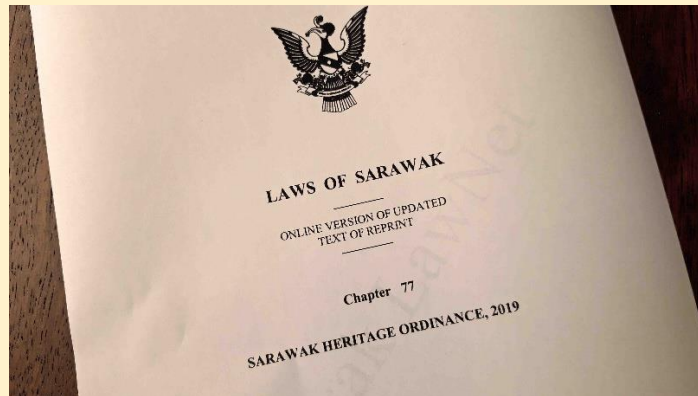


**Sarawak Heritage Society point of view
THE NEW SARAWAK HERITAGE ORDINANCE:
WILL IT BE A GAME CHANGER?**



Background

The new Sarawak Heritage Ordinance (Cap. 77) (SHO) was voted in October 2019 and gazetted in December 2019. As of early October 2020 it remains to be put in force through a decision by the Sarawak Minister of Tourism, Arts and Culture (MoTAC).

It replaces the 1993 Sarawak Cultural Heritage Ordinance (SCHO). Although the word 'cultural' is not mentioned in the title anymore, the scope remains *cultural* heritage.

The redesign of Sarawak's heritage law has been in the pipeline for some time. It was triggered by the realisation, by the Government as well as other stakeholders, that the management structure for cultural heritage showed a number of weaknesses and had not delivered what could have been expected. For example, the *Register of Buildings* and the *Schedule of Historical monuments and historical sites, provided by the SCHO*, had not been enriched by new gazetted entries in the some 25 years since the SCHO was promulgated. Indeed, the weaknesses observed can be seen as stemming, in part, from legal ambiguities.

The text of the ordinance can be downloaded from the Sarawak Government LawNet website.

The architecture of the ordinance: key points

Although it is presented as a new ordinance, the SHO appears for a large part to be a reinforcement of the former SCHO 1993. It has now 81 sections compared to 35 previously. A number of pre-existing provisions have been retained, including core vocabulary, with minor adjustments. The scope has been expanded to include underwater heritage and substantial new parts deal with administration and enforcement.¹

On the institutional and financial management front, there are three important new points:

- The new '*Administration*' part confirms the responsibility of the Sarawak Museum Department (SMD) for the management of cultural heritage, both in its '*museums*' and '*out-of-museums*' dimensions. Noteworthy is a provision to allow for delegation of museum management functions to '*managing agents*'. This is likely to have been introduced, in particular, to facilitate the management of the new Sarawak Museum Complex in Kuching.

- A *Sarawak Heritage Council* is to be set up. This organ is designed essentially as an advisory committee, seemingly devoid of executive powers. The mandate of the Council is, implicitly, centred on out-of-museum heritage. It includes advice on policy and strategy.

- Provision is made for a *Sarawak Heritage Trust Fund*, under the responsibility of the SMD. It may be noted that the previous ordinance had already provided for rules to be made for the establishment of a special fund for the same purpose.²

- The ordinance provides for a *Sarawak Heritage Register* replacing the dual '*Register of Buildings*' and '*Schedule of Historical Monuments and Sites*' of the SCHO 1993³.

The procedure of inscription of a monument, building or site in the Sarawak Heritage Register is for a large part reproduced from previous provisions. The Director *declares* a building / site as heritage, then *enters* it into the Register, *publishes the entry in the*

¹ Some new provisions (such as the Heritage Council and the Heritage Fund...) or wordings appear to be largely drawn from provisions of the National Heritage Act or the Sabah or Penang heritage Enactments.

² The SCHO 1993 mentioned that rules may be made for "the establishing a special fund to be employed for the purpose of defraying expenses for the maintenance, preservation or restoration of buildings, [listed/registered] monuments or sites [...] and such other expenditure as the Director may properly incur in carrying out his functions and exercising his powers under this Ordinance, and generally for the purpose of paying any expenses for carrying into effect the provisions of this Ordinance" (sect. 35 of the SCHO)

³ The SCHO 1993 provided for a '*Register of Buildings*' and a '*Schedule of Historical Monuments and Historical Sites*', with inscriptions of Historical Monuments / Sites into the Schedule to be *approved by the Yang di-Pertua Negeri (Governor)* and gazetted, whereas the listing of buildings in the Register of Buildings was to be compiled by the Director of the Sarawak Museum Department "*in consultation with the Minister*" with seemingly no requirement to declare the inscriptions publicly: in effect, the Register of buildings constituted a kind of "second tier" of listing.

Gazette and issues a 'Notice to preserve' which subjects any demolition, dismantling, altering, etc. to a permit.

Preservations Notices, issued as part of the process to inscribe items in the Register act, as previously, as *special conditions of title*, and the ordinance specifies now that *no applications for development under the land Code can be made without prior procurement of permits to demolish, dismantle, alter, etc.... issued by the Director of the Museum*. This is a positive step that moves heritage management closer into Sarawak's planning system, in particular on issuance of building/development permits.

Declared heritage sites become *conservation areas*, to be conserved and preserved according to *conservation management plans*.

A three-tiered classification is provided for historical buildings (Classes I, II and III) and the ordinance specifies that the 'subsequent conservation and use' of Class I buildings are subject to approval by the Dewan Undangan Negeri (Sarawak State legislative Assembly) and Class II subject to decisions by the Majlis Mesyuarat Kerajaan Negeri (State Government cabinet).

The ordinance now includes a part on *underwater heritage*, a category that was not explicitly covered by the previous ordinance a gap that was highlighted when a few years ago, several WW2 Japanese shipwrecks lying off Sarawak's coast were plundered for their metal content. The new provisions apply to underwater heritage in the territory of Sarawak, which the ordinance defines as "*all areas within the boundaries of the State which comprised the territory of Sarawak immediately before Malaysia Day, and includes, by virtue of the Sarawak (Alteration of Boundaries) Order in Council, 1954 [Vol VI, p.1025] the continental shelf being the seabed and its subsoil which lies between the high seas contiguous to the territorial waters of Sarawak*" (sect.2).

The level of some *penalties* has been raised and a new, substantial part is dedicated to *enforcement*. The Minister may appoint enforcement officers. The ordinance empowers the enforcement officers, other authorised public servants, Police and Customs officers to enforce the provisions relating to offences.

[For more on the content of the ordinance, see the [summary](#) of what the ordinance says, prepared by SHS to provide a recap in everyday language]

Sarawak Heritage Society point of view

Overall, the *Heritage Council*, the *Heritage Fund*, the provisions of *conservation management plans* for heritage sites are positive steps, as is the improved framework for enforcement.

Of interest is the retaining (with minor amendments) of the provisions of the former ordinance for the Authorities to '*make arrangements with the owner or occupier for [the] preservation, inspection and maintenance [of heritage buildings listed in the Register]*' with contributions from the Heritage Fund, or for leasing or purchasing the property. This remains to be developed in Sarawak: it allows for a more incentive-based approach to heritage protection. The ordinance also now specifies that Heritage assets may be acquired under the regulations on compulsory acquisition for public interest.

On the other hand, the adequacy and applicability of some provisions can be questioned and may affect the impact of the ordinance on the protection and conservation of Sarawak's cultural heritage. Following points can be noted in this respect:

- The ordinance makes no reference to the National Heritage Act 2005. The SCHO 1993 mentioned 'This Ordinance shall apply to all antiquities, ancient and historical monuments and records and archaeological sites and remains other than those declared to be Federal by or under Federal law'. The National Heritage Act came into operation in March 2006 throughout Malaysia but there appear to remain diverging understandings on its applicability to Sarawak. The ambiguity that remains on the applicability of the National Heritage Act ought to be lifted.
- A range of vocabulary with sometimes overlapping meanings is used, affecting clarity. Some of the terminology appears antiquated to heritage management professionals. There are also instances of overlapping or duplicated provisions (for ex. 35 – 41.8).
- 'Antiquities' are now defined as an any item over 50 years old, down from 100 years in the former ordinance. The former provisions requiring all non-Sarawak native possessors of antiquities to register them with the Sarawak Museum Department have been retained. Whereas the export of antiquities remains legitimately controlled, the ordinance retains some quite demanding provisions on licensing of antique dealers, such as mandatory records of inventory movements for inspection purposes. The added value of such provisions appears limited in terms of heritage conservation and they are likely to remain difficult to enforce. They are not common in heritage laws.

- The Sarawak Heritage Register is to list buildings, sites, underwater heritage objects or sites, or 'traditional knowledge or traditional cultural expression'. Based on this scope, it would not accommodate on-land tangible heritage objects other than buildings or sites. On gazettelement, the current understanding is that it is a prerequisite to the legal validity of preservation notices/orders, but the wording of the ordinance does not appear to specify it explicitly.
- Intangible and documentary heritage are only marginally addressed. Some ambiguity may be seen in the ways it can be entered in the Register and subsequently be protected: room is made for the listing in the Register of 'traditional knowledge or traditional cultural expression' (i.e. intangible heritage), but the provisions on the Register are presented under part IV of the ordinance entitled 'Historical monuments, historical sites and heritage sites', with wordings geared primarily to the protection of buildings, monuments and sites.
- The three-tiered classification provided for historical buildings (Classes I, II and III) is essentially based on age (> or < 100 years old), on the availability or not of documentation or records and on the existence or not of a pre-existing declaration as historical building/site.⁴ This classification departs from usual practices based on levels of heritage significance and does not seem to imply differentiated levels of protection.
- Exemptions: The ordinance retains a former provision allowing Authorities to *exempt* 'persons or class or description of persons' from the operation of the ordinance. The provisions on antiquity dealers also mention specifically the possibility for the Director to exempt a dealer from a licence. The justification for such clauses does not seem obvious and can carry risks. Such clauses do not appear in the National, Sabah or Penang heritage laws.
- The recommendation by SHS to introduce mandatory Heritage Impact Assessments in some circumstances has not been taken on board by the redactors of the ordinance. HIA is a potentially powerful cultural heritage management tool.

The past has shown that the budget allocations to the Sarawak Museum Department have been principally allocated to museum management (of which archaeology is assumed to be part of), at the detriment of out-of-museum heritage management. Based on this observation and because museum and out-of-museum cultural heritage management involve a different range of skills, the Sarawak Heritage Society had advocated for a separate institutional set-up from museums for heritage management. It is hoped that the substantial level of resources that will be called for the operation

⁴ The ordinance also defines, separately, 3 classes of antiquities (I,II,III) spelled out differently from the classes of buildings. In so far as the concept of 'antiquity' appears to include buildings, there appears here to be some overlap.

of the new Museum Complex will not jeopardise the resources needed for out-of-museum heritage management as was the case in the past. There remains a need for the development, by the Sarawak Government, of policy and strategy on cultural heritage. These should address the need for the abovementioned balance between Museum and 'out- of-Museum' cultural heritage conservation.

The 'proof of the pudding' will rest in:

- the quality of the by-laws that will be developed: the ordinance leaves the management of a number of aspects to be anchored in specific rules. These include the operation of the Heritage Fund; rules applicable to categories of heritage buildings, heritage zones, conservation management plans, protection of intangible or documentary heritage. Appropriate intra-government agency operation and budgeting procedures are also required to ensure that the provisions of the ordinance on maintenance and conservation are enforced on government-owned tangible heritage (for example when the maintenance of buildings is under the purview of JKR/Public Works or of third-party occupants);
- the human capital and funding that Sarawak will allocate to out-of-museum heritage management and the way this will be reflected in the organigram of the Sarawak Museum Department;
- the weight and executive support that will be given to the Sarawak Heritage Council;
- and the quality of enforcement on the ground.

It is also hoped that the content of the Sarawak Heritage Register will be published on the website of the Sarawak Museum Department.

Updating the ordinance may in time be warranted to facilitate more effective management of Sarawak's cultural heritage. Global approaches to heritage management and as a consequence, to heritage law have evolved significantly. A paradigm shift has taken place. From the focus on 'top- down' protection of monuments and objects, the concept of what constitutes heritage and how it ought to be managed has broadened and emphasis is increasingly put on the contribution of heritage management to sustainable development⁵.

[Observations akin to the above were made by SHS in a Comments Note presented to the Sarawak Ministry of Tourism, Arts and Culture on 1 November 2019, ahead of the tabling of the Sarawak Heritage Bill at the Sarawak State Assembly, shortly after SHS had access to Bill.]

⁵ Target 11.4 of the UN Sustainable Development Goals aims to "strengthen efforts to protect and safeguard the world's cultural and natural heritage"