

Explanatory Memorandum to the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (Wales) Order 2018

This Explanatory Memorandum has been prepared by the Department of Economy, Skills and Natural Resources and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (Wales) Order 2018. I am satisfied that the benefits justify the likely costs.

Dafydd Elis Thomas
Minister for Culture, Tourism and Sport
16 October 2018

1. Description

- 1.1 The Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (Wales) Order 2018 (the 2018 Order) revokes and replaces the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 (the 1994 Order).
- 1.2 The Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Act) exempts ecclesiastical buildings used for ecclesiastical purposes from certain provisions of that Act, including the need to obtain listed building consent for certain works to historic buildings. The 2018 Order restricts this exemption to those denominations listed in the Order. Those denominations have demonstrated that they have robust systems of controls in place that provide protection equivalent to the local authority systems provided for by the Act.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

- 2.1 None.

3. Legislative background

- 3.1 The Welsh Ministers make this Order in exercise of the powers conferred on them by sections 60(5) and (6), 75(7) and (8), and section 93 of the 1990 Act.
- 3.2 The functions of the Secretary of State under the 1990 Act (except the Treasury function under section 83(8)), so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales by article 2 of the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I.1999/672). The functions of the National Assembly for Wales were transferred to the Welsh Ministers by virtue of section 162 of, and paragraphs 30 and 32 of Schedule 11 to, the Government of Wales Act 2006.
- 3.3 In accordance with the provisions of section 93(3) of the 1990 Act this statutory instrument follows the negative procedure.

4. Purpose and intended effect of the legislation

- 4.1 Historic buildings are an important part of our heritage and the 1990 Act provides for listing and protecting buildings of special architectural or historic interest. Any alteration or extension that will affect the character of a building listed for its special architectural or historic interest requires listed building consent, usually obtained from the local planning authority. Listed buildings are also subject to a range of statutory measures, including enforcement and repair notices, to support their preservation.

- 4.2 Section 60(1) and (2) of the 1990 Act provides that ecclesiastical buildings for the time being used for ecclesiastical purposes are not subject to sections 3A, 4, 7 to 9, 47, 54 and 59 of the 1990 Act. These provisions relate to listed building controls including temporary listing, listed building consent, compulsory acquisition of buildings in need of repair, urgent preservation works and offences relating to intentional damage.
- 4.3 Section 69 of the 1990 Act allows local planning authorities to designate areas within their jurisdiction as conservation areas in order to preserve or enhance their special architectural or historic interest. Section 74 provides that a building in a conservation area must not be demolished without first obtaining conservation area consent.
- 4.4 Section 75 specifies exemptions from the provisions of section 74, including ecclesiastical buildings for the time being used for ecclesiastical purposes.
- 4.5 These exemptions for religious buildings in active use are commonly known as the 'ecclesiastical exemption' and reflect the particular needs of listed buildings serving as places of worship. The exemption applies to all places of worship of any religion although sections 60(3) and 75(5) exclude a building used by a minister of religion wholly or mainly as a residence.
- 4.6 In practice, the ecclesiastical exemption was limited to specific denominations through the 1994 Order. Those denominations were able to demonstrate that they had systems of controls that provided scrutiny and protection equivalent to that furnished by the secular structures of the local planning authorities.
- 4.7 Under the 1994 Order, the exemption was retained for the church buildings of:
- the Church in Wales;
 - the Church of England;
 - the Roman Catholic Church;
 - the Methodist Church;
 - the Baptist Union of Wales and the Baptist Union of Great Britain; and
 - the United Reformed Church.
- 4.8 In Wales, the 1994 Order restricted the exemption to any church building, any object or structure within it or fixed to its exterior and any structure or object forming part of the curtilage land unless the object was listed in its own right.
- 4.9 The 1994 Order applied to England and Wales when enacted but was repealed in England in 2010 and replaced by the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010.

Changes in the 2018 Order

4.10 The 2018 Order makes three key changes to the arrangements in the 1994 Order:

- removal of the United Reformed Church from the exempt denominations;
- removal of the ecclesiastical exemption for conservation area consent; and
- extension of the ecclesiastical exemption to cover separately listed curtilage structures. This will eliminate situations where secular consents have been required for those structures.

4.11 The United Reformed Church has requested its removal from the exempt denominations in Wales and its return to secular controls under local planning authorities. Exemption is maintained for the other five denominations in the 1994 Order.

4.12 Conservation area consent is only required for the demolition of a building. The ecclesiastical exemption for conservation area consent and the 1994 Order predated the 1997 'Shimizu'¹ legal decision. This decision ruled that demolition meant the total or near total demolition of a building with anything less constituting an alteration not requiring conservation area consent. The 1990 Act states that the exemption can only apply to a building in use for the time being for ecclesiastical purposes, which would effectively preclude demolition. The only circumstance where conservation area consent may possibly apply is where the major part of a building is demolished with ecclesiastical use continuing in what remains. In light of the limited applicability of the ecclesiastical exemption for conservation area consent, it has been removed so that all applications are dealt with under the secular system.

4.13 The 2018 Order follows the earlier arrangements in restricting the exemption to a church building, any object or structure fixed to it and any object or structure within its curtilage. However, the Order widens the previous arrangements by extending the exemption to objects and structures in a church building's curtilage which are listed in their own right. This change aims to increase clarity by applying the exemption to everything within the curtilage of a church building and reduce administrative burdens by removing 'dual controls' whereby works are subject to both denominational consent and listed building consent from the local planning authority. The 2018 Order includes a transitional provision to the effect that, if a listed building consent application pertaining to a curtilage object or structure is made before the 2018

¹ Shimizu (UK) Ltd v Westminster City Council [1997] 1 All E.R. 481

Order comes into force, it will continue to be determined by the local planning authority.

- 4.14 The new ecclesiastical exemption Order and associated guidance will give exempt denominations clear and effective systems that will enable them to protect and manage their listed places of worship to a standard equal to that achieved by the secular system of listed building control operated by local planning authorities. This will help them to maintain their listed places of worship and sensitively adapt them to the changing needs of their congregations so that these treasured buildings can continue to be vital elements of thriving communities in Wales.

5. Consultation

- 5.1 Three questions on the Order were asked as part of a larger consultation conducted between 16 April 2018 and 13 July 2018.
- 5.2 Consultees were asked whether they agreed that the exemption should be removed for conservation area consent. Thirty-five responses were received to this question, of which 31 (88%) agreed and only one opposed. In response to detailed comments, the supporting guidance has been amended to provide additional information on the circumstances when conservation area consent will be required.
- 5.3 The second question asked consultees if they agreed that any object or structure, whether listed or not, in the curtilage of a listed church building should be considered to be part of that church building for the purposes of ecclesiastical exemption. Thirty-five responses were received and a sizeable majority (25 / 71%) agreed with the proposal, including religious organisations and local authority representations. The consensus was that the change would clarify who was responsible for the consent. However, six (17%) responses were opposed on the basis that the exemption should only extend to structures actively used for worship.
- 5.4 The final question asked whether consultees agreed that the draft 2018 Order made no other substantive changes to the 1994 Order. Of the 34 responses, 28 (82%) agreed and only 1 (3%) disagreed. A number of consultees commented that the operation of the exemption varied in quality across Wales and that there was a need for closer monitoring by the Welsh Government. The guidance produced to accompany the 2018 Order will assist by providing a code of practice for the denominations to follow in administering the ecclesiastical exemption. It will also set out arrangements for reporting and monitoring.
- 5.5 A summary report on the consultation responses is available on the Welsh Government website at: <https://beta.gov.wales/ecclesiastical-exemption-and-guidance-scheduled-monuments>

6. Regulatory Impact Assessment (RIA)

Option 1 — Do nothing — Retain the 1994 Order

Description

- 6.1 This option would retain the arrangements put in place by the 1994 Order.
- 6.2 The same six denominations would continue to be exempt from secular controls for listed buildings and conservation areas.
- 6.3 The main listed church building would be covered by the exemption, as would any unlisted structures in its curtilage. However, listed building consent from the local planning authority would still be required along with any specific denominational consent for works to a separately listed structure in the curtilage of the main ecclesiastical building.

Costs

- 6.4 The retention of the existing requirements would not result in any direct changes to costs for the exempt denominations.
- 6.5 Leaving the list of exempt denominations unchanged would place pressure on the United Reformed Church by requiring it to maintain systems and expertise to consider applications for works to its listed churches in Wales despite their request to revert to secular controls.
- 6.6 Requiring the exempt denominations to secure denominational consent as well as listed building consent from the local planning authority for works to listed structures within the curtilage of a listed ecclesiastical building would continue the complex bureaucratic and administrative procedures that the denominations need to follow.
- 6.7 The 1994 Order is also hard to follow. Since it was replaced for England in 2010, it applies only to Wales but includes provisions which are not relevant to Wales. In addition, it is only available in English. As a result, the Order is inaccessible and confusing for those who need to use it.

Benefits

- 6.8 The operation of the ecclesiastical exemption under the 1994 Order was last independently reviewed in 2004. It was found to be operating effectively and it was recommended that it should continue.
- 6.9 Since the Order has been in place since 1994, it is well understood by the denominations and local planning authorities.

Option 2 — Amend the denominations with exemption in the 1994 Order

Description

6.10 Under this option, the 1994 Order would be retained but amended to remove the exemption for the United Reformed Church.

Costs

6.11 The retention of the existing requirements would not result in any direct changes to costs for the exempt denominations. Local planning authorities would impose no charges for considering and determining listed building consent applications, so the denomination leaving the ecclesiastical exemption system should not face increased costs.

6.12 There would be an impact on local planning authorities if they considered consent applications instead of the United Reformed Church. Cadw is a consultee on all proposed works under the exemption systems. In 2017–18, only 2 proposals were received from the United Reformed Church across Wales, out of a total of 232 for all denominations. As such, the additional cost for local planning authorities would be minimal.

6.13 The other costs identified in option 1 would also be relevant to this option.

Benefits

6.14 This option reflects the wishes of the individual denominations regarding their exemption from secular controls over listed buildings and conservation areas but would bring no further benefits.

Option 3 — Replace the 1994 Order with a new Order which includes policy changes

6.15 Under this option, the 1994 Order would be revoked and replaced with a new Order. It would remove the United Reformed Church from the exempt denominations, again subjecting its listed ecclesiastical buildings to secular listed building and conservation area consents. The new Order would also simplify procedures by removing dual controls over listed buildings and structures in the curtilage of a listed ecclesiastical building and by removing the ecclesiastical exemption for conservation area consent. These changes were strongly supported in the consultation responses.

Costs

6.16 Both local planning authorities and the exempt denominations would realise small savings from bringing listed curtilage buildings and

structures within the scope of ecclesiastical exemption. The authorities would no longer have to assess and determine a small number of listed building consent applications annually. The denominations would be freed from preparing applications for listed building consent in addition to those for their own internal consents.

- 6.17 The withdrawal under this option of the denominations' exemption from conservation area consent would be unlikely to involve significant cost impacts. As outlined above, the exemption predated the Shimizu judgement that demolition requiring conservation area consent meant the substantive demolition of the whole building, anything less being an alteration. Given that the exemption can only apply to a building in ecclesiastical use, it is difficult to envisage when a denomination could grant itself consent for demolition.
- 6.18 As in option 2, the removal of the exemption from the United Reformed Church would mean additional costs for local planning authorities, but these would be expected to be minimal. There would be no cost for the United Reformed Church as local planning authorities do not charge a fee for considering listed building consent applications.

Benefits

- 6.19 This option would deliver the request of the United Reformed Church to revert to the secular system of controls
- 6.20 It would also clarify what structures and buildings are subject to the exemption or secular controls, reducing the number of cases where works to the buildings of exempt denominations fall under dual controls.
- 6.21 The Order would be made clearer and easier to use by removing extensive, lapsed provisions that relate only to England. It would also be published bilingually as new secondary legislation of the National Assembly for Wales.

Option 4 — Remove ecclesiastical exemption entirely

- 6.22 Subsection 60(1) of the 1990 Act makes ecclesiastical buildings in use for ecclesiastical purposes exempt from most controls over listed buildings. Subsection 75(1)(b) does the same for conservation areas. This option would use the power in subsection 60(5) and 75(7) to make an order restricting or excluding the operation of the exemptions by removing the exemption for all classes of ecclesiastical buildings and denominations. The previously exempt denominations would accordingly have to make listed building consent applications to the relevant local planning authorities for all works to their listed ecclesiastical buildings.

Costs

- 6.23 The key impact would be on local planning authorities who would then be responsible for determining all listed building consent applications that would otherwise have been handled as denominational consents. In 2017–18, there were a total of 232 denominational consent applications in Wales of which 222 were determined by dioceses of the Church in Wales. In 2017–18, the total number of listed building consent applications determined by local planning authorities in Wales was 827 meaning that removal of the exemption would increase the workload of conservation departments by about 25%. Of the 222 applications handled by the Church in Wales, 206 were in four dioceses suggesting that a disproportionate impact on the respective local planning authorities would be likely.
- 6.24 Local authorities do not apply charges to listed building consent applications so there would be no additional cost for the previously exempt churches applying for consent. However, under their current procedures a consent application would still have to be made to the governing denomination, so all works would be subject to dual controls.
- 6.25 In addition, local authority conservation departments might have difficulties in matching the specialist knowledge and experience of the denominations and the long-standing expertise that they have developed in caring for listed places of worship.

Benefits

- 6.26 Removing ecclesiastical exemption could be perceived as introducing equality by removing special treatment for ecclesiastical buildings. However, it would be opposed by religious organisations on the basis that it would impose secular controls on freedom of worship by controlling how they manage their places of worship.

Option 5 — Revoke the 1994 Order and not replace it

- 6.27 Under this option the 1994 Order would be revoked and, in accordance with sections 60 and 74 of the 1990 Act, all ecclesiastical buildings in ecclesiastical use would be exempt from listed building and conservation area consent controls when carrying out works. They would also be exempt from certain other powers available to local planning authorities, including urgent works notices and compulsory acquisition should the building be neglected.
- 6.28 There are some 2,000 listed places of worship in Wales of which more than a third are listed at grade I and II*. The six denominations retaining exemption under the 1994 Order all have robust systems in place to assess the impact of works on listed places of worship that equal, or surpass, the secular systems. However, smaller denominations and faith groups could struggle to find the necessary expertise and to develop equivalent systems. As a result, inappropriate works to important listed

buildings could take place with no system of control or opportunity for oversight by the local planning authority.

Cost

- 6.29 Both local planning authorities and the owners of listed places of worship not currently covered by exemption would benefit from cost savings, with the former freed from considering listed building consent applications and the latter from preparing them. However, any savings realised by owners might be offset by having to pay for expert advice that would formerly have been provided by conservation officers from the local planning authority.
- 6.30 As applications to the local planning authority would no longer be possible, denominations not previously exempt would need to develop robust systems and committees to make informed decisions on changes to listed buildings.
- 6.31 Without robust systems in place to control works to listed buildings, there would be a high risk of inappropriate or unsympathetic developments to buildings of historic or architectural significance.
- 6.32 No enforcement action could be undertaken against unauthorised works and there would be no means of taking action when a building becomes at risk from neglect.

Benefits

- 6.33 The option would extend the exemption equally to all owners of places of worship, but, given that no statutory controls would be in place, it could be argued that it would discriminate against secular owners of listed buildings and buildings in conservation areas who would continue to have to apply for consent and be liable to enforcement and legal sanctions.

Summary and preferred option

- 6.34 The preferred option is option 3. It would replace the 1994 Order with a new bilingual Order.
- 6.35 The option has very limited cost implications, but would make a change to the exempt denominations and introduce a number of small policy changes, resulting in greater clarity over responsibilities and reducing double handling.

7. The Competition Filter Test

| The competition filter test | |
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| Question | Answer yes or no |
| Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share? | No |
| Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share? | No |
| Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share? | No |
| Q4: Would the costs of the regulation affect some firms substantially more than others? | No |
| Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation? | No |
| Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q8: Is the sector characterised by rapid technological change? | No |
| Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products? | No |