HE 31

Y Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol

Communities, Equality and Local Government Committee

Bil yr Amgylchedd Hanesyddol (Cymru)/Historic Environment (Wales) Bill

Ymateb gan: Y Gymdeithas Tai Hanesyddol

Response from: Historic Houses Association

A. Introduction

1. The Historic Houses Association (HHA) welcomes the opportunity make this submission to the committee. The majority of the Historic Environment in Wales, most especially listed buildings, are not in public ownership. Therefore the effects of the Bill will largely be experienced by the private sector in its various forms.

2. HHA represents historic houses, castles and gardens in private ownership. There are more than 1,600 HHA properties throughout the UK of which about 60% are open to the public, either as day visitors or by appointment. The HHA estimates that approximately two-thirds of the built heritage is privately owned and maintained.

3. The costs of maintaining private houses, castles and gardens are significant and expenditure by private owners in looking after the historic environment is substantial. HHA owners spend more than £100 million per year (HHA Survey, 2013), but the backlog of urgent repairs at HHA member houses totals over £750 million. Ensuring the economic sustainability of historic houses is, therefore, of great importance. This principle underpins HHA policy in this area.

4. The value of historic houses, castles and gardens to the people of Wales is well recognized by the Welsh Government as an important resource, benefiting the entire nation. 80% of international visitors say that their principal reason for visiting Britain is connected to heritage and culture. 87% of British people think that the historic environment plays an important part in the cultural life of the country. Historic houses provide character, distinctiveness and a sense of place and help create pride in where people live. VisitWales constantly seeks to promote the Heritage Environment as a key driver for its policies and CADW itself, as owner of many outstanding listed buildings, fully understand the contribution they make to life and prosperity in Wales.

5. The current system of heritage protection is based upon expert scrutiny of any proposed change to the historic environment by conservation experienced officers in local authorities or Cadw, or both. However, the funds to resource this system have reduced and there is every reason to believe that they will reduce further as public sector funding continues to be under pressure.

6. As a consequence, few listed building consent decisions are taken within the prescribed timetable and the perception of a failing system strongly discourages the sympathetic changes needed if heritage conservation is to work effectively.

7. With some 7000 listed buildings in Wales 'at risk' or vulnerable it is critical to streamline the sustainable adaption that successive Ministers have noted as being the key to bringing these buildings back to a position where they can once again benefit the people, of Wales. The great majority of these adaptations are neutral or beneficial in heritage terms. Simplifying them will free up local authority and Cadw staff resources to focus on the cases which might be harmful, and on appropriate enforcement.

B. Summary of key issues

- **HHA in general welcomes the provisions of the Bill although it has concerns (set out below) over one area**

- **However, all sections require good guidance which does not currently exist. The draft guidance is at present insufficient or absent especially where the Heritage Environment provisions overlap with other Bills**
- **Without them the provisions for enforcement, for example, may be misinterpreted**
- **The Bill does not deal with the fundamental issue of resources, indeed it would appear to add to local authority activity at a time when their focus is likely to be elsewhere owing to budget restrictions and the possible implementation of the Williams report.**

C. Provisions within the Bill

1. PART 2 – Ancient Monuments etc

In general the HHA welcomes the provisions of this Part of the Act.

Section 16 The new provision at 16(3) whereby it will become an offence if a person '...ought reasonably to have known...' will be greatly strengthened if up to date maps clearly showing (at high resolution) the position and extent of all scheduled monuments. Ideally these should be held on a central database map available both on CADW's and all LAs websites. The ease with which such a map can be accessed and interpreted is likely to influence any court asked to rule on whether a person ought to have known.

Section 17 The same point as above will apply in regard to metal detection.

It would further enhance the operation of both sections if any monument to which a temporary stop notice was in force under Section 13 could be highlighted on the map so as to counter problems where notices posted in accordance with that section are damaged or removed by animals, weather, or deliberate action.

Section 18 Whilst the HHA welcomes the establishment of the Register it is concerned that it appears to put Welsh Ministers above the law. Inevitably, and correctly, inclusion on the Register will mean restriction on the activity and usage of the grounds so designated, especially when planning matters are under consideration.

As drafted Welsh Ministers can designate 'places of recreation' [41A (1)(d)] and 'other designed grounds' [(1)(e)] and there is no form of appeal. Places of recreation can be open to wide interpretation and there could be argument as to whether a particular area – or more likely the extent of it - was indeed designed. An owner of ground that had no reason to believe that it might be so designated could easily find themselves in the middle of a sale or planning application, when with no notice and no appeal, their land is added to the Register. This could most likely occur if their site was not itself designed but was included under 41A(2).

Therefore HHA would recommend that at very least a provision should be added to the Act allowing any owner of land to ask for confirmation that the said land does not appear to Welsh Ministers as being of special historic interest. The act on enquiry on the part of an owner would give Ministers opportunity, should they see fit, to add the said land to the Register. Such a provision would mirror that being introduced in the Bill (section 27.3) whereby Welsh Ministers will certify that they do not intend to list a building.

There then should also be some form of appeal mechanism when additions to the register take place without the owner's prior knowledge . Again this would mirror the provisions with regard to listing buildings.

Finally detailed guidance as to the criteria that Ministers will use in deciding which grounds to include and most particularly the criteria for inclusion under 41A(2) is imperative.

Section 22 Here there is a specific need for enhanced guidance. Redefining 'Monument' as '... comprising anything, or group of things, that evidences previous human activity;' [22 (2)(b)], opens the way to almost every square meter of Wales to be declared a monument.

As in comment on Section 18 it is imperative that criteria are published.

PART 3 – Listed buildings

Section 24 The HHA welcomes the provisions of this section. The volume of listing or scheduling is not high, and Cadw generally does consult informally, but some members have not been consulted in the past and the existing lack of any statutory rights of consultation and appeal conflicts with natural justice.

Section 25 The interim protection while the decision is being made, to forestall pre-emptive demolition (but with provisions for compensation if designation does not go ahead and there is proven loss) seems proportionate.

Section 27 Finding an economically viable use for any historic building is the best way of helping ensure its conservation. Although Certificates of Immunity have rarely been used in practice the HHA welcomes all provisions designed to 'make it easier for owners or developers to create sustainable new uses for unlisted historic buildings by relaxing the conditions for applications for certificates of immunity from listing'.

Section 28 As with Section 27 the HHA welcomes the new provisions. However it does have concerns about the capacity of local authorities to deal with such matters. Heritage Partnership Agreements are perhaps most useful when there is either a major building or, more likely, a collection of listed buildings in one location or under one ownership. This makes the not inconsiderable costs more justifiable. However to produce a meaningful HPA will require considerable input from a local authority and the Act says that they 'may' enter into such an agreement rather than 'shall'. The HHA therefore fears than many will simply decline to make such agreements.

The HHA is not certain to what extent, if at all, Welsh Ministers intend to make use of 28.1 26L (3) other than for publicly owned buildings. If they were prepared in limited cases - perhaps for grade I and II* buildings – to themselves make such agreements with the relevant local authority as party, then the expertise at CADW could be brought to bear, thus relieving the local authority of part of the burden.

Once again guidance will be important. Most particularly it will be vital for owners to be able to enquire in advance with outline proposals as to whether an local authority will be mined to enter into an HPA. It would severely discredit the system if a major owner or institution spent a lot of time and energy preparing a proposal only for the local authority to decline to join in owing to lack of resource.

Section 29 The HHA believes that Temporary Stop Notices are a much needed tool to enable local authorities to act quickly if a listed building is under threat from unauthorised works. However it again calls into question the issue of resources. The most likely cause of a TSN will be a local authority being notifed of works of which it was wholly unaware. The TSN can only last 28 days and cannot be renewed. Hence to avoid any such works recommencing after 28 days the local authority will have to concurrently start proceedings to acquire a court injunction as under the existing legislation.

Since the whole rationale of the TSN is based on the fact that such injunctions can take 28 days to acquire, it means extremely rapid co-ordinated action on the part of the local authority. The HHA

fears that many will not have the resources to achieve this, or – more likely – will be forced to divert resources away from other current work thus leading to further delays in Listed Building Consent applications which is precisely the opposite of what the Bill intends.

Section 30 This is the one section about which the HHA has severe reservations. These are not about the principles but about the potential consequences which HHA does not believe have been properly thought through.

Paragraphs 118 – 139 of the Explanatory Guidance published when the Bill was introduced make the target(s) of this section quite clear. It is aimed at stopping the collapse of listed buildings, whether deliberately or neglectfully occasioned, particularly when owners use the detail of the existing legislation to frustrate this intent. That is both necessary and supported by the HHA.

The problem lies in the detailed wording and the lack of definitions. If it were solely Welsh Ministers who were going to operate these clauses then guidance might be sufficient but as Explanatory Guidance para 135 notes Welsh Ministers will use these powers '.. rarely, if ever...'. Instead it is local authorities who will implement.

One of the most constant complaints from HHA members over decades has been inconsistency in approach by different local authorities. Following the passage of the Bill, local authorities are going to be expected by Ministers and by the public to take action armed with these new powers. There are, on average, about 150 listed buildings at risk in each local authority area in Wales (and about another 200 vulnerable). The chances of consistency when considering over 3000 potential cases with acknowledged lack of resources and such imprecise wording, has to be very low indeed.

The key difference from the existing legislation is that Section 30 makes the Act applicable to occupied and residential property. Thus an elderly couple could be faced with 7 days notice that works are to commence. There is no date upon which the local authority may issue a notice requiring the owner to pay the expenses of the works, so that could be concurrent. In the absence of any appeal the owner could find themselves one month later with a Receiver appointed and the property being sold to cover the debt.

Much is made of the fact that this position is similar to that of a mortgage holder recovering their debt. However the crucial difference is that the holder of a mortgage has entered into a contract with the mortgage company and their occupation of the property is conditional upon that contract. There is no contract between the owner of a listed building and their local authority.

The position of occupants would be likewise invidious. Whether commercial or residential, they could find their occupancy terminated by a receiver with little hope of compensation from the owner who may have no funds. Once again any such occupancy of a mortgaged property has to be by prior agreement with the mortgage holding company. No such agreement will have been considered by a local authority.

Much is also made of the fact that any works must not unreasonably interfere with the residential use. It is assumed that this restriction applies to the physical interference not any financial consideration. In any event there is no definition and no mechanism whereby the reasonableness or otherwise can be challenged. The only permitted representation to Welsh Ministers concerns the levels of expenses recoverable and further appeal to the courts is likewise.

The matter of 7 days notice is perfectly reasonable when a building is unoccupied but not necessarily so when occupied. Take the examples of a historic building used for holiday lets or for weddings. At 7 days notice the owners could find themselves facing scaffolding, builders vehicles, contractors toilets, and all the associated noise, dust etc. They would be sued by their clients for something about which

they had no warning and no appeal. [NB the urgent works could be to a closely adjacent part of the building in use as above, thereby, in the local authority's opinion, not interfering with the use – if the use is commercial the local authority do not even have to consider it.]

Compounding all the above is that there is no definition of what constitutes Urgent Works. Again not so much of an issue when the building is unoccupied but a very serious one when it is lived in or used commercially as the scope and scale of the works are likely to determine whether the expenses are affordable or the building must be sold.

Paragraph 122 of the Explanatory Guidance notes "The Owner may choose to carry out the works specified in the notice, but, if not, the LPA may act." The HHA can find no provision neither in the 1990 Act, nor the present Bill, to allow for such action. Until now it was most likely in the local authority's interest if an owner would carry out the works. Armed with a local land charge and the ability to appoint a receiver it would almost certainly be in the local authority's interest to press ahead with the works themselves and recover all the costs.

The next problem is the phrase [30.6 (6) (5C)] '...land on which the building stands...'. Once again there is no definition. Holding a charge over the precise footprint of a building is likely to be useless to a local authority if there is no access and all services have to cross land in other ownership. It is to mean the building and its immediate surrounds, how far do they extend, the garden, the paddock?? Clearly a building with say a garden and/or some land is a much more saleable proposition than the same building bare.

The next point concerns equitable treatment in accordance with the building's need rather than the owner's ability to pay (or by extension the sale value of the seized building). There has always been a major issue for local authorities concerning cost recovery – the very cause of these new proposals. With the new powers and tight budgets there will be great pressure for local authorities to select building for urgent works notices where they feel they have the best chance of recovering their expenses rather than where the building itself is in the greatest danger.

Finally there is some doubt as to whether these provisions will work at all. The 1990 Act at 55.(4)(d) provides for an owner to make representation to the Secretary of State that the recovery of the expenses demanded by the local authority '... would cause him hardship,...". Under that Act the Secretary of State makes a determination and that is it. Under the Bill the new clause to be inserted into the 1990 Act (as sub-clause 5A) allows for an appeal to the county court against Welsh Ministers' equivalent ruling. For those occupiers whose building is at risk because of their lack of resources, it would be almost certain that they could successfully argue that any significant expense payment would cause them hardship.

Taken together the above points lead the HHA to argue that this section requires significant rethinking.

As an initial step, it believes that a better position would be for local authorities to be instructed to give owners the opportunity to carry out the works themselves. If local authorities were to issue a 'minded to carry out urgent works' notices, the threat of using the new local land charge provisions would act as a powerful incentive to persuade owners that they could no longer ignore the problems.

To avoid the land charge being made owners would have to enter into an agreement to carry out the works within a specified time frame. That in turn would create a contract, breach of which would render any appointment of a receiver etc much more justifiable. It would also give time for owners to rearrange tenancy arrangements and or commercial contracts, thus reducing the scope for arguments about hardship.

PART 4 – Miscellaneous

Section 33 Provided resources can be found these provisions should achieve the desired aim of a more stable future for Wales' historic environment record.

The HHA is not clear where the boundary lines will lie in future with regard to records to be held by local authorities, those held by CADW, those by the Royal Commission, the National Library etc etc.

HHA members have much experience in dealing with the public (13 million visitors a year). The expectations are today a) for digital, and b) for one stop shop, mostly via an app. Therefore HHA would most strongly recommend that all local authorities and other record holders contribute to a central database (overseen by CADW?) which can then be accessed as an educational, tourist, and environment resource by Welsh communities and visitors alike.

Section 37 The establishment of a Panel is welcomed. All the HHA asks is that firstly the private sector is sufficiently represented to reflect the large portion of the heritage environment under its control and secondly that a method is established for those not directly represented on the panel to feed in their contributions. This latter particularly in respect of the hundreds of voluntary and third sector organisations with an interest in the heritage environment identified in an earlier study.

Note

HHA has not commented here on some detailed aspects of guidance largely because of lack of time or prior involvement in their processes.

As an example the draft revision to Technical Advice Note 23 (the heritage section of guidance under Planning Policy Wales) was, as far as HHA knows carried out without reference to the private ownership at all despite the private sector being almost 100% of those affected. The present draft does not seem to embrace the forward looking concepts of sustainable adaptation as support by Ministers and the HHA.

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