

Explanatory Memorandum to the:

1. The Listed Buildings (Review of Listing Decisions) (Wales) Regulations 2017;
2. The Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017.

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

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the:

1. The Listed Buildings (Review of Listing Decisions) (Wales) Regulations 2017
2. The Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017

Ken Skates
Cabinet Secretary for Economy and Infrastructure
8 May 2017

1. Description

1.1 The Historic Environment (Wales) Act 2016 (the 2016 Act) has amended the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act) and the Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Act) to allow an owner and/or an occupier to ask the Welsh Ministers to review a decision to:

- schedule a monument,
- enlarge a scheduled area (where the monument is identified by reference to a map maintained by the Welsh Ministers), or
- list a building.

1.2 The Scheduled Monuments (Review of Scheduling Decisions) (Wales) Regulations 2017 (the Scheduling Review Regulations) and the Listed Buildings (Review of Listing Decisions) (Wales) Regulations 2017 (the Listing Review Regulations) make provision about:

- the grounds for reviews;
- how and when an application for a review must be made;
- the information that must be provided with an application;
- the classes of reviews to be decided by a person appointed by the Welsh Ministers; and;
- other procedural matters.

1.3 Since the Scheduling Review Regulations and Listing Review Regulations closely mirror one another in their policy intent, structure and detailed provisions, they can be appropriately considered together in this explanatory memorandum.

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

2.1 None

3. Legislative background

3.1 The Welsh Ministers make the Scheduling Review Regulations in exercise of the powers conferred on them by sections 1AE and 60(3) of, and Schedule A2 to the 1979 Act (those enabling provisions having been inserted into the 1979 Act by sections 3(1) and 40(2) of, and Schedule 1 to, the 2016 Act respectively).

3.2 The Welsh Ministers make the Listing Review Regulations in exercise of the powers conferred on them by sections 2D and 93(1) of, and Schedule 1B to, the 1990 Act (sections 2D of, and Schedule 1B to, the 1990 Act having been inserted by section 24(1) of, and Schedule 2 to, the 2016 Act respectively, while section 93(1) of the 1990 Act was amended by section 40(3) of the 2016 Act).

3.4 In accordance with the provisions of section 60(5) of the 1979 Act and section 93(3) of the 1990 Act these statutory instruments follow the negative procedure.

4. Purpose and intended effect of the legislation

4.1 The 1979 Act requires the Welsh Ministers to compile and maintain a schedule of monuments of national importance. The 1990 Act requires them to compile lists of buildings of special architectural or historic interest.

4.2 Following amendments made by the 2016 Act, the 1979 and 1990 Acts now place a duty on the Welsh Ministers to consult the owner, occupier and other appropriate persons if they propose to:

- include a monument on the schedule,
- exclude a monument from the schedule,
- enlarge or reduce the area shown for a scheduled monument (where the monument is identified by a map maintained by the Welsh Ministers),
- include a building on a list, or
- exclude a building from a list.

4.3 If the Welsh Ministers propose to schedule a monument, enlarge a scheduled area or list a building, the historic asset concerned will enjoy interim protection as if already designated until the Welsh Ministers reach a decision.

4.4 Under section 1AE of the 1979 Act (as inserted by section 3 of the 2016 Act), an owner and/or an occupier may ask the Welsh Minister to review their decision to schedule a monument or enlarge a scheduled area. Section 2D of the 1990 Act (as inserted by section 24 of the 2016 Act) provides a comparable right of review if the Welsh Ministers decide to list a building.

4.5 The Welsh Ministers must carry out the requested review employing one or more of the following procedures, as they deem appropriate:

- a public local inquiry (in the case of a scheduled monument) or a local inquiry (in the case of a listed building),
- a hearing, or
- written representations.

Those procedures are well established in planning and listed building consent appeals.

4.6 It is the Welsh Ministers' responsibility to determine whether a monument should be scheduled or a building listed. To introduce independence and transparency into the review process, Schedule A2 of the 1979 Act (inserted by section 3 of, and Schedule 1 to, the 2016 Act) and Schedule 1B of the 1990 Act (inserted by section 24 of, and Schedule 2 to, the 2016 Act) make provision for the Welsh Ministers to prescribe by regulations classes of reviews to be decided by an appointed person.

4.7 Accordingly, the Scheduling and Listing Review Regulations establish that all relevant reviews will be conducted and determined by an appointed person. The Planning Inspectorate will be the appointed person for these reviews.

4.8 Under sections 1AE(6) of the 1979 Act and 2D(6) of the 1990 Act, the Review Regulations set out:

- the grounds for a review;
- how and when an application for a review must be made; and
- the information that must be provided with an application.

4.9 The grounds for review adopted in the Review Regulations consequently reflect the fundamental designation criteria — national importance for scheduled monuments and special architectural or historic interest for listed buildings.

4.10 An application for a review must be received within 12 weeks of the Welsh Ministers' notice of designation (although the Review Regulations give the appointed person discretion to allow further time for any steps in the review process). The application must set out all matters which, in the view of the applicant, the appointed person should take into account in determining the review.

4.11 The Scheduling and Listing Review Regulations also set out how the available review procedures shall be conducted by the appointed person. Although the primary parties to the review are the applicant and the Welsh Ministers, other interested persons can participate. The Review Regulations aim to ensure that all parties to a review are given the opportunity to provide evidence on the appropriateness of the designation.

4.12 The review procedures are triggered by the receipt of the application and the appointed person will set a start date. As soon as possible after receiving the application, the appointed person must notify the Welsh Ministers and interested persons who were consulted on the original designation proposal. The Welsh Ministers have four weeks from the review's start date to submit a review statement, setting out the matters that they consider the appointed person should take into account in determining the review. Interested persons may also make representations to the appointed person within four weeks of the start date.

4.13 Within six weeks of the start date, the applicant and the Welsh Ministers must submit any additional comments that they wish to make on representations that the appointed person has received. At the end of that period, the appointed person may determine the review application on the basis of the written representations received.

4.14 The appointed person may also, having provided written notice to the applicant, the Welsh Ministers and any other person whom they consider appropriate, carry out the review by means of a hearing, or in complex cases, a public inquiry or by any combination of the three procedures.

4.15 Under all three procedures, the appointed person may appoint an assessor to provide advice and assistance in the conduct of the review. The appointed person may, at any time, require any of the parties to the review to provide additional information, and may also carry out a site inspection.

4.16 Regulation 25 of the Scheduling Review Regulations provides powers for the appointed person to require the payment of costs. Such costs may include the entire

administrative costs incurred by the appointed person and any costs arising from the preparation of an aborted hearing or inquiry. The appointed person may also make orders as to costs of participants and who should pay them. The policy intention is that the payment of costs would only apply to unreasonable behaviour, by any party to the review.

4.17 Equivalent provision is unnecessary in the Listing Review Regulations. Paragraph 2(1) of Schedule 1B to the 1990 Act provides that an appointed person has the same powers in relation to a review under section 2D of that Act as the Welsh Ministers have by virtue of section 322C (Costs: Wales) of the Town and Country Planning Act 1990, as applied by section 89 of that Act to the Planning (Listed Buildings and Conservation Areas Act 1990.

5. Consultation

5.1 Consultation on the proposals for the review procedures was conducted between 19 October 2016 and 13 January 2017.

5.2 Of those who responded, 97% agreed with the proposed grounds on which a review application could be made. None were opposed.

5.3 The consultation also sought views on the requirement that a request for a review must be made within three months of receipt of the notice of designation. A majority of respondents agreed with the proposal, a number pointing to the need to provide certainty on the status of the asset as quickly as possible. Of those that did not agree (27%), the majority argued that a longer period was necessary.

5.4 A significant majority (74%) of respondents also agreed that the proposed procedures outlined in the consultation were reasonable and fair for all involved. A majority (61%) agreed that the information required for reviews was appropriate. Most respondents also agreed (88%) with the proposal for the award of costs to deter unreasonable behaviour.

5.5 The regulations have been amended to take account of the consultation responses, including requiring further information on the location of the historic asset on the review application, regularising the role of the interested persons in the review process and allowing the appointed person flexibility to allow further time if necessary during the process.

5.5 A summary report of the consultation responses is available on the Welsh Government website at: <https://consultations.gov.wales/consultations/regulations-required-historic-environment-wales-act-2016-and-guidance>

6. Regulatory Impact Assessment

6.1 The impacts of the changes to the designation procedures, including the likely costs and impacts of reviews conducted by public local inquiry, hearing or written representations, were considered in the Regulatory Impact Assessment (RIA) prepared for the Historic Environment (Wales) Act 2016 (pages 56 to 60). The RIA anticipated that reviews would be infrequent and, if conducted by the Planning

Inspectorate, have an annual cost for the Welsh Government of £6,750. The cost to the owner of a property to gather evidence and submit a request for a review is estimated to be between £50 and £2,000 (depending upon the nature of the case and whether expert advice from consultants is required). The analysis in the RIA for the Act remains valid and as a result it was not considered necessary to prepare a separate Regulatory Impact Assessment for these Regulations. A copy of the RIA may be obtained from the attached link (<http://www.assembly.wales/laid%20documents/pri-ld10184-em-r/pri-ld10184-em-r-e.pdf>) or from Historic Environment Service (Cadw), Plas Carew, Unit 5/7 Cefn Coed, Parc Nantgarw, Cardiff, CF15 7QQ.]