

## **PART ONE: GENERAL PRINCIPLES**



# Chapter 2: Towards a new Planning Code for Wales

## INTRODUCTION

- 2.1 This Chapter summarises briefly the need for reform in this area of the law and, against that background, the process by which we have arrived at the recommendations in this, our Final Report.

## PLANNING LAW IN WALES

### Background: pre-2006

- 2.2 In our Consultation Paper, we explored the present state of the law governing town and country planning in Wales. We recounted the history of the legislation, noting that until 2007 primary legislation on planning was the exclusive preserve of the United Kingdom Parliament in Westminster.<sup>1</sup>
- 2.3 The first significant Act was the Town and Country Planning Act (“TCPA”) 1947, which came into force on 1 July 1948, almost exactly seventy years ago. It was amended on various occasions, being in due course replaced by the TCPA 1962, which was in turn amended (in particular by the TCPA 1968) and then replaced by the TCPA 1971. Further changes were made by the TCP (Amendment) Act 1972, the Local Government, Planning and Land Act 1980, and the Housing and Planning Act 1986.
- 2.4 The Government then invited the Law Commission to consolidate planning legislation again, this time incorporating a small number of minor technical amendments.<sup>2</sup> The result of that exercise was the enactment of four new statutes – the TCPA 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990,<sup>3</sup> the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990. They were almost immediately amended by the Planning and Compensation Act 1991 (principally in relation to enforcement) and the Environment Act 1995 (minerals and national parks) – the latter coming into force on 23 November 1996.
- 2.5 All the pieces of planning legislation noted above, and almost all associated secondary legislation, applied to Wales just as to England. And policy was the same in the two countries until the 1990s.
- 2.6 The Local Government (Wales) Act 1994 then introduced a unitary system of local government, which had consequences for the administration of the planning system, from 1 April 1996. Distinctive national planning policy started appearing from around 1996, and separate secondary legislation governing the mechanics of the planning system in Wales from the late 1990s. The Planning and Compulsory Purchase Act

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<sup>1</sup> Consultation Paper, paras 1.12 to 1.25.

<sup>2</sup> Law Com 189, Cm 958.

<sup>3</sup> Referred to in this Report, as in practice, as the “Listed Buildings Act”.

(“PCPA”) 2004 ushered in different systems of development planning in England and Wales.

### Planning law since 2006

- 2.7 Since the coming into force of Part 3 and then Part 4 of the Government of Wales Act 2006, the National Assembly for Wales has had exclusive responsibility for planning legislation. This has resulted in the Mobile Homes (Wales) Act 2013, the Well-being of Future Generations Act (Well-being Act) 2015, the Planning (Wales) Act (“P(W)A”) 2015, the Local Government (Wales) Act 2015, the Environment (Wales) Act 2016, and the Historic Environment (Wales) Act 2016.<sup>4</sup>
- 2.8 The Westminster Parliament passed the Planning Act 2008, which governed the handling of major infrastructure projects in both England and Wales – although it is noteworthy that the Act applies somewhat differently on either side of the border. Further legislation passed in Westminster significantly affected planning, but only in England, with a major new Act appearing almost annually. Some (but not all) of the changes introduced by those Acts were introduced in Wales by the P(W)A 2015.
- 2.9 Finally, as a result of the Wales Act 2017, which came into force on 1 April 2018, the Assembly now has legislative competence in relation to all planning matters – including, for the first time, the Community Infrastructure Levy (“CIL”).
- 2.10 Because of this somewhat piecemeal process of legislation, there are now in the region of 20 statutes governing planning and related matters in England and Wales – in some cases applying significantly differently in the two countries – as well as a further eight applying only in Wales, and twelve applying only in England. The precise number depends on what is understood by the term “planning”.
- 2.11 In our Consultation Paper we noted that this has led to an unnecessarily complex legislative code, which is difficult even for seasoned practitioners to find their way around, and almost impossible for lay people. And only some of it is available in Welsh. The unsatisfactory nature of planning legislation – originally to be found in a single-volume loose-leaf work, but now requiring ten volumes<sup>5</sup> – has been well-known by practitioners for many years. The particular problems of trying to understand the law as it applies in Wales were noted in debates in Parliament on the Wales Bill.<sup>6</sup>

### THE INVOLVEMENT OF THE LAW COMMISSION

- 2.12 Against that background, the Law Commission was invited to review the law relating to town and country planning in Wales, and to make recommendations to modernise and simplify the law. We looked particularly at the development management process, and spoke with a range of key stakeholders.

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<sup>4</sup> Consultation Paper, paras 1.26 to 1.44.

<sup>5</sup> *Encyclopedia of Planning Law and Practice*, 10 vols., Sweet & Maxwell.

<sup>6</sup> Consultation Paper, paras 1.45 to 1.75.

- 2.13 We did not find that there was a need for further fundamental policy-driven reform in that area. That exercise had largely been achieved by the Independent Advisory Group (“IAG”) and the Welsh Government, resulting in the passing of the P(W)A 2015, the Historic Environment (Wales) Act 2016, and the other pieces of legislation referred to above. However, widespread concern was expressed as to the complexity and inaccessibility of the law in this area.
- 2.14 In agreement with the Welsh Government, therefore, the project was reformulated, to encompass the consolidation and simplification of planning legislation for Wales, including:
- 1) the restatement of the law in a single code, so as to be easily accessible;
  - 2) the making of adjustments, to produce a satisfactory consolidated text;
  - 3) the simplification of the law by way of streamlining and rationalising unnecessary process and procedure; and
  - 4) the writing into statute of propositions derived from case law.

#### **Our recommendations on the form and accessibility of the law applicable in Wales**

- 2.15 This review coincided with a more wide-ranging exercise being carried out by the Law Commission, also at the invitation of the Welsh Government, to review generally the form and accessibility of the law applicable in Wales. The Commission’s final report on that subject, published in June 2016,<sup>7</sup> noted the need for the law to be clear and accessible and surveyed the reasons why the law in Wales had become inaccessible – in part a result of problems of inaccessibility of the law affecting the United Kingdom as a whole, but compounded in Wales by the nature and process of devolution.
- 2.16 To address these problems, we recommended that the Welsh Government pursue a programme of codification, to be executed in accordance with our further recommendations. In particular, legislation whose subject-matter is within the competence of the Assembly but is scattered across a number of statutes should be brought together in a single piece of Assembly legislation, accompanied by reform as appropriate. And future legislation in the subject area of a code would take effect by way of amending the code.
- 2.17 The Welsh Government accepted, or accepted in principle, all but one<sup>8</sup> of our recommendations. In April 2017 the Counsel General announced the launch of a pilot programme of consolidation, codification and better publication of legislation. He also explained that the Welsh Government saw a code not simply (as we had conceived it) as a piece of Assembly legislation, but rather as a collection of related primary legislation, secondary legislation and guidance, all of which should be accessible together through the Law Wales portal.
- 2.18 The present project became one of the constituents of the pilot programme. If our recommendations in this Report are implemented, it will lead to the emergence of a

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<sup>7</sup> *The Form and Accessibility of the Law Applicable in Wales* (Law Com No 366), June 2016.

<sup>8</sup> A recommendation as to responsibility for Welsh language terminology was not accepted.

single Planning Act to replace all of the 30 or so statutes currently in force in Wales; accompanied by related secondary legislation and guidance, this can form the centrepiece of Wales's first Code.

## THE SCOPING PAPER

- 2.19 Simultaneously with the publication of our report on the Form and Accessibility of the Law, we published in June 2016 a Scoping Paper<sup>9</sup> on the planning project, setting out our provisional views as to the nature and scope of a possible codification and simplification exercise. This was made available online, and a wide range of key stakeholders were sent a copy or notified of its existence.<sup>10</sup>
- 2.20 Over 60 organisations and individuals responded, or met us to discuss its contents.<sup>11</sup> They told us of the problems caused by the present system, and identified the likely benefits of consolidation and simplification. They also made various detailed points in relation to specific topics.<sup>12</sup>

## THE CONSULTATION PAPER

- 2.21 We considered carefully all the responses to the Scoping Paper, and continued our research, in consultation with the Welsh Government. In November 2017 we published a substantial Consultation Paper, *Planning Law in Wales*.
- 2.22 The first two chapters of the Consultation Paper, *General Principles*, set out in slightly more detail the introductory material we have summarised above. The third chapter outlined our provisional conclusions as to the scope of the codification exercise. The fourth chapter described the nature of the technical reforms we were making. The remaining chapters (5 to 18) set out a series of possible technical reforms, framed as consultation questions.

### The scope of the codification exercise

- 2.23 As to the scope of the codification exercise, we confirmed that any new Bill should include all the core planning provisions – that is, those dealing with the purpose of the planning system, how the system is administered, the plan-making process, the nature of development, the process of seeking planning permission, remedies, and enforcement. This would include both the provisions currently in the TCPA 1990 and the PCPA 2004, and those scattered through various other statutes.
- 2.24 We also suggested that it should include provisions ancillary to the development management system – modification and revocation of permission; discontinuance

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<sup>9</sup> *Planning Law in Wales: Scoping Paper* (Law Commission Consultation Paper No 228), June 2016 (referred to in this report simply as “Scoping Paper”).

<sup>10</sup> Consultation Paper, Chapter 2.

<sup>11</sup> Listed in Consultation Paper, Appendix A. An analysis of the responses is available online.

<sup>12</sup> Noted in the relevant topic chapters in Part Two of the Consultation Paper.

action; purchase notices; highways affected by development; and application to minerals development, statutory undertakers and the Crown – as well as challenges in the courts; and the provision of infrastructure by means of CIL and planning obligations.<sup>13</sup>

- 2.25 We also explored a number of other consent regimes that overlap with the main planning system or operate closely alongside it. We thus explored whether it would be possible and practical to merge planning permission with listed building consent, conservation area consent and scheduled monument consent. We also explored the special regimes relating to the control of outdoor advertising and works to protected trees.<sup>14</sup>
- 2.26 We then considered the various statutory provisions relating to improvement, regeneration and renewal, found in the TCPA 1990 and related statutes, concluding that it would be appropriate for the new Planning Bill to include a clear restatement of the law relating to the powers of public authorities to bring about improvement on private land.<sup>15</sup>
- 2.27 We accordingly concluded that the new Planning (Wales) Bill should include as far as possible all of the primary legislation relating to:
- 1) the planning and management of development (including works affecting listed buildings and conservation areas);
  - 2) the provision of infrastructure and other improvements;
  - 3) outdoor advertising and works to protected trees;
  - 4) public-sector led improvement and regeneration (insofar as currently within the TCPA 1990); and
  - 5) supplementary and miscellaneous provisions.
- 2.28 We noted the possibility that there would be a Historic Environment (Wales) Bill emerging at around the same time as the Planning (Wales) Bill. That would be largely a consolidation, without technical reform.<sup>16</sup>
- 2.29 We also considered but rejected the possibility of including within a new Planning Bill the statutory provisions relating to the countryside and rights of way; compulsory purchase and compensation; hazardous substances; major infrastructure projects; approval under the Building Regulations; and various other self-contained codes.<sup>17</sup>

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<sup>13</sup> Consultation Paper, paras 3.18 to 3.46.

<sup>14</sup> Consultation Paper, paras 3.47 to 3.62.

<sup>15</sup> Consultation Paper, para 3.63 to 38.82.

<sup>16</sup> As to the difference between consolidation and our conception of codification, see *Form and Accessibility of the Law Applicable in Wales*, para 2.14.

<sup>17</sup> Relating to transport infrastructure, mobile homes, high hedges, and protected wrecks.

- 2.30 We briefly consider again the scope of the codification exercise in Chapter 4 and Chapter 16.<sup>18</sup>

### Technical reforms to the legislation

- 2.31 In the Scoping Paper, we had identified four (to some extent overlapping) categories of possible technical improvements to the current legislative framework:
- 1) clarification where words or phrases used in the legislation lack clarity or consistency;
  - 2) improvements to streamline procedure or amend discrepancies;
  - 3) amendments where provisions do not reflect established practice; and
  - 4) rationalisation or removal of duplicative, obsolete or uncommenced provisions.
- 2.32 Respondents to the Scoping Paper broadly supported those categories, and made various suggestions relating to particular topics, which we considered in the relevant topic-based chapters in Part Two of the Consultation Paper.<sup>19</sup> A similar approach has been adopted in this Report.
- 2.33 We also suggested that it would be appropriate to review the balance between primary and secondary legislation, although we considered that, overall, the present balance was broadly correct.<sup>20</sup> And we proposed some reforms that would need to be the subject of amendments to secondary legislation – particularly in those areas of planning law that are principally governed by secondary legislation (notably advertising and trees<sup>21</sup>).
- 2.34 We tentatively considered whether it would be desirable to codify case law – that is, principles derived from judicial decisions. We concluded that this might sometimes be appropriate. However, in line with the caution expressed in the Scoping Paper, and by a number of those responding to it, we generally concluded that codification of case law is not as helpful as it might at first sight appear to be.<sup>22</sup>
- 2.35 In the light of those broad principles, we outlined in Part Two of the Consultation Paper the existing law in relation to each of the main topic areas within the broad field of planning law, and put forward 186 possible reforms, in the form of Consultation Questions. The topics were grouped into fourteen Chapters, as follows:

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<sup>18</sup> See **paras 4.28 to 4.48 and 16.98 to 16.111**.

<sup>19</sup> Consultation Paper, paras 4.4 to 4.28.

<sup>20</sup> Consultation Paper, paras 4.39 to 4.50.

<sup>21</sup> Consultation Paper, Chapters 14 and 15.

<sup>22</sup> Consultation Paper, paras 4.51 to 4.98.



5.	Introductory provisions	12.	Unauthorised development
6.	The formulation of the development plan	13.	Works affecting listed buildings and conservation areas
7.	The need for a planning application	14.	Outdoor advertising
8.	Applications to the planning authority	15.	Works to protected trees
9.	Applications to the Welsh Ministers	16.	Improvement, regeneration and renewal
10.	The provision of infrastructure and other improvements	17.	High Court challenges
11.	Appeals and other supplementary provisions	18.	Miscellaneous and supplementary provisions

2.36 The chapters in Part Two of this Report follow the same order.

### **Responses to the Consultation Paper**

2.37 The Consultation Paper was published in November 2017, with a four-month period for responses, expiring on St David's Day, 1 March 2018. In the following Chapter, we describe the consultation exercise undertaken, and the general character of the responses we received.