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Dear Sir

Planning Law in Wales: Law Commission Consultation

The Institute of Historic Building Conservation is the professional body of the United Kingdom representing conservation specialists and historic environment practitioners in the public and private sectors. The Institute exists to establish the highest standards of conservation practice, to support the effective protection and enhancement of the historic environment, and to promote heritage-led regeneration and access to the historic environment for all.

We are very pleased to have the chance to comment on the consultation document. The Institute's comments are as follows:

General Points

Although the proposed Code is an opportunity to clarify the statutory duty of Local Planning Authorities towards listed buildings, this should be in the light of our on-going concerns about the proposed unification of consent and the potential impact this may have on local authority conservation expertise. As a statement of our initial view on the central point of this consultation we do not consider that Listed Building consent should be unified with planning permission.

Consultation Questions other than 13-1 to 13-11

The 1990 Act requirement for special regard to the desirability of preserving buildings, features and setting applies only to the

granting of planning permission (S66), and not to the LPA's other planning functions, in particular, enforcement – or indeed any of its other functions. This renders Listed Building enforcement all too susceptible to being filed as too difficult or unpleasant, in the guise of 'expediency'. A clear statutory duty to have special regard to the desirability of preserving LBs and other Heritage Assets in exercising its enforcement function would be a huge benefit

We therefore support the proposal in **Consultation Question 5.4** to widen the statutory duties of S66 and S72 to cover any body carrying out any statutory function.

In relation to **Question 12.3**, the IHBC oppose the proposal to remove the Planning Enforcement Order, unless the removal of time limits for enforcement proposed in Q13.7 is applied not just to 'heritage development' (i.e. demolition in Conservation Areas) but also any other development in conservation areas and World Heritage Sites. An alternative remedy to the concerns about Planning Enforcement Orders would be to provide for them in the new bill, but with clarification on those areas of concern, i.e placing a limit on the time extension for which LPAs can apply, and a facility to challenge the certificate issued by the LPA as to the date on which the breach came to its attention. Lack of training for magistrates is hardly a reason for weakening the law.

In relation to the proposal under **Question 18-8**, this would affect listed building conditions, effectively proposing that some conditions that can be applied to LBC might also be made applicable to other permissions. IHBC would endorse the retention of these conditions as they are necessary for retaining the existing protection for LBs, and would also endorse their wider application – for example to unlisted agricultural or industrial buildings, where retention of features in situ might be incompatible with new uses, but their retention as part of the development might be desirable.

With respect to outdoor advertising, we would respond to **Question 14.12**, that it is a good idea for LPAs to be able to remove adverts. However, the proposal does not address the problem of A-boards and other portable adverts. We would also propose that any new regulations remove the circular arrangement in the current English advert Regulations, whereby adverts within 1m of a window are excluded from consent under one class, but then included under another that permits any advert inside a building. It would be difficult to prove, for example, that plastering the inner face of windows of a listed building with adverts comprised 'works' and therefore needed LBC, and this is currently permitted by the advert regulations so no other control exists. One can also foresee future

problems arising out of the use of means of digital light projection, and dealing with these now would be worthwhile.

Consultation Questions 13-1 to 13-11

Consultation question 13-1.

We provisionally consider that the control of works to historic assets could be simplified by:

(1) amending the definition of "development", for which planning permission is required, to include "heritage development", that is:

  (a) the demolition of a listed building; or

  (b) the alteration or extension of a listed building in any manner that is likely to affect its character as a building of special architectural or historic interest; or

  (c) the demolition of a building in a conservation area.

(2) removing the requirement for listed building consent and conservation area consent to be obtained for such works; and

(3) implementing the additional measures outlined in consultation questions 13-2 to 13-8, to ensure that the existing level of protection for historic assets would be maintained.

Do consultees agree?

We do not consider that Listed Building consent is suitable for unification with planning permission and do not support this main aspect of the heritage considerations in this consultation.

The two approvals exist for entirely different reasons and each is considered on a different basis. We have seen no evidence that unification of the consents will deliver better outcomes. Conversely, there may be a risk that it could lead to worse outcomes for listed buildings.

Each type of application is considered on a different basis, and even where there are overlaps in practice, that does not mean either (or both) are redundant, or that their unification will produce other more efficient or more beneficial outcomes, not least given the specialist knowledge required for each. Clear strengths in the current situation are that the wider considerations at large in Planning applications need not apply to the specialist consideration of Listed Building Consent processes. We have seen no evidence to

support the principle that unification of the consents will deliver better outcomes overall for either aspect in the planning process.

The proposed amendment does reflect changes relating to the Institute's response to the earlier Scoping Paper consultation that the definition of development would need to be extended to include a definition of "heritage development" even if it leaves the definition of "development" and associated provisions unnecessarily complex.

We are also concerned about the implications to the fee structure. Applicants who presently require Listed Building Consent but not planning permission could lose their fee exemption. This could be an introduction of fees on Listed Building Consent, which is a major issue requiring very detailed debate, without the appropriate discussion.

If the intention of merging the two consents is to avoid double handling of applications in certain cases then an alternative solution could be proposed, as we suggested previously, which removes the need for additional planning permission in cases where Listed Building Consent is already required rather than a complete merger. The Advertisement Consent regulations confer Planning Permission on anything that has advertisement consent, and opportunities of doing the same through the Listed Building regulations could be explored, excepting changes of use.

By absorbing the special regard to the historic environment into a "general duty for planning functions" risks a degree of scrutiny being be lost if all heritage development is lumped together under a "development" definition. In practice, the issues involved can be subtly different. The indication is that it is not only s66 consents that are covered by this, but all consents.

The proposed Planning Code should be clear that the character of a listed building includes aspects of its setting that contribute to its character and buildings and structures within its curtilage.

The Institute's concern at that time of the Scoping Paper consultation was that the consequence of the proposed unification of the consents will be a loss of quality decision making in terms of the importance attached to such applications. This could lead to potential failure of decision-makers to obtain advice from appropriate conservation experts, leading to more erosion of heritage protection. The concern remains that if this proposal is accepted it could result in a reduction of specialist knowledge required. Thus, the submergence of heritage and heritage consents into a wider definition/decision-making regime could dilute the role

and impact of specialist advisors in the planning process. This is turn could lead to a reduction in capacity of specialist advice leaving the historic environment without those to manage it with appropriate knowledge and understanding.

If unification of consents were taken forward, it would have implications for the issues raised in question 8-1 of the consultation, in terms of the items to accompany applications that should be prescribed in regulations to ensure that consideration of heritage issues (statements of significance/heritage impact assessments/specialist reports) are included.

The Code should include clarification of the correct approach for a decision maker in dealing with the application of the duty, to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses, under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 with particular reference to a requirement to obtain specialist advice in reaching decisions in relation to heritage development.

Paragraph 13.105, hints at exempting internal works affecting curtilage buildings from the requirement to obtain the proposed new unified consent. This raises concerns that until the significance of curtilage structures to the special character of a listed building are fully understood it would be inappropriate to assume that internal alterations to such structures would not affect the character of the principle building, for example internal joinery and machinery linked to its function.

Consultation question 13-2.
We provisionally propose that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development.
Do consultees agree?

Heritage development should not be permitted by a development order.

This is very much predicated on the introduction of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

Consultation question 13-3.

We provisionally propose that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed.
Do consultees agree?

There is in our opinion however no reason why heritage partnership agreements should not be able grant permission of whatever type and form is proposed.

Again however this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

Consultation question 13-4.
We provisionally consider that the provisions (currently in sections 191 and 192 of the TCPA 1990) relating to certificates of lawfulness should be extended to include works that currently require only listed building consent or conservation area consent.
Do consultees agree?

The proposal to extend S.191 of the TCPA 1990 appears to be similar to the "Certificate of Lawfulness of Proposed Works to a Listed Building" introduced under s.61 of Enterprise and Regulatory Reform Act 2013, that introduced a new Section 26H, 26I, 26J and 26 J to the Planning (Listed Buildings and Conservation Areas) Act 1990 in relation to England.

From experience this system appears to work and is considered appropriate in Wales in providing formal confirmation that proposed works of alteration or extension to a listed building do not require Consent because they do not affect the special interest of the listed building.

However, we would query extension of S.191 of the TCPA 1990 provisions to LBs or CAs to retrospectively approve existing uses. If unauthorised LB works remain criminalised (which we understand to be the intention), then it would be contradictory to allow those same works to become immune from action after a period of time as currently provided under s191 TCPA. This would also undermine the principle that it is essential to get advice before doing works that are potentially harmful to the historic environment; this is why these were not introduced by the Enterprise and Regulatory Reform Act 2013 in England.

It should not become possible to gain retrospective Listed Building Consent – only permission that lasts from the date of granting, as now. This then retains the ability to prosecute owners for failing to get permission regardless of whether they have subsequently gained consent for the work. This is essential to emphasising the principle of complying with the system, regardless of whether the breach is subsequently deemed acceptable. This principle is justified by the finite nature of historic fabric and the irreversibility of destroying it, and should be retained.

Consultation question 13-5.
We provisionally consider that the Bill should include provisions to the effect that:
(1) any appeal relating to works to a listed building may contain as a ground of appeal that the building in question is not of special architectural or historic interest, and ought to be removed from the list of such buildings maintained by the Welsh Ministers;
(2) where a building is subject to a building preservation notice (provisional listing), the notice of appeal may contain a claim that the building should not be included in the list;
(3) the Welsh Ministers, in determining an appeal relating to a listed building, may exercise their powers to remove the building from the list; and
(4) in determining an appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.
Do consultees agree?

This would only be supported if it is clear that in determining these grounds of appeal, the Welsh Ministers should only take into account whether or not the building meets the criteria, and not any other matters.

Consultation question 13-6.

We provisionally propose that the Bill should include provisions to the effect that:

(1) the carrying out without planning permission (or in breach of a condition or limitation attached to permission) of heritage development – defined along the lines indicated in Consultation question 13-1 – be a criminal offence, punishable

- on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or

- on summary conviction by imprisonment for a term not exceeding two years or a fine or both; and

(2) the defence to a charge of such an offence is the same as currently applies in relation to a charge of carrying out works without listed building consent.

Do consultees agree?

The provisions to criminalise breaches of planning permission are a response to concerns raised in the Institute's response to the consultation on the Scoping Paper in stating we would be strongly opposed to any move to decriminalise breaches relating to Listed Buildings. Currently breach of Listed Building Consent is a criminal offence and this does not apply to Planning Permission. We would strongly oppose any move to de-criminalise breaches relating to Listed Buildings.

Whilst we do not support the unification of consents as a principle we are pleased to see that this matter has been considered as part of the proposal as it is essential that unauthorised work to Listed Buildings continues to be a criminal offence.

Consultation question 13-7.
We provisionally propose that the Bill should include provisions to the effect that heritage development be excluded from the categories of development that are subject to time limits as to the period within which enforcement action may be taken. Do consultees agree?

Again this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

Whilst we do not support the unification of consents as a principle we are pleased to see that this matter has been considered and there is no time limit proposed on enforcement action for heritage development.

Consultation question 13-8.
We provisionally propose that the Bill should include provisions to the effect that:
(1) where an enforcement notice is issued in relation to the carrying out of heritage development in breach of planning control, the grounds on which an appeal may be made against such a notice

include grounds equivalent to grounds (a), (d), (i), (j) and (k) as set out in Section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990;
(2) the Welsh Ministers, in determining an enforcement appeal relating to a listed building, may exercise their powers to remove the building from the list.
(3) in determining an enforcement appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.
Do consultees agree?

Again this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

Whilst we do not support the unification of consents as a principle this proposal sits suitably within that context.

Consultation question 13-9.
We provisionally consider that planning permission should not be unified with scheduled monument consent.
Do consultees agree?

Again this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

The proposal not to include Monuments as part of "heritage/heritage development" seems at odds with the rest of the proposals. If Listed Building Consent were to be subsumed into a wider consent regime, then surely Scheduled Monument Consent must also be too. The proposal would divorce aspects of the system of Historic Environment management from others.

Indeed, there may be public value in merging SMC and LBC processes under a unified Heritage Consent regime covering all forms of heritage development. This would also ensure a unified regime is applied to dealing with unscheduled archaeology and also Scheduled Monuments that comprise built, above ground heritage. This could possibly be framed in a way to address the issue of undesignated heritage assets, which under the current regime in England are sometimes almost treated as if they were listed. This is

pertinent to the state of the current heritage lists, which in some areas are inadequate and far from comprehensive and up-to-date.

Consultation question 13-10.
We provisionally consider that the definition of "listed building" should be clarified by making it clear that the definition includes pre-1948 objects and structures if they were within the curtilage of the building in the list, as it was:
(1) in the case of a building listed prior to 1 January 1969, at that date; and
(2) in any other case, at the date on which the building was first included in the list.
Do consultees agree?

This could lead to confusion as it is the Institute's understanding that from 1969 the new definition of listed building came into force and applied to all listed buildings whenever they were listed. Otherwise surely the legislation would have made clear that two definitions applied dependent on circumstances. This proposed change could be interpreted to suggest that curtilage does not apply to buildings listed before 1969, however there is no case law as far as we are aware to support this, there has not been any legal interpretation specifically determining this point nor is there any relevant precedent to be followed.

It is however accepted that any work carried out to curtilage structures or buildings prior to 1 January 1969 would not be unauthorised as the provisions of the change would not act retrospectively.

Consultation question 13-11.
We provisionally propose that the Ancient Monuments and Archaeological Areas Act 1979 should be amended so that Part 2 (areas of archaeological interest) does not apply in Wales.
Do consultees agree?

No strong views are held on this proposal. If there have been no areas of archaeological interest designated in Wales as suggested the provisions in the 1979 Act have no relevance or use.

Yours sincerely

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