Response

Historic Environment (Wales) [consolidation] Bill

Response to the Legislation, Justice and Constitution Committee

Date: 7 October 2022

The CLA and the historic environment

1. The CLA's c3,000 members in Wales manage at least a quarter of Welsh heritage. As by far the biggest stakeholder group of those (charitable, commercial, private, and public) who manage or own heritage, we are one of the half-dozen key stakeholders in the heritage field. The CLA believes strongly in effective and proportionate heritage protection.

2. The CLA's heritage adviser was a member of the Task & Finish Group set up by Cadw as a sounding board on this Bill, and has therefore discussed the Bill with Cadw in some depth. He was previously a member of the External Review Group which advised Welsh Government on the 2012-18 Historic Environment Review, and the CLA therefore contributed to detailed discussions on both the Bill which became the Historic Environment (Wales) Act 2016, and the new Welsh Government/Cadw policy and guidance published in 2016-18.

The Historic Environment (Wales) consolidation Bill

3. We respond to the Committee's suggested questions as follows:

i. "the scope of the consolidation is appropriate"

4. Yes.

ii. "the relevant enactments have been included within the consolidation"

5. Yes.

iii. "the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent allowed by Standing Order 26C.2"

6. Yes (but see question iv below).

iv. "the Bill consolidates the law clearly and consistently"

7. Yes, we feel that (subject to the points below) this has been done well. The previous legislation had become a forest of hard-to-navigate amendments, and the new Bill is undoubtedly a great improvement. It is also in Welsh as well as English.

8. At the same time, this has not been a costless exercise: comparing the Bill to the legislation it replaces, or reading the tables of origins and destinations, shows that this involved not just a simple cutting-and-pasting exercise, but an enormous amount of complex editorial work, and we know that the Bill team, including in Cadw, has had to put a great number of hours into this.

9. We do have a number of comments, some very significant, which are set out in the remainder of this response:

'Conservation' and 'preservation': the need to update the legislation

10. The primary issue is that there is a fundamental (though we understand unintended) conflict between long-established Welsh Government policy and the text of the Bill.

11. Since 2011, Welsh Government historic environment policy has been based on 'conservation', defined in its *Conservation Principles* as "the careful management of change". That policy was adopted after extensive public consultation, and has been followed through ever since, notably in the major suite of Cadw guidance published in 2016-18.

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

13. This is a fundamental problem, not a semantic point, because these two terms represent wholly different approaches to heritage. Much of the history of heritage protection over recent decades, both internationally and in Wales, has been the move from 'preservation' to 'conservation'. That has happened because 'conservation' protects heritage much better: to remain valued and viable, heritage needs to be changed from time to time, and the 'conservation' approach looks thoroughly at what matters about the building, and at change to it, so as to arrive at the best outcomes. In contrast, 'preservation', with its inbuilt presumption against change, tends to generate and maximise uncertainty and conflict; and the obstacles it creates to change make heritage less attractive, less viable, and less usable, which is not good for its survival.

14. Putting this core point into Wellbeing of Future Generations Act terms, the 'conservation' approach directly aligns with the Act's Resilient Wales Goal, "the capacity to adapt to change". 'Preservation', and the current Bill's "duties to preserve", do not.

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

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

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

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

Technical changes to the Bill

19. We understand that the Bill is not yet finalised, and that changes to it can still be made where there is a good reason to do that, provided of course that these do not conflict with Standing Order 26. There are several places (all of which we have discussed with Cadw) where we feel your Committee should recommend that this should be done:

Section 20 – compensation for modification or revocation of SMC

20. Modification or revocation of Scheduled Monument Consent (SMC) is potentially a very serious matter – you could spend months or years and thousands of pounds getting consent, and then see it suddenly revoked.

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

22. The solution is a small tweak to the Bill: Section 20 already cross-refers to Schedules 4 and 6; it should also cross-refer to the compensation provisions several pages further on in section 24 (eg by simply adding to subsection (3) "…the compensation provisions in section 24 shall apply…"). This is just signposting; it does not change the legislation or the policy. Alternatively, section 24 could be moved up to immediately follow section 20, as for Listed Building Consent (LBC) (see section 108 re compensation, which immediately follows section 107).

Section 76 (5) – what is covered by listing

23. We welcome the Bill's clarification and solution in section 76(5) of what was the '1969 problem', though this is only a problem in small minority of cases.

24. The Bill text should also address a greater problem, the vagueness of 1990 Act section 1(5), which is misleading in implying that non-ancillary structures can be covered by listing when it is clear from 35 years of case law that they are not. The case law establishes that an attached structure, or an unattached structure within the curtilage of a listed building, is only covered by its listing if it is ancillary to it. This goes back at least to *Debenhams* in the House of Lords in 1987, and has been endorsed consistently and repeatedly in numerous subsequent cases, including most recently by the Court of Appeal in 2021 in *Blackbushe Airport* ("…in order to be treated as if it were part of the listed building, a freestanding structure within the curtilage must also be ancillary to that building" [paragraph 110]). This is long-established case law, set in the House of Lords (now the Supreme Court) and endorsed repeatedly by courts including the Court of Appeal, and thus most unlikely to change.

25. This point has already been clarified in the Bill's Explanatory Notes, but it would reduce confusion if the clarification was also brought into the text of the Bill itself. That simply requires the word 'ancillary' to be inserted before the word 'structure' in section 76 (5) (a), and in 76 (5) (b). That is not a change of policy; its effect is just, in the words of Standing Order 26C, to "clarify the application or effect of the existing law". Historic England uses similar wording in its 2021 Advice note on Listed Building Consent (paragraph 26): "The listing of a building applies protection not only to the building, both inside and out, but also to pre-1948 ancillary structures within its curtilage, and to ancillary objects or structures fixed to the building".

Section 90 (4) – applying for LBC should require an 'assessment', not 'statement'

26. During the Historic Environment Review, its External Review Group had a careful policy discussion about information requirements. It was then decided that (i)

applicants should be required to produce proper analysis of heritage significance and impact, to be called Heritage Impact Assessments, and (ii) in recognition of the resource implications of that for applicants, the requirement for Design & Access Statements (D&ASs) added little and should be scrapped for LBC applications (except for major development). That was implemented via Regulations, but was not reflected in the 1990 Act, and is not yet fully reflected in the Bill, which uses the term "statement", and implies that D&ASs are required though they usually are not.

27. This suggests two logistically-small but important tweaks to the Bill. Firstly, the words 'statement about' in 90(4) (and in 90(5)(a)) should be replaced by 'assessment of…'. That would be consistent with the term 'Heritage Impact Assessment', which is what the Regulations require. Much more importantly, the term "assessment" was deliberately chosen so as to make it clearer that the applicant needs to provide genuine analysis of the building's significance, and of the impact of the proposals on that significance, because evidence suggested that the term 'statement' led most applicants to provide flannel which merely described the building and/or its history and/or the proposals, and did not substantively consider significance or impact.

28. This is not a minor point, because an applicant needs to understand significance and impact to develop a competent application. If the applicant has not done that, the proposals and application are unlikely to be competent. Local planning authorities do not have the resource to do this themselves, and even if they did, that would come undesirably late in the process, after the proposals have been fixed by the applicant. Given that there are thousands of LBC applications each year, the local authority (and private) resource wasted by less-than-competent proposals and applications is damaging. This word change, in addition to making the statute consistent with current policy, therefore has substantial real-world benefits.

29. Secondly, 90 4(b) needs slight change because it does not apply to all LBC applications, only to the minority which still require D&ASs (and in those cases this will not be 'either or both').

Section 147 – 'preservation notices' and protecting buildings or monuments at risk

30. 'Preservation notices' have been carried forward from the 2016 Act, but have never been implemented. They are unlikely to be implemented because they would be very harmful to listed building protection, and it would be better if – like Areas of Archaeological Importance – they were removed from the Bill.

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

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

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

34. Secondly, in a small minority of often-prominent cases it is clear that there is a use and a viable solution, and repairing purchasers, but the owner is refusing to implement this. In these specific situations, the power to change ownership may need to be used, more assertively and effectively than now. It is not realistic to expect local authority staff to do that, and it needs to be organised centrally, potentially by a specific expert attached to Cadw. This would require only limited resource, and a few successful cases, effectively publicised, would much reduce the problem. If Welsh Government wishes to solve this, it should act on these lines. 'Preservation notices' would make the situation worse, have not been implemented, for that reason, and should – like Areas of Archaeological Importance – be removed from the Bill.

Schedule 8 – modifying/revoking LBC
Schedule 10 – orders terminating listed building partnership agreements

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

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