions are identified in the Drafters' Notes.

4. However, one provision of this kind was inadvertently omitted from the Drafters' Notes, and I would like to take this opportunity to correct that oversight. Section 54 of the Planning and Compulsory Purchase Act 2004 enables a development order under the Town and Country Planning Act 1990 to specify cases in which a person consulted about an application under the planning Acts is required to provide a response. This would include applications for listed building consent and conservation area consent, but the power has never been used in relation to those applications and Cadw considers that there is no prospect of it being used. Accordingly, in reliance on SO 26C.2(iii) the Bill does not amend section 54 to cover applications under the Bill, meaning that it will cease to apply to listed building and conservation area consent applications in Wales.

5. At a suitable opportunity the Drafters' Notes will be updated to include this reference.

6. The Drafters' Notes also include no reference to section 49 of the Planning (Listed Buildings and Conservation Areas) Act 1990, because that section will continue to apply to Wales after the consolidation. In our view, it would be more appropriate for section 49 to sit with the general law about compensation for the compulsory purchase of land, rather than with the law on the protection of the historic environment, and for that reason we do not think it belongs in this Bill.

7. Of the other examples of legislation mentioned in your Annex, the only realistic candidate for inclusion in the Bill was the provision about wrecks in the 1973 Act.

8. We took the view in relation to the 1969 and 1986 Acts that both Acts were peripheral to the subject-matter of the consolidation and should not be included in the Bill for that reason. In the case of the 1969 Act, the main provisions that are still in force are really about the powers of charities and the Charity Commission in connection with the disposal of land, rather than about the protection of the historic environment as such. Similarly, the 1986 Act is about preventing interferences with military aircraft that have crashed and vessels that have sunk. Had we included this provision in the Bill, we think this would have had a negative effect on the accessibility of the restated legislation.

9. As suggested above, the position in respect of the 1973 Act was different, and the legislation does protect certain wrecks thought to be historically, archaeologically or artistically important. The difficulty with the 1973 Act is that it was passed as "stop-gap" legislation at the time, creating what was meant to be a temporary mechanism for the designation and management of the sites of wrecks.

10. Incorporating the Act in the Bill would have required a number of new provisions to make it consistent with modern practices (the current provision is very light on detail about how the system established by the Act operates), and the legislation has not been used for 20 years (only six sites have ever been designated in relation to Wales). It also applies, of course, off-shore rather than on land. As a result the 1973 Act wasn't considered a priority partly because its omission could be justified and partly because it is not a significant part of the system for the protection of the historic environment.

UK Government proposed legislation

11. I understand, and to an extent share, the concerns of the Committee – the aim of all of the consolidation projects is to improve the accessibility of Welsh law, and we want to ensure that everything is done to maintain that improvement. That is not to say that

subsequent legislative changes cannot be made to legislation that has been consolidated. Clearly it can. What we want to ensure is that those changes are made as amendments to the consolidation, not as separate stand-alone legislative proposals.

12. Officials in the Office of the Legislative Counsel have discussed the Government's programme to improve the accessibility of Welsh law with their counterparts in the other UK drafting offices. This includes explaining our ambitions for maintaining the law once consolidated and codified. Those drafting offices are already aware of our existing policy that amendments to existing Welsh law by other legislatures must make changes to both language texts. There are plenty of examples of that happening already.

13. As explained in the evidence to the Committee, if the UK Government were to legislate for Wales on a matter for which the law had already been consolidated then the expectation would be that the consolidated law would be amended by that UK Bill. That is the approach, should this situation ever arise, that our officials would explain and discuss with the relevant policy, legal and drafting officials at the time.

14. I believe that, should this ever come to pass, then it would be appropriate to draw the Senedd's attention to the drafting approach being taken by the UK Government in their legislative proposals as part of the LCM process.

Codes of Welsh law

15. The Committee has understood the intentions for Codes of Welsh law correctly. They are, to adopt your wording, repositories of the law. They will most likely begin with a single piece of consolidated primary legislation. But they could also begin with the substantive statement of the law set out through an Act which reformed and restated the law on a subject (so through a Senedd Bill taken through Standing Order 26). Subsequent substantive primary legislation may also be part of a Code. For example, due to the amount of legislation involved, a Code of Welsh law on education may – as has been said in evidence previously – contain a number of Acts relating to different aspects of education law (e.g. schools, further education, higher education). If an Act is intended to form part of a Code, then a statement to that effect will be included within it – most usually in the way set out in section 1(1) of the Historic Environment (Wales) Bill.

16. Legislation which amends those substantive Acts will not form part of the Code and will not include the statement. They are simply the vehicle by which amendments to the, in this case, consolidated legislation is achieved.

17. The Committee is also correct to say that sitting within that Code (or 'repository') will be delegated legislation and guidance. The substantive regulations will include a statement that they form part of the Code. And again subsequent amending regulations will not be part of the Code but the effects they create will take place within the Code.

Legislation.gov.uk

18. Although The National Archives are aware of the Government's programme to improve the accessibility of Welsh law, we do not see that it is necessary to seek additional or different styling on legislation.gov.uk for legislation forming part of a Code. This is because it is not a new type or form of legislation (the Acts will continue to be Acts of Senedd Cymru for example).

19. We intend to use the Cyfraith Cymru/Law Wales website to set out the content of Codes of Welsh law. We will create a bespoke page for each Code, and users will be able to access the primary and subordinate legislation from this page, as well as links to

guidance. The Queen's Printer will remain responsible for the publication of the legislation (the official copies and printed versions) and legislation.gov.uk will continue to publish digital versions of the legislation (which is then available under the Open Government Licence for commercial publishers and others to re-use).

20. I will be updating the Senedd later this year on the excellent progress made with legislation.gov.uk on expanding the functionality of the site to enable the Welsh language texts of Welsh law to be updated. But ahead of this I can reassure the Committee that arrangements are being made to ensure that future amendments to Acts and SIs forming part of a Code of Welsh law will be updated on legislation.gov.uk swiftly.

Potential changes to Standing Orders

21. The Senedd and this Committee have recognised the risks, and arguably the damage, to the accessibility of law that has been consolidated subsequently fragmenting and proliferating again if amendments are not made to the substantive Acts. That is why we need to find a way to help ensure that the Senedd itself has to agree to any future legislative proposals doing anything other than amending a Code. I don't think we can say there would never be a good reason why this might happen, but I do think we can say that the Senedd has to be content were that to be proposed.

22. It seems to me that the best way to safeguard this principle is by including a provision on this in the relevant Standing Orders for Bills (and maybe also subordinate legislation if that was something the Senedd considered necessary).

23. The Trefnydd and I will seek to raise this with the Llywydd and the Business Committee once the intentions of the Senedd are known in relation to this Bill, so that a suitable approach to engaging with Members and Party Groups on this matter can be established. To reiterate the point I made at the evidence session, this is a matter that all Members need to consider and be content with – this is because Committees, individual Members and the Commission can bring forward legislative proposals, not just the Government.

New powers of the Welsh Ministers

24. Section 2(3) of the Bill includes a new power for the Welsh Ministers to provide for exceptions to the general rule that religious buildings used for religious purposes are not monuments for the purposes of Part 2 of the Bill.

25. This power has been included because of uncertainty about the meaning of the opening words of section 61(8) of the Ancient Monuments and Archaeological Areas Act 1979. That section prevents ecclesiastical buildings for the time being used for ecclesiastical purposes from being treated as "monuments".

26. In restating this provision in section 2(3) of the Bill, we were uncertain whether the exemption had originally been intended to apply in relation to the Church of England only, and uncertain about what the wording meant in the context of the operation of section 3 of the Human Rights Act 1998 (section 3 requires legislation to be read and given effect in a way that's compatible with ECHR rights, so far as it is possible to do so). We applied the provision to all religions in the first instance, because we took the view that this was the most likely ECHR compatible interpretation, but we have retained a degree of flexibility to respond to any future change in circumstances.

27. There are other examples in the Bill where provision has been moved from subordinate legislation into the Bill but changes might be needed in future. In those cases, the Bill

includes powers to amend the provisions. One example is the power in Schedule 3 to the Bill to change the categories of class consents; this is something that the 1979 Act leaves entirely to subordinate legislation. These examples do not involve the conferral of new powers and simply retain existing flexibility available to the Welsh Ministers to make adjustments to the system created by the Bill.

Section 209(6) of the Bill

28. This change has been made in the context of a change in the approach adopted by the Bill to what's covered on the face of the primary legislation. We have restated much more on the face of the Bill about key matters relevant to partnership agreements than currently appears on the face of the Ancient Monuments and Archaeological Areas Act 1979 and Planning (Listed Buildings and Conservation Areas) Act 1990. For example, provision about the termination of partnership agreements is covered exclusively by the Bill and not left to regulations (as is currently the case).

29. This difference in approach justifies a different procedure in our view, and this is something we think is permitted by Standing Order 26C.2. The matters we are leaving to regulations subject to negative procedure are the types of procedural matters that are also left to negative regulations elsewhere in the Bill; for example, in the provisions about applications for scheduled monument consent.

30. It's worth noting that any regulations modifying the effect of Part 2 of the Bill to partnership agreements would still be subject to the affirmative procedure. This is consistent with the Government's policy on determining the suitable procedure to apply to subordinate legislation.

Effect of the Interpretation Act 1978 and the Legislation (Wales) Act 2019 on the Bill

31. The Interpretation Act 1978 applies to all the Acts consolidated in the Bill and all the subordinate legislation made before 2020. The Legislation (Wales) Act 2019 applies to more recent subordinate legislation and will apply to the Bill. The Bill will therefore be subject to slightly different interpretation provisions from nearly all of the legislation it consolidates.

32. The main implications of this change are described in paragraphs 14 to 17 of the Drafters' Notes, and specific examples are given in the entries for sections 2, 3, 74, 160, 161 and 205 of the Bill and the entry for the omission of section 91(4) of the 1990 Listed Buildings Act. The Office of the Legislative Counsel also issued general guidance on the effect of the changes made by the Legislation Act in 2020: see https://gov.wales/guidance-for-preparing-welsh-legislation

33. The Schedules of generally applicable definitions in the two Acts are slightly different. In particular, the definition of "Wales" in the Interpretation Act does not include the territorial sea whereas the definition in the Legislation Act does. This has different implications for different Parts of the Bill. In Part 2, we have omitted provisions from the 1979 Act that give "Wales" the wider meaning, because they are not needed in a Bill that will be subject to the Legislation Act. In Part 3, we have added a provision giving "Wales" the Interpretation Act meaning; this preserves the effect of the silence in the 1990 Listed Buildings Act about the meaning of "Wales" (which means the Interpretation Act definition applies).

Use of 'expedient' and 'appropriate'

34. Our approach is that references to what is “appropriate” or “expedient” should not be included unless they are necessary. This reflects our general approach of omitting superfluous wording. Conversely, of course, wording should not be omitted where it *is* necessary.

35. Where a provision confers a power on a public authority to do something, it is generally unnecessary to require the authority to consider that doing that thing is “expedient” or “appropriate” because the law already requires public bodies to act reasonably. That position may have been less clear when some of the provisions restated in the Bill were first enacted (in some cases a very long time ago), which may explain why it was done. But a modern Bill would not normally include wording to indicate that a public body must act reasonably, and the references that have been omitted in the Bill are mainly of this kind.

36. Some references to what an authority considers “appropriate” have been retained in the Bill. This is where we think the references are necessary because the provisions in question would not work, or would be unclear, without them. But we are reviewing these references and we would be happy to look at any that the Committee considers may be unnecessary.

37. Where the Bill uses the word “appropriate,” the references should fall into the following categories:

    a. Provisions about consultation or notification often require Ministers to consult or notify specified persons and “any other persons they consider appropriate”. There are examples in sections 5(3), 78(2), 194(7) and 196(4) and paragraph 3(5) of Schedules 4 and 5, and similar provisions about who may be a party to a partnership agreement in sections 25(2) and 113(2) and (4) of the Bill. Referring only to “other persons” would be unclear and might have a different effect.

    b. Some provisions enable or require a public authority to take action it considers “appropriate” for particular purposes or having regard to particular considerations. The references to what the authority considers appropriate make clear the connection between the action and the purposes or considerations. There are examples in sections 35(1), 123(1) and 134(1) and paragraph 2(7) of Schedule 9.

    c. Some provisions state that a public authority may do anything it considers appropriate, in order to make clear that the power is a very broad one. This may be important if the context would otherwise suggest that the power might be narrower. There is an example in section 184(6).

    d. Some provisions refer to what is “appropriate” for a mixture of reasons b. and c., i.e. to make clear that a public authority has a wide power to do anything it considers appropriate for a particular purpose. There are examples in sections 9(5), 42(3), 81(5), 135(3) and 143.

38. These may not be the only reasons for including the word “appropriate” in legislation. For example, the Curriculum and Assessment (Wales) Act 2021 is a recent Act that includes the word “appropriate” in various places. Some of these references were included for reasons that are not relevant to the current Bill:

    a. Sections 12, 14, 16 and 51 of that Act confer powers for education bodies to do various things if they “consider it appropriate to do so”. These powers appear immediately after powers to do other things only if the bodies “consider it

necessary to do so". The references to what is "appropriate" are needed in these contexts to make clear that the test is not what is necessary.

b. Sections 33(4), 45(5) and 46(3) confer powers for a body to direct another person to "take the action that it considers appropriate". The wording is included to make clear that it is the body giving the direction that determines what action it is appropriate to take.

Engagement with HMCTS

39. The Welsh Government has followed the agreed procedures to make the HM Courts and Tribunals Service and the Ministry of Justice aware of the Bill. A Justice System Impact Identification form was submitted to the Ministry of Justice who have confirmed that the Bill will have nil or minimal impact on the justice system. In addition, information has also been submitted to the Lord Chief Justice and no issues have been identified that will impact on HMCTS or the Judicial College.

Judicial Review and Courts Act 2022

40. Section 13 of the Judicial Review and Courts Act 2022 was brought fully into force on 13 July 2022 by regulation 3 of the Criminal Justice Act 2003 (Commencement No. 34) and Judicial Review and Courts Act 2022 (Commencement No. 1) Regulations 2022 (SI 2022/816).

41. The Bill does not make any changes to the sentencing powers of Magistrates' Courts but incorporates actual and prospective changes to the penalties for historic environment offences made by other legislation. The only change to a sentencing power made by the Bill is in section 198, which omits the power to impose a sentence of imprisonment on conviction on indictment that is currently provided by section 330(5) of the Town and Country Planning Act 1990. (See the entry for section 198 in the Drafters' Notes.)

Updating TAN24

42. As part of the implementation phase anticipated in relation to the Bill, guidance and advice issued by the Welsh Government, including Technical Advice Note 24, will be updated. These will be textual changes updating the references to the title of the legislation or section numbers – the policy advice contained in these documents will remain the same.

43. Schedule 14 to the Bill makes transitional provisions, so that any reference to a repealed provision or enactment is to be read as reference to the corresponding provision of the Bill.

44. As I note above, I will be updating the Senedd later this year on progress under the Government's accessibility programme, including in relation to Cyfraith Cymru. But I hope my earlier comments on the intentions for publication of the Codes on that site set out how guidance will be included.

Costs associated with implementation

45. I note your comments regarding other legislation, but we must be clear that just because other legislation may not have costs at the level of this Bill, that in and of itself does not mean these costs are significant or lacking in accuracy or robustness. To calculate costs for this Bill, the parts of the historic environment sector that would be impacted by the new legislation were identified by Cadw, together with consideration of the work that

would be required. These informed estimates of costs, that also took comparisons with recent legislation and civil service pay grades into account.

46. Overwhelmingly, the costs identified were staff costs associated with updating websites, guidance and forms so that they refer to the correct legislation. Time will also be needed for staff to familiarise themselves with the new legislation. As noted in the Explanatory Memorandum these are 'opportunity' rather than 'actual' costs – only very limited actual costs (detailed in the Explanatory Memorandum) were identified.

47. Whilst I of course understand the Committee seeking clarification on any matter set out in Explanatory Memorandum, I should make clear that the Government does not intend to complete the full regulatory impact assessments in relation to consolidation Bills as we do, where relevant, for law reform Bills. In line with Standing Orders, the Government is required to set out the best estimates of any additional costs. In developing these, if it is considered that these costs would be significant, then this would suggest that the proposals cannot continue as a consolidation Bill and the government should consider whether or not to proceed by bringing forward a reform Bill. And a full RIA would be undertaken at that time.

48. But on the points raised by the Committee, I can confirm:

a) Costs for National Park Authorities and Local Authorities

The estimate of time reflects anticipated work to update websites and other materials to include references to the new legislation and familiarising key staff with the legislation. Much of the information that local authorities provide will not change as the effect of the law will remain the same. They may need to check, for example, links which take the reader to the Cadw website to ensure that they are correct, as well as to update references to the correct legislation. This is likely to be done at a similar cost by staff of similar grades to the Welsh Government and the costs have been estimated on this basis. Although no formal consultation has been undertaken, discussions with planning authorities on the impact of the Bill and what will need to be done prior to its commencement have informed our cost estimates.

b) Costs to land owners and private individuals

There will be no costs to landowners or private individuals as there is no change in the effect of the law.

c) Costs for third sector bodies and amenity societies

It is difficult to quantify this as some organisations will include links on their website which direct the reader to the pertinent legislation or associated material which will take a matter of minutes to update. Other organisations include more detailed explanatory text which will need to reflect the new legislation which may take longer to update. It is also not possible to place a cost on the time that this may take as each organisation will have different pay levels.

d) Familiarisation workshops for heritage crime officers

Although police authorities have their own mechanisms for identifying new legislation, there is a network of officers who deal specifically with heritage crime. There are four heritage crime liaison officers in Wales, one for each police force, one of whom is the overall single point of contact (SPOC) leading on heritage crime for Wales. The familiarisation session will be carried out as part of Cadw's regular meetings with the

heritage crime liaison officers. The identified costs include Cadw's costs, opportunity costs for the heritage crime officers' time to attend the session and any time needed to update any manuals or desk instructions.

e) Welsh Archaeological Trusts and the Royal Commission on the Ancient and Historical Monuments of Wales

The Welsh Archaeological Trusts are responsible for the Historic Environment Records of Wales. 'Archwilio' is the online access system to these records and contains information for the whole of Wales; some updating will be required to reflect the new legislation. The Welsh Archaeological Trusts also play a vital role in the management and promotion of the historic environment and we expect them to provide valuable assistance in raising awareness of the new legislation and related subordinate legislation and guidance. Accordingly, they will need to ensure their websites have the correct revised information.

The main costs for the Royal Commission will be associated with staff familiarising themselves with the Bill. The Commission will also need to review their websites and databases to identify changes that may be required to reflect the new legislation.

We have not undertaken formal consultation on the estimated costs, but discussions with the Welsh Archaeological Trusts and the Royal Commission suggest that this work will require minimal activity from both, and this is reflected in the cost estimates.

I look forward to the Committee's further deliberations on the Bill, and am happy to confirm that I will return to provide further evidence on 14 November.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Annex C: Correspondence with the Counsel General on matters mainly related to the Drafters' Notes

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
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Mick Antoniw MS
Counsel General and Minister for Constitution

20 September 2022

Dear Mick

Historic Environment (Wales) Bill

Following our productive meeting on 11 July 2022, during which we began our scrutiny of the Historic Environment (Wales) Bill (the Bill), we now have a further list of questions which we would like to explore with you. The list of questions in the Annex is mainly drawn from matters of interest to us in the Drafters' Notes. The list also includes some questions related to broader themes, as well as some follow-up questions to your response (dated 17 August 2022) to our letter of 19 July 2022.

I would be grateful to receive your response to our questions by 18 October 2022.

Kind regards,

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies
Chair

Annex

MONUMENTS OF SPECIAL HISTORIC INTEREST

1. Section 2(3) – The Drafters' Notes describe the change as "Reframing exemption for ecclesiastical buildings" and note the addition of a new regulation-making power (draft affirmative procedure) to specify exemptions. The Drafters' Notes state that the "current effect of the provision is uncertain" and that the regulation-making power is there for reasons of flexibility in case further clarification is needed in the future.

    a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv).

    b. Why is the effect of the current provision in the *Ancient Monuments and Archaeological Areas Act 1979* (1979 Act) uncertain?

    c. The new regulation-making power (draft affirmative procedure) allows the Welsh Ministers to change policy. The power is not limited to providing clarity – it is a power to apply historic environment law to buildings (i.e. religious buildings) that have not previously been subject to historic environment law. The power can also be used to make incidental, supplementary etc provision (read with section 209(2)). We would welcome further explanation and clarity on why the flexibility is needed.

2. Relevant to section 5 - Omission of power to make regulations to add to list of consultees. The Drafters' Notes state that the experience of implementing amendments made by the *Historic Environment (Wales) Act 2016* (the 2016 Act) has shown that the power is unnecessary, and that Cadw considers that the list of consultees in the section is already comprehensive.

    a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).

    b. We would also welcome confirmation that there is no other delegated power available to the Welsh Ministers that could be used to add to the list of consultees.

    c. We would welcome clarification as to whether there have ever been complaints from people who say they should have been consulted.

3. Section 14(2), (4), (5) – The Drafters' Notes state that important parts of the process for applying for scheduled monument consent have been moved into the Bill from a regulation-making power, because these are "settled elements of the application process" and are unlikely to change in the future. We would welcome clarity regarding the "unlikely to change" reason in the Drafters' Notes.

4. Schedule 6, paragraph 3 – The Drafters' Notes state that a change has been made to introduce consistency throughout this Part of the Bill on costs incurred by Ministers. The costs regime

currently applies to local inquiries but not hearings. The Bill applies the costs regime to both inquiries and hearings.

a. We would welcome clarity on who this change will affect, in particular, who will end up having to pay more costs or less costs.

b. We would also welcome clarity on why the consequential amendment to paragraph 4(1) of Schedule 1 to the 1979 Act is deemed to have been "missed" rather than being a deliberate omission.

5. Relevant to section 21(5) – Omission of power to specify exceptions by regulations. The Drafters' Notes state that section 7(4A) of the 1979 Act is not yet in force, and that the experience since 2016 suggests the power would never be used.

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).

b. We would welcome further explanation and clarity regarding the "power would never be used" reason cited in the Drafters' Notes, given that the power to specify exceptions was included in the 2016 Act.

6. Section 30(7)(b) – The Drafters' Notes state that the requirement that knowledge exists before works were carried out has been omitted. The Drafters' Notes state that this omission corrects an error in the drafting of section 2(8A) of the 1979 Act in relation to cases where the offence is committed later. The omission appears to be changing the elements of criminal defence in certain criminal proceedings. We would welcome confirmation that the Welsh Government has carefully considered the changes to the defence.

7. Section 31(5) – The Drafters' Notes state that there has been an addition of references to persons permitting works and occupiers as potential recipients of a temporary stop notice.

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).

b. We would welcome further explanation as regards the lack of clarity of the effect of the existing law to which Welsh Government refers, i.e. in the context of adding references to occupiers.

8. Section 39(2)(c) – The Drafters' Notes state that provision about securing safety or health by works of repair or works affording temporary support or shelter have been omitted. The Drafters' Notes also states that the ground of appeal in section 9ZE(3)(c) of the 1979 Act replicates equivalent provision for listed building but "seems to have been included by error in section 9ZE."

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv).

b. We would welcome clarity as regards the reasoning offered in the Drafters' Notes that provision in the 1979 Act "seems to have been included by error". We note that section 9ZE was inserted into the 1979 Act by the 2016 Act.

9. Section 46(3) – Reference to being 'employed' as a caretaker has been omitted. The Drafters' Notes states that it is "uncertain what "employed as" means in this context", and that the omission "avoids the ambiguity". We would welcome further explanation and clarity as regards:

- the reliance on SO26C.2(ii) and (iv);
- the reasoning offered in the Drafters' Notes about avoiding ambiguity;
- whether this broadens the category of caretakers captured by section 46(3) of the Bill, when compared to section 12(10) of the 1979 Act.

10. Section 47(4) – The Drafters' Notes state that the new drafting provides clarification that guardians may require the payment of a charge in connection with any use of a monument. The Drafters' Notes also state that this reflects established practice; for example, Cadw charges for weddings held on or near monuments.

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).

b. What difficulties have arisen in the past in respect of such charging, including the power to charge? If none, why is clarification needed?

c. Where does the power currently reside which permits guardians to charge?

d. While there may be evidence of established practice, we would welcome further explanation as to whether or not the new drafting amounts to a policy change.

11. Section 49(5)(a) – The Drafters' Notes state that this provides clarification that the power of full control and management of land in the vicinity of a monument allows charging for any use of the land. The Drafters' Notes also state that this reflects established practice; for example, Cadw charges for weddings held on or near monuments.

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).

b. What difficulties have arisen in the past in respect of such charging, including the power to charge? If none why is clarification needed?

c. Where does the power currently reside which permits guardians to charge?

d. While there may be evidence of established practice, we would welcome further explanation as to whether or not the new drafting amounts to a policy change.

12. Section 55(4) – The Drafters' Notes indicate that a change to the existing legal position has been made so that a power of local authorities to control the times of public access is no longer exercisable by regulations, and that this change "reflects established practice". We would welcome further explanation and clarity:

    - as regards the reliance on SO26C.2(ii) and (iv);
    - as to whether this is a removal of an existing regulation-making power;
    - under what legal authority has the "established practice" been carried out.

13. Section 55(5) – The Drafters' Notes indicate that a change to the existing legal position has been made so that a power of local authorities to exclude the public from access is no longer subject to a requirement for Ministerial consent, and that this change "reflects established practice". We would welcome further explanation and clarity as regards:

    - the reliance on SO26C.2(ii) and (iv).
    - under what legal authority have local authorities been controlling access without Ministerial consent?

14. Section 55(5)(c) – The Drafters' Notes state that the change to the existing legal position provides clarification that public access may be controlled in connection with events or other activities, and that this change "reflects established practice". We would welcome further explanation and clarity as regards:

    - the reliance on SO26C.2(ii).
    - under what legal authority has the "established practice" been carried out.

15. Section 55(6) – The Drafters' Notes state that the change to the existing legal position provides clarification that public access may be controlled in connection with events or other activities, and that this change "reflects established practice". We would welcome further explanation and clarity as regards:

    - the reliance on SO26C.2(ii).
    - under what legal authority has the "established practice" been carried out.

16. Section 56(1) – The Drafters' Notes state that the existing power to make regulations in connection with public access to monuments under public control has been narrowed. The Drafters' Notes also state that the existing power to make regulations has not been exercised and that the power "has been limited to what Cadw considers is required". We would welcome further explanation and clarity as regards:

- the reliance on SO26C.2(ii) and (iv), and
- the reasoning offered in the Drafters' Notes as to what Cadw considers is required.

17. Section 62(6) - Reference to being 'employed' as a caretaker has been omitted. The Drafters' Notes states that it is "uncertain what "employed as" means in this context", and that the omission "avoids the ambiguity". We would welcome further explanation and clarity as regards:

- the reliance on SO26C.2(ii) and whether the ground in (iv) is also applicable;
- the reasoning offered in the Drafters' Notes about avoiding ambiguity;
- whether this broadens the category of caretakers captured by section 62(6) of the Bill, when compared to section 24(5) of the 1979 Act.

18. Section 64(1) to (3) – The Drafters' Notes state that current powers available to the Welsh Ministers in relation to expenditure by local authorities on archaeological investigation have been omitted. The Drafters' Notes also state that the practice is to use general powers available under the *Government of Wales Act 2006* (the 2006 Act).

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).

b. We would welcome clarity as regards how the Welsh Government decided which provisions to include in the Bill and which to omit because they could be dealt with under the 2006 Act.

BUILDINGS OF SPECIAL ARCHITECTURAL OR HISTORIC INTEREST

19. Relevant to section 76(1) – Omission of references to Ministers "compiling" a list of buildings and approving lists compiled by others. The Drafters' Notes state that the power to approve lists compiled by others has never been used and "Cadw considers there is no prospect of it being used". We would welcome further explanation and clarity as regards:

- the reliance on SO26C.2(iii).
- the "Cadw considers there is no prospect of it being used" reason cited in the Drafters' Notes.

20. Relevant to section 76(1) – The Drafters' Notes state that this is the addition of a simple requirement for the Welsh Ministers to publish an up-to-date list of buildings they consider to be of special architectural or historic interest, instead of a requirement for them to make copies available for public inspection. In reliance on SOC26.2(ii), the justification is that this reflects established practice, and the up-to-date list is published online on part of the Cadw website. The original publication requirements are set out in sections 1(1) and 2(4) of the *Planning (Listed*

Buildings and Conservations Areas) Act 1990 (1990 LB Act), which require the Welsh Ministers to make the list available for public inspection, free of charge at reasonable hours in a convenient place.

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii).

b. Section 76(1) sets out how the Welsh Ministers currently comply with their publication obligations in the 1990 LB Act. We would welcome clarity as to whether that is the same as "clarifying the application or effect of existing law" for the purposes of SO26C.2(ii), when the new provision contains none of the specific access requirements stipulated by the existing law. Is this a change in policy?

c. Why has the equivalent requirement on planning authorities in section 76(4) and (5) not been similarly simplified?

d. We would come clarity as regards whether there is any interaction with other access to information rights?

e. How will people without a reliable internet connection access the list?

f. Why has the equivalent requirement on planning authorities in section 76(4) and (5) not been similarly simplified?

21. Relevant to section 78 – Omission of existing power to make regulations amending the list of persons to be consulted about proposals to list or de-list buildings. The Drafters' Notes state that the experience of implementing the 2016 Act "has shown power is unnecessary" and that Cadw considers that the list in the section is "already comprehensive". We would welcome:

- clarity regarding whether there is any other delegated power that could be used to add to the list of consultees (see also the omission of existing power relevant to section 5);
- a further explanation regarding the "Cadw considers" reason cited in the Drafters' Notes and clarity on how this makes the provision obsolete, spent or no longer of practical utility or effect such that SO26C.2(iii) is appropriate.

22. Schedule 7, paragraph 2 – The Drafters' Notes state that the current provisions in Schedule 1A, paragraph 2 and Schedule 2, paragraph 2 to the 1990 LB Act which continue criminal liability after the end of interim protection or temporary listing have been extended to cover the offence of intentionally damaging a listed building under section 118 of the Bill. The Drafters' Notes also state that this "Removes an anomaly, as the provision should apply to all listed building offences".

a. Sections 79(2) and 83(4) appear to expressly exclude the application of the section 118 offence in relation to buildings subject to interim protection or temporary listing. We would welcome clarity as to how paragraph 2 of Schedule 7 will take effect.

b. The change seeks to extend the circumstances when an existing criminal offence can be prosecuted. Given the seriousness of criminal convictions and penalties, we would welcome further explanation and clarity as regards the reliance on SO26C.2(iv), in particular further reasoning as to how this is a "minor" change to the law.

23. Section 81(2) and (6) – The Drafters' Notes state that the existing ground for review has been moved from regulations to the Bill "with simplified wording" and that this is subject to a new power to amend the ground. The Drafters' Notes also state that the change "Ensures that the section deals with this important matter, while retaining flexibility for any future changes". Previously section 2D(6)(a) of the 1990 LB Act gave Welsh Ministers the power to prescribe grounds in regulations. In the Bill, the grounds are set out in the primary legislation with a Henry VIII power to amend that list (affirmative procedure). We would welcome confirmation and clarity as to how this new regulation-making power is within the scope of SO26C.2(iv).

24. Section 81(3) and (4) – The Drafters' Notes state that the requirement to carry out reviews and make decisions in section 2D(3)(a) and (b) of the 1990 LB Act is restated to reflect the requirement in regulations (SI 2017/644, regulation 3) for all reviews to be carried out by persons appointed by the Welsh Ministers, and that the existing regulation-making power to specify exceptions is being retained. The Drafters' Notes also state that the position under the existing regulations is "not expected to change" and that "section 2D(3) may be misleading".

a. We would welcome further explanation as to why the position is not expected to change.

b. Under section 2D of the 1990 LB Act the default position is that the Welsh Ministers must carry out the review, subject to exceptions set out in Regulations. While in practice SI 2017/644 has the effect of requiring all applications to be treated as exceptions, we would welcome further explanation as to how inverting the existing position in primary legislation amounts to a "minor" change in the law.

25. Section 90(1) – The Drafters' Notes state that the Bill now includes references to additional provisions that may require applications to be made to the Welsh Ministers instead of the planning authority, on the basis that the existing list of provisions is incomplete and the additional references "clarify effect". We would welcome confirmation that every provision listed in section 90(1) (or its origin provision where relevant) already applies in relation to applications for listed building consent, even if not expressly referred to in section 10(1) of the 1990 LB Act.

26. Section 90(2)(c) – The Drafters' Notes state that the Bill now includes the addition of a reference to the Welsh Ministers being able to require information to be included in an application, which

"Reflects how provision is understood in practice". We would welcome further explanation to support the statement that this 'reflects how the provision is understood in practice'.

27. Section 90(3) – The Drafters' Notes state that the Bill now includes the addition of a provision for the relevant regulations to specify the content of applications and require the use of forms issued by the Welsh Ministers or others. The Drafters' Notes state that this clarifies matters that are understood to be within the scope of the existing power. We would welcome clarity regarding the extent of the existing provision, and request a more detailed explanation of the basis for the understanding that the scope includes the power to prescribe forms.

28. Section 92(1) – The Drafters' Notes state that the Bill now includes the addition of references to all provisions under which a planning authority may not or must not consider an application made to it. The Drafters' Notes also state that this "Fills gaps" as section 10(1) of the 1990 LB Act is "incomplete because it does not refer to section 81A of that Act or section 327A of the [*Town and Country Planning Act 1990*] 1990 Planning Act". We would welcome confirmation that adding provisions to this section does not change the existing effect of the law.

29. Section 92(2)(b), (3) and (4) – The power to give notification directions has been limited to imposing requirements on individual planning authorities, and replaced with regulations for requirements applying generally. The Drafters' Notes state that "regulations are considered appropriate and there is no need for general requirements to be imposed by directions". We would welcome a more detailed explanation as to why regulations are considered more appropriate for requirements applying generally.

30. Section 95(4) and (5)(a) – Directions excluding a requirement to notify the Welsh Ministers before granting consent have been limited to individual planning authorities and replaced with a regulation-making power for making exceptions that apply generally. The Drafters' Notes state that "regulations are considered appropriate and there is no need for general requirements to be imposed by directions". We would welcome a more detailed explanation as to why regulations are considered more appropriate for exceptions applying generally.

31. Section 95(7) – The Drafters' Notes state that this new provision sets out ways in which regulations or directions may specify a description of applications. The Drafters' Notes also state that this clarifies the scope that the existing direction-making power is understood to have and gives examples. We would welcome further details as to how this new provision clarifies the scope of the powers and what it adds to the existing law.

32. Section 98(1) and (2) – Omission of amendments to section 18 of the 1990 LB Act which would reduce the default period for starting works to 3 years but extend it in the case of legal challenge. The Drafters' Notes state that the amendments have not been brought into force and

"Cadw considers that there is no prospect of them being brought into force". We would welcome further clarity as regards

- the reliance on SO26C.2(iii), and
- a further explanation regarding the "Cadw considers" reason cited in the Drafters' Notes.

33. Section 98(3)(b) – The Drafters' Notes state that the provisions meaning that section 18 of the 1990 LB Act does not apply to consent granted by a partnership agreement have been moved from regulations to the Bill because "it changes the application of the section". We would welcome further detail as to the reasons for moving the provision from secondary to primary legislation.

34. Section 99(3) – The Drafters' Notes state that the existing list of provisions which apply to applications to vary or remove conditions are amended to exclude the requirement for a heritage impact statement but include the power to refuse similar applications. The Drafters' Notes also state that the change ensures that provisions which are appropriate for applications to vary and remove conditions are applied, and provisions which are not appropriate are not applied.

    a. We would welcome further clarity regarding this change, and an explanation as to the difference between the existing and new provisions.

    b. We would welcome a further explanation as to why removing the heritage impact statement requirement does not amount to a policy change.

35. Relevant to section 99 – Omission of amendment inserting a new section 19(5) into the 1990 LB Act which would prevent conditions being varied to extend the period within which works must start. The Drafters' Notes state that the amendment has not been brought into force and "Cadw considers that there is no prospect of it being brought into force". We would welcome a further explanation regarding the 'Cadw considers' reason cited in the Drafters' Notes.

36. Relevant to section 100(4) – Omission of the provision in the 1990 LB Act specifying the determination period for applications for approval of details, so that determination periods for all applications to which the section applies are set by regulations. The Drafters' Notes state that the purpose of the change is to "improve consistency by having all periods set out in one place", which is regulations, because "it is procedural detail that may change from time to time". We would welcome clarity as follows.

    a. Is there an existing power which allows for the determination period set out in the 1990 LB Act to be changed?

    b. Has the determination period been changed since 1990?

c. If the determination period has not changed for over 30 years, should the ability to change the period be subject to wider discussion / consultation (i.e. why should it be done via a consolidation Bill)?

37. Section 102(2) – The Drafters' Notes state that provision for further consultation has been moved from regulations (Negative procedure – see section 93(3) of the 1990 LB Act) to the Bill and reworded to clarify that any requirement for further consultation will be imposed by the Welsh Ministers giving directions. The Drafters' Notes also state that a regulation-making power is not needed "but the subsection clarifies how further consultation would be required".

a. We would welcome clarity regarding what specific rewording has taken place?

b. The Drafters' Notes cite SO26C.2(ii) and (iv) - which parts of the provision are clarification and which are minor change(s)?

c. We would welcome your view on whether the shift from (negative) regulations to directions lessens or removes the possibility of Senedd scrutiny.

38. Relevant to section 105 – Omission of the power to modify certain provisions about listing buildings in relation to land of planning authorities. The Drafters' Notes state that the power has not been used and "Cadw considers that there is no likelihood of it being used". We would welcome further clarity as regards:

- the reliance on SO26C.2(iii), and
- a further explanation regarding the "Cadw considers" reason cited in the Drafters' Notes.

39. Section 105(1) and (2) – The Drafters' Notes state that the existing powers to modify legislation in relation to applications by planning authorities and the Crown are "combined, simplified and made consistent". The types of application to which they apply are also "clarified". The Drafters' Notes state that the list of provisions that may be amended in section 82(3) of the 1990 LB Act is "incorrect" while that in section 82F "seems too wide". The Drafters' Notes also state that "It is not entirely clear which applications the powers apply to, but there is no reason to exclude any type of application for which the Act provides". We would welcome further detail as follows.

a. What specifically has been changed which amounts to 'clarification'?

b. What legislation can be modified?

c. By combining powers, has this resulted in any current delegated power being subject to the downgrading of scrutiny procedure?

d. If the current position is "not entirely clear" how can it be said that the existing provisions are both "incorrect" and "too wide"?

e. Whether the power is now wider than under section 82(2) and (3) of the 1990 LB Act ("any provision" rather than only a specified list) and, if so, what is the justification for this.

40. Relevant to section 105(3) – The Drafters' Notes state that a current power for regulations to require applications to be made to the Welsh Ministers is extended to Crown applications, and a power to provide for Ministers to serve notices is omitted. We would welcome the following:

- confirmation that this is an extension of a delegated power;
- clarification as to why a power to provide for Ministers to serve notices is not required;
- clarification about the "reflects effects powers are already understood to have" reasoning provided in the Drafters' Notes;
- an explanation as to how SO26C.2(ii), (iii) and (iv) each apply to the provision.

41. Section 109(6) – The Drafters' Notes state that the requirements to ignore development requiring planning permission and works requiring consent have been clarified and made consistent, while reference to Schedule 3 to the 1990 Planning Act has been omitted. According to the Drafters' Notes the change "Removes inconsistencies for which no reason has been identified; clarifies effect of provision; omits reference which has no practical effect and should have been repealed". We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii), (iii) and (iv), and ask for confirmation as to whether the inconsistencies/clarifications relate purely to the wording of the provision, or whether something else that has changed.

42. Schedule 9, paragraph 1(7) – The Drafters' Notes state that a provision has been added so that an authority may not withdraw a notice to treat that it is treated as having served by virtue of accepting a purchase notice. The Drafters' Notes also state that this "Corrects an apparent error. The equivalent provision in section 208 of the *Town and Country Planning Act 1971* [the 1971 Act] did apply to listed building purchases, and its omission from the 1990 LB Acts seems to have been a mistake". We would welcome clarity that there could be no reason why the omission from the 1990 LB Act may have been deliberate.

43. Schedule 9, paragraph 4(7) – The Drafters' Notes state that a provision has been added so that an authority may not withdraw a notice to treat that it is treated as having served due to the confirmation of a purchase notice. As with the new provision in Schedule 9, paragraph 1(7), the Drafters' Notes also state that this "Corrects an apparent error" for the same reasoning. We would welcome clarity that there could be no reason why the omission from the 1990 LB Act may have been deliberate.

44. Section 113(6) and (7) – The Drafters' Notes state that the effect of current wording about agreements granting consent subject to condition has been clarified, and the description of types of condition has been omitted. The Drafters' Notes also state that the current wording suggests a discretion as to whether conditions are included in an agreement, which is not how the provision is understood in practice.

    a. We would welcome further information about why there is a discrepancy between how the current provision is understood in practice and how the provision is actually worded.

    b. We would welcome further explanation as regards the change from the discretion to include conditions in a partnership agreement (1990 LB s.26L(6)(b)) to the mandatory obligation to include any conditions (s.113(7)).

45. Section 125(4) – The Drafters' Notes state that the new provision clarifies that the notification requirement only applies where the enforcement notice had been served, which sets out the effect that the existing law is already understood to have. We would welcome:

    - a more detailed explanation about how the new provision sets out the effect of the existing law;
    - an explanation of any implications of the interaction between section 124 (service and taking effect) and section 125(4) and (5);
    - confirmation as to whether there is any scenario where the notice has not been served but it would still be appropriate for notice to be given of variation or withdrawal.

46. Relevant to section 128(3)(b) – Omission of the reference to discharging (i.e. removing) a "limitation" of listed building consent. The Drafters' Notes state that the reference has been removed because the term "limitation" is not used elsewhere in the provisions.

    a. We would welcome clarity as to the meaning of "limitation" and the effect of removing it.

    b. Does the Welsh Government know why "limitation" was originally included in these sections if it does not have a specific meaning under the 1990 LB Act?

47. Section 130 – Omission of powers to apply section 289 of the *Public Health Act 1936* (the 1936 Act) with modifications, and restatement of section 289 (as modified) in the Bill. The Drafters' Notes state that the provisions have been moved "because of importance of provision and because how section 289 applies has not changed for a very long time (since at least SI 1972/1362)". The Drafters' Notes also state that this change was recommended by the Law Commission for the corresponding powers in the 1990 Planning Act. We would welcome:

    - further clarity regarding these omissions and the modifications;

- further explanation as regards applying the Law Commission recommendation which related to the 1990 Planning Act to the 1990 LB Act.

48. Section 132(2), (3), (7) and (8) – Omission of powers to apply sections 276 and 294 of the 1936 Act with modifications, and restatement of sections 276 and 294 (as modified) in the Bill. The Drafters' Notes state that the provisions have been moved "because of important of provisions and because how they apply has not changed for a very long time (since at least SI 1972/1362)", and that this change was recommended by the Law Commission for the corresponding powers in the 1990 Planning Act. We would welcome:

- further clarity regarding these omissions and the modifications;

- further explanation as regards applying the Law Commission recommendation which related to the 1990 Planning Act to the 1990 LB Act.

49. Section 132(5) – The Drafters' Notes state that a provision for costs of works to be a charge on the land has been moved from regulations to the Bill, and the regulation-making power is omitted. We would welcome clarity as to why the power that was previously discretionary (and could be changed) is now to be made permanent on the face of the Bill. Does this amount to a policy change?

50. Section 132(7) and (8) – The Drafters' Notes state that this is a restatement of section 276 of the 1936 Act, but omits subsection (3) which provides that the section does not apply to "refuse" removed by a local authority. According to the Drafters' Notes, "The exclusion of refuse seems intended to avoid any conflict between section 276 and other provisions of the 1936 Act allowing waste to be sold. It does not seem relevant or necessary where an authority does works required by an enforcement notice".

a. We would welcome further detail regarding the statements that things "seem" a certain way.

b. We would also welcome clarity as to why subsection (3) of section 276 to the 1936 Act wasn't disapplied by regulation 15 of SI 2012/793 if it is irrelevant.

c. We would welcome your view as to whether section 132(8)(b) could be further clarified, to make clear what (if any) costs may be recoverable from an owner of the materials who is not also the owner of the land?

51. Relevant to section 136(4) – Omission of the modification of Part 1 of the *Compulsory Purchase Act 1965* (the 1965 Act) in relation to land acquired by Ministers or statutory undertakers. The Drafters' Notes state that the inclusion of this modification in earlier consolidations appears to

have been an error. We would welcome clarity on how it has been determined that the inclusion of the modification in earlier consolidations was in error.

52. Section 151(2) paragraph (a) of the definition of "relevant building" - Reference to a building of "outstanding" interest is changed to refer to "special interest". The Drafters' Notes state that this change has been made for "consistency and clarity" and that the "tests of "special" and "outstanding" interest are not considered to be any different in practice". We would welcome the following clarity and confirmation:

- who has been consulted on whether the two terms are the same in practice?
- was there unanimous agreement?

53. Section 152(4) – The Drafters' Notes state that a power has been added to enter land to decide whether a temporary stop notice should be served, while a power to do so to consider a claim for compensation related to a temporary stop notice has been omitted. The Drafters' Notes also state that this corrects gap in provision. We would welcome the following clarity and confirmation:

- is this a new power of entry?
- why is it appropriate to make this change via a consolidation Bill?
- how does this amount to a "minor" change to existing law?

54. Section 152(9) – The Drafters' Notes state that a new provision has been inserted to the effect that the power to survey land includes determining presence of minerals. The Drafters' Notes also state that the change make the position consistent with the position for monuments under section 43(3) of the 1979 Act and "corrects anomaly". The Drafters' Notes add that "Section 88(6) [of the 1990 LB Act] originally referred to minerals but the reference was repealed by the *Planning and Compensation Act 1991* [the 1991 Act]. It is unclear why, as the presence of minerals could be relevant to compensation under the 1990 [LB] Act". We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv), in particular:

- how it is appropriate to re-insert a provision using a consolidation Bill which was repealed by the UK Parliament when it passed the 1991 Act?
- how does this amount to a "minor" change to existing law?

55. Section 155(5) – The Drafters' Notes state that there is an addition of a time limit for claiming compensation for damage. The Drafters' Notes also state that this corrects a gap and makes the position consistent with that for monuments, based on SI 2017/641, regulation 2(1)(e).

a. We would welcome clarity on what is the understanding of the current time limit.

b. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv), and as to how and why this does not amount to a change in policy.

56. Section 156(1) – The Drafters' Notes state that the default position in current law has been reversed, so that religious buildings are exempt only to the extent provided for in regulations, rather than being exempt unless regulations restrict or exclude the exemption. The Drafters' Notes also state that this "Better reflects existing position under SI 2018/1087, which removes exemption entirely but then re-exempts some building".

a. Who has been consulted on this matter and do they agree?

b. How does reversing the current default position amount to 'clarification'?

57. Relevant to section 156(3)(e) – The Drafters' Notes state that the power to amend the 1990 Planning Act has been omitted because it "has not been used and no need for it has been identified". We would welcome further explanation as regards the reliance on SO26C.2(iii) and further clarity and detail on the reasoning cited in the Drafters' Notes.

58. Section 157 – Inclusion of National Park authorities in the definition of "local authority". We would welcome the following clarification and confirmation.

a. Are the obligations, duties, powers etc of National Park authorities the same in the Bill as in the original provisions?

b. Are there any provisions of the Bill that apply in relation to local authorities that should not apply in relation to National Park authorities?

CONSERVATION AREAS

59. Relevant to section 158 – Omission of a provision obliging planning authorities to review past exercise of the designation function, of the power of the Welsh Ministers to designate conservation areas, and of the requirements for the Welsh Ministers to consult and give notice of designations. Sections 69(2) and (3) and 70(3) and (6) of the 1990 LB Act are omitted from the restatement. The Drafters' Notes state that section 69(2) has not been restated to avoid duplication with the restatement of section 69(1); section 69(3) has not been restated because Welsh Ministers have never used the power therein; and section 70(3) and (6) have been omitted from the restatement as a consequence of not restating section 69(3) of the 1990 LB Act.

a. We would welcome further clarity as to why section 69(2) of the 1990 LB Act is omitted because it is implicit, whereas other sections of the Bill take the approach of spelling out currently implicit powers (for example, section 158(2)). What is the basis for these different approaches?

b. We would also welcome further explanation as regards the reliance on SO26C.2(iii) to remove as obsolete a provision that has not been used or needed so far, and further information as to why the power has never been used and is not needed.

60. Relevant to section 161 – Omission of the ecclesiastical exemption from the requirement for consent in section 75(1)(b) and (5), and of powers to restrict, exclude or modify the exemption in subsections (7) to (9). The Drafters' Notes state that this reflects the fact that the exemption has been removed by article 5 of SI 2018/1087 and "There is no expectation of it being re-applied". The Drafters' Notes also state that demolition would nearly always be inconsistent with the ongoing use of a building for religious purposes, and where religious use cannot continue after the works the exemption cannot apply. We would welcome further clarity as to the statements in the Drafters' Notes that:

- there is no expectation of the exemption being reapplied;
- that demolition is "nearly always" inconsistent with ongoing use for religious purposes. Could religious use not continue in a new building on the site?

61. Section 161(2)(c) and (d) – The Welsh Ministers' direction-making power regarding exempting buildings from the requirement for consent has been limited to cases involving individual planning authorities, and replaced with a new power to make regulations (affirmative procedure – see section 209(5)(h)) conferring exemptions that apply generally. The Drafters' Notes state that regulations are "considered more appropriate for making general exemptions given their potential effect on the scope of the conservation area consent regime".

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iv) and the reasoning set out in the Drafters' Notes.

b. Why are regulations considered more appropriate than a general direction-giving power?

62. Section 163 (whole section) – The Drafters' Notes state that modifications of provisions in Part 3 of the Bill as they apply in relation to conservation area consent have been moved from regulations into the Bill, while preserving the Welsh Ministers' power to make other modifications or exclusions in future. The Drafters' Notes also state that key matters relating to conservation area consent are now set out together in the Bill, instead of it being left to regulations to exclude or modify provisions. The change from the original provision to the restated provision is significant enough to require a change in the applicable Senedd procedure. Does that suggest a more than minor change to the current law?

63. Section 163(1)(c)(i) and (2)(d) – The Drafters' Notes state that there has been addition of provisions applying powers of entry for the purposes of conservation area consent, subject to exceptions. The Drafters' Notes also state that this "Clarifies that certain powers of entry in

sections 152 to 155 must apply for the purpose of conservation area consent, while excluding others that are irrelevant, to reflect how the existing powers are understood to apply. Corrects what appears to have been an oversight".

a. We would welcome clarity and confirmation regarding the explanation in the Drafters' Notes about 'correcting what appears to be an oversight'.

b. Powers of entry are intrusive and likely to engage human rights. Is it appropriate to extend this type of power by way of a consolidation Bill?

64. Relevant to section 165(1) – Omission of the provision that grants may be made subject to conditions. The Drafters' Notes state "Omitted because it goes without saying".

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).

b. We would welcome further details as to why it "goes without saying" that the grant may be subject to conditions.

c. We would also welcome further clarity as to why it is necessary for section 148(6) to spell out that a grant could be subject to conditions, if such a provision is not needed here.

65. Relevant to section 166(3) – Omission of the provision that conservation area agreement grants may be made subject to conditions. The Drafters' Notes state "Omitted because it goes without saying".

a. We would welcome further explanation and clarity as regards the reliance on SO26C.2(iii).

b. We would welcome further details as to why it goes without saying that the grant may be subject to conditions.

SUPPLEMENTARY PROVISION ABOUT BUILDINGS OF SPECIAL INTEREST AND CONSERVATION AREAS

66. Section 169(6) – The Drafters' Notes state that functions to which provisions apply have been extended to include functions relating to compensation, purchase notices and listed building partnership agreements. The Drafters' Notes also state that the change "Removes anomalous gaps in the provisions and corrects an oversight in the drafting of SI 2021/1177".

a. We would welcome further clarity regarding the explanation in the Drafters' Notes that the change "Removes anomalous gaps".

b. We would welcome an explanation regarding the oversight in the drafting of a statutory instrument made only last year.

67. Section 171(3) – The Drafters' Notes state that the existing provision has been amended to remove minor differences between lists of functions covered by the Welsh Ministers powers' to make contributions and require other authorities to make contributions. The Drafters' Notes also state that the difference between the lists of provisions in section 90(1) and (3) of the 1990 LB Act are minor and "no reason for them has been identified". The Drafters' Notes also state that the lists "seem to contain errors". We would welcome clarity regarding what are the differences and what are the identified errors.

68. Section 174(7) – The Drafters' Notes state that the Bill now brings urgent Crown applications for consent within the scope of the legislation. (The Drafters' Notes also state that this "Corrects an error. The omission of urgent Crown applications from section 88E of the 1990 [LB] Act was an oversight in SI 2014/2773.")

    a. We would welcome clarity as to how has it been confirmed that the omission from SI 2014/2773 was an oversight and not a deliberate action?

    b. What scrutiny procedure has applied to urgent Crown applications since the 2014 statutory instrument, if there have been any made?

69. Section 184(2)(a) – The Drafters' Notes state that wording has been added to make clear that the right of appeal under this section does not apply to decisions to grant consent or remove conditions (which are subject to statutory review – see sections 182 and 183). The Drafters' Notes also state that this clarifies that the rights to appeal and apply for statutory review are mutually exclusive. How can we be sure that the intention was not for rights of appeal to apply to decisions to grant consent or remove conditions?

GENERAL PROVISIONS

70. Section 197(3) – The Drafters' Notes state provisions about the period within which information must be given has been applied to Part 2 of the Bill. The Drafters' Notes also state that section 57 of the 1979 Act is "currently silent on this issue" and that the change is "made for consistency with position under the 1990 [LB] Act". We would welcome an explanation as to why the Welsh Government considers that the 1979 Act being "silent on this issue" was not a deliberate act.

71. Relevant to section 200 – Omission of provision disapplying section 331 of the 1990 Planning Act in relation to offence of damaging listed building under section 59 of the 1990 LB Act (in section 80(2) of that Act). The Drafters' Notes state that section 89(2) of the LB Act "continued an error". The Drafters' Notes also state "The section 59 offence was first created by the *Civic Amenities Act 1967* [the 1967 Act], while section 331 of the 1990 Planning Act was first enacted in the *Town and Country Planning Act 1968* [the 1968 Act]. The need to apply it to this offence was apparently missed." We would welcome an explanation as to how the Welsh Government has determined that the omission of the offence was not a deliberate act.

72. Section 201 (whole section) – The Drafters' Notes state that a power to make provision for civil sanctions equivalent to what is permitted by Part 3 of the *Regulatory Enforcement and Sanctions Act 2008* (the 2008 Act) has been extended to cover all offences under the Bill. The Drafters' Notes also state that the powers in Part 3 of the 2008 Act apply to "relevant offences" that were in existence immediately before the day that Act was passed (see 2008, s. 37(2) and 38(2)). Section 201 preserves the effect of Part 3 of the 2008 Act in relation to relevant offences restated in the Bill, but also brings in offences that were added to the 1979 Act and 1990 LB Act by the 2016 Act, as well as a few offences from the 1990 Planning Act and 1972 Act included in the restatement. The Drafters' Notes state that "This is considered appropriate to avoid gaps and ensure consistency. The added offences are all very similar to offences that were already relevant offences for the purposes of the 2008 Act. The failure to extend the 2008 Act to offences inserted by the 2016 Act was a missed consequential amendment." We would welcome further explanation and clarity as regards the reliance on SO26C.2(ii) and (iv), particularly as to the application of the civil sanctions regime to more offences that already exist.

73. Section 203(1) and (2) – The Drafters' Notes state that powers for regulations to provide for exceptions and modification in the 1990 LB Act and the 1990 Planning Act have been omitted because they "have not been used and no need for them has been identified". The Drafters' Notes also state that "Omitting them is also consistent with the position under the 1979 Act (which does not include equivalent powers)."

    a. We would welcome clarity on the removal of any existing regulation-making powers, including confirmation as to a 'what if' scenario where it is later discovered that the power is actually needed.

    b. We would also welcome confirmation as to whether the regulation-making powers are not needed because there are other delegated powers which could be used in the future.

74. Section 207(3) – The power to specify additional interests as Crown interests have been omitted from the restatement. The Drafters' Notes state that there is no equivalent power in the 1979 Act and that the "Power in section 82C(3)(c) has not been used in relation to any land in Wales, and Cadw does not think it is required". We would welcome clarity on the removal of existing power, including confirmation as to a 'what if' scenario where it's later discovered that the power is needed.

75. Section 207(3), (6)(c) and (9)(a) – The Drafters' Notes state that the reference to interest in right of Her Majesty's[1] private estates applied to monuments. The Drafters' Notes also state that the change has been made for consistency with listed buildings and that "Section 50(4) of the 1979

[1] This reference relates to the Drafters' Notes laid before the Senedd in July 2022, and before the recent death of Her Majesty Queen Elizabeth II.

Act is currently silent on this point, but there is no reason for Crown land to have difference meanings in different parts of the Bill."

a. What discussions has the Welsh Government had with the UK Government on Crown-related matters, and have any concerns been raised?

b. We would welcome a further explanation of the impact of the change, including confirmation of what private estates will be captured by section 207.

76. Section 208(3) – The provision about payment and use of compensation has been extended to apply to all compensation under the Bill. The Drafters' Notes state that this "Removes gaps" and that "Section 86(3) of the 1990 [LB] Act does not currently apply to all compensation payable under the Act, but that seems to be an error". We would welcome clarity as regards the explanation in the Drafters' Notes regarding the removal of gaps in the current law and the extension of the provisions around compensation.

77. Section 209(2)(b) – The express powers to make ancillary provision included for all regulations under the Bill. The Drafters' Notes state that this "Ensures powers to make ancillary provision are included for all powers from the 1990 [LB] Act and 1990 Planning Act. Such powers can generally be implied, but the change ensures consistency." The Drafters' Notes also state that "Clause 112 of the Levelling-up and Regeneration Bill introduced in the UK Parliament on 11 May 2022 would amend both Acts to include express ancillary powers, but this change does not depend on that Bill being passed for the reasons given above".

a. We would welcome confirmation that this is the creation of broader delegated powers for the Welsh Ministers (particularly as regards the additional 'supplementary' power).

b. We would welcome further explanation regarding the statement that these powers can "generally be implied".

OTHER MATTERS

78. It is unclear how many brand-new delegated powers there are in the Bill. We would welcome further clarity and confirmation.

79. There are instances in the Bill where existing powers are being lost or narrowed. For example: Section 56(3) – The Drafters' Notes state that the existing power to regulate public access for any reason in connection with public access to monuments under public control "has been reframed as power to make byelaws and narrowed" (The Drafters' Notes also state that the existing power to make regulations has not been exercised and that the power to make byelaws will "attract relevant provisions from the *Local Government Byelaws (Wales) Act 2012*.") We would

welcome confirmation that the Welsh Government is content with losing/narrowing powers as a result of the Bill.

80. What will be the status of subordinate legislation made under the Acts that are being consolidated? For example, regulation 4 of the Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017 currently sets out two grounds for review of certain decisions made by the Welsh Ministers. One of those grounds has been incorporated into the Bill in section 9(2). What will be the status of the other ground set out in regulation 4?

81. Omitted provision in reliance on SO26C.2(iii) – the omitted provision is section 81B of the 1990 LB Act (section not in force) which contains a power for a planning authority to decline to determine an application where similar application is under consideration. The Drafters' Notes state "The insertion of section 81B by the 2004 Act has not been brought into force in Wales, and Cadw considers that there is no prospect of it being brought into force."

    a. We would welcome a further explanation regarding the "Cadw considers" reason cited in the Drafters' Notes.

    b. Sections 16 and 93 of the Bill contain a power for the Welsh Ministers to refuse to consider similar applications. The omitted provision is an un-commenced power for local planning authorities to do the same. We would welcome clarity as to why the Welsh Ministers have the power but the planning authorities will not.

82. We would welcome confirmation as to whether the Welsh Government's pre-introduction consultation and work with stakeholders (or a summary of that work/findings) will be made public?

FOLLOW-UP TO 17TH AUGUST LETTER

83. Paragraph 6 in response to question 1 in the Committee's outgoing letter regarding legislation excluded from the Bill:

    a. We would welcome further clarity and explanation as to why section 49 of the 1990 LB Act is not restated in the Bill.

    b. Section 50 of the 1990 Act, which also relates to the amount of compensation in relation to a compulsory purchase, has been included in the Bill at sections 140 and 141. We would welcome clarity and more detail as to why the line was drawn between sections 49 and 50.

84. Paragraph 23 in response to question 5 in the Committee's outgoing letter regarding potential changes to Standing Orders – The letter states "once the intentions of the Senedd are known in relation to this Bill". Does this mean if/when the Senedd agrees the Bill can proceed as a Consolidation Bill or if/when the Bill is passed?

85. Paragraph 26 in response to question 6 in the Committee's outgoing letter regarding new powers of the Welsh Ministers - The letter states "we have retained a degree of flexibility to respond to any future changes in circumstances". We would welcome clarity on what kind of future changes the Welsh Government envisages.

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies, Chair
Legislation, Justice & Constitution Committee
Senedd Cymru
Cardiff Bay
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17 October 2022

Dear Huw,

HISTORIC ENVIRONMENT (WALES) BILL

Thank you for your letter of 20 September 2022. Given the technical nature of a number of the points raised, the Office of the Legislative Counsel has prepared a detailed response to those which I attach as an Annex.

There are a handful of matters which I am responding to directly:

- I am grateful to the Committee for drawing attention to a mistake, via question 22, in paragraph 2 of Schedule 7. This preserves any criminal liability arising under certain sections of the Bill while a building is subject to temporary listing or interim protection. Paragraph 2 of Schedule 7 should not mention liability under section 118, because section 118 does not apply to a building subject to temporary listing or interim protection. This is a matter I will seek to address at Detailed Committee Consideration if the Bill proceeds to that point.

- In question 79 you have asked about the effect upon existing powers; I can confirm the Government is content with the effect achieved by the Bill in this regard.

- Question 82 sought information about pre-introduction consultation. Cadw worked with a task and finish group composed of individuals drawn from across the historic environment sector. The nature of the interaction was that specific questions or the drafting was shared with the group to glean an understanding of how the provisions worked in practice or the extent to which the effect of the law remained unchanged. The exchanges were never intended to be made public.

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- Finally, on question 84, paragraph 23 of my letter of 17 August was not intended to refer to an absolute date, but rather towards a time when the Government felt it would be appropriate to seek agreement to further changes to Standing Orders. Both timeframes suggested by you, point towards an approach before summer recess.

I trust that the remainder of your questions are answered in the attached annex.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

ANNEX PREPARED BY THE OFFICE OF THE LEGISLATIVE COUNSEL

Monuments of special historic interest

Question 1: section 2(3)

1. The power in section 2(3) of the Bill is in consequence of the change made in restating the opening words of section 61(8) of the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act), which appear in the opening words of section 2(3) of the Bill.

2. We are uncertain whether *"ecclesiastical"* in section 61(8) applies in relation to the Church of England only. It could have a broader meaning so that section 61(8) applies in relation to any religious building used for religious purposes.

3. *"Ecclesiastical"* is an expression used elsewhere in the 1979 Act in a context where it seems clear it is meant to be limited to the Church of England – see section 51, which deals with ecclesiastical property. But we consider this is not definitive in terms of accurately restating section 61(8) in a context where the legislation must be read so far as possible in a manner compatible with the rights contained in the ECHR. It's also the case that section 60 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Listed Buildings Act) uses the expression in a way that seems clearly to have been intended to go beyond the Church of England.

4. Section 2(3) of the Bill restates section 61(8) in the way we consider is most likely to be Convention compliant (to avoid the potential of unjustified discrimination), subject to a power for exceptions to the general position to be specified by regulations. We did not find relevant case law on this particular point, so the position arrived at in the Bill involved a degree of speculation on our part. In *AG ex rel Bedfordshire County Council v Howard United Reformed Church Trustees* (1976) (which related to listed buildings), the House of Lords found it unnecessary and unwise to decide whether *"ecclesiastical buildings"* was confined to Christian buildings. In practice, buildings which might otherwise be scheduled but which have not been after considering section 61 of the 1979 Act are all Christian ones. It is necessary to have flexibility to make provision to ensure buildings which should be protected can remain protected, if that is appropriate.

5. Standing Order (SO) 26C.2(iv) permits the addition of this kind of safeguard: the Llywydd's guidance on SO 26C specifically mentions the ECHR in the context of the kind of changes to the law might need to be made in a consolidation Bill.

6. The power to make supplementary etc. provision is commonly used to ensure the law operates effectively and covers provision for minor associated detail. See also the response to question 77.

Question 2: section 5

7. We have chosen not to restate section 1AA(6) of the 1979 Act to avoid including a provision that would never be used. This kind of omission is permitted by SO 26C.2(iii) on the basis the provision is of no practical utility or effect. We don't think this

assessment is affected by the fact section 1AA(6) was added to the 1979 Act by amendment in 2016.

8. We are not aware of any other power to amend the list of consultees.

9. Cadw has no records of any complaints from people who say they should have been consulted on proposed schedulings or listings. Notices of consultation on proposed schedulings and listings are posted on Cadw's website.

Question 3: section 14(2), (4) and (5)

10. In restating provision about applying for scheduled monument consent, the view has been taken that the balance in the current law between what's addressed on the face of the primary legislation and what has been left to regulations ought to be changed. It is helpful for future users of the legislation to see more of the essential requirements of the system in the primary legislation, instead of having to look elsewhere. This objective guided our approach to sections 14(2), (4) and (5). For example, the specific information mentioned in section 14(2) would always be essential to a full consent application (rather than an application for minor works under section 14(4) and (5)) and it seems preferable to say so in the Bill, instead of in regulations. This also provides greater consistency with the material required for an application for listed building consent in section 90.

11. Sections 14(4) and (5) relate to the simplified consent process introduced by the Historic Environment (Wales) Act 2016 (the 2016 Act). These provisions are working well but future administrations may wish to specify additional cases where the simplified process applies.

Question 4: Schedule 6, paragraph 3

12. The change will affect participants in a local inquiry or hearing held prior to determining an application for scheduled monument consent, or a modification or revocation of a granted consent. Costs will only be granted if a person has behaved unreasonably during an inquiry or hearing and that behaviour has caused another party to incur unnecessary or wasted expenditure. These costs could be awarded against any participant, including Cadw, if behaviour is deemed unreasonable.

13. In its amended form Part 1 of Schedule 1 to the 1979 Act, if taken at face value, makes no provision about evidence and costs at local inquiries caused to be carried out by the Welsh Ministers. We think this is clearly an oversight, because in the absence of provision about these matters, the efficacy of those inquiries could be undermined. If this were a deliberate choice, it would also leave inquiries under Part 1 of the 1979 Act as the only example of an inquiry in that Act in respect of which provision for these matters hadn't been made. Paragraph 4(1) ought to have been applied in relation to the new provision inserted by the 2016 Act.

Question 5: section 21(5)

14. Section 7 of the 1979 Act makes provision for the payment of compensation on the refusal of scheduled monument consent under certain circumstances. Section 7(4) of the 1979 Act originally provided a person would be entitled to receive compensation

for the refusal of scheduled monument consent, even if proposed works would involve the total or partial destruction of a monument, if those works were for the use of the monument for the purposes of agriculture or forestry. Section 7(4A) was introduced by the 2016 Act as there was no evidence to support preferential treatment for agriculture or forestry under section 7(4). There is no record in Wales of any such claims for compensation associated with agriculture or forestry works. The power in section 7(4A) was proposed as a replacement for section 7(4) in Wales in case there were grounds to make any distinction as to the right to compensation for any purpose. In the intervening period, no evidence has been forthcoming to indicate refusal of scheduled monument consent for the total or partial destruction of a monument in the circumstances set out in section 21(3)(b) or (c) of the Bill warrant compensation.

15. There is no prospect of section 10 of the 2016 Act, which includes the prospective amendment of section 7 of the 1979 Act, being brought into force for the reasons set out above. These circumstances mean it is a change permitted by SO 26C.2(iii), and section 7(4A) is not restated on that basis.

Question 6: section 30(7)(b)

16. In revisiting section 2(8A) of the 1979 Act and the drafting of its predecessor – section 2(8) – it became clear the changes made by the 2016 Act had unintentionally altered the effect of the original defence. In the context of section 2, and this particular defence, a person's knowledge before works have been carried out is relevant only in relation to having to prove steps had been taken with a view to finding out whether land contained a scheduled monument. The separate question of a person's knowledge or belief ought to be a relevant factor throughout the process of planning and carrying out works for the purposes of the availability of the defence (as was clear before section 2(8) was amended). The alternative position is at odds with the public policy interest protected by the offences in section 2, because it would potentially offer a defence to a person who acquired knowledge of a scheduled monument's position after works damaging the monument began.

Question 7: section 31(5)

17. In practice, Cadw would choose to serve copies of a temporary stop notice on occupiers of a scheduled monument, although not all occupiers would necessarily be considered to have an interest in the monument or land for the purposes of section 9ZI of the 1979 Act.

18. Section 171E(4) of the Town and Country Planning Act 1990 (the 1990 Planning Act), relating to temporary stop notices in respect of breaches of planning control, provides for notices to be served on an occupier as well as a person with an interest in the land. The provisions the 2016 Act inserted into the 1979 Act and the 1990 Listed Buildings Act do not make express provision for service on occupiers. That was because references to occupiers were thought to be unnecessary, rather than reflecting an intention occupiers should not be served. For the reasons given above, we now consider express references to occupiers should have been included.

19. SO 26C.2.(ii) is relevant in this context, because it permits clarification of the way the law operates in practice. Also relevant is ensuring consistency across the Bill between equivalent provisions, including provision that will be restated in the planning

consolidation project currently underway. For example, section 206 of the Bill (about service of documents) differentiates between occupiers and persons having an interest in monuments, buildings or other land.

Question 8: section 39(2)(c)

20. Section 9ZE(3)(c)(i) of the 1979 Act is at odds with the prohibition in section 2 on carrying out works affecting a scheduled monument (this prohibits works of repair or alteration). That's because it suggests works of repair or the provision of temporary support would be permitted without consent. Although there is a defence in section 2(9) relating to works carried out for health and safety in breach of section 2(1) or (6), this doesn't refer to the possibility of carrying out temporary repairs or support. This is in contrast to the position under section 8 of the 1990 Listed Buildings Act in relation to listed buildings. We think the provision included in section 9ZE(3) mistakenly replicated the position for listed buildings.

21. The dividing line between the different categories of change permitted by SO 26C isn't always clear. In this case, SO 26C.2(iv) is relevant because the Bill is correcting what appears to be a clear anomaly/error in the provision being restated.

Questions 9 and 17 – section 46(3) and 62(6)

22. It isn't immediately clear from the 1979 Act whether the expression *"employed as"* is referring to the contractual basis on which a person is acting as a caretaker, or whether it is a synonym for *"engaged as"* or *"acting as"*.

23. What appears to matter for the purposes of the 1979 Act is whether a person is occupying a monument in the capacity of caretaker, not whether they're doing so under a particular contractual arrangement. This fits with our understanding of how this provision has been understood in practice (where the arrangements involving caretakers vary). We don't think the omission of the wording broadens the provision.

24. We think the change clarifies the application of the current law by removing ambiguity and is why we've relied on SO 26C.2(ii) and (iv).

Questions 10 and 11: sections 47(4) and 49(5)(a)

25. We consider the provision included on charging clarifies the current position but does not change it (hence relying on SO 26C.2(ii)). By virtue of being appointed guardian of a monument or associated land, a person has full control and management of the monument or land. We don't think there is any doubt this includes the power to charge for certain uses of the monument, as would be the case for other persons who have control or management of particular premises for other reasons.

26. While Cadw and local authorities have relied on the full control and management of monuments in guardianship the 1979 Act provides, relationships with the freeholders of guardianship monuments can be complex. Therefore, greater clarity on the powers regarding charging for the use of monuments is desirable.

Questions 12 to 15: section 55(4), 55(5), 55(5)(c) and 55(6)

27. On section 55(4):

    a. The powers available to local authorities under section 19 of the 1979 Act to legislate have been restated in a modified form: they've been restated as powers to make byelaws, not regulations. It's also the case the powers have been narrowed in terms of the range of things they might cover. This includes removing the requirement that the normal times of public access to monuments be controlled by regulations, so the issue will be addressed administratively by each local authority. This narrowing of the existing power could be viewed as the removal of a power to make regulations.

    b. The change is a minor one relating to a matter of form; it reflects the way the rules on accessing monuments have been applied in practice and is consistent with modern drafting practice (it is very unusual for an issue of this nature to be addressed by subordinate legislation).

    c. As such the Drafters' Notes refer to SO 26C.2(ii) and (iv).

28. Section 55(5) - this change reflects the way the provision in section 19 has been applied in practice, which is a type of change permitted by SO 26C. We referred to paragraph (iv) in acknowledgment of the fact we are changing the current law.

29. Section 55(5)(c) and 55(6) - we do not consider the drafting changes the current position; it clarifies what's already permitted, we think, by virtue of the Welsh Ministers or a local authority having control or management of a monument. The position in the 1979 Act isn't clear, though, because of the absence from section 19(2) of the Act of an acknowledgement of this connection. The drafting in the Bill has been included to clarify the basis on which current practice is carried out, and this is a change permitted by SO 26C.2(ii).

30. Controls on public access would be exercised on the basis of ownership, guardianship or general powers such as section 60 of the Government of Wales Act 2006 (GoWA 2006) or the equivalent in local government powers.

<u>Question 16: section 56(1)</u>

31. Under the 1979 Act, a range of matters were subject to regulations under sections 19(3) and (4) and contravention would be an offence incurring a fine. In practice, the Welsh Ministers would only make such regulations if they would prohibit or regulate behaviour that would damage the monument or disturb the public's enjoyment. Restating the provision in this way provides transparency and clarity about its intent.

32. The restated powers taken from section 19 reflect the way in which the system created by the 1979 Act has been applied in practice. The absence of any regulations made for Wales under that section suggests the power in its current form is not required in the Bill. This is a change considered to be permitted by SO 26.2(ii), but the reference in the Drafters' Notes to SO 26C.2(iv) is an acknowledgement of a change to the current law.

<u>Question 18: section 64(1) to (3)</u>

33. The 1979 Act predates Welsh devolution, and there are powers currently available to the Welsh Ministers under the Act that overlap entirely with the general powers available to Ministers under Part 2 of GoWA 2006. Our approach to restating section 45 was to omit any powers where that overlap existed. This is consistent with SO 26C.2(iii) – omitting provision that is unnecessary.

34. Our general approach to the powers of the Welsh Ministers is to omit provision from the restatement only where the same effect could be achieved using general powers, taking into account any controls over the way in which the powers in the 1979 Act are exercisable. Where the exercise of powers is conditional on meeting certain tests or subject to other express restrictions, the powers in the Bill are restated instead of relying on the functions conferred by GoWA 2006.

Buildings of special architectural or historic interest

Question 19: section 76(1)

35. The duty to either compile lists of buildings or approve lists compiled by others was first imposed by the Town and Country Planning Act 1947, but in practice lists of buildings in Wales have always been compiled by or on behalf of Ministers.

36. Because the list of buildings has already been compiled and a systematic resurvey of Wales was completed in 2006, there is no need for approving lists compiled by others. The vast majority of Cadw's listings are now individual 'spot listings' triggered by requests from the public. While reports on specific categories of buildings appropriate for listing may be commissioned from time to time, candidate buildings would always be fully assessed by Cadw officers before inclusion in the list. In the circumstances, the power to approve lists of buildings compiled by others no longer has any practical utility.

Question 20: section 76(1)

37. When section 2(4) of the 1990 Listed Buildings Act was first enacted as section 11 of the Civic Amenities Act 1967, lists and amendments were kept on paper, but the list of buildings is now maintained electronically. There is no hard copy version of the entire list, which includes more than 30,000 buildings.

38. Replacing the duty to make copies available for inspection with a duty to publish the list is intended to reflect what the duty is understood to mean as a result of technological changes since 1967. It could also be described as omitting outdated requirements that no longer have any practical utility or effect.

39. Local authorities continue to provide access to list entries as described in section 77(4) and (5) of the Bill. If people have no access to the internet, they may obtain list entries directly from the relevant local authority or on request from Cadw. They may also access the online database in local libraries.

40. These arrangements are in addition to any other rights of access to information a person might have. But published information is likely to be exempt from disclosure under section 21 of the Freedom of Information Act 2000 on the basis it is already reasonably accessible to the person by other means.

Question 21: section 78

41. We are not aware of any other power to amend the list of consultees.

42. These consultation provisions have been in force since 2017. Since then Cadw has not identified any reason why it might be necessary to amend the list of consultees, because it already includes all the people it would be appropriate to consult. The power has been omitted under SO 26C.2(iii) because it has no practical utility. See also response to question 2.

Question 23: section 81(2) and (6)

43. The main change here is moving the grounds for reviews from regulations into the Bill, to reflect the importance of the provisions. Retaining the power to amend them (with an enhanced Senedd procedure because any regulations would now be amending primary legislation) preserves flexibility that already exists. The combined effect of these changes is to make the provisions more coherent and accessible without significantly altering their practical effect. It is appropriate to make the changes for the purposes of achieving a satisfactory consolidation.

Question 24: section 81(3) and (4)

44. Section 81 of the Bill reflects the effect of regulation 3 of SI 2017/644, with a power to make exceptions derived from paragraph 1(2) of Schedule 1B to the 1990 Listed Buildings Act. This does not change the substantive law but reflects the existing effect of paragraph 1 of Schedule 1B and regulation 3. The only change is in the status of the provision for all reviews to be carried out by appointed persons, which has been moved from secondary to primary legislation. This is considered appropriate to achieve a more coherent piece of legislation.

45. Since the Welsh Ministers are responsible for listing buildings, the use of an appointed person in designation reviews ensures a degree of independence and transparency, the need for which is unlikely to change in future.

Question 25: section 90(1)

46. Confirmed.

Question 26: section 90(2)(c)

47. Section 10 of the 1990 Listed Buildings Act could be read as assuming all applications are made to the local planning authority. The drafting of section 90 of the Bill, on the other hand, makes it clear some applications for listed building consent are made to the Welsh Ministers.

48. Just as planning authorities may have to go back to applicants for information to make sure they have all the relevant material for the purposes of a decision, so may the Welsh Ministers. We consider the existing provisions must be read as giving the Welsh Ministers a power to require further information where an application is made to them, and it is more helpful to set that out as an express power in the Bill.

Question 27: section 90(3)

49. Section 10(3)(a) to (ab) of the 1990 Listed Buildings Act provides regulations may make provision about the form and manner in which applications are to be made, the particulars of such matters as are to be included in such applications, and the documents or other materials which should accompany such applications. The Welsh Ministers and their predecessors have long provided forms for this purpose which are always used in practice. SI 2012/793 require applications to be made in writing to a local planning authority on a form published by the Welsh Ministers (or a form to substantially the same effect). Currently an application is made online using the 1App or using a copy of an application form issued by the Welsh Ministers.

Question 28: section 92(1)

50. Confirmed.

Questions 29 and 30: sections 92 and 95

51. The Committee and its predecessors have recommended provisions in various Senedd Bills conferring powers on the Welsh Ministers to give directions should be replaced with powers to make orders or regulations in the form of statutory instruments subject to Senedd procedure. (For example recommendations 8, 18 and 19 of the Committee's report on the Tertiary Education and Research (Wales) Bill.) The Welsh Government has not always agreed with the recommendations, for example if the directions in question apply only to specific bodies or cases, or if their effect is only minor and technical. However, the principle that general law-making powers conferred on the Welsh Ministers should usually be exercisable by statutory instrument, with an appropriate level of Senedd control, is well accepted.

52. Where a consolidation Bill is restating provisions that confer powers to make general provision of a legislative character in the form of directions, it may be appropriate to replace those powers with powers to make regulations by statutory instrument. The Llywydd's guidance to support the operation of SO 26C gives this as an example of the type of change that may be made to achieve a satisfactory consolidation under SO 26C.2(iv).

53. Whether such a change should be made needs to be judged on a case-by-case basis, taking account of the nature and scope of the provision that may be made in the directions and any practical difficulties the change might cause. In the case of the powers restated in sections 92 and 95 of the Bill, the powers to give directions of general application have been replaced with powers to make regulations and countervailing considerations in favour of retaining directions have not been identified.

Question 31: section 95(7)

54. The examples in section 95(7) provide an indication of some of the more significant types of provision that could be made (and have already been made) in directions. They provide helpful clarification by making it easier for the reader to understand how the power is likely be used.

Question 32: section 98

55. Section 51 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) would change the default period within which development authorised by planning permission and works authorised by listed building consent or conservation area consent must begin. The change has not been brought into force in Wales. It was enacted for England and Wales by an Act of the UK Parliament passed before the Senedd had legislative powers; there was no evidence a reduction in the timescale was needed in Wales, and no reduction has proved to be necessary since 2004.

56. For planning permission, the changes made by section 51 were reversed by section 35 of the Planning (Wales) Act 2015 (which also made other changes to the law) because they were no longer considered appropriate.

57. We consider section 51 of the 2004 Act is no longer of practical utility for the purposes of SO 26C.2(iii).

Question 33: section 98(3)(b)

58. The provision moved from SI 2021/1177 into the restatement of section 18 of the 1990 Listed Buildings Act specifies a type of consent to which section 18 does not apply. It is a provision narrowing the effect of primary legislation, and it is appropriate for it to appear in the primary legislation.

59. Section 18(3) already specifies another type of consent to which the section does not apply. Moving the provision from the 2021 Regulations into the section means these provisions appear in one place, giving a more coherent statement of the law.

Question 34: section 99(3)

60. Section 99(3) restates section 19(3) of the 1990 Listed Buildings Act with two changes to the list of provisions that apply to applications to vary or discharge the conditions of listed building consent or conservation area consent:

    a. Firstly, section 99(3) applies section 93 of the Bill, which restates section 81A of the 1990 Listed Buildings Act about refusing similar applications. Section 81A is inserted by section 43 of the 2004 Act, which does not amend section 19 of the 1990 Listed Buildings Act to apply section 81A to applications to vary or discharge conditions. This seems anomalous given all the other provisions about dealing with applications for consent are applied to applications to vary or remove conditions, and the wording of section 20(2)(aa) of the 1990 Listed Buildings Act (also inserted by section 43 of the 2004 Act) might imply section 81A is thought to apply to those applications. No reason has been identified for not applying section 81A. It may have been overlooked because the corresponding amendments section 43 made to the 1990 Planning Act did not need to deal with applications to vary or remove conditions (planning conditions are varied or removed by applying for a new planning permission).

    b. Secondly, section 99(3) excludes the provisions in section 90 relating to heritage impact statements. Such statements are not provided with applications for the

variation or removal of conditions. Section 99(3) of the Bill changes the powers of the Welsh Ministers, by omitting the power to require a statement to be provided with an application under that section. There would never be any need for a statement with an application for variation or removal of conditions, because such an application will have no impact on the content of a heritage impact statement.

Question 35: section 99

61. This amendment was also made by the 2004 Act. There was no evidence this was an issue in Wales needing to be addressed by legislation.

Question 36: section 100(4)

62. It is anomalous the period after which an appeal may be brought under section 20(2) of the 1990 Listed Buildings Act is set out in different places for different cases. Removing that difference results in more coherent legislation.

63. Setting the period after which an appeal may be made in regulations is consistent with the approach for planning appeals in section 78(2) of the 1990 Planning Act, and with the fact the period within which appeals may be brought is set by subordinate legislation under both 1990 Acts. Consistency between the two Acts is particularly desirable because most works requiring listed building consent also require planning permission; applications under both Acts are often required.

64. There is not currently a power to amend the 8-week period for determining an application for consent specified in section 20(3)(b) of the 1990 Listed Buildings Act, so it has not changed. The 8-week period prescribed under section 20(3)(a) is currently set out in regulation 3(5) of SI 2012/793 (the same period was specified in regulation 3(4) of SI 1990/1519).

65. Although there are no current plans to change the periods set by SI 2012/793, it is possible changes might be considered in future. In the planning context, the 8-week determination period is extended if an application is amended (see article 22 of SI 2012/801). Different determination periods have been set for applications requiring an Environmental Impact Assessment (see regulation 61 of SI 2017/567) and for various other types of application in England (see article 34 of SI 2015/595). Any proposal to make regulations under section 100(4) of the Bill changing the determination period for any type of application would be subject to consultation.

Question 37: section 102(2)

66. Section 21(4B) of the 1990 Listed Buildings Act requires regulations to provide for an application which is varied "*to be subject to such further consultation as the Welsh Ministers consider appropriate*". Regulation 12B(2) of SI 2012/793 was made under this power and repeats the wording of the power without adding anything. The requirement has been moved on to the face of the Bill, rather than being left to regulations, to avoid this unnecessary duplication; a minor change made to achieve a satisfactory consolidation under SO 26C.2(iv).

67. It is not entirely clear from the wording of the current provisions how the Welsh Ministers are to indicate what consultation they consider appropriate, or who will carry it out. The provision for the Welsh Ministers to "*direct*" further consultation is intended to give a clearer flavour of how the provision operates in practice, relying on SO 26C.2(ii).

68. Neither of these changes involve replacing the power to make regulations in section 21(4B) with a power to give directions.

Question 38: section 105

69. No modifications have ever been made under section 82(1) of the 1990 Listed Buildings Act, and Cadw has been unable to identify any modifications that might need to be made. The power is omitted on the basis it has no practical utility.

Question 39: section 105(1) and (2)

70. Sections 82 and 82F of the 1990 Listed Buildings Act contain wording that is unclear, incorrect and too wide. The lack of clarity relates to the types of applications to which the sections apply; the incorrect and excessively wide wording relates to the provisions that may be modified under them.

71. The main clarification made in section 105 is that subsection (2) lists the types of application to which it applies, adopting the terminology used elsewhere in Part 2 of the Bill. Section 82(2) of the 1990 Listed Buildings Act refers to applications *"relating to the execution of works for the demolition, alteration or extension of listed buildings,"* which requires more effort to work out which applications are covered. Section 82F of the Act only mentions applications for consent, but it must also be intended to apply to applications to vary or remove conditions or obtain approval under a consent. Section 105(2) of the Bill makes this position clear.

72. The list of provisions that may be modified in section 82(3) of the 1990 Listed Buildings Act is incorrect. Modifications under section 82(2) must relate to applications, but the list of provisions in section 82(3) includes provisions that have nothing to do with applications while not including some sections about applications (such as section 81A and 88E, added by later legislation which did not amend section 82). The power in section 82F is too wide. It allows modifications of provisions *"contained in or having effect under any enactment"* but the provisions about applications are all made in or under the 1990 Listed Buildings Act and the 1990 Planning Act and are all restated in the Bill. Section 105(1) avoids these problems by conferring a power to exclude or modify *"any provision made by or under this Act"*. The modifications will have to relate to applications, so the regulations will only be able to affect provisions relevant to applications.

73. There is no change of Senedd scrutiny procedures. Regulations under sections 82 and 82F of the 1990 Listed Buildings Act are subject to negative procedure (see section 93(3) of that Act). Regulations under section 105 of the Bill are subject to negative procedure (see section 209(6)).

Question 40: section 105(3)

74. Sections 82 and 82F of the 1990 Listed Buildings Act both confer broad powers to modify provisions. Section 82(4) gives two examples of specific modifications that may be made whereas section 82F does not. Nevertheless, we consider both types of modification would be within the power conferred by section 82F.

75. Section 105(3) of the Bill is not giving the Welsh Ministers a new power they do not have under section 82F of the 1990 Listed Buildings Act. But if section 105(3) only stated it applied to applications by planning authorities, that would be misleading as it might imply the power from section 82F was being narrowed.

76. Provision for the Welsh Ministers to decide an application under section 82(4)(a) of the Act could include provision for them to give notices relating to the application that would otherwise be given by the planning authority. We cannot identify any other way the power to provide for the Welsh Ministers to serve notices in section 82(4)(b) could be used in relation to applications. It is omitted under SO 26C.2(iii) as having no practical effect or utility.

77. On further consideration, we do not consider it is necessary to rely on SO 26C.2(iv) for either of these changes. The Drafters' Notes will be updated in due course to omit the reference to paragraph (iv).

Question 41: section 109(6)

78. Section 32(4) of the 1990 Listed Buildings Act requires that, in determining whether a building or land is capable of reasonably beneficial use, no account is to be taken of a prospective use involving certain types of development of land or any works requiring listed building consent.

79. Section 32(4) requires a use to be ignored if it would involve development *"other than any development specified in paragraph 1 or 2 of Schedule 3 to the principal Act"*. The development specified in Schedule 3 to the 1990 Planning Act consists only of the redevelopment and subdivision of buildings. Almost identical provision is made by section 138 of the 1990 Planning Act in relation to purchase notices under that Act.

80. The courts have considered the effect of the reference to Schedule 3 in section 138 of the 1990 Planning Act, and have held Schedule 3 is irrelevant to the question of whether land has any reasonably beneficial use: see *Gavaghan v Secretary of State for the Environment (1988) 59 P&CR 124, [1989] 1 PLR 88; Hudscott Estates (East) Ltd v Secretary of State for the Environment, Transport and the Regions* (2001) 82 P&CR 8, [2001] 2 PLR 11; and paragraph P138.03 of the *Encyclopedia of Planning Law and Practice*.

81. The uses of land to be ignored under section 138 are those requiring a grant of planning permission: see *R (Stafford Borough Council) v Secretary of State for Communities and Local Government* [2011] EWHC 936 (Admin).

82. Section 109(6) of the Bill restates section 32(4) on the basis of the caselaw in relation to section 138.

83. These changes are clarifying the effect the courts have held section 138 to have, in reliance on SO 26C.2(ii). The removal of the reference to Schedule 3 to the 1990

Planning Act could also be described as omitting wording that no longer has any practical effect under SO 26C.2(iii).

84. Section 32(4) refers to cases where there has been an undertaking to grant listed building consent but not to cases where an undertaking has been given to grant planning permission. We cannot identify any reason for this difference. Section 109(6) removes this anomaly by including a reference to an undertaking to grant planning permission, relying on SO 26C.2(iv).

Questions 42 and 43: Schedule 9, paragraphs 1(7) and 4(7)

85. We are unable to identify any reason why the 1990 Listed Buildings Act would have deliberately changed the position relating to withdrawal of notices to treat. The changes the Act made deliberately were those recommended by the Law Commission in its *Report on the Consolidation of Certain Enactments Relating to Town and Country Planning* (Cm 958, February 1990). The report did not suggest any changes in relation to the withdrawal of notices to treat.

Question 44: section 113(6) and (7)

86. Section 26L(6) of the 1990 Listed Buildings Act states an agreement "*may contain provision… granting listed building consent … and specifying any conditions to which the consent is subject*". The most obvious and sensible reading of the provision is that any conditions must be included in the agreement, since otherwise they will not be recorded. This is how the provision is understood in practice, but the wording has been adjusted in section 113(7) of the Bill to avoid any doubt.

Question 45: section 125(4)

87. Section 125(4) of the Bill makes explicit that which is already implied in section 38(6) of the 1990 Listed Buildings Act. Section 38(6) requires notice of the withdrawal or variation of an enforcement notice to be served on every person who has been served with a copy of the notice or would, if the notice were re-issued, be served with a copy. In our view, this means section 38(6) applies only if the enforcement notice has been served, and the reference to people who would be served if the notice were reissued relates to cases where the ownership or occupation of the building has changed since copies of the notice were served. We are not aware of any scenario in which a notice of withdrawal or variation would need to be served if copies of the original enforcement notice had not been served.

88. We are not aware of any issues relating to the interaction between the provisions about when enforcement notices take effect and the powers to vary or withdraw them.

Question 46: section 128(3)(b)

89. We cannot say what "*limitation*" means in section 41(6)(b) of the 1990 Listed Buildings Act, because there is no provision for listed building consent to be granted subject to limitations. The 1990 Planning Act does refer to both conditions and limitations of planning permission, but even in that Act the distinction is problematic. The Law Commission has recommended abolishing it (*Planning Law in Wales*, recommendation 8-9).

90. We think the reference to "*limitations*" in section 41(6)(b) of the 1990 Listed Buildings Act was a mistake, and the only effect of correcting the mistake is to remove superfluous wording. In the Town and Country Planning Act 1971, section 88 about appeals against planning enforcement notices referred to conditions and limitations, while section 97 about appeals against listed building enforcement notices referred only to conditions. The erroneous reference to limitations in the provisions about listed building enforcement notices derives from the Schedule to the Local Government and Planning (Amendment) Act 1981, which replaced sections 88 and 97 of the 1971 Act with new provisions. It is possible that the provisions about listed buildings cases were drafted by adapting the provisions about planning cases, but that not all the necessary adaptations were made.

Questions 47 and 48: sections 130 and 132(2), (3), (7) and (8)

91. Section 42(3) of the 1990 Listed Buildings Act confers a power to apply certain sections of the Public Health Act 1936 (the 1936 Act) with modifications. That is currently done by regulation 15 of SI 2012/793. To understand the position, a reader must therefore consult section 42, regulation 15 and the 1936 Act. In the Bill, section 130 restates the effect of those provisions in one place, for the purposes of achieving a satisfactory consolidation.

92. Section 42(4) specifies a particular purpose for which modifications of section 289 of the 1936 Act may be made. No modifications have been made for that purpose, and Cadw have not identified any that might be needed. That power is therefore omitted from the Bill as having no practical utility. The Drafters' Notes should have cited SO 26C.2(iii) for this omission and will be updated in due course.

93. Section 178 of the 1990 Planning Act contains identical powers. Recommendation 18-13 in the Law Commission's report *Planning Law in Wales* was to restate those provisions in primary legislation, and is equally applicable to section 42 of the 1990 Listed Buildings Act.

Question 49: section 132(5)

94. Section 132(5) and (6) of the Bill do not involve a change of policy. Regulation 15(2) of SI 2012/793 is moved into the Bill for the purposes of achieving a satisfactory consolidation. Dealing with this issue in primary legislation is consistent with section 55(5C) of the 1990 Listed Buildings Act, restated in section 146(3) of the Bill.

Question 50: section 132(7) and (8)

95. Section 276(3) of the 1936 Act is a surprising provision because it is hard to see why the power to sell materials, or the duty to account to the owner for the proceeds of sale, should be subject to an exception for "*refuse*" (which we would now call "*waste*"). We think the exception made sense in the context of the 1936 Act as originally enacted and may still be relevant in relation to waste collection, but it does not fit the context where section 276 is applied for the purposes of other Acts.

96. Sections 72 and 73 of the 1936 Act gave local authorities functions of collecting domestic and trade refuse. Section 76(2) gave them a power to sell refuse they

removed, without any duty to account for the proceeds. Section 276 of the 1936 Act says it applies wherever an authority removes any materials from any premises and it includes a duty to account to the owner in section 276(2). Section 276(3) makes provision for the relationship between sections 76(2) and 276(2).

97. This issue does not arise where a planning authority enters land to do works required by an enforcement notice. So the omission of section 276(3) is justified under either of paragraph (iii) or (iv) of SO 26C.2.

98. SI 2012/793 followed the approach taken in earlier regulations. It may have been considered unnecessary to expressly disapply section 276(3) or it may have been an oversight.

99. We concluded we were unable to add any words to section 132(8)(b) to clarify which costs may be recovered from an owner of materials, or how they may be recovered. Any change to the position of owners of materials who do not also own the land might also raise policy questions that would require further consideration.

Question 51: section 136(4)

100. Section 52(1) of the 1990 Listed Buildings Act gives planning authorities the power to acquire buildings by agreement. Subsection (2)(b) says it applies to acquisitions under subsection (1), but it purports to modify the Compulsory Purchase Act 1965 for the situation where land is acquired by Ministers or statutory undertakers. That is a completely different situation that cannot arise under subsection (1).

101. Section 52(2)(b) restated section 132(4)(c) of the Town and Country Planning Act 1971. This is a general provision modifying the 1965 Act in relation to all the cases to which it was applied by Part 6 of the 1971 Act, which contained a wider range of powers to acquire land (including the powers restated in Part 9 of the 1990 Planning Act as well as those restated in Chapter 5 of Part 1 of the 1990 Listed Buildings Act). Even if section 132(4)(c) was relevant to acquisitions under any of those other powers, it was not relevant to the power for certain local authorities to acquire listed buildings by agreement and should have been omitted from the 1990 Listed Buildings Act.

102. So far as it refers to statutory undertakers, the provision should not have been restated in the 1971 Act either. Although the Town and Country Planning Act 1962 had contained provisions under which statutory undertakers could be authorised to acquire land, those provisions were repealed by the Town and Country Planning Act 1968.

Question 52: section 151

103. Drafting was shared with Cadw's task and finish group and no issues were raised. The 'special' interest of a listed building is a well-established consideration in the assessment of its significance, whereas 'outstanding' is not a term regularly used in such evaluations.

Question 53: section 152(4)

104. The 2016 Act amended both the 1979 Act and the 1990 Listed Buildings Act to insert powers to issue temporary stop notices, with associated powers of entry. The powers inserted into the 1979 Act included in section 9ZJ(a) an express power to enter land to ascertain whether a temporary stop notice should be served, while those inserted in section 88(3A) of the 1990 Listed Buildings Act did not. Restating both sets of provisions in one Bill has focussed attention on this drafting difference and on the question of whether different powers were intended. There is no reason for the powers to be different, and the failure to include the same power in the 1990 Listed Buildings Act as in the 1979 Act is thought to have been an oversight.

105. There are already powers in both Acts (which are also restated in the Bill) to enter land to investigate whether works are being carried out without consent or in breach of a condition of consent. Those powers could be used to assess whether the first condition for issuing a temporary stop notice had been met, but not to consider the second condition, which is whether works should stop immediately. We consider the addition of an express power covering that second condition to be a minor change it is appropriate to make in the interests of achieving a satisfactory consolidation.

106. The 2016 Act amended both Acts to insert express powers to enter land to consider claims for compensation relating to temporary stop notices, but both Acts also include general powers to enter land to survey or value it in connection with a claim for compensation (in section 43 of the 1979 Act and section 88(4) of the 1990 Listed Buildings Act, also restated in the Bill). The specific powers duplicate the general ones and they have been omitted from the Bill as unnecessary.

Question 54: section 152(9)

107. As explained in the Drafters' Notes, the repeal made by the Planning and Compensation Act 1991 resulted in a difference between the powers to enter land in the 1990 Listed Buildings Act (which do not include a power to bore to determine the presence of minerals) and those in the other planning Acts and the 1979 Act (which do). The difference appears to be an anomaly and we have been unable to identify any reason for it.

108. Schedule 3 to the 1991 Act amended the 1990 Listed Buildings Act by inserting more detailed provisions about the exercise of powers of entry, as well as repealing the reference to minerals in section 88(6). That Schedule was added to the Planning and Compensation Bill without any debate in Parliament.

109. We do not think reinstating the reference to minerals is a significant extension of the powers in section 88 of the 1990 Listed Buildings Act, which already include boring to determine the nature of the subsoil.

Question 55: section 155(5)

110. No time limit is specified for claiming compensation under section 88B(7), leaving the position unclear, but it cannot be the case the entitlement to make a claim lasts forever. Compensation claims for damage related to the exercise of powers of entry must be made in a timely manner so that evidence of damage can be presented.

111. Section 9 of the Limitation Act 1980 sets a 6-year limitation period for claiming any "*sum recoverable by virtue of any enactment*". That limitation period may apply to compensation under section 88B(7) of the 1990 Listed Buildings Act, and is obviously very different from the 6-month limitation periods for all other compensation claims under the legislation consolidated in the Bill.

112. The failure of the 1990 Listed Buildings Act to provide for a time limit for claiming compensation under section 88B(7) is clearly an anomaly – and it is interesting to note Cadw have no records of a claim being made. A 6-month time limit was included in section 155(5) of the Bill for consistency with the other compensation provisions, in the interests of achieving a satisfactory consolidation. This is not a change of policy but involves correcting an anomaly by bringing claims under section 155(5) within the same general policy applying to all time limits for compensation claims under the Bill.

Question 56: section 156(1)

113. Drafting was shared with Cadw's task and finish group, which contained representatives of exempt denominations and local authorities, and no issues were raised. The current legal position, set out in the 1990 Listed Buildings Act and SI 2018/1087, has been criticised by users as complicated and confusing.

114. Section 60 of the Act gives the false impression all ecclesiastical buildings used for ecclesiastical purposes are exempt, when the effect of SI 2018/1087 is the exemption is relatively narrow. If the default position in primary legislation is reversed and regulations are made conferring the same exemption as SI 2018/1087, the result will be clearer and simpler legislation. In that respect, section 156 of the Bill helps to clarify the law under SO 26C.2(ii).

115. The change of approach in section 156 could also be seen as moving the general provision that ecclesiastical buildings are not exempt, currently set out in article 3 of SI 2018/1087, onto the face of the Bill. Moving the provision from secondary to primary legislation could be described as a minor change appropriate to make for the purposes of achieving a satisfactory consolidation under SO 26C.2(iv).

Question 57: section 156(3)(e)

116. There are no modifications of the 1990 Planning Act in SI 2018/1087, or in SI 1994/1771 which it replaced. Furthermore, most of the provisions of the 1990 Planning Act relevant to listed building consent are restated in the Bill and could still be modified under section 156(3)(e). Insofar as section 60 confers a power to modify other provisions of the 1990 Planning Act, it is no longer of practical utility.

Question 58: section 157

117. The definition of "*local authority*" in section 157 of the Bill applies to the references in sections 144 to 147, 152(6), 170, 171, 177(4), 183(7)(c), 197 and Schedule 9. (Other provisions confer functions on a narrower range of local authorities or on planning authorities.) Where those provisions give functions to local authorities, National Park authorities have the functions to the same extent as under the original legislation.

118. Wherever the 1990 Listed Buildings Act refers to a local authority and relies on the general definition of that term in the 1990 Planning Act, National Park authorities are also included, by virtue of provisions inserted by paragraphs 32(11) and 33 of Schedule 10 to the Environment Act 1995 or glossing provisions in paragraph 2(4) of Schedule 8 and paragraph 13 of Schedule 9 to the 1995 Act.

119. Section 177 of the Bill restates provisions from section 250 of the Local Government Act 1972 about evidence at local inquiries. They include a provision that a person may not be required to produce the title of land which does not belong to a local authority. In the 1972 Act, "*local authority*" does not include a National Park authority, but since National Park authorities exercise all the functions of planning authorities and local authorities in relation to historic buildings and conservation areas, it does not seem appropriate to treat them differently from other authorities in this context, so section 177 relies on the general definition of "*local authority*" in section 157.

Conservation areas

120. It is worth reiterating the Government has aimed to restate the existing legislation so as to 'tell the story' in the clearest, most certain, way. In doing so, judgments have been made about which matters need to be set out expressly and which can be assumed. In some cases, different judgments have been made from the drafters of the existing legislation, for example because existing provisions do not reflect modern drafting practice. However, the approach of applying listed building provisions with modifications has been retained to avoid repetition and damaging the overall accessibility of the legislation.

Question 59: section 158

121. The reason for omitting section 69(2) of the 1990 Listed Buildings Act is not that it is implicit. It is omitted because, rather than making express what section 69(1) implies, we think it duplicates what section 69(1) has already expressly said in different words, namely the duty to designate is an ongoing one. In such a case duplication leads to confusion about what the respective provisions mean.

122. By contrast, the inclusion of section 158(2) of the Bill fills in a chronological gap in the story: it is helpful to set out planning authorities may vary or cancel designations before setting out authorities must notify the Welsh Ministers when they have done the varying or cancelling.

123. Section 69(3) of the 1990 Listed Buildings Act is omitted as the Welsh Ministers' have never used their power to designate conservation areas. Planning authorities are, through their local knowledge, better placed to exercise this function. There is no reason to think this will change in future.

Question 60: section 161

124. There is no expectation of the ecclesiastical exemption being reapplied in relation to conservation area consent. The cases to which the exemption, if reapplied, would be capable of applying would be rare (because demolition would nearly always be inconsistent with ongoing use of a building for religious purposes, and where religious use cannot continue after the works, the exemption cannot apply).

125. On the second part of the question, religious use might be able to continue in a new building on the site, but that would not be relevant to the ecclesiastical exemption (if it were reapplied in future).

Question 61: section 161(2)(c) and (d)

126. To the extent the existing power of direction enables provision to be made which will effectively alter the conservation area regime across Wales, the Welsh Ministers consider it is more appropriate for that to be subject to Senedd scrutiny. Section 161 provides the power must now be exercised by regulations. This is a change to the existing law: section 75(1)(d), (2) and (3) of the 1990 Listed Buildings Act enable the Welsh Ministers to make general directions (not regulations). We consider this is appropriate for the purposes of achieving a satisfactory consolidation. See also response to questions 29 and 30 above.

Question 62: section 163

127. Moving modifications of provisions as they apply in relation to conservation area consent from regulations into primary legislation is a minor change to the current law; we are restating modifications that have already been made. But we think this change significantly improves accessibility. The fact many listed buildings provisions apply in modified form to conservation areas is an important matter, and it is more accessible to have the modifications set out in the conservation area part of the primary legislation than to oblige readers to locate those modifications in separate regulations.

128. The change in the applicable Senedd procedure is a consequence of moving the existing modifications into primary legislation: in order to preserve the Welsh Ministers' power to make modifications in future, it is necessary to provide a power to amend primary legislation.

Question 63: section 163(1)(c)(i) and (2)(d)

129. There is no intention to grant new powers of entry. Instead the intention is to state more clearly the powers of entry we consider must already apply in relation to conservation area consent. We cannot think of a reason why Parliament would have intended powers of entry to apply in the context of the listed building consent regime but not the conservation area consent regime; and we think the references in section 88 of the 1990 Listed Buildings Act to other sections of that Act would be read as including references to those sections as applied by section 74(3). But mentioning sections 88 to 88C in section 74(3) would have made it clearer they are intended to apply in relation to conservation area consent. That is the point now clarified in section 163(1)(c)(i) and (2)(d) of the Bill.

Questions 64 and 65: sections 165(1) and 166(3)

130. Although some existing legislation includes express powers to make grants subject to conditions, we consider such provisions reflect the position that would exist in the absence of express provision. Where a public authority has the power to make grants, it must follow there is a power to include conditions in a grant agreement, and it is hard to imagine a grant being made without any conditions. As such it is unnecessary

to say the grant may be made subject to conditions, and the provisions to that effect are omitted in reliance on SO 26C.2(iii). In addition, sections 165 and 166 both make provision about the effect of breaching conditions of a grant, so it is obvious conditions may be imposed. On the other hand, in section 148(6) it was appropriate to state more directly conditions could be included, to introduce the specific example of conditions relating to public access.

Supplementary provision about buildings of special interest and conservation areas

Questions 66: section 169(6)

131. The list of functions to which paragraph 7 of Schedule 4 to the 1990 Listed Buildings Act applies includes all the functions of planning authorities relating to temporary listing and listed building consent, but only some functions relating to enforcement and none relating to heritage partnership agreements (HPAs). We think this is because the list of functions was not updated correctly when the Act was amended by subsequent legislation.

132. Paragraph 7 (of Schedule 4) applies to functions under sections 38 and 42 relating to issuing enforcement notices and doing works required by those notices. It also refers to functions under section 44D, as inserted by the 2016 Act, which is about compensation for loss caused by a temporary stop notice. In the context, it is clear the reference should have been to the power to issue a temporary stop notice under section 44B. Paragraph 7 does not mention the function of applying for an injunction under section 44A, which was inserted by the Planning and Compensation Act 1991, but we cannot identify any reason why it should apply to all enforcement functions except that one. The most likely explanation is that the need to add a reference to section 44A was missed in the drafting of the 1991 Act.

133. Paragraph 7 should apply to an authority's functions relating to HPAs, just as it applies to their functions relating to applications for listed building consent, because HPAs can grant listed building consent. The question of how the 1990 Listed Buildings Act should be modified in relation to HPAs was considered in the drafting of SI 2021/1177, but the need to apply paragraph 7 of Schedule 4 was missed.

Questions 67: section 171(3)

134. Section 90(1) and (3) of the 1990 Listed Buildings Act both apply where compensation is paid by a local authority because of things done under the provisions in Chapters 1 to 4 of Part 1 of that Act about listing, consent, purchase notices and enforcement. Subsection (1) specifically mentions Schedule 3 (about the determination of appeals), whereas subsection (3) does not. It is hard to see what a local authority could do under Schedule 3 that could give rise to a claim for compensation; and in any case Schedule 3 should already be covered by the references to Chapters 2 and 4 of Part 1 of the Act.

135. Both subsections mention things done under section 60 (the ecclesiastical exemption) even though that section only disapplies other sections rather than conferring any functions on local authorities.

136. Subsection (3) refers to things done under section 56, which does not confer any functions apart from a duty to consider whether to exercise other functions, and under

section 59, which does not confer any functions at all. It also refers to section 66(1), which is a duty to have regard to certain matters when exercising functions under the 1990 Planning Act, which contains its own financial provisions. And it refers to sections 67, 68 and 73, which are not restated in the Bill.

137. In other words, wherever either subsection refers to a provision not mentioned in the other subsection, the reference is either incorrect or unnecessary.

Questions 68: section 174(7)

138. At present there is a gap in the provisions for urgent Crown applications. Section 82B(11) provides section 12(4) applies to an urgent Crown application in the same way it applies where a direction is given under section 12, which originally meant the applicant and planning authority had a right to be heard by an appointed person. But SI 2014/2773 amended section 12 so subsection (4) no longer applies in Wales.

139. The Welsh Ministers have no record of having dealt with an application relating to urgent works on Crown land.

Questions 69: section 184(2)

140. Section 62(1) of the 1990 Listed Buildings Act provides the decisions listed in subsection (2) cannot be questioned in any legal proceedings except as provided in section 63. Those decisions include a decision on an enforcement appeal granting listed building consent or discharging a condition of a consent. Section 62(1) means a challenge to such a decision can only be made by applying for statutory review under section 63 and not by appealing under section 65.

141. In considering the corresponding provisions of the 1990 Planning Act, the courts have held a challenge to a decision on an enforcement appeal granting planning permission, or discharging a condition or limitation of permission, must be made by applying for statutory review, but a challenge to any other decision on such an appeal must be brought by making an appeal to the High Court (*Jarmain v Secretary of State for the Environment, Transport and the Regions* [2002] 1 PLR 105; *R (Wandsworth Borough Council) v Secretary of State for Transport, Local Government and the Regions* [2004] JPL 291; *Oxford City Council v Secretary of State for Communities and Local Government* [2007] 2 P&CR 29).

General provisions

Question 70: section 197(3)

142. We've not taken a view as to whether the approach adopted to the issue by the 1979 Act was deliberate, but the absence of a clear deadline seems undesirable in the context of an offence of failing to give information. Because we've rationalised similar but slightly different powers to require information from separate Acts into a single Bill, it's been necessary to make judgments about how to address inconsistencies between the relevant legislation. In this instance, the silence in the 1979 Act on this point isn't consistent with modern drafting practice and is undesirable for the reason given above about criminalising failures to comply with a notice.

Question 71: section 200

143. The issue here arises because the offences in section 59 of the 1990 Listed Buildings Act originally existed outside the Town and Country Planning Acts, in section 3 of the Civic Amenities Act 1967. The 1967 Act made some amendments to the Town and Country Planning Act 1962, but section 3 was a free-standing provision. Neither the 1962 Act nor the 1967 Act included any provision about the situation where an offence is committed by a corporation. The Town and Country Planning Act 1968 did make provision about that situation, but only for offences under the 1962 Act and the 1968 Act, not the offences in section 3 of the 1967 Act.

144. Subsequent consolidations have preserved this position, but we cannot identify any reason why the provision about offences committed by corporations in the 1968 Act should not have been applied to the offences in section 3 of the 1967 Act. We think it should have been applied to those offences, given it applied to all the other statutory offences relating to listed buildings. It seems likely the failure to apply it was an oversight in the drafting of the 1968 Act.

Question 72: section 201

145. The new offences inserted into existing Acts by the 2016 Act were the offences of breaching a scheduled monument enforcement notice and breaching a temporary stop notice (in relation to a scheduled monument or listed building). The offence of breaching a listed building enforcement notice was already included in the 1990 Listed Buildings Act and was therefore a "*relevant offence*" for the purposes of the Regulatory Enforcement and Sanctions Act 2008 (the 2008 Act), as were all the other offences relating to unauthorised works and causing damage to scheduled monuments or listed buildings. As explained in the Drafters' Notes, the need to apply Part 3 of the 2008 Act to the new offences inserted by the 2016 Act was missed during the drafting of the Historic Environment (Wales) Bill 2015.

146. The other offences in the current Bill to which Part 3 of the 2008 Act does not already apply are those in sections 177 and 197 and paragraph 2 of Schedule 6 relating to the provision of information. Again, it would seem anomalous to exclude those offences from section 201 given all the other offences that are restated in the Bill, including offences relating to the provision information with applications for consent, are "*relevant offences*" for the purposes of Part 3 of the 2008 Act.

147. These changes are made for the purposes of achieving a satisfactory consolidation under SO 26C.2(iv). On further consideration, SO 26C.2(ii) is not relevant and the Drafters' Notes will be updated in due course.

Question 73: section 203

148. Section 31(4) and (5) of the 1990 Listed Buildings Act are subject to "*the provisions of any regulations made under this Act,*" but it is not completely clear whether this is referring to regulations under powers set out elsewhere in the Act, or it is conferring separate powers to modify those subsections. In any event, no regulations have been made to limit or exclude the operation of section 31(4) and (5), and we cannot envisage any scenario in which they would be made. Insofar as section 31(4) and (5) are conferring

separate regulation-making powers, they are no longer of any practical utility for the purposes of SO 26C.2(iii).

149. It is conceivable regulations under section 28 or 116 of the Bill modifying the provisions about compensation for termination of a partnership agreement could be used to make consequential modifications of section 203 of the Bill, although we cannot think of any reason why that would be necessary. We are not aware of any other delegated powers that could be used to modify section 203; and if any such powers existed, there would be no need for section 203 to refer to them.

Question 74: section 207(3)

150. We cannot envisage any scenario in which it would be necessary to amend the definition of "*Crown interest*" in the Bill. The Crown and Duchy interests in land covered by section 207(3) and (4) of the Bill are the same as those covered by definitions in many other Acts (see, for example, section 10(2) of the Wild Animals and Circuses (Wales) Act 2020). We do not think there are any other Crown interests in land that could be added.

151. The only order made under section 82C(3)(c) of the 1990 Listed Buildings Act is SI 2006/1469, which relates to the Houses of Parliament and is not relevant to Wales. The Senedd is dealt with differently, in an order under GoWA 2006 whose effect has been incorporated into section 207 of the Bill.

152. In the unlikely event it did prove necessary to amend the definition of "*Crown interest*" because of a legislative change, we would expect the relevant legislation to make any consequential amendments to section 207. If an amendment was needed for some other reason, it is likely a Senedd Bill would be required.

Question 75: section 207(3), (6)(c) and (9)(a)

153. No discussions have been had with the UK Government specifically on Crown-related land. We have liaised with the UK Government on the Bill more generally and no concerns have been raised in relation to Crown-related land.

154. The approach adopted to these interests means land in which these interests exist could be subject to Part 2 of the Bill, as applied by section 74. We don't think this is significant because section 74 allows interferences with that land only to the extent Crown interests are unaffected, and does not affect things done by or on behalf of the Crown. And as suggested in the Drafters' Notes, there seems no justification for restating the current inconsistency between the two principal Acts. The drafting would capture any interests in land held in right of His Majesty's private estates.

Question 76: section 208(3)

155. Section 208(3) of the Bill restates section 51(3) of the 1979 Act and section 86(3) of the 1990 Listed Buildings Act. Section 51(3) applies to all compensation under the 1979 Act. Section 86(3) applies to compensation for loss caused by a building preservation notice (that is temporary listing) or the termination of a HPA. It does not apply to compensation for losses caused by interim protection, the revocation or modification of consent, a temporary stop notice or the exercise of a power of entry, even though

section 51(3) of the 1979 Act applies to the compensation for the corresponding losses under that Act.

156. We are unable to identify any reason for these differences. The 2016 Act amended section 51(3) of the 1979 Act to include compensation relating to interim protection and temporary stop notices, and the failure to make corresponding amendments to section 86(3) of the 1990 Act was an oversight. We think the Planning and Compensation Act 1991 should also have applied section 86(3) of the 1990 Act to compensation under section 88B(7) relating to powers of entry. The fact section 86(3) does not apply to compensation for the revocation or modification of consent derives from the Town and Country Planning Act 1968, which first introduced listed building consent. We are unable to tell whether that was a deliberate choice or an oversight, but it is another anomaly that should be corrected for the purposes of achieving a satisfactory consolidation.

Question 77: section 209(2)(b)

157. The 1990 Planning Act and 1990 Listed Buildings Act do not include general provisions conferring express powers for orders and regulations to make ancillary provision, but such powers are included in some sections. Modern drafting practice is to spell out that powers to make subordinate legislation include powers to make ancillary provision, although it is long established that even in the absence of such provision ancillary powers can be implied where they are needed: see *Attorney General v Great Eastern Rly Co* (1880) 5 App Cas 473. Accordingly, subordinate legislation under the 1990 Acts may make consequential, incidental and supplementary provision where appropriate or necessary.

158. The inclusion of express ancillary powers in section 209(2)(b) of the Bill clarifies those powers are available and avoids the need to rely on implied powers. (Similarly, the Explanatory Notes to the Levelling-up and Regeneration Bill state the purpose of inserting express ancillary powers into the 1990 Acts is "*to make the legal position clear and express*".) It would be misleading and unhelpful for section 209 to provide that only certain powers in the Bill included ancillary powers, as that could suggest ancillary powers were available in some cases but not others.

Other matters

Question 78: new delegated powers

159. In most instances, the delegated powers in the Bill are not new, but have been derived from existing legislation. In some cases, the character of existing delegated powers has been altered, for instance from directions to regulations, but they are not new powers (see response to questions 29 to 31). In other cases, delegated powers have been changed, frequently narrowed, to reflect that the provisions have now been incorporated in the Bill, rather than left to subordinate legislation.

160. A new delegated power for the Welsh Ministers has been identified in the Bill in section 2(3); it allows the Welsh Minsters to except specified buildings from a general exclusion of religious buildings in religious use from scheduling (see response to question 1).

161. No new delegated powers have been identified in the Bill for any other public bodies. In some instances, regulation-making powers for local authorities (including National Park authorities) have been changed to by-law-making powers.

Question 80: status of subordinate legislation

162. The Government's programme to improve the accessibility of Welsh law, *The Future of Welsh Law*, committed to a project considering a package of subordinate legislation to implement this Bill if passed. All associated subordinate legislation, including SI 2017/643, will be considered as part of this project.

Question 81: omitting section 81B of the 1990 Listed Buildings Act

163. In its report, *Planning Law in Wales*, the Law Commission made recommendations (8-5 and 8-6) concerning a planning authority's ability to decline to determine similar applications. It recommended restating sections 70A and 78A of the 1990 Planning Act but omitting section 70B. The Welsh Government accepted these recommendations. The provisions of the 1990 Listed Buildings Act corresponding to sections 70A, 70B and 78A are sections 81A, 81B and 20A respectively.

164. There are occasions where applications for planning permission and listed building consent are submitted in parallel, so it is not sensible to have different systems in operation. Therefore, sections 20A and 81A of the 1990 Listed Buildings Act were included in the consolidation and section 81B was omitted.

Follow up questions

Question 83: legislation excluded from the Bill

165. Section 50 of the 1990 Listed Buildings Act specifically relates to compulsory acquisitions made under section 47 of that Act. Section 47 of the 1990 Act has been restated in the Bill (in section 137) and so section 50 is also restated. Section 50 is different in scope to section 49, which relates to any compulsory acquisition of land, not only those acquisitions provided for under the Bill. We have taken the view that restating it in this Bill, which does not deal with all such compulsory acquisitions, would not improve accessibility.

Question 85: new powers

166. See response to Question 1.

Annex D: Correspondence with the Counsel General on the exclusion of marine law

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Legislation, Justice and Constitution Committee

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Mick Antoniw MS
Counsel General and Minister for Constitution

7 October 2022

Dear Mick

Historic Environment (Wales) Bill

At our meeting on 3 October 2022, we considered correspondence we have received from external stakeholders in relation to the Historic Environment (Wales) Bill (see papers 17 to 21). The expert views offered by these organisations and individuals will be raised with you when you attend our meeting on 14 November. However, in advance of that session, we would be grateful if you would review the comments made by Dr Hayley Roberts and others about the exclusion of the marine environment from the Bill. While we acknowledge that this matter has previously been discussed, on 11 July 2022 and in your correspondence to us dated 17 August 2022, we would welcome your views on the specific points raised by Dr Roberts.

I would be grateful to receive your response by 4 November 2022.

Kind regards,

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies
Chair

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

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28 October 2022

Dear Huw,

HISTORIC ENVIRONMENT (WALES) BILL

Thank you for your letter of 7 October 2022 asking me to review the evidence provided to the Committee by Dr Hayley Roberts on the current exclusion from the Bill of marine historic environment legislation.

Clearly there are no absolute divisions between subject matters in law and there will be connections between matters included in a consolidation Bill and others which are not.

Wrecks are the best-known features of the Welsh marine historic environment, but it also includes submerged landscapes, artefact scatters on the seabed and evidence of centuries of exploitation of the marine environment. A number of statutes currently provide a complex web of protection for the marine historic environment, particularly the:

- Protection of Wrecks Act 1973 (the 1973 Act),
- Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act),
- Protection of Military Remains Act 1986,
- Merchant Shipping Act 1995,
- Marine and Coastal Access Act 2009.

The main provisions for the protection of the marine historic environment are contained in the 1973 and 1979 Acts.

Section 1 of the 1973 Act provides protection for wrecks designated because of their historical, archaeological or artistic importance, or for any objects contained (or formerly

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contained) within them. Diving at designated wreck sites in Wales is prohibited unless Cadw has issued an appropriate licence.

Section 2 of the 1973 Act provides protection for wrecks that are designated as dangerous because of their contents. The subject-matter of section 2 is a reserved matter under paragraph 120 of Schedule 7A to the Government of Wales Act 2006 so it would not be possible to include it in the Bill.

Dr Roberts raises the question of whether wrecks could be protected through scheduling under the 1979 Act rather than the 1973 Act, and the Bill instead repeal section 1 of the 1973 Act for Wales. It is possible to schedule wrecks and other underwater sites within the 12 nautical mile limit of territorial waters as well as those up to and above high water. The systems of protection offered by the two Acts are, however, different. If a wreck has been scheduled, there is no requirement for a licence to dive on a site; public access is permitted on a 'look but do not touch' basis. There are occasions where scheduling would not be appropriate. For example, a remote wreck site, which is vulnerable to uncontrolled salvage or treasure hunting, or which is particularly fragile, might be better preserved through designation as a protected wreck. This means that the site remains as undisturbed as possible, minimising the risk of damage. Despite the acknowledged shortcomings of the 1973 Act, Cadw would be reluctant to lose the ability to designate a wreck under the 1973 Act if that is deemed the most appropriate protection.

As explained in my letter of 17 August, incorporating section 1 of the 1973 Act in the Bill would require a number of new provisions to make it consistent with modern practices. For example, the Act does not require a formal process of consultation before designation or an opportunity to review decisions to designate or refuse a licence to dive. If the provisions are compared to those, for example, in the Planning (Listed Buildings and Conservation Areas) Act 1990 and the 1979 Act, the lack of detail in the procedures is stark. Filling these gaps would entail introducing more than minor changes to legislation.

Three other statutes also affect the management and protection of the marine historic environment:

- The Marine and Coastal Access Act 2009 (2009 Act) sets out a requirement for a national marine plan for Wales. It also requires marine licences for many types of activity below the level of mean high water spring tides. In considering applications, Natural Resource Wales considers a range of factors, including the impact of any proposed activity on the marine historic environment. The marine historic environment is only one of the many matters treated in the 2009 Act and it would not be appropriate to include it in the Bill.

- The Protection of Military Remains Act 1986 (1986 Act) makes it an offence to interfere with the wreckage of any crashed, sunken or stranded military aircraft or designated vessel without a licence. This is irrespective of loss of life or whether the loss occurred during peacetime or wartime. None of the Secretary of State's functions under the Act have been devolved to the Welsh Ministers. In practice, the Ministry of Defence is responsible for designation as a protected place or as a controlled site. The purposes of the Act are not limited to the historic environment, and it does not apply to the very oldest vessels and sites, so it would not be appropriate for this consolidation.

- Under the Merchant Shipping Act 1995 all wreck material — regardless of age, size or apparent importance or value — recovered from UK territorial waters must be reported to the Receiver of Wreck. Although the 1995 Act puts in place controls that

affect the marine historic environment it's subject matter is a reserved matter under paragraph 120 of Schedule 7A to the Government of Wales Act 2006.

While the accessibility of the law for the marine historic environment is unquestionably an issue, there are good arguments that the 1973 Act's proper association is with legislation for the marine environment, where management and protection could be treated more holistically. This point also came out in the Law Commission's evidence to the Committee.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Annex E: Correspondence from stakeholders

The following people and organisations responded to our letter seeking views on the consolidation exercise. All responses can be viewed on the **Committee's website**.

Reference	Organisation
01	Historic Houses (Wales)
02	Natural Resources Wales
03	Royal Town Planning Institute
04	Dr Hayley Roberts - Bangor University
05	Association of Local Government Archaeological Officers
06	Country Land Association Cymru
07	Deputy Welsh Language Commissioner