

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

Report on the Historic Environment (Wales) Bill

October 2015

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership:



David Melding (Chair)
Welsh Conservatives
South Wales Central



Alun Davies
Welsh Labour
Blaenau Gwent



Suzy Davies
Welsh Conservatives
South Wales West



Dafydd Elis-Thomas
Plaid Cymru
Dwyfor Meirionnydd



William Powell
Welsh Liberal Democrats
Mid and West Wales



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The Committee's Recommendations

Recommendation 1: We recommend that the Deputy Minister:

- (i) reviews the Bill to ascertain the subordinate legislation that must be made to ensure the Bill works effectively; and
- (ii) where such legislation is identified, should table amendments to the Bill to place a duty on the Welsh Ministers to introduce it.

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Recommendation 2: We recommend that the Deputy Minister should table amendments to sections 11 and 28 of the Bill to require, as free-standing provisions, a duty to consult before a heritage partnership is agreed or varied (under section 9ZB of the *Ancient Monuments and Archaeological Areas Act 1979* and section 26M of the *Planning (Listed Buildings and Conservation Areas) Act 1990*).

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Recommendation 3: We recommend that the Deputy Minister should table an amendment to the Bill, requiring the Welsh Ministers to lay before the Assembly the guidance issued in accordance with section 36.

(Page 23)

Recommendation 4: We recommend that the Deputy Minister should table an amendment to the Bill requiring regulations made under section 38(7)(h) to be subject to the affirmative procedure.

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Recommendation 5: We recommend that the Deputy Minister clarifies during the Stage 1 debate on the Bill, the purpose and effect of sections 39(1) and 39(2) including, in particular, the way in which he expects to exercise the power contained in section 39(1) (which inserts section 60(1A) into the *Ancient Monuments and Archaeological Areas Act 1979*).

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Recommendation 6: We recommend that the Deputy Minister should table an amendment to the Bill to apply the affirmative procedure to subordinate legislation made under section 60(1A) of the *Ancient Monuments and Archaeological Areas Act 1979* (as inserted by section 39(1) of the Bill) that amends primary legislation.

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Recommendation 7: We recommend that the Deputy Minister should table an amendment to the Bill applying the negative procedure to commencement orders made in accordance with section 40(4) that include transitional, transitory or saving provision. (Page 26)

1. Introduction

Committee Remit

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Introduction and consideration of the Bill

4. On 1 May 2015, the Deputy Minister for Culture, Sport and Tourism, Ken Skates AM (“the Deputy Minister”) introduced the Historic Environment (Wales) Bill and accompanying Explanatory Memorandum.¹ The Deputy Minister also published:
 - two Keeling Schedules, showing how the Bill amends existing primary legislation;²
 - Statements of Policy Intent;³
 - draft statutory guidance.⁴

¹ Welsh Government, *Historic Environment (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, 1 May 2015

² Welsh Government, *Planning (Listed Buildings and Conservation Areas) Act 1990, Amendments to be made by the Historic Environment (Wales) Bill*, May 2015; Welsh Government, *Ancient Monuments and Archaeological Areas Act 1979, Amendments to be made by the Historic Environment (Wales) Bill*, May 2015

³ Welsh Government, *Historic Environment (Wales) Bill, Statements of Policy Intent*, May 2015

⁴ Welsh Government, *Historic Environment (Wales) Bill, Complementary document for consideration, Draft, Managing Historic Environment Records in Wales – Statutory Guidance*, 1 May 2015

5. The Assembly's Business Committee referred the Bill to the Communities, Equality and Local Government Committee to consider and report on the general principles, setting a deadline of 9 October 2015.

6. We considered the Bill on 8 June 2015, taking evidence from the Deputy Minister.

2. Background

Existing legislation

7. The current framework for the protection and management of the Welsh historic environment rests principally within two pieces of UK legislation.

8. Under the *Ancient Monuments and Archaeological Areas Act 1979* ('the 1979 Act'), the Welsh Ministers are required to compile and maintain a schedule of monuments ('the Schedule') that meet certain published criteria and that they deem to be of national importance. Subject to certain defences, it is an offence to damage a scheduled monument or undertake works without the Welsh Ministers' formal consent.

9. The *Planning (Listed Buildings and Conservation Areas) Act 1990* ('the 1990 Act') gives the Welsh Ministers powers to designate listed buildings of special architectural or historic interest. It also sets out a consent procedure for permitted works to listed buildings, establishes offences for unauthorised works and furnishes mechanisms for enforcement actions.

10. The requirement for consent under both Acts serves to safeguard nationally important assets from changes that may damage or destroy their interest or character.

Development of the Bill

11. According to the Explanatory Memorandum:

"The development of the Historic Environment (Wales) Bill has been informed by extensive engagement with stakeholders across the historic environment sector in Wales and members of the public, two public consultations and specially commissioned research."⁵

12. The engagement included workshops during 2012⁶ and a consultation exercise during 2013.⁷

⁵ Explanatory Memorandum, paragraph 210

⁶ Explanatory Memorandum, paragraph 211

Purpose of the Bill

13. The Explanatory Memorandum describes the Bill as forming:

“... part of a suite of legislation, policy, advice and guidance that makes important improvements to the existing systems for the protection and sustainable management of the Welsh historic environment.”⁸

14. The Bill’s aims are to:

- introduce greater transparency and accountability into decisions taken on the historic environment;
- give more effective protection to listed buildings and scheduled monuments; and
- enhance existing mechanisms for the sustainable management of the historic environment.⁹

⁷ Welsh Government, *The future of our past: A consultation on proposals for the historic environment of Wales*, July 2013

⁸ Explanatory Memorandum, paragraph 1

⁹ Explanatory Memorandum, paragraph 24

3. Legislative Competence

General

15. The Explanatory Memorandum states that the Assembly has competence to make this legislation as the provisions in the Bill relate to the following subjects in Part 1 of Schedule 7 to the *Government of Wales Act 2006*:

- Paragraph 2: Ancient monuments and historic buildings
- Paragraph 3: Culture
- Paragraph 6: Environment
- Paragraph 18: Town and country planning.¹⁰

16. The Deputy Minister told us he was satisfied that the Bill was within the Assembly's legislative competence.¹¹

17. We explored with the Deputy Minister the extent to which the Bill complies with Articles 6 and 8 of the European Convention on Human Rights ("the Convention").

Human rights – Article 6: the right to a fair trial

18. In most criminal proceedings, the duty is on the prosecution to prove its case. It is not incumbent on the defendant to prove innocence. In some circumstances, this "burden of proof" can be reversed so that a defendant is "put to proof".

19. The Bill reverses the burden of proof in several instances. New section 2(8A) of the 1979 Act (as inserted by section 15(3) of the Bill) will require a defendant to prove that he or she:

- (i) took all reasonable steps to find out whether there was a scheduled monument in the area before carrying out works which damage or destroy the monument and
- (ii) did not know and had no reason to believe that a monument was present.

¹⁰ Explanatory Memorandum, paragraphs 3-4

¹¹ Constitutional and Legislative Affairs ("CLA") Committee, RoP paragraph [5], 8 June 2015

20. Currently a defendant only has to prove the facts set out in point (ii) of paragraph 19 above.

21. New section 28(1A) (as inserted by section 16(3) of the Bill) concerns the offence of damaging ancient monuments and imposes an additional test that a defendant ought reasonably to have known that a monument was present; currently he or she has to prove only that he did not know it was present.

22. New section 44C of the 1990 Act (as inserted by section 29(1) of the Bill) makes it an offence to contravene a temporary stop notice. It is a defence to prove certain things such as that works were necessary in order to preserve the building.

23. These reversed burdens of proof are relevant to Article 6 (the right to a fair trial) of the Convention.

24. When questioned about whether the balance in the Bill is right and whether what the Welsh Government is proposing is proportionate in terms of what it is seeking to achieve, the Deputy Minister said:

“I can assure the committee that careful consideration was given to the defendant’s right to a fair trial, and we consider that the imposition of a reversed burden of proof in certain provisions in the Bill is justified and is a proportionate means of achieving the Bill’s policy objectives. It’s worth noting that the primary burden—that being the burden of proving that somebody has caused damage to a protected site—will still remain with the prosecution. The matters that the accused must show in order to establish the defence are matters that should be within the accused’s own knowledge, so the burden should be one he can easily discharge. If the prosecution were required to prove the accused’s knowledge, then the regime would not be able to operate effectively, and the courts have held that it’s not unfair to place a burden of this kind on the accused in a situation such as this.”¹²

¹² CLA Committee, RoP paragraph [87], 8 June 2015

Human rights – Article 8: the right to respect for family and private life

25. The Bill contains:

- (i) interim protection¹³ provisions (new sections 1AB to 1AE to the 1979 Act, as inserted by section 3 of the Bill and new section 2B, 2C and 28B to the 1990 Act, as inserted by section 24 of the Bill); and
- (ii) powers of entry under Scheduled Monument Enforcement Notices and Temporary Stop Notices (new sections 9ZC to 9ZH to the 1979 Act, as inserted by section 12 of the Bill).

26. These provisions engage human rights under Article 8 (the right to respect for family and private life) and Article 1 Protocol 1 (protection of property) of the Convention.

27. New section 54(4A) to the 1990 Act (as inserted by section 30(2)) will allow access for urgent works to buildings in residential use where that use is not unreasonably interfered with. New section 55(5C) to (5E) (as inserted by section 30(6)) allows recovery of the costs of work to be imposed as a “charge” on the relevant land which may lead to its sale without the owner’s consent in order to recover those costs. These provisions also engage Article 8 and Article 1 Protocol 1 rights.

28. We asked the Deputy Minister whether he was content that he had the balance right in respect of Article 8. He told us:

“This relates to one of the clearest deficiencies that exist in the current legislation, namely that properties that are being used for storage can be excluded from urgent works, by virtue of them being occupied, essentially. We were very keen to ensure that article 8, and section 54(4A) were not in conflict, and the right balance has to be struck between what we’re trying to achieve in the Bill, in terms of protection of historic assets, and the rights of the individual. So, the new section 54(4A) of the 1990 Act enables local authorities to undertake urgent works

¹³ The provisions of the Bill amend the 1979 Act to place a duty on the Welsh Ministers to consult with appropriate persons, including the owner, when proposing to add, remove or make a material amendment to an entry in the Schedule. An amendment is considered material if it adds to or reduces the scheduled area. The Bill also introduces interim protection, so that the provisions of the 1979 Act will apply to a monument as if already scheduled during the period of the consultation.

to the whole or any part of the building in residential use, but only where those works would not interfere unreasonably with that use. The power can only be used where works are urgently necessary to preserve the listed building, and where those works don't interfere unreasonably with residential use. So, we've built into the system as well procedural safeguards, for example section 54(5A) requires at least seven days' notice to be given in writing."¹⁴

29. The Deputy Minister also felt that it was proportionate to compel the sale of property under section 55 without the owner's consent.¹⁵ He said:

"There are many examples of local planning authorities being reluctant to carry out urgent works because of a concern of not being able to recover costs. So, new section 55(5A) to (5G) enables the recovery of expenses by way of a local land charge that we are content is proportionate. There are procedural safeguards, as well, built into section 55, which enables an owner to make representation to Welsh Ministers challenging any liability for costs, including on the grounds that the works were unnecessary."¹⁶

Our view

30. We note the Deputy Minister's view regarding the Assembly's ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

31. We have noted the Deputy Minister's comments regarding how the Bill seeks to comply with European Convention on Human Rights and we consider the approach adopted to be reasonable and to be limited to specific objectives.

¹⁴ CLA Committee, RoP paragraph [83], 8 June 2015

¹⁵ CLA Committee, RoP paragraphs [84 and 85], 8 June 2015

¹⁶ CLA Committee, RoP paragraph [85], 8 June 2015

4. General Observations

Consolidation

32. The Bill contains 41 sections and two Schedules, and is divided into five Parts. The Bill is mostly made up of amendments to the 1979 Act and the 1990 Act, but also includes two sets of stand-alone provisions.

33. Given that a substantial part of the Bill amends two UK Acts we asked why a consolidating Bill was not introduced. The Deputy Minister explained that:

“There were three years of consultation that led to the drafting of the Bill. I think it’s worth noting that the two Acts ... are fundamentally robust, but there are clear deficiencies contained within them, which this legislation seeks to address. Working within the legislative timetable for the fourth Assembly and given the limited resources available, pulling together all of the historic environment legislation into one Bill was not practicable.”¹⁷

34. The Deputy Minister’s official acknowledged that stakeholders were asked about their preference for the legislative approach to be taken. She said:

“I would be lying if I said that they would want to see the amending legislation that we have.”¹⁸

35. She added that stakeholders “support the policy intent”¹⁹ and

“... were happy with the structure and the framework of the legislation, but they would have liked to have seen all the legislation come into one piece of historic environment legislation for Wales.”²⁰

36. When asked whether a longer drafting period would have allowed consolidation, the Deputy Minister’s official said:

¹⁷ CLA Committee, RoP paragraph [7], 8 June 2015

¹⁸ CLA Committee, RoP paragraph [29], 8 June 2015

¹⁹ CLA Committee, RoP paragraph [29], 8 June 2015

²⁰ CLA Committee, RoP paragraph [32], 8 June 2015

“I think it was just a balance between resource, timetabling and the magnitude of the work, once it was looked at, to try and pull the legislation together, and not taking account of the unintended consequences of doing so. It was a much bigger piece of work than initially probably thought.”²¹

37. When asked whether he had considered the difficulty of reading a statutory framework that referred to the Secretary of State and the Welsh Ministers, the Deputy Minister said:

“Yes, yes we did. First of all, I think there would be much to recommend a consolidation Bill in a future Assembly. We would not rule that out.”²²

38. He added:

“... we are also providing Keeling schedules, which will help lay readers as well as professionals and local planning authorities to appreciate the amendments. The Keeling schedules ... are also being published on the Assembly website and also on Cadw’s website. So, that will assist in public awareness of the differences, but we do recognise that amending legislation does make it more difficult for the public to access.”²³

39. In responding to probing about the large number of organisations and people who could be affected by the legislation, the Deputy Minister also explained that:

“... there will also be a comprehensive mapping database that will be accessible to all and able to inform any person of the location and the details of a scheduled monument. Insofar as listed buildings are concerned, owners will be aware through searches of any listed status of a building that they purchase.”²⁴

40. The Deputy Minister’s official also emphasised that a lot of consultation had taken place with external stakeholder groups, including “policy and electronic bulletins to make them aware of the changes that will be coming in.”²⁵

²¹ CLA Committee, RoP paragraph [34], 8 June 2015

²² CLA Committee, RoP paragraph [9], 8 June 2015

²³ CLA Committee, RoP paragraph [12], 8 June 2015

²⁴ CLA Committee, RoP paragraph [26], 8 June 2015

²⁵ CLA Committee, RoP paragraph [27], 8 June 2015

Our view

41. We consider this to be a convoluted piece of law. While the Keeling Schedules are useful for the purposes of scrutiny, once enacted, the Bill will be difficult to follow in places and not very accessible.

42. In our view, it would have been significantly better if introduced as a consolidation Bill. This is particularly because of the impact it could have on the protection and maintenance of our historic environment and the number of organisations and people it could affect.

43. We note the Deputy Minister's comments regarding time and resources. However, we note that the Welsh Government announced its intention to legislate in May 2011²⁶ and started consulting with stakeholders on issues related to the development of the Bill in 2012. We are not clear why consolidating provisions could not have been prepared alongside the preparatory work for the specific provisions of the Bill that was subsequently introduced in May 2015.

44. It is clear that the Welsh Government has a significant challenge to overcome in making Welsh law more accessible to the people it affects. It is a matter to which the next government must give serious consideration in the Fifth Assembly. We refer to this issue in our report on *Making Laws in Wales*.²⁷

Balance between primary and secondary legislation

45. We asked the Deputy Minister about the balance between what's on the face of the Bill and what's placed as secondary legislation. He told us:

“... in drafting the Bill, we were very careful to place as much as possible on the face of the Bill, rather than relying on secondary legislation. We believe that it does strike the right balance between the detail on the face of the Bill and the need to be able to react to what are often changing circumstances within the historic environment.

²⁶ Welsh Government Oral Statement, *Statement on Legislative Priorities*, Record of Proceedings, 14 June 2011

²⁷ Constitutional and Legislative Affairs Committee, *Making Laws in Wales*, October 2015

So ... the Bill necessarily includes ... a modest number of powers to make subordinate legislation, but most relate to administrative arrangements. Where they concern more substantive matters, we propose that they're subject to the affirmative procedure. There are new provisions that need to fit in with the existing regime, and in most cases are there to either simplify or to strengthen the existing legislation."²⁸

Our view

46. We note the balance that has been adopted for this Bill has to a large extent been determined by the existing legislation which it seeks to amend. We re-iterate our view that this Bill would have been significantly better if introduced as a consolidation Bill.

²⁸ CLA Committee, RoP paragraphs [22 and 23], 8 June 2015

5. Powers to make subordinate legislation

Background

47. The Bill contains the following powers for the Welsh Ministers:

- 18 powers to make regulations;
- one power to make an order;
- one power to issue guidance; and
- two powers to issue directions.

48. We comment on some of these powers below.

Section 3 – Amendments relating to the Schedule

49. Section 3(1) inserts five new sections into the 1979 Act.

50. New section 1AD makes provision for compensation to be paid for loss or damage caused by interim protection if the Welsh Ministers decide:

- (i) not to include a monument in the Schedule, or
- (ii) not to make a material amendment that increases the area shown for a monument on a map that accompanies the monument's entry in the Schedule.

51. Section 1AD(2) enables the Welsh Ministers to make regulations setting out the time and manner in which any compensation claim needs to be made to the Welsh Ministers. The Explanatory Memorandum states that the power is exercised by the use of the negative procedure because the regulations will prescribe “matters of detail which may change from time to time”.²⁹

52. New section 1AE contains provisions for the review of the Welsh Ministers' decisions to make certain amendments relating to the Schedule. Section 1AE(6) enables the Welsh Ministers to make regulations setting out the grounds on which an application for a review may be made and other procedural matters associated with the review. The power is exercised by the use of the negative procedure

²⁹ Explanatory Memorandum, Section 5, page 45

because the regulations will prescribe “technical matters of detail which may change from time to time”.³⁰

53. We asked where in the Bill was the duty, for example in relation to section 1AD(2), to introduce regulations to prescribe the time and manner in which any compensation claim needs to be made. In response, the Deputy Minister’s official said:

“Clearly, there is an expectation here for the Welsh Ministers to set out that process, because obviously, as you said, they wouldn’t be able to actually put in the claim for compensation without those prescriptive circumstances. It’s been done in the way it has to allow for an element of adapting as knowledge grows, because obviously this is a new regime that has to fit into an existing regime, so we need to have a little bit of the tried and tested period of time. That’s why it’s been drafted in the way it has, but certainly, obviously that is something that the Welsh Ministers would do to enable this to work effectively.”³¹

54. We noted that a similar issues arises in section 1AE(6). We asked for an undertaking from the Deputy Minister to go through the Bill and, where there is an expectation of the Welsh Ministers to do certain things in order to make the main legislation work, to put the Welsh Ministers under a duty to do so. The Deputy Minister indicated that he would consider any recommendations made by the Committee.³²

Our view

55. Primary legislation should make the Welsh Government’s intentions clear.

56. We believe that where there is a necessity to introduce subordinate legislation to make the legislation work effectively, the Bill must provide a duty on the Welsh Ministers to do so. While we believe this applies in respect of section 3, we consider there would be merit in undertaking an exercise to ensure this principle applies in respect of the whole Bill.

³⁰ Explanatory Memorandum, Section 5, page 45

³¹ CLA Committee, RoP paragraph [36], 8 June 2015

³² CLA Committee, RoP paragraph [38], 8 June 2015

Recommendation 1: We recommend that the Deputy Minister:

- (i) reviews the Bill to ascertain the subordinate legislation that must be made to ensure the Bill works effectively; and**
- (ii) where such legislation is identified, should table amendments to the Bill to place a duty on the Welsh Ministers to introduce it.**

Section 11 – Heritage Partnership Agreements; Section 28 – Heritage Partnership Agreements

57. Section 11(1) inserts new sections 9ZA and 9ZB into the 1979 Act which make provision for heritage partnership agreements (“HPAs”). They are agreements between the Welsh Ministers and the owners of scheduled monuments which will grant scheduled monument consent (SMC) for a programme of specified works to be carried out within a fixed period, negating the need to apply for separate consent for each set of works.

58. Section 9ZB(3) enables the Welsh Ministers to make regulations with respect to HPAs about consultation, publicity, terms to be included, application, disapplication or reproduction of the provisions of the 1979 Act. It also allows regulations to be made enabling the Welsh Ministers to terminate by order an HPA or any provision of such an agreement. The power is exercised by the use of the affirmative procedure because:

“The regulation-making power allows the Welsh Ministers to disapply or apply, with or without modifications, any provisions in the 1979 Act for the purposes of HPAs.”³³

59. The Bill states that the Welsh Ministers “may” make regulations about about any consultation that “must” take place before a heritage partnership agreement is made or varied.

60. The Deputy Minister told us:

“The purpose of section 9ZB(3) is to ensure that regulation-making power is broad enough to allow us to make provisions in regulations, rather than, for example, in guidance. These

³³ Explanatory Memorandum, Section 5, page 46

regulations will be subject to the affirmative procedure. This will, we believe, give Assembly Members the opportunity to consider the consultation requirements as well.”³⁴

61. Section 28(1) of the Bill makes similar provision to section 11(1) but in respect of the 1990 Act; it inserts sections 26L and 26M into that Act putting in place HPAs relating to listed buildings.

Our view

62. We consider it strange that a discretionary power to make regulations includes a mandatory duty to consult before a heritage partnership agreement is made or varied. We believe that such a duty should appear on the face of the Bill and not within the ambit of a regulation-making power.

Recommendation 2: We recommend that the Deputy Minister should table amendments to sections 11 and 28 of the Bill to require, as free-standing provisions, a duty to consult before a heritage partnership is agreed or varied (under section 9ZB of the *Ancient Monuments and Archaeological Areas Act 1979* and section 26M of the *Planning (Listed Buildings and Conservation Areas) Act 1990*).

Section 36 – Guidance

63. Section 36 allows the Welsh Ministers to issue guidance on: creating and maintaining Historic Environment Records (HERs), the publication of HERs and the charging of fees in connection with those publication functions, and the making of arrangements for the discharge of HER-related functions. Prior to issuing the guidance, the Welsh Ministers must consult with the local planning authorities and any other person that the Welsh Ministers consider appropriate. The Welsh Government published draft statutory guidance to accompany the introduction of the Bill.³⁵

64. No Assembly procedure applies to the issue of guidance because:

³⁴ CLA Committee, RoP paragraph [44], 8 June 2015

³⁵ Welsh Government, *Historic Environment (Wales) Bill, Complementary document for consideration, Draft, Managing Historic Environment Records in Wales – Statutory Guidance*, 1 May 2015

“The power to issue guidance is intended to facilitate the application of the primary legislation. The guidance will be largely concerned with process, and as such, Assembly procedure is not appropriate.”³⁶

65. The Deputy Minister told us:

“it’s not common practice for guidance of this nature to be subject to legislative procedure, and we consider that the duty to consult will provide those using the guidance with sufficient opportunity to consider and to make representations that will inform the issued guidance.”³⁷

66. It was also confirmed that the guidance related only to the creation and maintenance of historic environment records.³⁸

Our view

67. We note the Deputy Minister’s views and are content that no procedure should apply to the making of this guidance. However, we believe there would be merit in a duty to lay the guidance before the Assembly.

Recommendation 3: We recommend that the Deputy Minister should table an amendment to the Bill, requiring the Welsh Ministers to lay before the Assembly the guidance issued in accordance with section 36.

Section 38 – Constitution etc

68. Section 37 requires the Welsh Ministers to establish the Advisory Panel for the Welsh Historic Environment (“the Panel”). The purpose of the Panel is to provide expertise and a diversity of perspectives on a broad range of policy and strategy developments and activities relating to the wider historic environment, including properties in state care.

69. Section 38 makes provision about the membership of the Panel and about its legal status. In particular, section 38(7) lists persons disqualified from membership of the Panel and includes at paragraph (h) a power to add staff of an organisation by means of regulations subject to the negative procedure.

³⁶ Explanatory Memorandum, Section 5, page 50

³⁷ CLA Committee, RoP paragraph [70], 8 June 2015

³⁸ CLA Committee, RoP paragraphs [77 and 80], 8 June 2015

70. The Welsh Government's Statements of Policy Intent states:

"The panel will need to demonstrate independence, integrity and impartiality. The panel will provide advice to the Welsh Ministers on a range of policy, strategy and funding issues. Many of the decisions taken by the Welsh Ministers on these issues may impact directly on a range of organisations be it in terms of the policies that they have to implement or the funding that they might (or might not) be awarded.

The categories of persons under consideration for disqualification are:

- staff of the Welsh Government,
- staff employed by the Royal Commission on the Ancient and Historical Monuments of Wales, and
- staff employed by the four Welsh archaeological trusts.

It will not be possible to eliminate all conflicts of interest, since the pool of people with the required expertise, skills and knowledge is relatively small. Operating protocols will be used to deal with any potential conflicts of interest beyond those identified in the legislation and regulations."³⁹

71. According to the Explanatory Memorandum, the negative procedure applies to the making of regulations because the main disqualifications from membership are already included in the Bill and "any subordinate legislation will be concerned with relatively minor detail."⁴⁰

72. Given that the potential to exclude people from the Panel is potentially a serious matter we asked the Deputy Minister why the regulation-making power was subject to the negative procedure. He said:

"We've already identified the main disqualifications for membership of the panel, and they're set out on the face of the Bill. But, it may prove necessary to amend the list in the future, taking account of any reorganisations or restructuring. And the regulation-making powers are necessary to add to that list of

³⁹ Statements of Policy Intent, pages 22-23

⁴⁰ Explanatory Memorandum, Section 5, page 49

disqualifications on the face of the Bill, in the event of such reorganisations or restructuring taking place. We don't consider it appropriate to subject these regulation-making powers to the affirmative procedure. The affirmative procedure may be appropriate for regulations disqualifying persons from being Assembly Members, given the impact that such disqualifications may have on the democratic process. But, the advisory panel's role is purely advisory, and so it's not appropriate to subject the regulation-making power in section 38 to the same level of scrutiny."⁴¹

Our view

73. We note the Deputy Minister's views. However, we consider the act of disqualifying a person (or of deciding not to do so) is an important matter that warrants consideration by the Assembly.

Recommendation 4: We recommend that the Deputy Minister should table an amendment to the Bill requiring regulations made under section 38(7)(h) to be subject to the affirmative procedure.

Section 39 – Regulations and Orders

74. Section 39(1) of the Bill inserts a new subsection (1A) in section 60 of the 1979 Act which states:

“Any power of the Welsh Ministers to make regulations or an order under this Act includes power to make such incidental, supplemental, consequential, transitory, transitional or saving provision as the Welsh Ministers consider appropriate.”

75. We asked why this particular section is being included and the type of changes to the 1979 Act that the Deputy Minister would still be anticipating after this Bill became an Act. The Deputy Minister's official told us:

“The reason we've got this power in there is because ... we're introducing new regimes to fit in with the existing legislation. That legislation obviously dates back to 1979. So, the reason we have this power really is to make sure that there is that smooth transition, and so if there is anything that we do need to change so that we can adapt or make sure that the new

⁴¹ CLA Committee, RoP paragraph [59], 8 June 2015

regime is effective against the existing legislation, then we may need this power to add to the pure changes that we are introducing via our Bill.”⁴²

76. She added:

“It’s not that we haven’t amended what we consider necessary to be amended; it’s basically looking at the main thrust of those amendments and how they will sit alongside the existing legislation. Obviously, you can go some way to making sure that you’ve made all the changes needed, but when that regime starts to kick off and work in practice, we don’t want to be left in a situation where we’re unable to make changes other than by further primary legislation to enable that to work effectively, not only for, obviously, the protection of listed buildings and scheduled monuments, but also for those individuals that are affected by these changes.”⁴³

and

“this is a, sort of, common power that’s used across all types of legislation. But, that is there, basically, to ensure that there isn’t that loophole created by the changes.”⁴⁴

77. We also note that section 39(2) inserts new sections 60(3), 60(4) and 60(5) into the 1979 Act. Section 60(3) refers to section 37 of the 1979 Act and section 60(5) to section 19 of the 1979 Act, but neither section 19 or 37 is contained in the relevant Keeling schedule.

Our view

78. We note the comments made in respect of this section.

79. However, we consider the power in section 60(1A) of the 1979 Act, as inserted by section 39(1) of the Bill, to be quite broad, given that it could be used in respect of regulations that amend primary legislation.

80. We note that new section 60(1A) applies to the 1979 Act in its entirety and not just the amended provisions that are the subject of

⁴² CLA Committee, RoP paragraph [53], 8 June 2015

⁴³ CLA Committee, RoP paragraph [55], 8 June 2015

⁴⁴ CLA Committee, RoP paragraph [56], 8 June 2015

this Bill. We note also that the original 1979 Act required no equivalent power to that which is contained in new section 60(1A).

81. We also note that the Keeling Schedule does not repeat unamended sections of the 1979 Act to which amending provisions of the Bill apply. This adds weight to our belief that the Bill would have been significantly better as a consolidation Bill.

82. We believe that the Deputy Minister should clarify the purpose and effect of sections 39(1) and 39(2) of the Bill.

Recommendation 5: We recommend that the Deputy Minister clarifies during the Stage 1 debate on the Bill, the purpose and effect of sections 39(1) and 39(2) including, in particular, the way in which he expects to exercise the power contained in section 39(1) (which inserts section 60(1A) into the *Ancient Monuments and Archaeological Areas Act 1979*).

Recommendation 6: We recommend that the Deputy Minister should table an amendment to the Bill to apply the affirmative procedure to subordinate legislation made under section 60(1A) of the *Ancient Monuments and Archaeological Areas Act 1979* (as inserted by section 39(1) of the Bill) that amends primary legislation.

Section 40 – Coming into force

83. Section 40 sets out the provisions that will come into force on the date of Royal Assent; those that will come into force two months after Royal Assent; and those that will be brought into force by an order made by the Welsh Ministers. The Deputy Minister explained that:

“... commencement Orders are not subject to any Assembly procedure because they’re merely bringing into force provisions that have already been scrutinised and passed by the Assembly. The Bill will introduce new regimes, and in order to ensure that there is a smooth transition from the existing regime into the new regime, it’s considered necessary to include limited ancillary powers. They’ll only be used in connection with the commencement of the provisions. Section 40(4) doesn’t give a power to make any wider provision in connection with commencement. We’ve deliberately kept this

power as narrow as possible, whilst, at the same time, ensuring that the Bill's provisions can be commenced effectively."⁴⁵

Our view

84. We note the comments explaining the reason for the two provisions.

85. We remain of the view that the negative procedure should be applied to order-making powers that do more than simply identify the date of commencement of a particular provision.

Recommendation 7: We recommend that the Deputy Minister should table an amendment to the Bill applying the negative procedure to commencement orders made in accordance with section 40(4) that include transitional, transitory or saving provision.

⁴⁵ CLA Committee, RoP paragraph [72], 8 June 2015