

SL(5)98 – Historic Environment Records in Wales: Compilation and Use

Background and Purpose

This is statutory guidance issued by the Welsh Ministers under section 37 of the Historic Environment (Wales) Act 2016. It is guidance for local authorities, national park authorities and Natural Resources Wales about using historic environment records and contributing to the compilation of historic environment records.

Procedure

None, but the guidance must be laid before the Assembly.

Scrutiny under Standing Order 21.7

The guidance is not a statutory instrument so the Committee is not reporting under Standing Order 21.2 or 21.3.

The Committee has considered and reported on the guidance under:

- Standing Order 21.7(i): as subordinate legislation laid before the Assembly;
- Standing Order 21.7(v): as a legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Reporting points

The title to the guidance states (emphasis added):

“Statutory Guidance on how Local Authorities, National Park Authorities and Natural Resources Wales **should** use Historic Environment Records and Contribute to their Compilation”.

It seems from this title that the guidance tells those public bodies what they “should” do in relation to both: (1) using historic environment records, and (2) contributing to the compilation of historic environment records.

However, the Statement of Purpose in the guidance states that the guidance explains how those public bodies: (1) “may” contribute to the compilation of historic environment records, and (b) “should” make use of historic environment records.



The Committee draws attention to inconsistency between: (1) the use of “should” in the title to the guidance, and (2) the use of “should” and “may” in the Statement of Purpose.

The Committee notes that elsewhere the guidance refers to things that the public bodies “must” do (despite the heading of the guidance only referring to what “should” be done).

Further, the guidance does not offer any guidance to public bodies around the meaning of “may”, “should” and “must”. In this regard, the Committee notes the helpful approach adopted in the draft HEFCW Financial Management Code (laid before the Assembly on 29 March 2017) which explained the meaning of “must” and “should” and explained the consequences of failing to comply with the requirements of that code:

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4. Where HEFCW uses the term ‘must’, it means it is a specific legal requirement or requirement under this Code. Institutions must comply with these requirements.
 5. HEFCW uses ‘should’ for items it regards as minimum good practice, but for which there is no specific legislation or for which HEFCW is not setting a requirement under this Code; however, governing bodies must take such guidance into account. HEFCW will consider the extent to which an institution has adopted the ‘should’ provisions (or alternative, equally robust arrangements) in the Institutional Risk Review – our annual assessment of risk.
 6. A summary of ‘must’ and ‘should’ provisions is provided at **Annex C**.
 7. Where an institution fails, or is likely to fail, to comply with a requirement imposed by this Code, HEFCW may instigate the processes within its Statement of Intervention.
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The Committee reports that the guidance could be drafted in a clearer way to help public bodies understand what they may do, what they should do and what they must do, and the consequences of not doing any of those things.

Legal Advisers

Constitutional and Legislative Affairs Committee

19 April 2017

