THE SOCIETY FOR THE PROTECTION OF ANCIENT BUILDINGS
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By email: Planning_wales@lawcommission.gsi.gov.uk.

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Our ref: SPAB/18/PLWales

Dear Sir / Madam,

Planning Law in Wales (Cyfraith Cynllunio yng Nghymru)

Thank you for the opportunity to respond to the review of planning law in Wales and the proposed reforms set out in *Planning Law in Wales (Cyfraith Cynllunio yng Nghymru)*. The SPAB is a membership organisation founded in 1877 by William Morris and the oldest conservation body in Britain. The SPAB is also a national amenity society and as such has a statutory role in the planning system in both Wales and England. We must be notified of all listed building consent applications for full or partial demolition or alterations comprising demolition. We have a similar role within the ecclesiastical consent systems operated by the religious denominations that are granted exemption from secular listed building controls. Our response to this consultation is predicated on our considerable experience of working within the planning system in Wales and our overview of the operation of the planning system nationally.

General

Current heritage protection Wales

The SPAB welcomed the introduction of the Historic Environment (Wales) Act 2016 and the beneficial changes for historic environment protection that it contains. The Act has been well received by a wide range of people both within the sector and building owners, and arguably Wales now benefits from having the most robust and progressive heritage protection in the United Kingdom. We are concerned that this review is taking place before the Act has bedded in and before its effectiveness has been evaluated and appreciated. We believe that implementing the proposed reforms set out in the review would undermine the exemplary protection that Wales is currently afforded by its new legislation.

The planning system is the key mechanism through which the historic environment is protected and managed in Wales and it is crucial to note that it currently protects both designated and undesignated heritage assets. Where assets are protected through statutory designation (be it through listing, scheduling or another form of national designation) there a high tests that must be met where a local authority is determining an application for their alteration or demolition. Undesignated heritage assets (locally listed buildings and assets not yet discovered) can be of equivalent importance and are often only identified through the plan-making or development management process. The identification of undesignated heritage assets relies on LPAs having adequate heritage expertise within their development management teams and the proposed reforms in the review seriously endanger the existence of those roles in local authorities. Additionally the review has not adequately dealt with the issue of undesignated heritage assets, to the potential detriment of the historic environment in Wales.

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Threats to the historic environment in Wales

Limited resources within local authorities and in other public heritage bodies, coupled with de-regulation of the planning system, has left the historic environment vulnerable to harm. As already expressed, The Act is a positive and robust piece of legislation, but it should be noted that it cannot be implemented effectively while local authorities are not adequately resourced with dedicated conservation professionals. We consider it likely that a serious and unintended consequence of this review would be that conservation expertise is diminished further at a time where growth and housing need is putting pressure on the historic environment.

The review appears not to have appreciated that the historic environment is a complex and ever-evolving thing based on the interplay of multi-layered heritage values. The definition of heritage in the United Kingdom has progressed a great deal in the last 100 years, dealing with the intersection of built heritage and cultural heritage in a far more progressive way than many of our neighbours. Unfortunately the review has not taken this complexity into account and instead deals with buildings and monuments and designated assets in silos, which we anticipate would be to the detriment of the historic environment.

We have answered the consultation questions selectively which highlight the above issues and deal with our other concerns

Specific questions

Consultation question 5.4

We provisionally propose that a provision or provisions should be included to the effect that:

(1) a body exercising any statutory function must have regard to the desirability of preserving or enhancing historic assets, their setting, and any features of special interest that they possess; and

(2) a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to those matters; and that "historic assets" be defined so as to include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe.

Do consultees agree?

We strongly agree with the proposal to introduce a statutory duty but strongly disagree with the proposed definition of 'historic assets'. Historic assets are already defined in 1.7 of *TAN 24 The Historic Environment* and the proposed definition is not consistent with that definition. It would be extremely unhelpful to introduce a conflicting definition especially where that definition is less inclusive (omitting

undesignated heritage assets) and less holistic (omitting the idea that a heritage asset can be one asset or a combination of many).

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?

No, we strongly disagree.

The merging of listed building consent with planning permission

Before we discuss the proposals and their implications, we feel it ought to be stated that we do not believe that adequate evidence for the need of this reform has been presented. No data has been produced to suggest that the relatively small number of overlapping applications made for both listed building consent and planning permission have been overly problematic in terms of inefficiency or accessibility for the public.

The arguments made in the proposal are not entirely without merit and might seem logical and persuasive. However, crucially, we do not agree that the proposals would ensure that the existing level of protection for heritage assets would be maintained, or that the desire for simplification of the system would be attained.

Fundamentally we consider that the requirement for listed building consent is based on a different ethos and legal basis than planning permission. Planning and development-control relates to the need to regulate land use and promote sustainable growth. The listed building consent regime exists primarily to protect nationally important buildings, and secondarily allows for the appropriate management of change

to bring buildings back into use, or to change their use to contribute to an LPAs plan for growth. We anticipate that the separate purposes of the two consent systems would be obscured by their being merged and that the requirement to have 'special regard to preserving or enhancing' listed buildings during decision making could be lost to the growth agenda.

Importantly, the current requirement for listed building consent indicates to owners and decision-makers that the asset they are dealing with is so valuable, sensitive and irreplaceable as to need an additional consent, overseen by a specialist officer. Any perceived diminution of the value of listed buildings, their status within the planning system and the regime that controls them can only aggravate the already alarming cuts to historic environment expertise in local authorities. The review makes it clear that it would be the role of guidance to ensure that beleaguered and resource-starved authorities do not cut or by-pass conservation officers but we wholly disagree with this assertion. It is the responsibility of the review not to introduce reforms that would diminish the existing levels of protection, and whilst it might be convenient to state that that responsibility stops at writing robust legislation, changes to legislation should not be made in a vacuum. It is well documented that the heritage expertise in local authorities is declining and it is simply obvious to those working in the sector that in the current environment, this reform would inevitably lead to cuts to specialist staff who are currently protected by being experts in heritage and a separate consent regime. Additionally we note that such guidance on the need for specialist advice exists throughout the United Kingdom and is yet to have prevented the loss of local authority and other historic environment services. Similarly professional bodies are already campaigning against the loss of specialist staff as suggested in 13.125, it hasn't prevented that loss, and so we would suggest that this would be no mitigation against the unintended but highly likely consequence of the reform.

The aims of this proposal as set out in 13.7 – that the legislative framework be simplified, the system be made more accessible and that the existing levels of heritage protection are upheld – have not been met by this proposal. There is not evidence to suggest that on a technical level bureaucracy would be reduced, no evidence has been presented that the system would become more accessible and, as our response makes clear, we have very grave concerns that this reform would in fact diminish the level of protection for the historic environment.

Heritage development

The proposed definition of 'heritage development' is effectively confined to buildings. Whilst we understand that the definition serves a purpose in relation to listed buildings and conservation areas, as we have already discussed above, it would be unhelpful to have a definition set out in legislation which excludes development affecting all other heritage assets – both designated and undesignated.

The merging of Conservation area consent with planning permission

Given that the proposed reform in Wales has already been implemented in England, it is understandable that the review would seek to rationalise the permissions required for demolition within conservation areas in Wales. However, again we would state there is not overwhelming evidence that conservation

area consent causes real problems in practice, and would suggest that it would be wise to allow the reform in England to bed in and assess its effectiveness (whilst recognising that alternative circumstances apply in Wales) before reform is made in Wales.

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?

No, as we strongly disagree with the merging of consents.

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?

No, as we strongly disagree with the merging of consents.

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?

No, as we strongly disagree with the merging of consents, but acknowledge this would be one of the merits of the reforms should they be implemented.

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?

No, as we strongly disagree with the merging of consents.

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 Proposal 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?

Yes, should the reforms be implemented, though of course this would only be necessary due to the amalgamation of the consents.

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?

Yes, should the reforms be implemented and subject to our concerns relating to the definition of 'heritage development' as expressed above. Again we note this would only be necessary due to the amalgamation as there is no time limit at present.

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?

No, as we strongly disagree with the merging of consents.

Proposal 13-9.

We provisionally consider that planning permission should not be unified with scheduled monument consent.

Do consultees agree?

Yes, should the reforms be implemented. However, we feel the review misses an opportunity in not proposing to widen the consultation arrangements for scheduled monument consent.

At present there is no duty to notify national amenity societies of consents relating to scheduled monuments under the existing 1979 Act. This is an oddity given the requirement under the *Planning (Listed Building & Conservation Areas) 1990* that LPAs notify the national amenity societies of equivalent works to listed buildings. In addition, where planning permission is also sought for works to a scheduled monument there is no requirement for the NAS to be notified, and yet under requirements pertaining to planning applications, the wider public are.

Yet further obfuscation exists where, through historical errors in designation, a monument is both scheduled and listed – LPAs and applicants are rightly unsure what consent is required, and therefore who to consult. This is perhaps a matter that can be reversed over time by rationalising existing designations and advising owners and LPAs of their duties under such a circumstance, but we include it here to show that there are issues relating to the accessibility and transparency of the scheduled monument consent system that this review has not sought to rectify despite it being a stated aim of the exercise.

To open up the SMC process to wider consultation would add value to the decision-making process and increase the protection afforded to scheduled monuments. To that end we would welcome an amendment to Part I of the *Ancient Monuments and Archaeological Areas Act 1979* that directs that the national amenity societies should be notified of works for demolition or alteration of scheduled monuments in Wales.

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; an

(2) in any other case, at the date on which the building was first included in the list.

Do consultees agree?

Yes, should the reforms be implemented.

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. Part 2 of the *Ancient Monuments and Archaeological Areas Act 1979* makes provision for the designation of Archaeological Areas. This mechanism for designation of important archaeological sites as they are discovered helps to prevent buried assets from being damaged or destroyed without first being investigated and recorded.

Whilst we take the point in 13.192 that no such areas have been designated in Wales and that use of this mechanism has been limited in England, the proposal to remove the opportunity to designate such areas in Wales is contrary to the aim that any reform of the consent regime 'must maintain at least the current level of protections' and no convincing argument has been made that it impedes the current framework.

Issues not covered by consultation questions:

Applications

Whilst the matter of application submission documents is discussed in 13.149-13.150 there is no accompanying consultation question. We would like to state that, should the reforms be implemented, we believe that not adding into the regulations the base-level information required for heritage applications, in-line with the proposals for planning permission submission documents under 8.1, would be a missed opportunity.

The Ecclesiastical Exemption

The Ecclesiastical Exception affords certain religious denominations an exemption from the requirement to seek listed building consent. By definition it requires that the listed building consent regime exists. Those denominations are not exempt form the requirements of planning permission, and it is not clear what impact the abolition of listed building consent would have on this exemption and the current parallel denominational consent regimes.

Fees

Whilst the matter of fees is discussed in 13.155-13.158 there is no accompanying consultation question on the specific matter of heritage applications and the fees to be levied against them.

We would like to state our strong opposition to any reform which would introduce a fee for heritage applications. Presently, applications for listed building consent are not subject to a fee on the basis that most listed building consent applications are not made for commercial gain, and because the state imposes greater expectations on owners of listed buildings because of their public value. In a similar vein applicants seeking planning permission where the need for permission arises out of the imposition of an Article 4 Direction on a conservation area do not have to pay a fee for that permission.

There is a long standing argument that to introduce a charge for non-developmental works to a listed building would increase the likelihood of unauthorised works taking place. Lost historic features cannot simply be reinstated through taking enforcement action: once they are gone they are gone. The same follows for planning permissions sought due to the imposition of Article 4 Directions.

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The suggestion is made that it would be the responsibility of Welsh Ministers to decide if an exemption from fees would be made for certain applications, including those relating to heritage works. Again we would argue that this is not an appropriate level of mitigation of the potential consequence of the reform – that unauthorised works take place due to a reluctance to pay fees relating to applications – and again argue that the proposed reform would diminish the existing level of protection in place for the historic environment.

For the reasons stated above, we urge you to reject the proposal to merge the listed building consent regime with the requirement for planning permission, as we believe it would only serve to undermine the newly strengthened heritage protection system in Wales.

Yours sincerely,

Emma Lawrence

Emma Lawrence
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