

Y Pwyllgor Amgylchedd a Chynaliadwyedd

Adroddiad i Gynulliad Cenedlaethol Cymru ar Femorandwm Cydsyniad Deddfwriaethol
Atodol y Bil Tai a Chynllunio sy'n ymwneud â phrynu gorfodol.

3 Mawrth 2016

1. Cyflwyniad

- 1.1 Trafodwyd Femorandwm Cydsyniad Deddfwriaethol Atodol y Bil Tai a Chynllunio ('y Memorandwm') yn ein cyfarfod ar 25 Chwefror 2016. Darparodd y Gwasanaethau Cyfreithiol bapur sy'n egluro'r darpariaethau a gaiff eu cwmpasu gan y Memorandwm. Darperir hyn yn Atodiad A.
- 1.2 Mae ein hystyriaeth o'r Memorandwm wedi canolbwyntio ar ddwy agwedd: rhinweddau'r newidiadau deddfwriaethol arfaethedig; a'r broses a ddilynwyd i ganfod tystiolaeth o'r angen am y newid arfaethedig hwn i'r gyfraith yng Nghymru.
- 1.3 Am y rhesymau a nodir yn yr adroddiad hwn, rydym yn casglu **na ddylai'r Cynulliad roi ei gydsyniad i Senedd y DU ddeddfu ar y mater hwn.**

2. Manteision y newidiadau arfaethedig

- 2.1 Yn yr amser byr a gawsom i ystyried y Memorandwm, dim ond barn nifer fach o randdeiliaid yr oedd yn bosibl inni ei chasglu. Er ei bod yn ymddangos fel pe bai'r ymatebion a gawsom yn cynnig rhywfaint o gefnogaeth i'r newid deddfwriaethol arfaethedig, maent hefyd yn codi rhai cwestiynau pwysig am agweddau ar y cynigion hyn. Rydym wedi cyflwyno'r rhain i'r Gweinidog Cyfoeth Naturiol ('y Gweinidog'). Ymatebodd y Gweinidog ar 2 Mawrth 2016.
- 2.2 Mae ein llythyr at y Gweinidog Cyfoeth Naturiol wedi'i atodi i'r adroddiad amgaeedig fel Atodiad B. Mae ymateb y Gweinidog wedi'i atodi fel Atodiad C. Dylid cyfeirio at yr ohebiaeth hon ar gyfer manylion y materion y credwn sydd angen eu hystyried ymhellach.
- 2.3 Mae'r darpariaethau a gaiff eu cwmpasu gan y Memorandwm yn rai technegol ac yn anodd i'w hystyried mewn maes polisi sydd o ddiddordeb cyhoeddus. Mae'r amserlen ar gyfer ystyried y Memorandwm hwn wedi ein hatal rhag ymgymryd â digon o waith i lunio ein casgliadau ein hunain o ran rhinweddau'r cynigion hyn gan nad ydym wedi cael amser i gasglu'r holl ystod o dystiolaeth sydd ei hangen i lunio casgliadau o'r fath.
- 2.4 **Er nad ydym wedi dod i gasgliadau mewn perthynas â rhinweddau'r newidiadau arfaethedig hyn, rydym wedi darparu gwybodaeth i gynorthwyo Aelodau'r Cynulliad i ystyried eu rhinweddau.**

3. Y broses a ddilynwyd i gefnogi'r newidiadau arfaethedig

- 3.1 Ar sail yr ymatebion a gawsom gan randdeiliaid, a'r ffaith y cynhaliwyd ymgynghoriad cychwynnol Llywodraeth y DU ar sail Lloegr yn unig, ymddengys mai prin, os o gwbl, yr ymgynghorwyd â rhanddeiliaid yng Nghymru ynghylch y newidiadau deddfwriaethol hyn.
- 3.2 Gofynnwyd i'r Gweinidog Cyfoeth Naturiol egluro'r ymgynghoriad sydd wedi'i gynnal. Yn ei ymateb, mae'r Gweinidog yn cydnabod nad yw'r ymgynghoriad a gynhaliwyd hyd yma wedi ymgysylltu rhanddeiliaid Cymru. Ymhellach, mae'r Gweinidog yn cydnabod yr angen i ymgynghori â rhanddeiliaid yng Nghymru cyn y gwneir unrhyw newidiadau i'r gyfraith yng Nghymru. Rhoddir manylion pellach yn llythyr y Gweinidog, yn Atodiad C.
- 3.3 Mae'n amlwg nad ymgynghorwyd â rhanddeiliaid yng Nghymru, ac mae hyn yn peri inni bryderu ynghylch ar ba sail y caiff y newidiadau hyn i'r gyfraith eu cynnig.
- 3.4 Fel pwyllgor sydd wedi cael y cyfrifoldeb o graffu ar ddeddfwriaeth, ni fyddem yn fodlon cytuno ar newid y gyfraith os na fu'n destun ymgynghori a gwaith craffu priodol.

- 3.5 Credwn y dylid cymhwyso yr un prawf cyn i'r Cynulliad benderfynu a yw am roi caniatâd i Senedd y DU ddeddfu ar ei ran yn y mater hwn.
- 3.6 **Deuwn i'r casgliad, na ddylai'r Cynulliad, o dan yr amgylchiadau, roi ei gydsyniad i Senedd y DU ddeddfu ar y mater hwn.**
- 3.7 Mae'r Gweinidog yn ceisio cael newidiadau gan Lywodraeth y DU (fel y nodir yn ei lythyr yn Atodiad C) cyn y ddadl yn y Cynulliad ar y mater hwn.
- 3.8 Pe bai Llywodraeth y DU yn cytuno i gais y Gweinidog, efallai y dylai Aelodau'r Cynulliad ystyried a yw hyn yn rhoi sicrwydd deublyg iddynt na fydd y gyfraith yng Nghymru yn newid new yr ymgynghorir yn llawn â rhanddeiliaid a bod unrhyw newidiadau dilynol yn destun gwaith craffu priodol.

4. Dogfennau ategol

- 1.5 Ynghlwm â'r adroddiad eglurhaol hwn mae pedwar atodiad sy'n rhoi rhagor o wybodaeth. Y rhain yw:
- Atodiad A** – Papur esboniadol gan Wasanaeth Cyfreithiol y Cynulliad.
- Atodiad B** - Llythyr dyddiedig 29 Chwefror 2016 gan Gadeirydd y Pwyllgor Amgylchedd a Chynaliadwyedd at y Gweinidog Cyfoeth Naturiol.
- Atodiad C** – Ymateb y Gweinidog, dyddiedig 2 Chwefror 2016.
- Atodiad Ch** – Ymatebion ysgrifenedig gan Gymdeithas y Cyfreithwyr, Cymdeithas Llywodraeth Leol Cymru a Dŵr Cymru.
- 4.2 Gobeithio y bydd y wybodaeth ychwanegol hon o gymorth i Aelodau'r Cynulliad wneud penderfyniad ar y cynnig cydsyniad deddfwriaethol hwn.

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Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chynghor i Aelodau Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau fod yr wybodaeth a'r cynghor a gynhwysir ynddi yn gywir, ond ni dderbynir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion. This document has been prepared by National Assembly for Wales lawyers in order to provide Assembly Members and their staff with information and advice in relation to matters under consideration by the Assembly and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no liability is accepted for any reliance placed on them by third parties.

Environment and Sustainability Committee Legal Advice Supplementary Legislative Consent Memorandum Housing and Planning Bill: Compulsory Purchase Provisions

Introduction

1. The [Housing and Planning Bill](#) (the 'Bill') was introduced in the House of Commons on 13 October 2015. The Bill was brought to the House of Lords on 13 January 2016 and is currently at Committee stage.
2. The Supplementary Legislative Consent Memorandum ("SLCM") to which this note refers was laid on 22 January 2016, and is the fourth Legislative Consent Memorandum to have been laid in respect of the Bill. .
3. The plenary debate is scheduled to take place on 15th March 2016.
4. Standing Order 29 provides that the Welsh Ministers must lay a Legislative Consent Memorandum where a UK Bill makes provision in relation to Wales:

'(i) for any purpose within the legislative competence of the Assembly (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the competence of the Assembly); or

(ii) which modifies the legislative competence of the Assembly'.

Summary of the Bill and its Policy Objectives

5. The Bill is sponsored by the Department for Communities and Local Government. The UK Government's stated policy objectives for the Bill mainly relate to England and are aimed at providing more housing, tackling rogue landlords, recovering abandoned premises, extending the "right to acquire" in the social rented-sector and simplifying the planning system.
6. Provisions in Part 7 of and Schedules 14 to 19 to the Bill relate to compulsory purchase and apply in relation to Wales.

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Right to enter and survey land – Clauses 152-159

7. **Clause 152** introduces a general power for acquiring authorities to enter and survey land and value it when they are contemplating pursuing a CPO. The authority may need to find out if for example there are any underground structures or contaminated land which may hamper a scheme. At present only some acquiring authorities, such as local authorities have the power.
8. **Clauses 153 – 155** provides for a warrant to authorise the use of force where entry for survey is prevented or is likely to be prevented. A minimum of 14 days' notice must be given and information on the availability of compensation if damage is done must be given to the owner/occupier. Where a survey is to be carried out on land held by a statutory undertaker and the undertaker objects because the survey would seriously interfere with the carrying on of its undertaking, ministerial authority will be required before the acquiring authority can enter the land.
9. **Clause 156** makes provision for compensation to be recovered from the acquiring authority for any damage done as a result of the exercise of the power of entry and for any disputes to be determined by the Upper Tribunal.
10. **Clause 157** introduces offences in connection with powers to enter land. These can be committed by persons obstructing the acquiring authority in the exercise of the powers without reasonable excuse and also the person exercising the power of entry if they obtain and disclose confidential information other than for the purposes for which the person was exercising the power.
11. **Clause 158** provides that clauses 152-157 will apply in relation to Crown Land if the authorised person has the permission of the appropriate authority.
12. **Clause 159** introduces Schedule 14 which clarifies how existing powers of entry will interact with the new general power of entry in clause 152.

Confirmation and Time Limits – Clauses 160-162

13. **Clause 160** allows the Welsh Ministers where they are the confirming authority to publish a timetable setting out the steps to be taken and to provide an annual report to the Welsh Assembly (we presume this is an error and should refer to the National Assembly for Wales).
14. **Clause 161** provides for inspectors to be appointed to act in place of the confirming authority.
15. **Clause 162** clarifies the time limits for exercising compulsory powers where the notice to treat procedure is followed. Notices to treat and general vesting declarations may not be served after the end of the period of 3 years beginning on the day on which the compulsory purchase order becomes operative.

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Vesting declarations- Clauses 163-164

16. **Clause 163** dispenses with the requirement for a preliminary notice of intention before a general vesting declaration may be executed. Instead a prescribed statement about the effect of Parts 2 and 3 of the Compulsory Purchase (Vesting Declarations) Act 1981 must be included in the confirmation notice, which must also include an invitation to any person who would be entitled to claim compensation to give the acquiring authority information about the person's name, address and interest.
16. **Clause 164** extends the current minimum time period between the notice period and vesting from 28 days to 3 months.

Possession following notice to treat etc. – Clauses 165 - 170

17. **Clause 165** extends the minimum notice period after which an acquiring authority may take possession under the notice to treat/notice of entry procedure from 14 days to 3 months. It also provides that a notice of entry ceases to have effect if, before entering on and taking possession of the land, the acquiring authority become aware of an owner, lessee or occupier to whom they have not given a notice. If the acquiring authority serves a notice to treat on the recently discovered lessee or occupier, the acquiring authority may serve a new notice of entry on all the owners, lessees and occupiers of the land. A shorter notice period is introduced in these circumstances provided the recently discovered person is not in occupation of the land. That period will be a minimum of 14 days, or until the end of the period specified in the last notice of entry, whichever is the longer.
18. **Clause 166** enables a person in possession of land to serve a counter-notice requiring the acquiring authority to take possession of land by no later than a date specified, which must be not less than 28 days after the day on which the counter-notice is served and must be before the end of the period specified in the notice of entry or any extended period that the person has agreed with the acquiring authority.
19. **Clause 167** makes it clear that an acquiring authority may agree to extend the period specified in the notice of entry, and **Clause 168** provides that the changes set out in Clauses 165 – 167 apply to the New Towns Act 1981.
20. **Clause 169** introduces Schedule 8 which abolishes an alternative (no longer used) procedure for taking possession of land under section 11 (2) of, and Schedule 3 to, the Compulsory Purchase Act 1965.
21. **Clause 170** extends the minimum notice period for taking possession from 14 days to 3 months. This amendment brings the entry period in line with the extended 3 month notice of entry process.

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Compensation – Clauses 171-175

22. **Clause 171** provides a power to the Secretary of State to make regulations to impose further requirements concerning the notice claimants must give the acquiring authority detailing the compensation sought by them.
23. **Clause 172** clarifies what information must be included in a request for advance payment. Within 28 days of receiving a request, the acquiring authority is able to request further information from the claimant in order to estimate the amount of compensation. The Secretary of State will be able to make regulations to govern the form and content of the request for an advance payment.
24. **Clause 173** provides that an acquiring authority is able to make an advance payment at any time after a request has been submitted and the compulsory acquisition has been authorised. An acquiring authority must make an advance payment if the acquiring authority has given notice to treat in respect of the land to which the request relates, or made a general vesting declaration in respect of the land. The time for making the payment has been reduced from three to two months.
25. **Clause 174** requires an acquiring authority to pay interest if it fails to make an advance payment when it is due. The Treasury must make regulations to specify the rate of interest that will be payable.
26. **Clause 175** provides for repayment of any advance compensation where the acquiring authority does not end up taking possession of the land.

Disputes – Clauses 176 - 178

27. **Clause 176** introduces Schedules 17 and 18 to the Bill. The Explanatory Notes state that the intention of the provisions is to harmonise the approach to the treatment of material detriment under the vesting declaration and notice to treat procedures and to allow the acquiring authority to enter and take possession of the land they are authorised to take before any material detriment has been determined by the Upper Tribunal. A material detriment arises when an acquiring authority only needs to acquire part of a plot of land with the result that the remaining or retaining land is less valuable.
28. **Clause 177** widens the remedies available to the courts. It clarifies that the court has power to quash the decision to confirm the compulsory purchase order as well as the power to quash any provision of the order itself. Where the compulsory purchase order itself is found to be sound but there is an error in the decision to confirm the order, the court may decide to quash the decision alone, meaning that the order will go back to the confirming Minister/s for reconsideration.

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29. **Clause 178** includes new provisions extending the time period to implement a compulsory purchase order where it has been challenged in the courts

Power to override rights – Clauses 179 -182

30. **Clause 179** extends existing powers to override easements and other rights under the Town and Country Planning Act 1990 and other legislation to acquiring authorities which do not already have those powers.
31. **Clause 180** provides for payment of compensation where rights are overridden, and **Clause 181** defines the terms used in sections 179 and 180.
32. **Clause 182** introduces Schedule 19 to the Bill which makes amendments that are consequential on clauses 179 and 180.

Legislative Competence

33. It is the view of the Welsh Government that Part 7 of and Schedules 14 to 19 to the Bill fall within the legislative competence of the National Assembly for Wales in so far as they relate to devolved subjects such as *‘Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Economic regeneration and development, including social development of communities, reclamation of derelict land and improvement of the environment. Highways. Housing. Powers and duties of local authorities. Town and country planning, including listed buildings. Water supply. Water resources management. Flood risk management and Coastal protection’*
34. This is because compulsory purchase powers are an important tool for assembling land needed to help deliver social, environmental and economic change.
35. The test for determining whether legislation is within the legislative competence of the Assembly is to consider: (1) whether the legislation fairly and realistically relates to a devolved subject, and (2) whether any exceptions apply.
36. The Explanatory Notes to the Bill (paragraph 25) provide that the provisions which are the subject of the SLCM are intended to streamline the compulsory purchase system in order to provide for effective regeneration of areas. The UK Government do not agree that a legislative consent motion is necessary for any of the compulsory purchase provisions as they are matters over which the Assembly has no competence. This is presumably because ‘compulsory purchase’ is a silent subject.
37. Given the purpose and effect of the provisions, Legal Services agree with the Welsh Government that the Bill relates to the devolved subjects that they have highlighted in the SLCM.

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38. Further even if the provisions relate to both a devolved subject (e.g. Town and country planning) and a silent subject (compulsory purchase) this does not affect the legislative competence of the Assembly. This was clarified by the Supreme Court in its judgment on the Agricultural Sector (Wales) Act 2014.
39. The Committee may also wish to be aware that DCLG's ['Technical consultation on improvements to compulsory purchase processes'](#) upon which much of Part 7 is based applied to England only.
40. Should the reservations in the Draft Wales Bill remain unchanged 'compulsory purchase of land' would become a reservation which would mean that the Assembly would not have competence to pass any laws which relate to the subject even where they also relate to another subject such as Town and Country Planning, which is the case with the Bill.

**Legal Advisers
National Assembly for Wales
February 2016**

Carl Sargeant AM
Minister for Natural Resources
Welsh Government

29 February 2016

Dear Carl,

Supplementary Legislative Consent Memorandum on the Housing and Planning Bill

The Environment and Sustainability Committee considered the Supplementary Legislative Consent Memorandum (SLCM) on the Housing and Planning Bill ('the Bill') dealing with the Compulsory Purchase Provisions contained in Part 7 and Schedules 14–19. Committee members had concerns about the extent to which the provisions were consulted on in Wales and the UK Government's assessment of how they relate to the legislative competence of the National Assembly for Wales. The Committee also had specific concerns about a number of clauses within the Bill.

Lack of consultation with Welsh stakeholders

We are concerned that the technical consultation carried out by the Department for Communities and Local Government on which much of the proposals for the changes to the compulsory purchase processes are based was England-only. This means that at a crucial stage of the Bill drafting process the needs of Wales were not taken into account. It would have been more appropriate for the consultation to have been carried out on an England and Wales basis if the intention was for the provisions to apply to both.

Please could you outline for the Committee, the timing and detail of the discussion you had with the UK Government in relation to these provisions applying to England and Wales (as opposed to England-only), and whether the



extension of these provisions to Wales was instigated by the UK Government or on the request of Welsh Ministers?

We contacted a small group of stakeholders who confirmed that they had not been consulted on or notified of these proposed changes.

Please can you outline to what extent you have sought the views of stakeholders in Wales in advance of bringing forward this SLCM in January?

Specific Clauses

Section 160

Please can you set out the reasons why the Secretary of State **must** publish one or more timetables in relation to steps to be taken by confirming authorities in confirming a compulsory purchase order, but the Welsh Ministers **may** publish one or more such timetables. Is this difference something the Welsh Government has asked for and if so what was the rationale for it?

Section 161

Please can you set out the Welsh Government's view on the new power to appoint an Inspector to confirm a Compulsory Purchase Order, rather than the decision being taken by a Welsh Minister?

Clauses 171 and 172

Could you set out why you consider it appropriate for the Secretary of State to have regulation-making powers in respect of notices and requests rather than Welsh Ministers? Can you let us know if you agree with these proposals?

Clause 181

Please can you set out why you consider it appropriate for the Secretary of State to have the power to amend the definition of "specified authority" in sections 179 and 180, given that the definition includes the Welsh Ministers and other bodies within the legislative competence of the National Assembly for Wales?

Members of the Committee will be discussing the SLCM at their meeting on 2 March, therefore an early response would be much appreciated.

Yours sincerely,



A handwritten signature in black ink on a light-colored background. The signature is written in a cursive style and reads "Alun Ffred Jones".

Alun Ffred Jones
Committee Chair



Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

Alun Ffred Jones AM
Chair of the Environment and Sustainability Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

20 March 2016

Dear Alunfred .

I am writing in response to your letter of 29 February in relation to the Supplementary Legislative Consent Memorandum on the Housing and Planning Bill ('the Bill'), dealing with the compulsory purchase provisions in Part 7 of and Schedules 14 to 19 to that Bill, which would currently apply in relation to both England and Wales.

Compulsory purchase powers are an important tool to assemble the land necessary to deliver sustainable development and community regeneration. The Welsh Government's view is that the exercise of compulsory purchase relates directly to areas of devolved competence including transport, economic regeneration, water, the historic environment and planning. However, the UK Government's view (as set out in the Explanatory Notes to the Bill) is that corresponding provision to Part 7 and Schedules 14 to 19 would not be within the Assembly's legislative competence.

The Technical consultation on improvements to compulsory purchase processes, undertaken by Department of Communities and Local Government and HM Treasury, took place on an England only basis. Although invited to participate in a joint consultation no indication was given that there was an intention to legislate on an England and Wales basis. The Welsh Government intention at that time was to bring forward separate Welsh legislation and guidance at a later date. The UK Government response to the consultation makes no reference the reforms being extended to Wales.

Bae Caerdydd • Cardiff Bay
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English Enquiry Line 0300 0603300
Llinell Ymholiadau Cymraeg 0300 0604400
Correspondence.Carl.Sargeant@wales.gsi.gov.uk

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The Welsh Government is supportive of the aim of improving the compulsory purchase regime and recognises that some of the changes proposed also relate to matters which are not currently devolved. However, as you note, the technical consultation was carried out on an England only basis and for this reason and with the aim of ensuring that Welsh stakeholders are given an opportunity to contribute, I intend to seek a power to apply, with modifications the relevant provisions to Wales. This would allow a Welsh consultation to be undertaken and, if considered necessary, legislative changes to be introduced at an appropriate time. If the UK Government does not agree this approach I will withdraw my support for the motion.

Queries on specific clauses

Section 160

Please can you set out the reasons why the Secretary of State must publish one or more timetables in relation to steps to be taken by confirming authorities in confirming a compulsory purchase order, but the Welsh Ministers may publish one or more such timetables. Is this difference something the Welsh Government has asked for and if so what was the rationale for it?

While the Welsh Government was not specifically consulted on this provision, I am content that it should be a power for Welsh Ministers rather than a requirement. It is appropriate for Welsh Ministers to decide whether the number of compulsory purchases in which they are involved merit publishing a timetable. In practice, the number of confirmations in Wales would be far less than in England so allowing a view to be taken as to whether the volume of confirmations would make it advantageous to publish a timetable is appropriate. For example, Local Authority highways CPOs confirmed have averaged only 2 per annum over the last 10 years and only 1 per annum over the last 5 years.

Section 161

Please can you set out the Welsh Government's view on the new power to appoint an Inspector to confirm a Compulsory Purchase Order, rather than the decision being taken by a Welsh Minister?

The proposal introduces the option of allowing the delegation of decisions on orders to an Inspector. This brings the confirming CPO process in line with existing delegations for some planning appeals.

Clauses 171 and 172

Could you set out why you consider it appropriate for the Secretary of State to have regulation-making powers in respect of notices and requests rather than Welsh Ministers? Can you let us know if you agree with these proposals?

My officials have already raised this point with UK Government officials, and I will be writing on it shortly. I consider these should be Welsh Ministers' powers in relation to Wales.

Clause 181

Please can you set out why you consider it appropriate for the Secretary of State to have the power to amend the definition of "specified authority" in sections 179 and 180, given that the definition includes the Welsh Ministers and other bodies within the legislative competence of the National Assembly for Wales?

The primary concern regarding overriding of easements was that existing legislation did not cover all organisations that have access to CPO powers. The ability to amend / widened the “specified authorities” enables flexibility at a later date. As stated previously I intend to request that Welsh Ministers have power to apply these provisions

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carl', with a large, stylized initial 'C'.

Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

Atodiad Ch

Response from Law Society

Planning and Housing Bill (HL)

Supplementary Legislative Consent Motion

Submission to the Environment and Sustainability Committee of the National Assembly for Wales

by

Huw Williams¹

1. Introduction

- 1.1 Thank you for the opportunity to submit evidence to the Committee's examination of the Supplementary Legislative Consent Motion² ("SLCM") in relation to Part 7 and Schedules 14 to 19 of the Housing and Planning Bill that is before Parliament.
- 1.2 This paper addresses the questions set in an email from the Clerk of the Committee. At the end of the paper, it draws attention to the interaction between the SLCM and the devolution of legislative competence in relation to compulsory purchase under the Government of Wales Act 2006 Part IV and the position envisaged under the draft Wales Bill and contains some observations on the Welsh public sector's capacity in relation to compulsory purchase.

2. Consultation

2.1 Were you aware of this SLCM prior to this correspondence?

- (a) No. I was not aware personally, nor was the Law Society either in Chancery lane London or at the Wales Office, aware that a Legislative Consent Motion would be sought in respect of these proposals.

2.2 Have you been consulted on the implications for Wales of these clauses?

- (a) The Law Society has not been consulted on the implications for Wales of these clauses

2.3 Did you respond to the UK Government's consultation on these provisions or make a submission to Parliament? (If you have provided a consultation response, or sought input into the Parliamentary process, a copy of any submission made would be gratefully received).

- (a) The Law Society was consulted on the "Technical Consultation on compulsory purchase processes" issued jointly by HM Treasury and the Department of Communities and Local Government in March 2015. A copy of

¹ Lead Partner – Public Law and Vice-chairman of Geldards LLP, a member of the Planning and Environment Law Committee of the Law Society of England and Wales, Chair of Public Law Wales (Wales Public Law and Human Rights Association) and a member of the Welsh Government's Independent Advisory Group on Planning 2012-13

² See: <http://www.assembly.wales/laid%20documents/lcm-ld10513/lcm-ld10513-e.pdf>

the Law Society's consultation response can be viewed at <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/dclg-compulsory-purchase-consultation-law-society-response/>

- (b) It should be noted that the Law Society's response was made on the basis that the consultation proposals related to England. I contributed to the consultation response on the basis that the question of applying these changes to Wales was a matter for the Welsh Government and the National Assembly for Wales. The Welsh based members of the Law Society's Planning and Environment Law Committee have consistently taken the view that compulsory purchase and compensation was a devolved subject under GOWA 2006 for the same reasons as are set out in paragraphs 35 to 37 of the SLCM.
- (c) Given that an SLCM has now come forward to apply the proposed reforms to Wales, it is an unsatisfactory situation that the Welsh Government did not take part in the original consultation. The reason for this is something the Committee might wish to explore during its examination of the SLCM. Similarly the response by DCLG/HM Treasury to the consultation³ makes no reference the reforms being extended to Wales.
- (d) The approach of DCLG to this consultation is further evidence of the Department's disregard or ignorance of the continuing Welsh dimension to certain of its functions arising from the non-devolution of certain subjects. The establishment last year of a review of the Community Infrastructure Levy, without any acknowledgement of the impact of the review on the rest of the planning system in Wales which is devolved, is a case in point⁴.
- (e) The attitude of DCLG is in contract to that of the Department of Environment Food and Rural Affairs, which regularly consults jointly with the Welsh Government.in relation to environmental matters ⁵

3. Merits

3.1 What are your views on the proposed changes to the compulsory purchase regime?

- (a) The Law Society's response to the original consultation document shows a general support of the proposals, many of which address areas of difficulty or inconsistency which have been well-known to practitioners in this field for many years.

3.2 What are the implications for Wales if the proposed changes are made?

- (a) As the Law Society's submission to the Constitutional and Legislative Affairs Committee on the Draft Wales Bill makes clear, it considers that the code for determining the compensation payable on the compulsory acquisition of land should remain the same in both England and Wales. This is because the

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See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472595/151027_Government_response_for_publication_FINAL.pdf

⁴ See the Law Society's submission to the Constitutional and Legislative Affairs Committee on the Draft wales Bill at paragraphs 12 – 21

<http://www.senedd.assembly.wales/documents/s46706/DWB%2024%20-%20Huw%20Williams.pdf>

⁵ For example The Welsh Government and the Department for Environment, Food and Rural Affairs (DEFRA) consultation on proposals to tackle waste crime and poor performing sites in the waste management industry <http://gov.wales/consultations/environmentandcountryside/waste-crime-and-poor-performing-sites/?lang=en>

payment of compensation and the vesting or transfer of land as a result of compulsory purchase is intimately connected with the civil law relating real property (land) which is currently not devolved: a situation that seems likely to continue.

- (b) The conferring of powers of compulsory purchase and the procedural machinery for making compulsory purchase orders, determining objections and taking possession of land, on the other hand, are matters where provision can be made to reflect the particular circumstances of Wales.
- (c) There is one proposal in the Bill, however, that the Committee may wish to examine more closely. This is in relation to the period of notice that has to be given to take entry on to land once a CPO has come into force. This is currently 14 days where a "Notice to Treat" has been served and 28 days where entry is taken under a "General Vesting Declaration" ("GVD").
- (d) Notice to Treat procedure is generally used for works being carried out by the public sector which then also operates them e.g. highways. In these cases the legal transfer of title only takes place when compensation is agreed and may not be completed for some years.
- (e) GVD on the other hand vests the legal title in the acquiring authority immediately and is used where land is being assembled for development (for example under the CPO powers in part IX of the Town and Country Planning Act 1990) and a transfer to a private sector development partner of title to the assembled site is required.
- (f) In its response to question 12 of the DCLG/HM Treasury consultation the Law Society disagreed with the proposal to introduce a standard entry period of three months and suggested two months. In my experience, the current practices of acquiring authorities and their contractors in operating community and landowner engagement programmes mean that difficulties are seldom experienced in taking entry. There is also the question of differentiating between the taking of possession of unoccupied land and the taking possession of domestic, industrial or retail premises.
- (g) Accordingly, the Committee may wish to consider whether to recommend in relation to Clauses 165 and 170 of the Bill that the Welsh Ministers are given powers to apply these provisions and to specify a different notice period by statutory instrument. This would enable the Welsh Government to consult and come forward with evidence based proposals that met Welsh circumstances.

3.3 What are the implications for Wales if the proposed changes are made on an England-only basis?

- (a) While a degree of procedural divergence to meet Welsh circumstances may be contemplated, for the reasons already given it is considered that the compensation code should be consistent across Wales and England due to the common system of land law.
- (b) However, this can only be maintained if there is proper liaison between the Welsh Government and DCLG/HM Treasury, which recognises that CPO is a devolved function and that accordingly the interests of Wales in the system, need to be acknowledged from the outset in consulting on proposals.

- (c) It is important that effective arrangements are put in place in the near future. HM Treasury's White Paper on Productivity: "Fixing the Foundations: Creating a more prosperous nation"⁶ at paragraph 9.16 clearly envisages a further round of reform based on a number of ideas that came forward in the DCLG/HM Treasury Technical Consultation. I understand that this encompasses reconsidering the comprehensive proposals for reform and codification of the CPO system published by the Law Commission in 2004 during the chairmanship of Mr Justice Carnwath⁷ a noted authority on CPO law but which the UK Government of the day declined to take forward⁸.

4. Further observations

4.1 The Daft Wales Bill

The necessity for these provisions to be the subject of a SLCM is the clearest evidence that the Draft Wales Bill, which proposes to make compulsory purchase a wholly reserved matter, represents a rolling back of devolved powers and the Committee may wish to consider a further paper which I submitted in a personal capacity to the Welsh Affairs Committee and the Constitutional and Legislative Affairs Committee, which amplified the discussion of the effect of the Draft Wales Bill's proposals in relation to CPO and highlighted problems with the current devolution arrangements in relation to CPO⁹.

4.2 CPO Policy capacity within the Welsh public sector

- (a) I have been advising the Welsh Ministers, sponsored bodies such as the Welsh Development Agency and the Cardiff Bay Development Corporation, as well as many Welsh local authorities and compulsory purchase and compensation since the early 1980's, when I worked as an in-house lawyer with the Mid-Glamorgan County Council.
- (b) The Local Government, Planning and Land Act 1980, Part XII, preserved the Land Authority for Wales, which had originally been established under the Community Land Act 1975. Under section 105 (1) the Authority's function was laid down as "... acquiring land in Wales which in its opinion needs to be made available for development, and of disposing of it to other persons (for development by them) at a time which is in the Authority's opinion appropriate to meet the need". To support this function the Authority retained its powers of compulsory purchase and made extensive use of them over the years. As a result, the surveyors and lawyers employed in-house by the Authority (and the WDA from the merging of the Land Authority with it in 1999 until the WDA was itself merged with the Welsh Government in 2006), developed considerable expertise in the exercise of CPO powers and land compensation matters.
- (c) The other source of CPO experience and expertise in CPO up to 1996 were the County Councils, whose highways programmes generated a regular flow of CPO work. A similar source of expertise was situated in the Welsh Office's highways

⁶See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443898/Productivity_Plan_web.pdf

⁷ Now Lord Carnwath JSC

⁸ See: <http://www.lawcom.gov.uk/project/towards-a-compulsory-purchase-code/>

⁹ See: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/welsh-affairs-committee/prelegislative-scrutiny-of-the-draft-wales-bill/written/26391.html>

division which promoted the statutory orders for motorway and trunk road schemes.

- (d) The creation of the Welsh unitary authorities in 1996 and the abolition of the WDA, coupled with the climate of financial austerity since 2008, has resulted in the dissipation of most of these sources of expertise. The loss of former Land Authority/WDA in particular and absence of any clear succession planning has resulted in a loss of expertise in non-highways CPO matters within the Welsh Government, while the creation of 22 unitary local authorities has made it difficult for them to sustain a sufficient work flow of CPO's to develop the skills of specialist teams of CPO surveyors and lawyers in-house.
- (e) The loss of capacity is illustrated by the fact that since 2004 DCLG in England has updated the statutory guidance on the use of CPO powers on two separate occasions¹⁰. Compulsory Purchase Guidance in Wales on the other hand is still based on a Circular issued in 2004¹¹ and which is based on an earlier ODPM Circular¹². A Welsh Assembly Government Consultation in 2006 on updating the current Welsh circular, carried out as part of the "Planning for Wales" programme was not followed up. A recommendation by the Independent Advisory Group on Planning in its 2012 report "Towards a Welsh Planning Act: Ensuring the Planning System Delivers"¹³ that an updated circular should be issued remains outstanding.
- (f) In my view, if the Welsh Government wishes to influence the continuing process of CPO reform that is now underway the Welsh Ministers need to consider how to rebuild its capacity in this technical but important subject and the Committee may wish to pursue this matter with the Welsh Government during its inquiry.

¹⁰ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472851/circular1918885.pdf and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472726/151027_Updated_guidance_for_publication_FINAL2.pdf

¹¹ See: [http://gov.wales/about/foi/publications-catalogue/circular/circulars04/NAFWC14\(1\)2004?lang=en](http://gov.wales/about/foi/publications-catalogue/circular/circulars04/NAFWC14(1)2004?lang=en) and [http://gov.wales/about/foi/publications-catalogue/circular/circulars04/NAFWC14\(2\)2004?lang=en](http://gov.wales/about/foi/publications-catalogue/circular/circulars04/NAFWC14(2)2004?lang=en)

¹² ODPM 02/2002 Compulsory Purchase Orders.

¹³ <http://www1.bridgend.gov.uk/media/145331/WD79.pdf> - see recommendation 97

Response from Dŵr Cymru

Please see our response below to the questions you have asked regarding the supplementary legislative consent memorandum (SLCM) which you are considering in relation to the Housing and Planning Bill.

Were you aware of this SLCM (Supplementary Legislative Consent Memorandum) prior to this correspondence?

No.

Have you been consulted on the implications for Wales of these clauses?

No. In the limited time available since you contacted us, we have undertaken a quick review of the Bill's provisions that are relevant to us and we are generally content.

Did you respond to the UK Government's consultation on these provisions or make a submission to Parliament? (If you have provided a consultation response, or sought input into the Parliamentary process, a copy of any submission made would be gratefully received).

No.

What are the implications for Wales if the proposed changes are made, and what are the implications for Wales if the proposed changes are made on an England-only basis?

From our company's perspective, we can see the argument for making the compulsory purchase amendments in UK legislation rather than amend all the existing legislation in a separate Bill applicable only to Wales. It not for Dŵr Cymru Cyfyngedig to comment on any other possible implications for Wales.

Response from Welsh Local Government Association

Were you aware of this SLCM prior to this correspondence?

No we were not aware of the SLCM prior to this correspondence

Have you been consulted on the implications for Wales of these clauses?

Did you respond to the UK Government's consultation on these provisions or make a submission to Parliament? (If you have provided a consultation response, or sought input into the Parliamentary process, a copy of any submission made would be gratefully received).

The proposals are not a complete overhaul of the CPO regime but they do offer more clarity to the both the acquiring authority and the land owner on the timescales and procedures. There are issues however:

- In view of the uncertainty on the time for confirmation the publication of a timetable is to be strongly encouraged and it would be disappointing if the Welsh Ministers did not exercise this power.
- the power to appoint an inspector to confirm a CPO may speed up the process but it certainly brings into question whether it is appropriate for an unelected body to confirm orders which takes away people's property. We would welcome clarity on the circumstances when the Minister would appoint an Inspector.
- the set time limit of 3 years from the confirmation of the CPO for service of a Notice to Treat or a GVD is a welcome clarification
- the change to the times for entry under a GVD or Notice to Treat are potentially an issue for acquiring authorities. Previously entry could be obtained 14 days after the service of a Notice to Treat and a Notice to Enter whereas this has been replaced in all cases to a minimum of three months. There will be no ability to require a quick entry following confirmation to start works. As the timescales for confirmation of a CPO are an unknown quantity on the lines of 'how long is a piece of string' this can cause issues in the planning and delivery of schemes. If, however, the Welsh Ministers do publish a

confirmation timetable then it could be built into the timetabling at an early stage and provide greater certainty.

- another concern are the proposals regarding advance payments. The new provisions require in certain circumstances for payment to be made before land is entered. The time period of two months from submission of a claim or from receipt of additional information is a very onerous requirement on local authorities especially in these austere times. Failure to meet that timescale will result penalty interest being paid. Whilst the acquiring authority can ask for additional information to assess confirmation within 28 days there is the potential for disputes as to whether the information is necessary and the proposals so far as I can see do not address this. In addition, as the advance payment may need to be made paid before entry is taken, if it is determined not to proceed with the compulsory purchase of that parcel of land then the money can be recovered however it can be difficult to recover money once paid and this would place a financial burden on acquiring authorities.
- a welcome provision is the ability of the courts to not only quash the order but to quash the decision to confirm the order generally or in part meaning that the acquiring authority may not have to go back to square one with the scheme if there is an issue especially if it resulted from an administrative error of the confirming authority.

If the provisions are made in Wales they will offer further clarity in the compulsory purchase procedure especially in areas where the current legislation is deficient and we rely on court decisions as to the procedures however there is no doubt that that there will be additional burdens on acquiring authorities particularly in respect of the advance payment provisions and the extension of the periods from the confirmation of the scheme to when entry can be required and works commenced. It will be important that pressure is placed on the Welsh Ministers to publish a timetable of the confirmation procedure so that this can be fully considered

by the acquiring authority and the scheme designed and timetabled appropriately.

If the amendments are only brought in for England and not Wales we would be relying on the existing rules and regulations which has its flaws and omissions although the existing shorter timescales for entry and the advance payment requirements would be of benefit in these current times. There would also be confusion and difficulty in bringing about any cross-boundary schemes.