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
Cardiff
CF99 1SN

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.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Mick.Antoniw@llyw.cymru
Correspondence.Mick.Antoniw@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

- 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.