

HISTORIC ENVIRONMENT (WALES) ACT 2023

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 — Monuments of special historic interest

Chapter 3 — Control of works affecting scheduled monuments

50. *Chapter 3* sets out that particular types of works may only be carried out to scheduled monuments if the works are authorised (section 11). The provisions of this Chapter themselves give authorisation (at section 12 and Schedule 3) for certain descriptions of works. The Chapter (at section 13) also provides that works may be authorised by grant of scheduled monument consent.
51. The bulk of the provisions in the Chapter are about scheduled monument consent: the application process (sections 14 to 16), the grant of consent (sections 17 to 19) and the modification and revocation of consent (section 20 and Schedule 4). The closing sections of the Chapter deal with the compensation that can be claimed in certain circumstances if scheduled monument consent is refused, granted subject to conditions or subsequently modified or revoked (sections 21 to 24).
52. The Welsh Ministers have published guidance, which is kept under review, to support the management of scheduled monuments. The guidance at the time of writing these notes, *Managing Scheduled Monuments in Wales* (2018), sets out the general principles to follow when managing and making changes to scheduled monuments. It explains how to apply for scheduled monument consent, including the roles and responsibilities of owners and Cadw.

Section 11 — Requirement for works to be authorised

53. This section provides that a wide range of works affecting a scheduled monument, extending from demolition to repair, may only be carried out with authorisation under this Chapter. In practice, this means that almost any works to a scheduled monument — including those that will benefit the asset, such as repairing masonry, filling in erosion scars or conducting archaeological investigations — will require authorisation. The authorisation may be either by scheduled monument consent under section 13, or, in certain narrowly defined circumstances, as works falling within a description of a class of works under section 12.
54. Subsection (1) of this section states that a person must not carry out, cause or permit the relevant works to be carried out unless those works are authorised. In addition to prohibiting a person from undertaking works personally or commissioning or employing others to conduct them, this provision stops a person from allowing works to proceed without taking action to prevent them. A landowner cannot, therefore, deliberately turn a blind eye to unauthorised works taking place on a scheduled monument on the landowner's property.
55. If a person carries out, causes or permits any works to a scheduled monument in breach of subsection (1), it constitutes an offence under section 30(1).

Section 12 — Authorisation of classes of works

Schedule 3 — Authorisation for classes of works

56. **Section 12(1)** authorises works to a scheduled monument if the works fall within a description of a class of works in the table in Schedule 3.
57. **Schedule 3** restates, with modifications, classes of consent from the Ancient Monuments (Class Consents) Order 1994, **SI 1994/1381**. The incorporation of these well-established provisions from secondary legislation brings together the relevant legislation about the authorisation of works. Regulation-making powers in paragraph 1 of Schedule 3, however, give the Welsh Ministers flexibility to amend the Schedule.
58. **Schedule 3** sets out eight classes of works that are authorised by section 12(1). These works are not normally damaging and therefore can proceed without the need for the detailed consideration of the scheduled monument consent process.
59. Class 1 comprises agricultural, horticultural and forestry works of the same kind as works carried out lawfully on the same spot within the previous six years. By permitting the same activity to occur in the same place, any further disruption to the scheduled monument from the ongoing works will be minimised. For example, where a scheduled site has been lawfully ploughed within the previous six years, ploughing may continue provided it goes no deeper than it did during that six-year period. The works specified in paragraphs (a) to (f) of the Class 1 entry have all been excluded from authorisation because of the threats that they would pose to undisturbed archaeology or the standing remains of a scheduled monument.
60. If agricultural, horticultural or forestry works have not taken place on a scheduled monument for more than six years, the possibility of authorisation under section 12(1) lapses and it cannot be revived. Thereafter such works would require scheduled monument consent under section 13.
61. Class 5 has been included to provide authorisation should the Historic Buildings and Monuments Commission for England (**Historic England**) be undertaking works on Offa's Dyke or some other cross-border scheduled monument and inadvertently or by prior agreement carry the works across the border into Wales.
62. Class 6 permits works of archaeological evaluation to be carried out by or on behalf of someone who has applied for scheduled monument consent. Such works will be limited, for instance test pits or trial trenches, and be carried out to assess the archaeological resource and potential of the monument in order to inform the determination of the scheduled monument consent. These works must be undertaken in accordance with a written specification approved by Cadw.

Section 13 — Authorisation of works by scheduled monument consent

63. **Section 13** provides for the authorisation of works by the grant of scheduled monument consent.
64. Subsection (1) sets out that works are authorised if written consent has been granted by the Welsh Ministers and the works are carried out in accordance with the terms of the consent, which may include conditions. Sections 18 and 19 make further provision about conditions attached to scheduled monument consents. In practice, Cadw, acting on behalf of the Welsh Ministers, administers the scheduled monument consent process and grants consent.
65. Under subsection (2), the Welsh Ministers may grant written consent for unauthorised works already carried out to a scheduled monument or land in, on or under which there is such a monument. In such cases, the works are only authorised from the grant of the consent. Any potential criminal liability arising from the unauthorised works prior to the consent remains and could be the basis for subsequent proceedings. In practice,

retrospective consent is rarely granted and only in cases where the unauthorised works are beneficial to the monument.

Section 14 — Applying for scheduled monument consent

66. **Section 14** puts in place the fundamental structure for the scheduled monument consent application process.
67. It prescribes how an application must be made to the Welsh Ministers, sets out its required content and provides the Welsh Ministers with powers to make regulations on further aspects of the application procedure (subsections (1) to (3)).
68. Subsections (4) and (5) allow for a simplified application procedure for scheduled monument consent where works are of a minor nature. Such works might include: localised erosion repairs, replacing short stretches of fencing, re-bedding loose stones, or installing plaques or signs. In cases where proposed minor works will have a neutral or positive impact on a monument, Cadw may agree the works during a site visit and dispense with the need for a formal application. In all cases, even where a written application is not required, works will only be authorised on receipt of written scheduled monument consent, which is granted under section 13(1).

Section 15 — Declarations of ownership in respect of monument

69. This section enables the Welsh Ministers to refuse to consider an application for scheduled monument consent if it is not accompanied by a declaration of ownership signed by or on behalf of the applicant. The declaration relates to the ownership of the monument at the beginning of the 21-day period that ends on the day of the application. It must confirm that the applicant either was then the sole owner of the monument, or has given notice to all other owners of the monument or taken all reasonable steps to do so (subsection (1)). In practice, the applicant can be an owner, occupier, agent or another person.

Section 17 — Procedure for determining applications and effect of grant of consent

Schedule 6 — Proceedings under Part 2

70. **Section 17**, with Schedule 6, regulates the procedure for determining applications and granting scheduled monument consent.
71. Subsection (2) provides that, before determining an application for scheduled monument consent, the Welsh Ministers may:
 - a. cause a local inquiry to be held;
 - b. appoint a person to hold a hearing;
 - c. appoint a person to receive written representations; or
 - d. employ any combination of these proceedings.
72. At the time of writing these notes, the Welsh Ministers would appoint an inspector from Planning and Environment Decisions Wales to conduct such proceedings.
73. In practice, various informal actions are taken before the Welsh Ministers might exercise their power under subsection (2). In the majority of cases, Cadw will provide pre-application advice to the prospective applicant. This might be of particular importance where there is likely to be a requirement to engage archaeological expertise. Following receipt of an application, normally Cadw (acting on behalf of the Welsh Ministers) will issue an interim decision letter, which includes details of any proposed conditions or the reasons for any proposed refusal. This provides the applicant with the opportunity to make representations, which may include providing additional information relevant to the application. A Cadw officer will receive and consider these

representations. It is at that point, if there are unresolved issues, that the Welsh Ministers may exercise their power under subsection (2).

74. Subsection (5) establishes that, unless its terms make some other contrary provision, a scheduled monument consent has effect for the benefit of the monument and all persons for the time being with an interest in it. If, for example, the ownership of a scheduled monument were to change while consented works were underway, the new owner would not need to apply for a new scheduled monument consent in order to continue the works (provided there were no provision to the contrary in the terms of the consent).
75. [Schedule 6](#) makes provision for summonses to require evidence or attendance at local inquiries and about the recovery or payment of costs incurred during inquiries or hearings.

Section 18 — Power to grant consent subject to conditions

Section 19 — Condition about period within which works must start

76. [Section 18](#) allows scheduled monument consents to be granted subject to conditions. The section provides two examples of conditions, but these are not exhaustive. Conditions may relate directly to the way in which works are carried out or they may impose other requirements, such as a programme of archaeological recording and reporting or the publication of results after the completion of archaeological excavations and any necessary post-excavation analysis.
77. [Section 19\(1\)](#) requires a scheduled monument consent to be granted subject to a condition that the works must start before the end of a period specified in the condition. If the consented works do not start within that period, the consent will lapse. Where works are started within the specified period, a consent will have effect as provided by [section 17\(5\)](#).
78. Subsection (2) sets out that if a consent is granted without a condition specifying a period within which works must begin, the works must begin within five years of the day on which consent was granted.
79. Subsection (3) provides that this section does not apply in relation to three classes of scheduled monument consents:
 - a. scheduled monument consents that cease to have effect at the end of a specified period (irrespective of whether works have started)

Such consents often relate to short-term events or activities at a monument for which a very specific period may be defined. The period of a consent could also be specified, for instance, in order to limit the impact of works on protected species.
 - b. scheduled monument consents granted under [section 13\(2\)](#) for works carried out before consent was granted

Since the consent authorises works that have already been completed, a requirement for works to begin is unnecessary.
 - c. scheduled monument consents granted by a scheduled monument partnership agreement.

Scheduled monument partnership agreements may run for ten to fifteen years and the consents that they grant last for the lifetime of the agreements, irrespective of when works begin.

Section 20 — Modification and revocation of consent

Schedule 4 — Procedure for orders modifying or revoking scheduled monument consent

Schedule 6 — Proceedings under Part 2

80. **Section 20** provides the Welsh Ministers with powers to revoke or modify a scheduled monument consent by order. Subsection (2) sets out that an order under this section may not be made to modify or revoke a scheduled monument consent granted either for the retention of works under section 13(2) or by a scheduled monument partnership agreement. Scheduled monument partnership agreements incorporate separate mechanisms (section 27 and Schedule 5) that permit the Welsh Ministers to terminate all or part of an agreement, including consents, by order.
81. **Schedule 4** sets out the procedure that must be followed in making orders, which includes provision for holding local inquiries or hearings in certain circumstances. Schedule 6 makes provision for summonses to require evidence or attendance at local inquiries and about the recovery or payment of costs incurred during inquiries or hearings.

Section 21 — Compensation for refusal of scheduled monument consent or grant of consent subject to conditions

82. **Section 21** makes provision, subject to certain conditions, for the payment of compensation where a person with an interest in a monument suffers loss or damage if scheduled monument consent is refused or granted subject to conditions.
83. Subsection (7) identifies two matters to be considered in the calculation of the amount of loss or damage consisting of depreciation of the value of an interest in land (meaning the extent to which the value of the interest is effectively diminished by the limitations on works imposed by the refusal of scheduled monument consent or its grant subject to conditions).
- a. It is to be assumed that any subsequent application for scheduled monument consent for works of a similar description would be determined by the Welsh Ministers in the same way.
 - b. In the case of a refusal of consent, if the Welsh Ministers, on refusing that consent, undertook to grant consent for other works affecting the monument if an application were made, that undertaking should be taken into account. An undertaking might allow for some other viable use of the land, thereby reducing the depreciation for the purposes of calculating the amount of compensation payable.

Section 22 — Recovery of compensation paid under section 21 on subsequent grant of consent

84. **Section 22** gives the Welsh Ministers powers to recover compensation paid under section 21 if they subsequently grant consent for, or modify or remove conditions that affected, any or all of the works in respect of which compensation was paid.
85. This section only applies if the Welsh Ministers have served notice of the payment of compensation on the council of each county or county borough in which the monument is located (subsection (2)). The required details of the notice are set out in subsection (5) and subsection (6) makes the notice a local land charge.
86. Subsection (3) provides that when granting or modifying a scheduled monument consent in a case to which this section applies, the Welsh Ministers may specify that works for which compensation had been paid cannot proceed until the “recoverable amount” (defined in section 23) has been repaid or satisfactorily secured.

Section 23 — Determination of amount recoverable under section 22

87. **Section 23(1)** requires the Welsh Ministers to specify the “recoverable amount” of the compensation paid under section 21 when giving notice of their decision to grant or modify scheduled monument consent in a case under section 22.
88. If a person with an interest in the monument disputes the amount specified by the Welsh Ministers, that person may seek a determination of the amount from the Upper Tribunal. The Upper Tribunal (Lands Chamber) Rules make provision for the reference of a case to the Tribunal and its handling. If a dispute is referred to the Upper Tribunal, the recoverable amount will be the amount that it determines (subsections (2) and (3)).

Section 24 — Compensation where works affecting a scheduled monument cease to be authorised

89. This section provides for compensation to be paid if works previously authorised cease to be so authorised. Subsection (1) provides that this may happen if:
- a. an authorisation under section 12 ceases to apply when a class of works specified in Schedule 3 is amended or the Welsh Ministers direct that section 12(1) does not apply to a scheduled monument;
 - b. scheduled monument consent is modified or revoked by an order made under section 20; or
 - c. authorisation is cancelled following the service of a notice of proposed modification or revocation of scheduled monument consent as set out in paragraph 2 of Schedule 4.
90. Any person with an interest in the monument is entitled, on making a claim for compensation to the Welsh Ministers, to be paid compensation by them for any expenditure incurred in carrying out works which become abortive by the cessation of authorisation or any other loss or damage directly attributable to that cessation. For the purposes of this section, expenditure incurred on carrying out works includes expenditure on preparatory matters, which might include, but are not limited to, site surveys, the preparation of plans or a heritage impact statement or the production of detailed specifications of materials and methodologies (subsections (2) and (4)).
91. **Sections 202, 203 and 204** make additional provisions about claims for compensation under this Act.