

Y Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol
Communities, Equality and Local Government Committee
Bil yr Amgylchedd Hanesyddol (Cymru)/Historic Environment (Wales) Bill
Ymateb gan: Cymdeithas Cyfraith Amgylcheddol y DU
Response from: The UK Environmental Law Association

Introduction

1. The UK Environmental Law Association (UKELA) is pleased to have the opportunity to submit its views and comments to the National Assembly for Wales's Communities Equality and Local Government on the contents of the Historic Environment (Wales) Bill.
2. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
3. UKELA prepares advice to UK Governments with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by UKELA's Wales Working Party.

Overview

4. The quality of the environment is fundamental to the well-being of current and future generations in terms of their health, and social and economic well-being. Protection and enhancement of the environment includes Wales's historic environment. This forms an important aspect of the landscape and environment of Wales which is exceptionally diverse and beautiful, and should be protected and enhanced for future generations. The sustainable management of the historic environment should aim to provide an equal balance between the three pillars of social, economic and environmental well-being.

5. It is an established principle of international law, with reference to the Aarhus Convention, that participation should be an essential element of environmental decision making. This principle is also supported by the European Landscape Convention and accepted in the practice of Environmental Impact Assessment. Each of these is relevant to planning procedures in Wales with respect to the protection of the historic environment.
6. The Welsh Government has the chance, through this Bill, to be innovative and unique in the way it takes forward heritage protection. UKELA is offering its comments below to support the development of leading edge legislation that is truly ground breaking. We support the general principles of the Bill but believe that the provisions could be improved, particularly in relation, the co-ordination of this legislation with the Well-being of Future Generations (Wales) Act, public participation in the procedures for designating assets relating to the historic environment and third party damage to scheduled monuments and listed buildings. We have outlined our concerns in relation to the general principles of the Bill, i.e., attempting to provide more effective protection of Wales's heritage and ensure its sustainable management in a transparent and accountable manner. We offer an analysis of the case for change and suggest some amendments to the Bill to improve the legislation in these respects.

The General Principles

7. It is difficult to argue with the general principles of the Bill. However, it is not always clear that these principles are reflected in the measures proposed as outlined in detail below.

Sustainable Management

The Co-ordination of the Historic Environment (Wales) Bill with the Well-being of Future Generations Bill.

8. UKELA welcomes the adoption of the principle of sustainable development in guiding the management of the historic environment in

Wales. However, we believe that there should be a clear link between the legislation on the historic environment in Wales and the provisions of the Well-being of Future Generations (Wales) Act 2015. The Well-being of Future Generations (Wales) Act 2015 aims to ensure that ‘well being’ objectives, vital to the achievement of sustainable development, lie at the heart of government decision making. This is particularly important in the context of the sustainable management of the historic environment. In our view, therefore, the Bill should include a general statutory purpose for those involved in heritage management, linked to the achievement of sustainable development and the Well-being of Future Generations (Wales) Act, along the lines of that provided by amendment to the Planning Bill.

9. A second point is that there is no reference to the importance of heritage protection to future generations in the provisions on scheduled monument consent. The perspective of future generations is essential to the objectives of the Well-being of Future Generations (Wales) Act 2015 and has a particular resonance in relation to the protection of the historic environment in Wales (as outlined in the Explanatory memorandum to this Bill). The current law states that “Any scheduled monument consent ...shall (except so far as it otherwise provides) ensure **for the benefit of the monument and of all persons for the time being interested therein** (emphasis added).” (Scheduled 1 para 1(2)). The lack of any reference to future generations here is therefore, worrying and there is a clear case for introducing an amendment along these lines.

Transparency and Accountability

10. UKELA welcomes the general principle of transparency and accountability in the approach to the protection of the historic environment. However, we are concerned that there is a lack of provision for public participation in the processes for designating scheduled monuments and listed buildings. Public participation is now clearly established at an international level as an essential principle in decision making on environmental protection and sustainable development.

Public participation also plays a significant part in ensuring transparency and accountability in any process of government decision making. The Conservation Principles for the Historic Environment in Wales, endorsed by Welsh Government, support the view that:

“Everyone should have the opportunity to contribute his or her knowledge of the heritage value of different sites, and to participate in decisions about their future, by means that are accessible, inclusive and informed.”

It is our view that the public, and not just experts in the field, have a valuable role to play in contributing “knowledge of the heritage value of different sites” and should therefore have the opportunity to participate in decision making.

Public Participation, Scheduled Monuments, Listed Buildings

11. We are disappointed that the new duties under Section 1AA Ancient Monuments and Archaeological Areas Act 1979 and Section 2A of the Planning (Listed Buildings and Conservation Areas) Act 1990 will only extend to those with a proprietary interest or “special knowledge of, or interest” in the proposed scheduled monument or listed building. We would suggest that an amendment to this effect is included in the Bill.

12. We are also concerned about the proposal to remove the duty, with respect to scheduled monument consent, to hold an inquiry or allow “the applicant, and to any other person to whom it appears to the Secretary of State expedient to afford it, an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.” This will remove the opportunity currently afforded to third parties to make representations on proposals for scheduled monument consents at an oral hearing. We would, therefore, suggest removing this provision or at least making provision in regulations regarding the opportunities for public consultation in relation to the procedure for scheduled monument consent.

Public Participation and Heritage Partnerships .

13. We support the provisions in the Bill for Welsh Ministers to create regulations on the arrangements for consultation on a new heritage partnership agreement (or its variation) and the publicity that must be given to this. However, we believe that this should be duty rather than a power and that it should be made clear on the face of the Bill that consultation should involve the public and not be restricted to those with a proprietary interest or “special knowledge of, or interest” in the relevant scheduled monument. This is particularly important given that Heritage Partnership agreements may provide for, and/or restrict, public access to the scheduled monument or its associated land.

The new Advisory Panel for the Welsh Historic Environment (APHE)

14. The protection of the historic environment in Wales is a public function carried out by CADW with the help of the Royal Commission on Ancient Historic Monuments of Wales in maintaining a national archive of such assets. Some independent advice and guidance to Welsh Government on strategic direction is already provided by the Historic Environment Group (HEG). Therefore, it will be important, in a time of scarce resources, to ensure that there is clear divide between the role of the HEG and the new APWHE. It is also important to ensure that the APWHE, as an independent body, is made accountable to government and does not undermine the democratic function of Welsh Government in providing strategic direction to the protection of the historic environment. Therefore, it will be necessary to provide robust regulations on the appointments process and terms of reference for this Panel.

Effective Protection of the Historic Environment

15. UKELA welcomes the provisions on enforcement and stop notices in relation to scheduled monuments that bring the law on heritage protection in line with the well established system of enforcement in planning law.
16. We believe that it is also essential to strengthen the approach to third party damage to both ancient monuments and listed buildings. Third party damage presents a real threat to the maintenance of the historic

environment and it can be hard to prove, evidentially, that a person had knowledge of the special status of such buildings and artefacts.

17. We would, therefore, suggest going further than the current proposal to amend section 28 of the Ancient Monuments and Archaeological Areas Act 1979, and provide two new offences with respect to third party damage to either scheduled monuments or listed buildings. These offences should mirror the approach to the protection of Sites of Special Scientific Interest from third party damage, under s28P Wildlife Countryside Act 1981. Thus, we suggest that two new offences should be included in the Bill as follows:

A person who without reasonable excuse:

- a) Intentionally or recklessly destroys or damages a scheduled monument or listed building, and
 - b) knew that what he destroyed or damaged was a protected monument or listed building
- is guilty of an offence and is liable on summary conviction, or conviction on indictment, to a fine.

A person who without reasonable excuse

- a) Intentionally or recklessly destroys or damages a scheduled monument or listed building,
- is guilty of an offence and is liable on summary conviction, or conviction on indictment, to a fine not exceeding Level 4 on the standard scale.

18. A similar approach could be taken to offences relating to the use of metal detectors in respect of ancient monuments.

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