

# HISTORIC ENVIRONMENT (WALES) ACT 2023

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2 — Monuments of special historic interest**

##### ***Chapter 5 — Enforcement of controls relating to scheduled monuments***

110. This Chapter sets out that it is an offence to carry out, or cause or permit to be carried out, unauthorised works in relation to a scheduled monument (section 30). It provides the Welsh Ministers with the powers to issue a temporary stop notice to put an immediate halt to works that either breach section 11 or a condition of a consent (sections 31 to 34). It also provides for an enforcement notice, which may be used to specify steps to be taken to remedy the effects of unauthorised works and provision is made for the service and taking effect of a notice as well as for an appeal against it (sections 35 to 41). The Chapter also provides for injunctions to restrain actual or expected breaches of section 11 or failures to comply with scheduled monument consent conditions (section 42).

##### ***Section 30 — Offence of carrying out unauthorised works or breaching condition of consent***

111. **Section 30(1)** makes it an offence for a person to carry out unauthorised works to a scheduled monument, or to cause or permit such works to be carried out. Authorisation may be provided by section 12, which authorises specific classes of works, or under section 13, which provides for the grant of scheduled monument consent by the Welsh Ministers.
112. If scheduled monument consent has been granted, subsection (2)(b) provides that it is an offence for a person to fail to comply with a condition of a consent in carrying out works, or in causing or permitting the works to be carried out. This will apply to all conditions attached to a scheduled monument consent, including, for instance, those for publication of the results after the completion of an archaeological investigation.
113. In subsections (1) and (2), a “person” may be anyone who undertakes works to a monument, be that an owner or occupier of a monument, a contractor or subcontractor or other third party.
114. If works are undertaken without authorisation or in breach of a condition, an offence is committed whether a person:
- a. carries out those works personally,
  - b. instructs or employs someone else to undertake them, or
  - c. permits such works.
115. The last point means that a person cannot turn a blind eye to what happens on a scheduled monument and fail to take reasonable steps to prevent unauthorised works.

116. Subsection (4) provides a person with a defence in proceedings for a subsection (1) offence relating to a monument under interim protection where the person can prove that the person did not know and could not reasonably have been expected to know that the monument was subject to interim protection. Where the defence is raised by a person on whom a notice should have been served under section 5(2), it is for the prosecution to prove that the notice was served on the person.
117. Information on monuments under interim protection should be readily available. Section 5(2) to (4) requires the Welsh Ministers to serve notice if they propose to add a monument to the schedule or add to the area of an existing scheduled monument. The notice, which must be served on every owner and occupier of the monument amongst other persons, has to specify the date upon which interim protection begins and explain its effect. A list of monuments under interim protection is published on the Cadw website in accordance with section 6(4) (see paragraph 39 above) and Cof Cymru also identifies monuments under interim protection.
118. Subsection (7) provides a similar defence in proceedings for an offence under this section for works that have resulted in the demolition or destruction of, or any damage to, a scheduled monument or flooding or tipping operations on land in, on or under which a scheduled monument is located. A person will have a defence if the person can prove that, prior to the works, the person took all reasonable steps to determine if a scheduled monument was in the area to be affected by the works and that the person did not know and had no reason to believe that the monument was in the area, or, as the case may be, that it was a scheduled monument.
119. Such reasonable steps might include checking Cof Cymru, where accurate and up-to-date information on the location and extent of all scheduled monuments in Wales is available. Other sites — for example, Archwilio, the online portal of the Welsh historic environment records, or DataMapWales — also incorporate information on scheduled monuments derived from Cof Cymru.
120. A long-term owner or occupier of a scheduled monument is likely to be aware of its status and extent because Cadw field monument wardens visit all scheduled monuments in Wales on a rolling programme to record their condition. New owners should discover their acquisition of a scheduled monument in the conveyancing title search, since an entry in the schedule is a local land charge under section 3(5).
121. Subsection (8) provides a person with a defence in proceedings for an offence under this section if works were undertaken to address urgent health and safety needs. However, the defence is only available where the works are limited to the minimum measures immediately necessary to secure health and safety and notice was given to the Welsh Ministers with detailed justification for the works as soon as reasonably practicable.
122. Subsection (9) provides that the penalty for an offence under this section is an unlimited fine, whether on summary conviction or conviction by indictment.

***Section 31 — Power of Welsh Ministers to issue temporary stop notice***

***Section 32 — Duration etc. of temporary stop notice***

***Section 33 — Offence of breaching temporary stop notice***

123. **Section 31** gives the Welsh Ministers powers to issue a temporary stop notice to put an immediate halt to any or all works to a scheduled monument that they consider to be unauthorised or to breach a condition of a scheduled monument consent. The Welsh Ministers may only do so if they consider that the works ought to be stopped immediately, having regard to the effect of the works on the monument as one of national importance.

124. Subsections (2) to (5) specify the required contents of a temporary stop notice and make provision for service of a notice. Subsections (3) and (4) require the Welsh Ministers to display a copy of the notice on the monument or land, or, where it is not reasonably practicable to display a copy of the notice on the monument or land or doing so could damage the monument, in a prominent location nearby. Subsection (5) then provides that a copy of the notice may be served on the persons identified in that subsection — including a person whom the Welsh Ministers consider is carrying out the works or causing or permitting them to be carried out.
125. While the Welsh Ministers will endeavour to serve individual copies on interested parties under subsection (5), public display of a copy of the temporary stop notice provides a mechanism for alerting all involved in the specified works affecting the scheduled monument that those works must be suspended immediately.
126. [Section 66](#) makes provision for an authorised person to enter land to display a temporary stop notice and for related purposes.
127. [Section 32](#) sets out that a temporary stop notice takes effect when a copy of it is first displayed in accordance with section 31, will remain in effect for 28 days (unless a shorter period is specified) and may be withdrawn by the Welsh Ministers before its expiry.
128. Once a temporary stop notice is in effect, section 33 makes it an offence for a person to undertake works prohibited by the notice or cause or permit another person to do so.

***Section 34 — Compensation for loss or damage caused by temporary stop notice***

129. [Section 34](#) provides that any person with an interest in a monument or land to which a temporary stop notice relates may be entitled to compensation from the Welsh Ministers for loss or damage directly attributable to the effect of a temporary stop notice.
130. Subsection (1) provides that compensation is only payable where:
- a. the works specified in the notice did not breach section 11 at the time the notice took effect (that is, they were either authorised or did not require authorisation); or
  - b. the works specified in the notice did not breach a condition of a scheduled monument consent at the time the notice took effect; or
- the Welsh Ministers withdrew the temporary stop notice after it took effect.

However, subsection (2) further provides that no compensation is payable if the Welsh Ministers withdraw a notice after granting a scheduled monument consent that will allow the works specified in the notice to proceed.

131. Subsection (5) also excludes any claim for loss or damage that might have been avoided if the claimant had provided information required by the Welsh Ministers regarding interests in the land under section 197 or had otherwise cooperated with the Welsh Ministers.
132. [Sections 202](#) and [203](#) make additional provisions about claims for compensation under this Act (see paragraph 45 above).

***Section 35 — Power of Welsh Ministers to issue enforcement notice***

133. [Section 35](#) gives the Welsh Ministers powers to issue an enforcement notice to stop specified unauthorised works to a scheduled monument and/or require steps to be taken to:
- a. restore the monument or land to its condition before the unauthorised works took place;

The steps required would be likely to include appropriate archaeological investigation of the damaged area to recover and record historical evidence before further specified operations proceed.

- b. alleviate the effect of the works, if restoration is not reasonably practicable or desirable; or

In the event of serious or extensive damage to a scheduled monument, restoration might be unviable and could, in fact, cause further harm to surviving archaeological evidence. In such a case, the Welsh Ministers would specify steps to stabilise the monument in its altered state to protect it and the information it contains for the future.

- c. put the monument or land in the condition it would have been in if the terms and conditions of a granted scheduled monument consent had been fulfilled.

- 134. Under subsection (5) the Welsh Ministers must maintain an up-to-date list of scheduled monument enforcement notices that are in effect. At the time of writing these notes, the list is included on the “Statutory scheduled monument consultation notices” page in the “Scheduled monuments” section of the Cadw website.

### ***Section 36 — Service and taking effect of enforcement notice***

- 135. **Section 36** sets out the requirements for service of a copy of an enforcement notice and when a notice takes effect.
- 136. Subsection (2) provides that an enforcement notice will take effect at the beginning of the day specified in the notice. Should an appeal be made to a magistrates’ court against the notice under section 39, section 39(4) provides that the notice will not take effect until the appeal is determined or withdrawn.
- 137. Subsection (3) allows an enforcement notice to set different periods for stopping different works or taking different steps. Such flexibility enables an enforcement notice to make appropriate provision for the conservation requirements of a monument. For instance, a phased series of steps might be set out to achieve the satisfactory restoration or stabilisation of a monument damaged by unauthorised works.
- 138. Subsection (4) requires a copy of the notice to be served on every owner and occupier of the monument or land to which it relates, to any lessee (if appropriate) and to any other person who has an interest in the monument or land which the Welsh Ministers consider to be materially affected by the notice.
- 139. Subsection (5) requires a copy of the notice to be served before the end of 28 days after the day on which it was issued, and at least 28 days before the date specified in the notice as the date on which it is to take effect. “Issued” here means when the enforcement notice was agreed by a delegated officer of the Welsh Ministers.
- 140. **Section 66** makes provision for an authorised person to enter land to serve an enforcement notice and for related purposes.

### ***Section 38 — Effect of granting scheduled monument consent on enforcement notice***

- 141. **Section 38** provides for a situation where, after an enforcement notice is issued, scheduled monument consent is granted to authorise:
  - a. works to which the notice relates that had been carried out in breach of section 11, or
  - b. works that had breached a condition of a previous scheduled monument consent.

142. Subsection (2) provides that steps specified in the notice that are inconsistent with the new consent cease to have effect. However, subsection (3) sets out that a person remains liable for any earlier offence arising from a failure to comply with an enforcement notice, even though part or all of the notice subsequently ceases to have effect under this section. Failing to comply with an enforcement notice (section 41) is a separate offence from carrying out unauthorised works (section 30) and proceedings for the offences may be pursued independently.

### ***Section 39 — Appeal against enforcement notice***

143. **Section 39** permits anyone upon whom a copy of an enforcement notice has been served or with an interest in the monument or land to which the notice relates to appeal against the notice to a magistrates' court.
144. Subsection (2) lists the grounds for an appeal and subsection (3) requires that it is made before the date specified in the notice as the date on which the notice takes effect. Subsection (2)(b) provides for an appeal on the basis that the works did not constitute a breach of section 11 or of a condition of a scheduled monument consent. Perhaps this might be because the works occurred outside the area of the scheduled monument or they did, in fact, comply with an authorisation provided by section 12 or 13 and any attached conditions.
145. Subsection (6) provides that the court may uphold a notice in spite of a failure to serve the notice on a person who was required to be served, if it is satisfied that the person has not been significantly disadvantaged by the failure.

### ***Section 40 — Powers to enter land and take steps required by enforcement notice***

#### ***Section 41 — Offence of failing to comply with enforcement notice***

146. **Section 40** provides for a situation in which a required step has not been taken within the time prescribed in an enforcement notice. In that case, a person authorised in writing by the Welsh Ministers may enter the land, take that step and recover the costs incurred from any owner or lessee of the monument or land. This allows necessary conservation works to secure the future of the scheduled monument that are detailed in the enforcement notice to take place in a timely fashion. Otherwise, a damaged monument might be left to deteriorate, leading to further damage to the monument and the loss of any archaeological information that it contains.
147. If the power of entry in subsection (1) is to be exercised on occupied land, section 69(2) (a) requires at least 14 days' notice to be given to every occupier.
148. Should an occupier prevent an owner from undertaking works required by an enforcement notice, subsection (3) enables a magistrates' court, on application from the owner, to issue a warrant authorising the owner to enter the land and carry out the work. This provides important legal recourse for an owner since section 41(1) places any liability for an offence for a failure to comply with an enforcement notice on an owner of the scheduled monument or land. An owner may also have a defence under section 41(3) if, in spite of all reasonable efforts to take steps set out in an enforcement notice, an occupier obstructs their execution.
149. **Section 70** allows any person with an interest in land to make a claim for compensation for any damage to land or other property caused by the exercise of powers under this section.
150. **Section 41** establishes that if, after the end of the period prescribed in an enforcement notice, works specified in the notice have not stopped or a required step has not been taken, an owner of the scheduled monument or land to which the notice relates will be guilty of an offence.

***Section 42 — Injunction to restrain unauthorised works or failure to comply with condition of consent***

151. **Section 42** allows the Welsh Ministers to apply to the High Court or the county court for an injunction to restrain actual or expected breaches of section 11 (requirement for works to be authorised) or actual or expected failures to comply with a condition of a scheduled monument consent.