

## **PART TWO: SPECIFIC TOPICS**



# Chapter 5: Introductory provisions

## INTRODUCTION

- 5.1 Chapter 5 of the Consultation Paper listed a number of general provisions underlying the operation of the planning system and proceeded to discuss two categories of such provisions. These were:
- 1) whether there is a need to include within the Planning Bill an explicit statement as the purpose of the planning system;
  - 2) how to rationalise and simplify the various statutory duties that currently apply to the exercise of planning functions; and
  - 3) the provisions dealing with the administration of the planning system.
- 5.2 In this chapter of our Report, we consider first the rationalisation and simplification of the various statutory duties; in the light of our consideration of that, we explain our conclusion that an explicit statement of the purpose of the planning system is unnecessary. We turn finally to the administration of the system and make some recommendations for simplification of the provisions regarding the administration of the system.

## PRINCIPLES UNDERLYING THE PLANNING CODE

### Statutory duties applicable to the exercise of planning functions

- 5.3 There are at present two general principles specifically relating to planning in Wales. The first, which has existed since the planning system was introduced 70 years ago, is the duty of decision-makers to have regard to the development plan, so far as material, and to all other material considerations.
- 5.4 There are also certain specific material considerations that are highlighted in one way or another: the preservation or enhancement of listed buildings and conservation areas; the use of the Welsh language; and Welsh Government policy.
- 5.5 The second general principle, introduced by the Well-being Act 2015 and the P(W)A 2015, relates to sustainable development. Section 2 of the P(W)A 2015 provides that any function relating to the formulation of the development plan or the management of development must be exercised as part of carrying out sustainable development in accordance with the Well-being Act.
- 5.6 In addition to those two general principles, there are a number of general duties in other legislation that will at least to some extent be relevant to the exercise of functions under planning legislation.

- 5.7 In our Consultation Paper, we accordingly made a number of suggestions as to specific duties, and how they might best be dealt with. These were on the whole well received by consultees, as noted below in relation to each specific Consultation Question, but certain broader concerns did emerge, leading us to review the issue of statutory duties more generally, both in planning legislation and in other, related legislation.

## **Statutory duties: the Planning Acts**

### *The development plan*

- 5.8 Firstly, as noted in the Consultation Paper,<sup>1</sup> there are various situations in which a planning authority is to exercise a particular function having regard to the development plan, so far as material, and to any other material considerations. These are the determination of a planning application, the imposition of conditions limiting the duration of a planning permission, the revocation or modification of a permission, the making of a discontinuance order, and the issue of an enforcement notice.<sup>2</sup>
- 5.9 The Welsh Ministers are under a similar duty when determining called-in applications, or deciding appeals.<sup>3</sup> But they have no such duty when imposing conditions limiting the duration of a planning permission, or when exercising their default powers to revoke or modify a permission, make a discontinuance order, or issue an enforcement notice.<sup>4</sup>
- 5.10 A strategic planning panel, when preparing a strategic development plan, must have regard to the NDF, the strategic plan for any adjoining area, and the local development plan for each area within the panel's area (but not for any adjacent area).<sup>5</sup> A planning authority, when preparing a local development plan, must have regard to the NDF and the strategic plan for the area and any adjacent area (but not the local plan for any adjacent area).<sup>6</sup> Local plans must be in general conformity with the NDF and any strategic plan for the area.<sup>7</sup>
- 5.11 Where planning authorities and the Welsh Ministers are to have regard to the development plan when making any determination, they are to make that determination in accordance with the plan unless relevant considerations suggest otherwise.<sup>8</sup>

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<sup>1</sup> Consultation Paper, para 5.16.

<sup>2</sup> TCPA 1990, ss 70(2)(a),(c), 91(2), 92(6), 97(2), 102(1), 172(1)(b), Sched 9, para 1(1).

<sup>3</sup> TCPA 1990, ss 70(2), 77(4)(a), 79(4)(a).

<sup>4</sup> TCPA 1990, ss 100, 104, 182, Sched 9, para 11.

<sup>5</sup> PCPA 2004, s 60I(6), inserted by P(W)A 2015.

<sup>6</sup> PCPA 2004, s 62(5), amended by P(W)A 2015.

<sup>7</sup> PCPA 2004, s 62(3A), amended by P(W)A 2015.

<sup>8</sup> PCPA 2004, s 38(6).

### *The Welsh language*

- 5.12 Planning authorities are under a duty to have regard to any relevant considerations relating to the Welsh language when determining planning applications;<sup>9</sup> and the Welsh Ministers are under a similar duty when determining called-in applications and appeals.<sup>10</sup> But that does not alter the weight to be given to any other material consideration.<sup>11</sup>
- 5.13 The Welsh Ministers, in preparing the NDF, must carry out an appraisal of its sustainability. Similarly, the relevant plan-making body, in preparing a strategic plan or a local plan, must carry out an appraisal of its sustainability. In each case, such an appraisal must include an assessment of its likely effects on the use of the Welsh language.<sup>12</sup>
- 5.14 However, neither planning authorities nor the Welsh Ministers are under any such duties when carrying out their other planning functions – such as the approval of details required by a condition on a planning permission, the taking of any enforcement action other than issuing an enforcement notice, decision making in relation to advertisements and protected trees, the exercise of powers relating to waste land, and the acquisition of land for planning purposes.

### *The historic environment*

- 5.15 Planning authorities and the Welsh Ministers are to have special regard to the desirability of preserving a listed building, its setting and its special features when granting either listed building consent or planning permission.<sup>13</sup> Authorities are to have regard (but not special regard) to the desirability of preserving features of special interest, and listed buildings in particular, when acquiring and disposing of land – but no similar duty applies to the exercise of such functions by the Welsh Ministers.<sup>14</sup> And authorities and the Welsh Ministers must pay special attention to the desirability of preserving or enhancing the character or appearance of a conservation area when exercising any planning functions.<sup>15</sup>
- 5.16 There are no statutory duties on either planning authorities or the Welsh Ministers to have regard to listed buildings when carrying out any other functions under the TCPA 1990, or any functions under the Listed Buildings Act 1990. And there are no similar duties under the Planning Acts laid on other persons or bodies who have various functions to perform, notably as consultees.

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<sup>9</sup> TCPA 1990, s 70(2)(aa).

<sup>10</sup> TCPA 1990, ss 70(2), 77(4)(a), 79(4)(a).

<sup>11</sup> P(W)A 2015, s 31(4).

<sup>12</sup> PCPA 2004, ss 60B(2), 60I(8), 62(6A), inserted by P(W)A 2015.

<sup>13</sup> P(LBCA)A 1990, ss 16(2), 66(1).

<sup>14</sup> P(LBCA)A 1990, s 66(2).

<sup>15</sup> P(LBCA)A 1990, s 72(1).

5.17 From the above analysis, we observe that:

- 1) all of the existing statutory duties are laid upon either planning authorities or the Welsh Ministers or both;
- 2) the duty may be to “have special regard”, “pay special attention”, or “have regard” to the various matters;
- 3) the functions to which they apply are set out specifically; and
- 4) the incidence of those duties is not consistent.

### **Statutory duties: other related legislation**

5.18 A number of related statutes impose duties on various categories of public bodies. We consider them in the order that they were first introduced.

5.19 Section 11 of the Countryside Act 1968 creates a duty to have regard to the desirability of conserving the natural beauty and amenity of the countryside. The duty is laid on Ministers, government departments, and public bodies when exercising any function under any enactment relating to land. “Public bodies” includes any local authority or statutory undertaker, and any not-for-profit statutory body acting for the improvement of any place or the supply of any service.<sup>16</sup> “Statutory undertaker” is not defined.

5.20 Section 62 of the Environment Act 1995 inserted section 11A into the National Parks and Access to the Countryside Act 1949.<sup>17</sup> This imposes a duty on relevant authorities, when exercising “any functions”, to have regard to conserving and enhancing the natural beauty [etc] of national parks, and of promoting opportunities for the understanding and enjoyment of their special qualities by the public. “Relevant authorities” means Ministers, statutory undertakers, those holding public office, local authorities (including community councils), and national park authorities. Here too, “statutory undertaker” is not defined.

5.21 Section 17 of the Crime and Disorder Act 1998 imposes a duty on various authorities to exercise their “various functions” with due regard to their likely effect on crime and disorder. The authorities in question are a wide variety of local authorities and similar bodies, including national parks authorities, but not community councils or statutory undertakers. The list of authorities can be extended by the Welsh Ministers.

5.22 Section 85 of the Countryside and Rights of Way Act 2000 imposes on any relevant authority exercising any function in relation to an area of outstanding natural beauty (AONB) to have regard to the purpose of conserving and enhancing the natural beauty of the AONB. “Relevant authority” has the same meaning as in section 11A of the 1949 Act (above), save that “statutory undertaker” is defined as having the same meaning as in Part 11 of the TCPA 1990.

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<sup>16</sup> Countryside Act 1968, s 49.

<sup>17</sup> Applied in Wales by s 4A of the 1949 Act.

- 5.23 Section 149 of the Equality Act 2010 creates a duty to have due regard to the need to eliminate discrimination, advance equality and foster good relations. The duty is laid upon every public authority, in the exercise of its functions, and a person exercising public functions. The term “public authorities” is exhaustively defined in Schedule 19 to the Act, to include Government departments (other than the security services, the SIS and GCHQ), the Welsh Ministers, the First Minister for Wales, the Counsel General, and a subsidiary of the Welsh Ministers. It also includes local authorities,<sup>18</sup> national park authorities, urban development corporations, and a wide variety of bodies active in various areas of public life (such as the armed forces, broadcasters, health authorities, regulators, the police, and transport operators), but not statutory undertakers.
- 5.24 Section 3 of the Well-being Act 2015 requires every public body to carry out sustainable development. “Public body” for this purpose means the Welsh Ministers, local authorities, national park authorities, Natural Resources Wales (NRW), fire and rescue authorities, various health bodies, and five other national bodies.<sup>19</sup> The Welsh Ministers can amend that definition.<sup>20</sup>
- 5.25 Finally, section 6 of the Environment (Wales) Act 2016 requires public authorities to seek to maintain biodiversity in the exercise of functions in relation to Wales. This explicitly does not apply to the exercise of functions by HMRC or judicial functions by the courts. “Public authority” for this purpose means Ministers of the Crown, the Welsh Ministers, the First Minister, the Counsel General, Government departments, local authorities, planning authorities, strategic planning panels, persons holding public office, and statutory undertakers (defined more or less as in the TCPA 1990).
- 5.26 From the above analysis, we observe that:
- 1) all of the above duties are laid upon public authorities in various specified categories;
  - 2) the extent of the relevant categories in the various pieces of legislation are by no means the same – in particular, with relation to statutory undertakers;
  - 3) the nature of the duty varies as between having regard, and having “due regard” to various matters; and that
  - 4) in most cases, the duties relate to the carrying out by the body concerned of any function under any legislation, such that the functions are not specifically noted.
- 5.27 Other legislation imposes general environmental duties on particular categories of utilities – such as water undertakers, electricity suppliers, and telecommunications operators – when formulating proposals.<sup>21</sup>

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<sup>18</sup> But not community councils.

<sup>19</sup> WBFGA 2015, s 6.

<sup>20</sup> WBFGA 2015, s 52.

<sup>21</sup> Consultation Paper, para 5.115.

## Duties at common law: other relevant considerations

- 5.28 We have noted above that there is a limited duty on planning authorities and the Welsh Ministers to have regard to “any other material considerations”.<sup>22</sup> This echoes the duty laid upon any public body (however that term is defined) under common law, to take into account any relevant matters, and to ignore any irrelevant ones, when carrying out any function under any legislation.<sup>23</sup>

## THE DUTY TO HAVE REGARD TO THE DEVELOPMENT PLAN

***We provisionally proposed that a provision be included in the Bill to the effect that a public body exercising any function under the Code must have regard to the development plan, so far as relevant to the exercise of that function; and must exercise that function in accordance with the plan unless relevant considerations indicate otherwise (Consultation Question 5-1).***

### Proposed enlargement of the duty

- 5.29 In the Consultation Paper, we noted that the duty to have regard to the development plan applies to a wide range of significant functions under the TCPA 1990, but that the list of those functions is by no means comprehensive.<sup>24</sup>
- 5.30 In reality, many of those powers are in fact exercised by planning authorities with regard to the development plan, insofar as it contains any policies that are relevant. Where, for example, an authority is considering the terms of a proposed planning obligation under section 106 of the TCPA 1990, or taking various forms of enforcement action, or withdrawing an enforcement notice that has been issued, it will almost inevitably have regard to the provisions of the development plan. On the other hand, if it is considering an application for a certificate of lawfulness, the development plan will not be relevant.<sup>25</sup>
- 5.31 We also noted that the duty to have regard to the development plan applies at present only to the exercise by a planning authority (and in some cases the Welsh Ministers) of any of various functions, and not to the exercise of such a function by any other public body – although we did not specify what we meant by “public body”.
- 5.32 We therefore provisionally suggested that the duty currently in section 70 (and in the other provisions referred to above<sup>26</sup>) to have regard to the development plan should be applied to the exercise by any public body of any functions under the Planning Code – not just to those specifically named duties. It should thus be included at the

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<sup>22</sup> See paras 5.8 to 5.9.

<sup>23</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, CA, per Lord Greene MR at p.229; see also *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, HL, per Lord Reid at p 1030, and *R v Alconbury Developments Ltd v Secretary of State* [2003] 2 AC 295 at [50].

<sup>24</sup> See Consultation Paper, para 5.20.

<sup>25</sup> Subject to the decision in *Richmond-upon-Thames v Secretary of State* [2002] 2 PLR 115 (see para 7.34). see Consultation Paper, para 5.24.

<sup>26</sup> See fn 2 above.



outset of the Bill, along with the principle as to the primacy of the plan, now currently to be found in section 38(6) the PCPA 2004.

- 5.33 Forty-one consultees responded to this question, of whom 32 were in agreement.
- 5.34 Nine respondents were equivocal. PINS noted that our proposals would make little difference to current practice, but would nevertheless be a significant change to the law, and could have an impact on public bodies. Three consultees took the opportunity to suggest that the requirement should apply only where the development plan is up-to-date – although case law already recognises that qualification.<sup>27</sup>
- 5.35 NRW sought clarity as to the impact of the proposal on the role of various bodies who are consulted in relation to planning applications. Ceredigion CC, Carmarthenshire CC, Pembrokeshire Coast NPA and National Parks Wales suggested that consideration would need to be given as to the implications for plan making. And in our discussions with the WG it was emphasised that we would need to be clear as to which functions were to be covered by the new duty, and which public bodies.

### **The bodies to whom the duty should apply**

- 5.36 Firstly, we accept that the Bill needs to be clear as to the bodies that are subject to the duty to have regard to the development plan.
- 5.37 We consider that it should apply at least to those making decisions and determinations and formulating plans and proposals under the planning Acts. That will generally be planning authorities, strategic planning panels and the Welsh Ministers.
- 5.38 We have noted above that in some cases, where planning authorities are under a duty to have regard to the development plan, the Welsh Ministers are not under the same duty.<sup>28</sup> The Welsh Ministers will in practice pay considerable regard to the development plan, not just when determining called-in applications and appeals but also when exercising default powers, considering whether to approve article 4 directions, or to confirm discontinuance orders removing deemed consent for advertisements. But in relation to some of their other powers – notably those to make regulations prescribing various matters – the duty to have regard to the development plan would not be relevant.
- 5.39 NRW raised the point, in relation to all of our proposals relating to duties to take into account various matters (Consultation Questions 5-1 to 5-6), that such duties should apply only to decision-making bodies, and not to other public bodies whose role in the planning system is largely confined to responding to consultations on proposals.
- 5.40 As for bodies other than decision-makers, we accept that a duty laid upon “public bodies” generally (or “public authorities” or some other such term) is not helpful. It is noticeable that in the Countryside Act 1968, the earliest of the statutes considered above, the list of the bodies upon whom the duty under section 11 is imposed is not an exclusive list; and that some of the key terms (such as “public bodies”) are defined

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<sup>27</sup> And see now PPW (ninth edn), Chapter 2.

<sup>28</sup> See **para 5.9** above.

in fairly general terms, whilst others (“statutory undertakers”) are not defined at all. In more recent legislation, notably the Equality Act 2010, the bodies upon whom duties are laid are defined – at great length.

- 5.41 It would be possible to include in the Bill a schedule similar in character to Schedule 19 to the 2010 Act, including all the key stakeholders in the planning system. However, that would inevitably lead to problems with ensuring that all relevant bodies (and no irrelevant ones) were included, and that the list was kept up-to-date. It would also complicate the Bill. More significantly, it might be difficult to enforce such a widely applicable duty, possibly leading to unmeritorious litigation. We therefore do not recommend that approach.
- 5.42 Further, if those making decisions etc (principally planning authorities and the Welsh Ministers) were to be subject to the duty to have regard to the development plan, any other bodies involved in the planning process would in fact have to have regard to the plan as well, since to intervene on a basis that involved going against the plan would be unproductive and a waste of time. So, for example, a community council or a statutory undertaker, when making representations on a planning application or appeal, could either draw the attention of the decision-maker to policies of the plan that supported the case being promoted; or it could note the existence of such policies and explain why they should not be followed in this particular case.
- 5.43 We therefore consider that the duty only needs to be laid on those bodies making relevant decisions etc under the Act – in practice, planning authorities, strategic planning panels and the Welsh Ministers.

#### **The functions to which the duty should apply**

- 5.44 We have considered carefully the scope of the statutory functions to which the duty should apply, bearing in mind the desirability of avoiding unmeritorious litigation. There is thus already a considerable amount of litigation in relation to the duty as it currently applies; all that we are suggesting is extending it to all the functions under the Act to which it is relevant.
- 5.45 The functions to which the development plan is clearly relevant include the following:
- 1) decisions to make local development orders; or to make directions under general development orders restricting permitted development rights;
  - 2) decisions relating to planning applications and appeals – including whether an application should be called-in for decision by the Welsh Ministers; the initial decision to grant or refuse permission; the imposition of conditions; the approval of matters required under conditions; the conduct of appeal proceedings;
  - 3) decisions to modify or revoke planning permission, or to modify conditions; or to discontinue development;
  - 4) decisions as to the response to purchase notices;

- 5) decisions as to enforcement proceedings – including the initial decision to take action; the choice of procedure to be followed; and whether to discontinue such action, and on what basis;
  - 6) decisions relating to the amenity of an area – including the making of orders withdrawing deemed consent for advertising; the making and confirmation of tree preservation orders; the issue of unsightly land notices; action to deal with graffiti and flyposting; and the designation of conservation areas; and
  - 7) decisions as to the acquisition and disposal of land for planning purposes.
- 5.46 As regards the formulation or modification or withdrawal of the NDF or a strategic or local development plan, it would be appropriate for the plan-making body to have regard to any other part of the development plan for the area in question, and any development plan for any adjacent area. However, there is already a carefully formulated scheme requiring the various authorities to have regard to certain development plans – for example, those of neighbouring authorities. We consider that the new duty need not apply so as to replace those duties.<sup>29</sup>
- 5.47 In relation to Part 3 of the TCPA 1990 (development management), Chapter 1 of Part 6 (purchase notices), and Part 7 (enforcement), we consider that the duty should apply to all functions, as they are all interlinked – the decision as to whether to take enforcement action, or to withdraw an enforcement notice, for example, should be just as much subject to the development plan duty as a decision whether to grant planning permission. Equally, the Welsh Ministers should be under the same duty as planning authorities.
- 5.48 The exercise of functions under Part 8 (trees, advertisements and untidy land) should be subject to the duty, insofar as there are any relevant development plan policies, as should those under Part 9 (acquisition of land for planning purposes). In particular, those determining applications for consents other than planning permission – that is, listed building consent or conservation area consent (if those consents are retained), consent for the display of advertisements or for the carrying out of works to protected trees – should have regard to the development plan insofar as the plan contains any relevant policies.
- 5.49 It would clearly not be relevant to have regard to the development plan when making a decision that is essentially a matter of law – such as a determination as to whether planning permission or any other consent is required for a particular proposal, or a decision as to whether or how to respond to a High Court challenge, nor to a determination of a claim for compensation. Nor would the plan be relevant to the application a statutory definition to a particular set of facts.
- 5.50 The plan would normally not be relevant to a decision by the Welsh Ministers as to whether to make regulations as to planning procedures or as to the need for permission. However, it could occur that a particular piece of secondary legislation was often frustrating the implementation of development plan policies, in which case it might be appropriate to take that into account in considering whether it should be

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<sup>29</sup> Currently in TCPA 1990, Pt 2 and PCPA 2004, Pt 6 (development plans),

modified. So, for example, if a number of planning authorities were making Article 4 directions to avoid the result of a particular provision in the GPDO or the Use Classes Order frustrating development plan policies, the Welsh Ministers would no doubt take that into account when considering whether the provision should be modified or removed. We therefore consider that the development plan could be relevant, but we accept that there would be a real risk of unmeritorious litigation in relation to such action, outweighing the desirability of an express duty.

## Conclusion

- 5.51 On balance, therefore, we consider that the extent of the duty should be limited by applying to the exercise by planning authorities or the Welsh Government of all functions under the Bill other than those relating to the formulation of the development plan, the determination of applications for certificates, or claims for compensation, and the making of subordinate legislation.

### Recommendation 5-1.

**We recommend that a provision should be included in the Bill, to the effect that, in the exercise of any of their functions under the Code, the planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers:**

- (1) must have regard to the development plan, so far as relevant to the exercise of that function; and**
- (2) must exercise that function in accordance with the plan unless any other relevant considerations indicate otherwise**

**but that this duty should not apply to the exercise of functions relating to the formulation of the development plan, the determination of applications for certificates of lawfulness or claims for compensation, and the making of subordinate legislation.**

## THE GENERAL DUTY TO HAVE REGARD TO OTHER MATERIAL CONSIDERATIONS

### Possible reforms

- 5.52 We noted in the Consultation Paper that a number of provisions in the TCPA 1990 imposed, alongside the duty to have regard to the development plan (considered above), a duty to have regard to all “any other material considerations”. As with the development plan duty, the explicit duty to take into account other material considerations is laid on planning authorities, when determining planning applications and in the other circumstances set out at para 5.11 above,<sup>30</sup> and on the Welsh Ministers in relation to the determination of called-in applications and appeals.<sup>31</sup> Here

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<sup>30</sup> TCPA 1990, ss 70(2)(c), 91(2), 92(6), 97(2), 102(1), 172(1)(b), Sched 9, para 1(1).

<sup>31</sup> TCPA 1990, ss 70(2)(c), 77(4)(a), 79(4)(a).

too, however, that leaves a number of functions under the Act that are not subject to the statutory duty.

- 5.53 We observed in the Consultation Paper that the duty in section 70 and elsewhere to have regard to any other material considerations is arguably no more than a statutory statement of a basic principle of administrative law.<sup>32</sup> However, it is of critical importance, as decision-makers must in many cases take into account a whole host of factors that are only partially dealt with by the development plan, or as to which the plan is either out-of-date or totally silent.<sup>33</sup>
- 5.54 As to what can properly be classified as a “material consideration”, we touched on the relevant case law, and concluded that the principle outlined in *Stringer v Minister of Housing and Local Government*<sup>34</sup> still accurately summarised the position in law; but that it was not readily capable of being worded as a statutory provision. We also noted that the House of Lords and the Supreme Court on several occasions have confirmed that “material” in this context means “relevant”.<sup>35</sup>
- 5.55 We therefore made a number of suggestions, highlighted below.

#### **Inclusion in the Bill of a definition of “material considerations”**

***We suggested that to attempt to define relevant or material considerations in the Planning Code would cause as many problems as it would solve (Consultation Question 5-2(a)).***

- 5.56 Twenty-four consultees responded to this suggestion, of whom 21 were in agreement. One consultee, the CMet Residents Group, disagreed.
- 5.57 Some of those responding to Question 5-3 (discussed below) also suggested particular matters that should be explicitly recognised as “material considerations”, such as supplementary planning guidance, the public interest and the results of public participation; and crime and disorder. And one (Merthyr Tydfil CBC) suggested that some should be specifically excluded – such as health policies, the proximity of A3 uses<sup>36</sup> to schools etc. no doubt every user of the planning system could suggest something that should be included or excluded. However, it would be extremely difficult to compile a list that would be comprehensive.
- 5.58 The CMet Residents Group, in response to question 5-2, suggested a list of 19 items for possible inclusion in a list of “material considerations”, based on an examination of the Planning Portal website. We are grateful to them for carrying out this useful

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<sup>32</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, CA, per Lord Greene MR at p.229; see also *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, HL, per Lord Reid at p 1030, and *R v Alconbury Developments Ltd v Secretary of State* [2003] 2 AC 295 at [50] (Consultation Paper, para 5.28).

<sup>33</sup> Consultation Paper, para 5.29.

<sup>34</sup> [1970] 1 WLR 1281, at p.1294.

<sup>35</sup> *Tesco Stores v Secretary of State and West Oxfordshire DC* (1994) 68 P&CR 219, CA, per Lord Bingham at p.227; *R (Health and Safety Executive) v Wolverhampton CC* [2012] UKSC 34, 1 WLR 2264, per Lord Carnwath of Notting Hill at [26]. See Consultation Paper, paras 5.31, 5.32.

<sup>36</sup> Restaurants, snack bars and cafes (Class A3 in the Use Classes Order).

exercise. However, the result highlights the problems involved: several items (such as access for people with disabilities, heritage considerations, and the development plan) are covered by other statutory duties; one (Government policy) we deal with below; one (supplementary planning guidance) was heavily qualified. The remaining items form a list that is far from comprehensive. In particular, it refers to a number of urban concerns (parking, traffic, noise, overlooking and so on) but does not mention effects on national parks, open space, or biodiversity. Any such list would almost inevitably be open to the same criticism.

- 5.59 We thus remain of the view that it would not be helpful to try to produce a definition of “material [or relevant] considerations”, or to compile – even on a non-exclusive basis – a list of considerations that might be relevant.

### **“Material considerations” or “relevant considerations”?**

***We suggested that the term “relevant considerations” would be more appropriate than “material considerations” (Consultation Question 5-2(b)).***

- 5.60 Forty consultees responded on this point; 17 agreed with our suggestion, 11 were equivocal, and 11 disagreed.
- 5.61 Keith Bush QC agreed that “material” is ambiguous and difficult for lay people to understand. He also pointed out that “relevant” is easier to convey bilingually, as “perthnasol” easily conveys the same meaning as “relevant”. The Law Society agreed that the term “relevant considerations” is more appropriate, and better accords with present-day administrative law terminology. And the UK Environmental Law Association agreed that “one of the key problems with planning law in its current state is the unnecessarily confusing and outdated nature of the language used. Therefore, we would welcome the proposal to change this term to ‘relevant considerations’.”
- 5.62 Other respondents were more hesitant. Several, including PINS, made the point that the word “material” occurs in two significant contexts in the TCPA 1990 – “material change of use” (in section 55) and “material considerations” (in section 70 and elsewhere) – and questioned whether a change of the term in one context might cause a problem with its use in the other. Other respondents, largely local authorities and long-time users of the planning system, suggested that the term “material considerations” was well understood, and need not be changed.
- 5.63 We have accordingly considered carefully the meaning of the word “material” in the TCPA 1990. We observed that, as well as sections 55 and 70, there are over 40 other places in the Act where the word “material” is used as an adjective. The Oxford English Dictionary offers seven different definitions of the adjective “material”; but its use in the Act generally falls into three of these, some slightly overlapping.<sup>37</sup>
- 5.64 First, in a number of places, the word “material” is used in the sense of “major”, “not trivial” or “significant” (in Welsh, “sylweddol”) – for example, a building operation that

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<sup>37</sup> This not only causes problems for users of the English text, but it also causes significant difficulty for the Welsh translators. We are grateful for the assistance we have received on this point from the Welsh Government Translation Service.

materially affects the external appearance of a building; something that materially changes any condition or limitation; a material or non-material change to a planning permission; a material detriment to a house; an interest that would be materially affected by the taking of enforcement action; a material change in any of the matters relevant for determining lawfulness; being satisfied that a defect is not material; and a document that is legible in all material respects.<sup>38</sup> In each of these instances, the thing in question is material for the purposes of the statutory provision in question simply because it is not trivial – any building operation will affect the appearance of a house, but some are too minor to be taken into account.

5.65 Secondly, in a few places, “material” means “relevant” (in Welsh, “perthnasol”). The development plan thus only needs to be taken into account insofar as it is material, or relevant, to the application.<sup>39</sup> Similarly, decisions makers only need to have regard to other considerations – that is, considerations other than the development plan – only insofar as they are material, or relevant.<sup>40</sup> Thus, for example, the Courts have confirmed that personal circumstances of an applicant for planning permission may in some cases be “material” or “relevant” to the determination of the application. The definition of an “owner-occupier” refers to a person who at all times material for the purposes of [paragraph (a) or paragraph (b)] has been entitled to an owner’s interest – that is, at all times that are relevant for the specified purposes.<sup>41</sup>

5.66 A notable example of the use of the first and second meanings in a single statutory provision is section 193(7) of the TCPA 1990, which is as follows:

A local planning authority may revoke a certificate under section 191 or section 192 if, on the application for the certificate—

- (a) a statement was made or document used which was false in a material particular; or
- (b) any material information was withheld.

There are other provisions that are along similar lines. In the references to statements and documents that are “false or misleading in a material particular,” the word “material” seems to mean “significant”. But in the references to “withholding material information”, it seems more likely to mean “relevant”.

5.67 Thirdly, the provisions in section 56 of the TCPA 1990 dealing with the start of development refer to “material operation” and “material development”.<sup>42</sup> Each term is used in a very specific sense, defined in the section itself. Attention was drawn to these provisions by PEBA. And the word “material” in the phrase “material change of use” is arguably an example of the first of the above definitions (“major”, “not trivial”

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<sup>38</sup> TCPA 1990, s 55(1), (3), (5); s 55(2)(a)(ii); ss 61D(2),(3), 61DE(2); ss 69, 96A, 100A, 286; s 166(2); ss 65(6), 171D(5), 193(7), 194(1); ss 171BB(4), 173ZA; s 192(4); s 193(7); ss 217(4), 225B(4), 225D(3), 225I(3); s 329(3A).

<sup>39</sup> TCPA 1990, ss 70(2)(a), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172, 177(2).

<sup>40</sup> TCPA 1990, ss 62(4A), 70(2)(c), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172, 177(2).

<sup>41</sup> TCPA 1990, s 168(2).

<sup>42</sup> TCPA 1990, s 56(2), (4), (5).



or “significant”), but it is arguably also an example of the second (“relevant”). It is in any event a much-used legal term, which has come to have a reasonably well-defined meaning – albeit one that only emerges from a considerable volume of case law.

- 5.68 Against that background, we are not persuaded that the term “material considerations” is generally well understood. It may well be understood by those, such as planning authorities, planning consultants and lawyers, who have operated the planning system over many years. But there will be others – new entrants, third sector groups and individual land owners – who will not be familiar with the technical terms used. Whilst some may be unavoidable, the number of such terms should be minimised. We remain of the view that the phrases “development plan, so far as relevant” and “other relevant considerations” are likely to be more widely understood amongst users of the planning system generally. And guidance can emphasise that the term “relevant”, in this context, is identical to the old term “material”.
- 5.69 We therefore consider that the word “material” in the first sense identified above should be replaced with “significant” (“sylweddol”); when used in the second sense, it should be replaced with “relevant” (“perthnasol”). But we do not suggest any change to the use of the word “material” in section 56, as this is an entirely self-contained provision; nor to the phrase “material change of use”, as a well-recognised legal term of art.
- 5.70 In particular, we continue to recommend that the word “relevant” (or “perthnasol”) is used in place of “material” in the provisions of the Bill corresponding to sections 62(4A), 70(2), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172 and 177(2) of the TCPA 1990. We consider that this would clarify the effect of the law.

### Functions to which the duty should be applied

***We provisionally proposed that a provision be included in the Bill, to the effect that a public body exercising any function under the Code must also have regard to any other relevant considerations (Consultation Question 5-3)***

- 5.71 Thirty-four consultees responded, of whom 29 agreed, 4 were equivocal or raised other points, and 1 disagreed.
- 5.72 For the same reasons as underlie our conclusion in respect of the development plan, we consider that the duty to have regard to other relevant considerations should apply to any functions performed by bodies that make planning decisions. Moreover, since the duty to have regard to all relevant considerations already applies under the common law to the making of any administrative decision, it would be unsatisfactory to specify explicitly some functions but not others.
- 5.73 Newtown and Llanllwchaiarn Town Council disagreed, on the basis that it would like to see a definition of the words “any function”, particularly by reference to the position of community councils in the planning process. This issue would not arise, however, if the duty were confined to functions under the Planning Code carried out by a planning authority, a strategic planning panel, or the Welsh Ministers.
- 5.74 Given the existing general duty at common law to have regard to relevant considerations, this would amount to a clarification of the law.



### **Recommendation 5-2.**

**We recommend that:**

- (1) the Bill should not include a definition of the term “relevant [or material] considerations” or a list of examples; and**
- (2) the word “relevant” should be used in place of “material” in the provisions of the Bill corresponding to sections 62(4A), 70(2), 70A(1), 70A(6), 91(2), 92(6), 97, 102, 172 and 177(2) of the TCPA 1990.**

### **Recommendation 5-3.**

**We recommend that a provision should be included in the Bill, to the effect that, in the exercise of any of their functions under the Code, a planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers must also have regard to any other relevant considerations.**

## **SPECIFIC MATERIAL CONSIDERATIONS (1): LISTED BUILDINGS AND OTHER HISTORIC ASSETS**

*We provisionally proposed that a provision or provisions be included to the effect that 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 a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to the those matters (Consultation Question 5-4(a)).*

*We also suggested that “heritage 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 (Consultation Question 5-4(b)).*

### **The existing law**

- 5.75 We have summarised the existing duties regarding historic assets, and the limitation of their scope.<sup>43</sup> We also noted the illogical variations in their scope.
- 5.76 We provisionally proposed that that the duties relating to listed buildings and conservation areas should be widened so as to apply equally in relation to any historic asset (including world heritage sites, scheduled monuments, and registered parks and gardens). And we suggested that it would be appropriate to insert a power to

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<sup>43</sup> Consultation Paper, paras 5.41 to 5.56. See also discussion above, at **paras 5.15 to 5.17**.

enable the Welsh Ministers to add other categories of land to the definition of “historic asset”, as to enable the inclusion of, for example, registered battlefields.

### **General duty to have regard (or special regard) to historic assets**

- 5.77 As to the widening of the general duty, 45 consultees responded. 34 were in agreement – the Society for the Protection of Ancient Buildings (SPAB) and the Chartered Institute for Archaeologists, for example, “strongly agreed”, and the Law Society “welcomed the clarity this would bring”. And two consultees were equivocal.
- 5.78 Pembrokeshire Coast NPA, National Parks Wales and Carmarthenshire CC agreed in principle, but sought clarity as to the extent of the functions to which the duty would apply. They and others also pointed out that different categories of assets require differing levels of protection.
- 5.79 Two consultees disagreed with the proposal, suggesting that it was too wide and would result in ambiguity about the scope of the proposed power. Rhondda Cynon Taf CBC suggested that the duty should be limited to circumstances where “a decision affects the historic asset or its setting”. Newtown and Llanllwchaearn Town Council also suggested that the breadth of the definition created uncertainty about the position of town and community councils.
- 5.80 We disagree. In order to identify instances where decisions “affect the historic asset or its setting”, a public body must necessarily consider all the decisions which come within its jurisdiction. The duty to have regard to consider issues relating to historic assets must therefore necessarily be wide, in order to allow authorities to incorporate such issues as part of their wider decision-making powers. We also consider the definition to be sufficiently broad as to include town and community councils, where they participate in the determination of planning decisions which relate to the historic environment.
- 5.81 We would envisage that the wider duty would apply to the exercise of any functions under any legislation, as with the duties relating to national parks, AONBs etc.<sup>44</sup> This would achieve parity between the various special designations. This does not mean that all of those designations are of equal importance in every case, any more than that all listed buildings are of equal significance. But it would ensure that decision-makers and bodies putting forward proposals in connection with land that falls within any of the relevant categories will at least have regard to the desirability of preserving or enhancing it, as appropriate.
- 5.82 At present, the duty relating to listed buildings, such as it is, refers to the “preservation” of the buildings themselves, their setting and their features. The duty relating to conservation areas refers to the “preservation and enhancement” of their character or appearance. It would be possible to specify the duty differently for each class of historic asset – or, for example, extend the listed building duty to encompass scheduled monuments. However, we consider that would lead to much semantic argument, and consider that it would be preferable, if possible, to have a single duty relating to all classes of historic assets.

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<sup>44</sup> See paras 5.19 to 5.25 above.

5.83 Several consultees suggested that the word “conservation” be used in place of “preservation” – the Historic Houses Association (HHA) and the CLA, for example, suggesting that this would be “essential”.

5.84 The House of Lords has considered the term “preservation”, in the context of the conservation area duty. It upheld the decision of the Court of Appeal that:

Neither 'preserving' nor 'enhancing' is used in any meaning other than its ordinary English meaning. The court is not here concerned with enhancement, but the ordinary meaning of 'preserve' as a transitive verb is 'to keep safe from harm or injury; to keep in safety, save, take care of, guard'.<sup>45</sup> In my judgment character or appearance can be said to be preserved where they are not harmed. Cases may be envisaged where development would itself make a positive contribution to preservation of character or appearance. A work of reinstatement might be such. ... The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved.<sup>46</sup>

5.85 The phrase “the preservation of a listed building” would no doubt be interpreted similarly. And the duty is not to achieve the preservation (as defined above) of the building in all circumstances, but merely to have regard to the desirability of doing so. It is also surprising that the duty to consider the desirability of “enhancing” the asset applies only in the case of a conservation area, and not a listed building.

5.86 Finally, it may be noted that the Welsh word “cadwraeth” can be translated as either “conservation” or “preservation”.

5.87 We consider that the general duty should be phrased in terms of having regard to the desirability of preserving or enhancing the asset in question, and its special features, and its setting.

### **Categories of historic assets to which the duty should apply**

5.88 In the Consultation Paper, we suggested that the new duty should apply in relation to “historic assets”, defined to include world heritage sites, scheduled monuments, listed buildings, conservation areas, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe.

5.89 Thirty-two consultees responded on this point; all agreed in whole or part. Several (including the Theatres Trust, several archaeological trusts, and the SPAB) suggested that the definition was too tightly drawn, in that it included statutorily recognised categories, but not other categories such as buildings or sites recognised by local authorities to be of interest. Others suggested that it was too loose; PEBA, for example, observed that “it is important that the definition of ‘historic assets’ is clearly limited to those that have been recognised for their value through a formal

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<sup>45</sup> *Oxford English Dictionary*, 2nd ed. (1989), vol. XII, p. 404.

<sup>46</sup> *South Lakeland DC v Secretary of State* [1991] 1 WLR 1322, (Mann LJ) at 1326-1327; upheld in the House of Lords at [1992] 2 AC 141 at p 150F.

designation. Otherwise the scope of the special duty will be uncertain and it will be seen to lack justification.”

- 5.90 The Law Society agreed that categories of assets could be augmented by ministers; the HHA and the Mineral Products Association considered otherwise.
- 5.91 We understand the desire to enable the duty to be extended to encompass less formally designated assets; but we consider that a provision such as this should only relate to categories of assets that are recognised by or under statute. Including a category such as “conflict sites, historic landscapes, other areas or sites which local authorities or the Welsh Ministers consider to be of local historic, archaeological or architectural interest”, as urged by two consultees, would leave the position too open-ended. On the other hand, as perceptions change over the years as to the value of particular categories of assets, it should be possible for the Welsh Ministers to introduce a formal register – for example, of battle sites – without the need to amend primary legislation.
- 5.92 We therefore consider that the definition of “historic asset” should remain as suggested in the Consultation Paper.

#### **Duty to have consider historic assets: other points**

- 5.93 In the Consultation Paper, we suggested a twofold duty –
- 1) a general duty to have regard to the preservation of historic assets [etc], applicable to any public body (undefined) carrying out any of its functions; and
  - 2) a more specific duty to “have special regard” to the preservation of assets, applicable to any such body carrying out any function under the Planning Code or the Historic Environment Code.
- 5.94 In relation to the first of these, what we had in mind was a general duty equivalent to those discussed at the start of this Chapter relating to national parks and AONBs, applicable to all bodies whose operations do bring them into contact with historic buildings and areas. This is the duty that is conspicuously absent at present. The second duty was to be applicable in the specific context of performing functions under the planning Acts. This duty exists at present, under the Listed Buildings Act 1990, but only in a somewhat attenuated form, as noted above.
- 5.95 Few consultees made any comment on the distinction between these; and we remain of the view that a twofold duty is appropriate.
- 5.96 As to the bodies to whom the more general duty should apply, it is noticeable that each of the duties discussed earlier in the Chapter – both those in the planning Acts and those in other legislation – is applied to a specific group of public bodies. We do not think it appropriate that the general duty relating to historic assets should be applied to the very large collection of bodies specified in Schedule 19 to the Equality Act – most of whom will have no involvement with such matters. But it should apply to bodies whose operations do bring them into contact with historic assets.

- 5.97 Rather than create a new grouping, we think that it would be most straightforward for the duty to be applicable, as far as possible, to bodies within the categories specified in one of the statutes identified earlier – notably section 11 of the Countryside Act 1968, section 11A of the National Parks and Access to the Countryside Act 1949,<sup>47</sup> and section 85 of the Countryside and Rights of Way Act 2000. The categories of bodies specified in those three provisions are very similar, but we consider that the most appropriate formulation is that contained in section 85 of the 2000 Act – namely, Ministers, those holding public office, local authorities (including community councils), national park authorities and statutory undertakers (defined as in Part 11 of the TCPA 1990). Strategic planning panels should be added to that list.
- 5.98 We thus consider that there should be a general duty – located within the Historic Environment Bill – for any such body, when carrying out any of its functions so as to affect a historic asset or its setting, to have regard to the desirability of preserving or enhancing the asset, its setting, and any features of special interest that it possesses. And if that were to be done, there would be no need for that general duty to be signposted in the Planning Bill – as with the sustainable development duty, considered below.<sup>48</sup>
- 5.99 As to the more specific duty relating to the performance of planning functions (currently under the TCPA 1990), for the reasons discussed above in relation to the duty to have regard to the development plan and any other material considerations<sup>49</sup>, we consider that it should be applicable to planning authorities, strategic planning panels and the Welsh Ministers. Others with functions under planning legislation, such as statutory undertakers and community councils, would of course still be subject to the less demanding general duty.
- 5.100 If our recommendation to unify planning permission with LBC and CAC is accepted<sup>50</sup>, the more specific duty should be located within the Planning Bill, to emphasise the continuing importance of the historic environment in planning decisions. If that recommendation is not accepted, both duties could be located within the Historic Environment Bill.
- 5.101 We realise that this expansion of the duties currently found in the Listed Buildings Act 1990 is a change in the law. But we consider that it would not involve significant new policy, or give rise to significant controversy; and that the change would be appropriate to make at the same time as consolidating the existing law.

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<sup>47</sup> Introduced by Environment Act 1995, s 62; applied in Wales by section 4A of the 1949 Act.

<sup>48</sup> See **paras 5.143 to 5.146** below.

<sup>49</sup> See **paras 5.36 to 5.43 and 5.72** above.

<sup>50</sup> See **Recommendation 13-1**.

#### **Recommendation 5-4.**

**We recommend that:**

- (1) a provision should be included in the Historic Environment Bill to the effect that a public body exercising any function in relation to any historic asset or its setting must have regard to the desirability of preserving or enhancing the asset, its setting, and any features of special interest that it possesses; and**
- (2) a provision should be included in the Planning Bill to the effect that planning authorities, strategic planning panels and the Welsh Ministers, when exercising any function under the Planning Code and the Historic Environment Code must have special regard to the those matters so far as relevant to the exercise of that function;**
- (3) “public body” should include:**
  - the Welsh Ministers;**
  - any Minister of the Crown;**
  - any public body (including a local authority, a national park authority, a strategic planning panel, and a joint committee);**
  - any statutory undertaker (as defined in Part 11 of the TCPA 1990),**
  - any person holding public office (as defined in section 85 of the Countryside and Rights of Way Act 2000);**
- (4) “heritage assets” should 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.**

#### **SPECIFIC MATERIAL CONSIDERATIONS (2): THE USE OF THE WELSH LANGUAGE**

***We provisionally proposed that a provision be included in the Bill, to the effect that the relevant considerations, to which a body must have regard when exercising any function under the Code, should include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; but that the duty to consider the effect on the use of the Welsh language was not to affect whether regard is to be had to any other consideration when exercising that function or the weight to be given to any such consideration in the exercise of that function (Consultation Question 5-5).***

- 5.102 In the Consultation Paper, we noted that the P(W)A 2015 had inserted into the PCPA 2004 provisions requiring the sustainability appraisal produced in connection with the

National Development Framework and strategic and local development plans to include “an assessment of the likely effects of the policies in the draft Framework on the use of the Welsh language”.<sup>51</sup> And section 31 of the P(W)A 2015 inserted into the TCPA 1990 section 70(2)(aa), requiring those determining planning applications (and appeals) to have regard to “any considerations relating to the use of the Welsh language, so far as material to the application.”

- 5.103 But there is no duty in relation to any other function under the TCPA 1990, or any functions under the Listed Buildings Act 1990, to have regard to the effect of the exercise of that function on the Welsh language.
- 5.104 As will be apparent from the commentary above in relation to other considerations, any consideration – whether explicitly mentioned in the relevant statute or not – must be taken into account if it is relevant in law to the exercise of a particular statutory function, and must be ignored if it is irrelevant.<sup>52</sup> That applies, in principle, to the effect of a decision on the use of the Welsh language just as to any other consideration. However, it is not always clear whether a particular matter is indeed relevant, in this general sense, which is why the Act makes specific reference to certain matters, to remove any doubt.
- 5.105 We accepted that it would be desirable that there should be on this basis some mention in the Planning Bill of the effect of planning decisions on the use of the Welsh language. We therefore accepted that this is an exception to the principle, noted above, of generally not mentioning specific relevant considerations.<sup>53</sup> However, there seemed to be no reason to limit the range of functions to which the duty applies. we accordingly proposed the inclusion of a provision to the effect that such considerations would include the effect of the exercise of the function in question on the use of the Welsh language, where relevant.
- 5.106 But we accepted that it would also be appropriate to include in the Bill a provision equivalent to section 31(4) of the P(W)A 2015, to the effect that the duty to have regard to the Welsh language should not affect whether regard was to be had to any particular consideration, or the weight to be given to any such consideration.
- 5.107 Of the 37 consultees responded to this proposal, 30 were in agreement. Keith Bush QC observed that

the WG’s language strategy *Cymraeg 2050* has important implications for land use, especially on the effect of development patterns on the sustainability of natural Welsh communities. Effective consideration of these implications must be secured as an integrated part of the planning process.

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<sup>51</sup> PCPA 2004, s 60B(2), inserted by P(W)A 2015, s 3 (NDF); s 60I(8), inserted by P(W)A 2015, s 6 (strategic development plans); PCPA 2004, s 62(6A), inserted by P(W)A 2015, s 11 (local development plans); see also PCPA 2004, s 61(2)(a).

<sup>52</sup> See **para 5.28** above.

<sup>53</sup> See **para 5.59** above.

- 5.108 Huw Williams also agreed, commenting that the proposal maintained the present position, but in clearer terms. Several consultees agreed but only on the basis that the caveats as to the weight to be given to other considerations would be included.
- 5.109 Substantial responses to this proposal were received from Ms Meri Huws (the Welsh Language Commissioner) and from Mr Owain Wyn (Chairman of the Eryri (Snowdonia) National Park Authority).
- 5.110 Ms Huws suggested that the requirement to have regard to the likely effect, if any, of the exercise of a function on the use of the Welsh language, is too limited; and that the wording of the duty should be aligned more closely with the wording of the requirements as to policy-making standards in the Welsh Language Standards (No 1) Regulations 2015, made under section 29 of the Welsh Language (Wales) Measure 2011.
- 5.111 The 2015 Regulations prescribe ten standards to guide the commissioning of research, the publication of consultation documents, and the formulation of new policies, and apply to such activities when undertaken by, amongst others the Welsh Ministers and local authorities<sup>54</sup> – which could include the formulation of the development plan. But they do not relate to the making of discretionary decisions by such bodies – including decisions on applications for planning permission and other consents. We consider that it is helpful for guidance to be produced by the Welsh Government as to the proper interpretation of the requirement to have regard to the effect of decision-making on the Welsh language; and the production of Technical Advice Note TAN 20, *Planning and the Welsh Language* – most recently updated in October 2017 – is helpful in this regard. A future edition of TAN 20 may include advice framed in terms similar to those to be found in the 2015 Regulations; but to prescribe such standards in legislation specifically applying to planning decisions seems inappropriate.
- 5.112 Ms Huws also drew attention to the lack of evidence as to the effect of planning decisions on the use of the Welsh language. We understand that concern, but consider that such monitoring should be encouraged by guidance and as a matter of good practice, rather than required by legislation.
- 5.113 Mr Wyn commented that the role of the planning system in securing a flourishing Welsh language will vary as between different areas. He drew attention to the guidance in TAN 20 acknowledging the concept of “areas of linguistic sensitivity”, and argued that the Bill should give statutory force to such a concept, requiring “special” consideration to be given to language issues in such areas. We consider that this, too, is a matter more suitable for guidance than legislation – not least because the boundaries of such areas would need to be precisely drawn for such a requirement to be capable of implementation, which would no doubt be far from straightforward.
- 5.114 Some consultees drew particular attention to potential problems if the control of outdoor advertising were to be subject to the proposed duty. However, what is proposed is merely a requirement to have regard to the effect of a decision on the

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<sup>54</sup> Welsh Language (Wales) Measure 2011, Sched 6.



use of the Welsh language.<sup>55</sup> It is thus a long way short of the position that applies in the Gaeltacht (the Irish-speaking area of the Republic of Ireland), where deemed consent for advertisements only applies if they are in Irish, or bilingual with prominence given to the Irish text.<sup>56</sup>

- 5.115 The Institute of Civil Engineers Wales disagreed, on the basis that the proposal might have undesired consequences, including possible discrimination.
- 5.116 We have already recommended that the duty to have regard to the development plan and to any other material considerations should apply only to planning authorities, strategic planning panels and the Welsh Ministers, and not to public bodies generally. The same point would apply in relation to this proposal.
- 5.117 A similar approach also applies in relation to the functions to which the Welsh language duty should be attached, to avoid unmeritorious litigation. We thus consider that the duty should apply to the exercise of all functions under the Bill other than those relating to the determination of applications for certificates, or claims for compensation.

#### **Recommendation 5-5.**

**We recommend that a provision should be included in the Bill to the effect that:**

- (1) the relevant considerations, to which a planning authority, a strategic planning panel or, as the case may be, the Welsh Ministers must have regard (in accordance with Recommendation 5-3) when exercising any function under the Code – other than those relating to the determination of applications for certificates, or claims for compensation – should include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; but**
- (2) the duty to consider the effect of the exercise of a function on the use of the Welsh language is not to affect:**
  - whether regard is to be had to any other consideration when exercising that function or**
  - the weight to be given to any such consideration in the exercise of that function.**

**Such a provision would replace section 70(2)(aa) of the TCPA 1990 and sections 60B(2), 60I(8), 62(6A) of the PCPA 2004.**

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<sup>55</sup> And see TAN 20, section 4.

<sup>56</sup> Planning and Development Regulations 2001, art 6(2)(b)(v) (advertisements as “exempted development”).

### SPECIFIC MATERIAL CONSIDERATIONS (3): WELSH GOVERNMENT POLICY

***We provisionally proposed that a provision be included in the Bill, to the effect that the relevant considerations, to which a public body must have regard when exercising any function under the Code, should include the policies of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; but that the duty to consider Welsh Government policies should not affect whether regard is to be had to any other consideration when exercising that function, or the weight to be given to any such consideration in the exercise of that function (Consultation Question 5-6).***

- 5.118 Alongside the Wales Spatial Plan and the Framework, the published policies of the Welsh Government, and in particular *Planning Policy Wales* – regularly updated, most recently in November 2016 – and the technical advice notes (TANs) are hugely influential in providing the policy basis for both plan-making and decision-taking.
- 5.119 As to the status of Government policy in plan-making, the PCPA 2004 requires that, in preparing a local development plan, a planning authority in Wales must have regard to “current national policies” (a phrase that is not defined).<sup>57</sup> But there is no equivalent duty in relation to the determination of planning applications, nor to the exercise of any other functions under the TCPA 1990 or the Listed Buildings Act 1990.
- 5.120 However, the courts have stated clearly that the policy statements of the Secretary of State (in England) are material considerations to which regard should be paid in considering the outcome of a planning application or a planning appeal, even though they do not displace the primacy given by the TCPA 1990 to the statutory development plan.<sup>58</sup> The planning policies of the Welsh Government would similarly need to be taken into account in relation the exercise of any other planning function to which they are relevant.
- 5.121 In the Consultation Paper, we observed that, given that the planning policies of the Welsh Government are of such significance in the day-to-day operation of the planning system, it seemed surprising that they are not mentioned on the face of the TCPA 1990 as a consideration to be taken into account.
- 5.122 We therefore provisionally considered that, as with the Welsh language (above), the Bill should state explicitly that such policies, so far as relevant, should be amongst the matters to which public bodies are to have regard when exercising any functions under the Planning Code.
- 5.123 43 consultees responded to this question; 41 were in agreement.
- 5.124 Planning Aid Wales and the Law Society suggested that it would be helpful if the scope of the term “Welsh Government policy” were to be clarified. The former suggested that it should mean “PPW, TANs and Ministerial statements”, but it would

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<sup>57</sup> PCPA 2004, s 62(5). And see *R (Persimmon Homes Ltd) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin), at [20], [118].

<sup>58</sup> *Gransden (E C) Ltd v Secretary of State* (1987) 54 P&CR 86 per Woolf J at p 87; *Hopkins Homes v Secretary of State*; *Cheshire East BC v Secretary of State* [2017] UKSC 37, PTSR 623, at [21].

inevitably not be clear which statements would be included, and what weight should be given to statements made some while ago. That indeed highlights the problem inherent in any attempt to define the term.

- 5.125 We consider that the duty should be explicitly confined to the policies of the Welsh Government relating to the use and development of land, to make it plain that Government policy on other issues is not necessarily to be taken into account – although it might of course be relevant in a particular case. And such policies should only be considered insofar as they are relevant to the exercise of the function in question. Determining which policies are relevant will remain, as it is at present, an exercise for the decision-maker.
- 5.126 But we do accept, as with some of the other duties already considered, that the duty should be laid only upon planning authorities, strategic planning panels and the Welsh Ministers, rather than on public bodies generally.
- 5.127 Subject to that point, we consider that our proposal should be pursued. We consider that it does not constitute an expansion of the existing set of duties (currently in section 70 and elsewhere in the TCPA 1990) to have regard to material considerations, since the courts have already accepted that Government policies are to be taken into account in any event. But it would be a useful clarification of the existing law.

#### **Recommendation 5-6.**

**We recommend that a provision should be included in the Bill, to the effect that:**

- (1) the relevant considerations, to which a planning authority, a strategic planning panel or the Welsh Ministers must have regard (in accordance with Recommendation 5-4) when exercising any function under the Code – other than those relating to the determination of applications for certificates and claims for compensation – should include the policies of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; but**
- (2) the duty to consider Welsh Government policies is not to affect:**
- whether regard is to be had to any other consideration when exercising that function, or**
  - the weight to be given to any such consideration in the exercise of that function.**

## THE SUSTAINABLE DEVELOPMENT PRINCIPLE

***We provisionally proposed that it is not necessary for the Bill to contain a provision, equivalent to section 2 of the P(W)A 2015, to the effect that any public body exercising some of the functions under the Code must do so as part of its duty under the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development (Consultation Question 5-7).***

### The existing law

- 5.128 In the Consultation Paper, we drew attention to section 3(1) of the Well-being Act 2015, which provides that each public body must “carry out sustainable development”. That includes identifying well-being objectives that are designed to maximise its contribution to achieving each of the well-being goals specified in section 4 of that Act, and taking all reasonable steps to meet those objectives, but the duty is not limited to such objectives.<sup>59</sup> Section 3 does not confer upon public bodies a new function; rather, it lays upon them a new duty to exercise the functions that they already have as part of their duty to carry out sustainable development. And amongst those functions are all of their various powers and duties under the planning Acts.
- 5.129 We then noted that section 2 of the P(W)A 2015, which makes it clear that the new duties under the Well-being Act apply in particular to
- 1) the exercise by public bodies of functions under Part 3 of the TCPA 1990, relating to planning applications,
  - 2) the exercise by them of functions under Part 6 of the PCPA 2004, relating to development planning.
- 5.130 Section 2 of the P(W)A 2015 adds nothing to the duty under section 3 of the Well-being Act. It states that the principle of sustainable development does not alter whether regard should be had as to whether a particular matter is “material” to a particular planning decision (see above), nor as to the weight to be given to any such matter. And the more general duty under section 3 of the Well-being Act 2015 applies equally to the performance of any planning functions under any Act – including the TCPA 1990, the Listed Buildings Act 1990, the Hazardous Substances Act 1990, and the PCPA 1990.

### Proposed change

- 5.131 We considered that it was not helpful for there to be in the Planning Bill a specific provision linking only some of the functions to be performed under it to the Well-being Act, since the duty under section 3 of that Act would apply to the exercise of such functions in any event.
- 5.132 It would be possible for the Bill to include a provision equivalent to section 2 of the P(W)A 2015, but enlarged in its application so as to apply clearly to the exercise by a public body of any function under the Code. We did not consider that such a change

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<sup>59</sup> For the definition of “public body” in the Well-being Act, see **para 5.xx** above.

would in practice lead to any extra burden on planning authorities or others, but it would clarify the legislation.

- 5.133 However, we also noted that a number of other statutes (for example, those relating to the natural environment) impose duties on public bodies, in the exercise of any of their functions, to have regard to various matters.<sup>60</sup> On balance, we concluded that would not be helpful for there to be a reference to each of those duties in the Planning Bill, in addition to the reference that already exists in the statute in question. Instead, we suggested that the existence of those duties should be referred to in guidance.
- 5.134 We saw no obvious reason why the duty under section 3 of the Well-being Act (albeit slightly differently phrased) was any different in principle from those other duties. We therefore provisionally found no reason for section 2 of the P(W)A 2015 to be restated in the Bill, either in its present form or extended so as to apply explicitly to the exercise of other functions under the Code.

## Response

- 5.135 43 consultees responded to this question. 27 were in agreement with our proposal; seven were equivocal; and nine disagreed.
- 5.136 Allan Archer commented:
- I think, although it is bound to raise an eyebrow, being such a recent legislative provision, that you have presented a cogent rationale for not carrying forward the Well-being cross-reference.
- 5.137 However, he and others emphasised that the sustainable development duty must be adequately highlighted and underlined in national policy and guidance.
- 5.138 The Bar Council, on the other hand, observed:
- The rationale for this omission appears to be at odds with what we understand is one of the chief purposes of the Codification exercise, namely better presentation and simplification in order to enable the public to understand the planning system more readily as well as being comprehensive... The duty to carry out sustainable development is an important one, and may not be well-understood by members of the public... Given the importance of ensuring that the Code is comprehensive, we would suggest that there is real merit in re-stating the statutory duty.
- 5.139 A number of other consultees disagreed with the proposed omission, making the more general point that the concept of sustainable development is central to planning, such that the cross-reference to the duty under the well-being Act should be retained. Huw Williams, who was a member of the Independent Advisory Group whose report led to the enactment of the P(W)A 2015, observed that “sustainable development has been a feature of planning permission policy and plan preparation for many years.

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<sup>60</sup> See **paras 5.19 to 5.25** above.

As such it must be considered in the ‘planning balance’ when planning decisions, particularly decisions on planning applications, are considered.”

- 5.140 We recognise that the sustainable development principle is central to the planning system. The opening paragraph of *Planning Policy Wales*, for example, states:

*Planning Policy Wales* (PPW) sets out the land use planning policies of the WG...It translates our commitment to sustainable development into the planning system so that it can play an appropriate role in moving towards sustainability.<sup>61</sup>

- 5.141 But we note that section 2 of P(W)A 2015 does not elevate the importance of sustainable development above that of the development plan.
- 5.142 We thus accept that there is a case for an explicit reference to sustainable development on the face of the Bill. And we understand the argument that it would be helpful for users if all the duties relating to the operation of the planning system were to be referred to in a single place.
- 5.143 On the other hand, for the reasons explored below in relation to Recommendation 5-8, we have concluded that it is not appropriate for a list of such duties to be included in the Bill; and there is no reason for the sustainability duty to be treated differently. In particular, if only some duties are mentioned, it may be thought that others are less important; and if a particular duty is mentioned in one some statutes, it arguably might be thought to apply less in relation to others.
- 5.144 Further, although we have recommended that two specific considerations should be referred to explicitly in the Bill – impact on the Welsh language, and the policies of the Welsh Government – neither of those is the subject of a directly applicable provision in another statute. The same does not apply in relation to the sustainable development duty, which is and will remain the subject of the Well-being Act 2015.
- 5.145 We also note the routine practice of the Planning Inspectorate, noted by Mr Williams and by the Law Society, to refer to sustainability at the end of decisions on planning appeals. However, interestingly, the reference is directly to the duty under section 3 of the Well-being Act 2015, rather than to section 2 of the P(W)A 2015. That too suggests that a reference in planning legislation to the Well-being Act 2015 is not required.
- 5.146 On balance, therefore, we remain of the view that it is not necessary to have an explicit reference to sustainability and the Well-being Act 2015 in the Planning Bill, provided that it continues to be prominently referred to in Welsh Government guidance.

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<sup>61</sup> PPW, Edition 9, November 2016, para 1.1.1.

### **Recommendation 5-7.**

**We recommend that it is not necessary for the Bill to contain a provision, equivalent to section 2 of the P(W)A 2015, to the effect that any public body exercising some of the functions under the Code must do so as part of its duty under the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development.**

## **DUTIES UNDER OTHER STATUTORY SCHEMES**

***We provisionally proposed that a series of signpost provisions to duties in non-planning legislation that might be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance (Consultation Question 5-8).***

- 5.147 In the Consultation Paper, we noted that, in addition to the duties applying directly to the exercise of functions by decision-makers under the planning Acts, there were a number of other statutes that impose on public bodies duties that are directly relevant to the exercise of those functions. We have outlined them earlier in this Chapter.<sup>62</sup>
- 5.148 We observed that, given that many of those using planning legislation are unaware of some or all of those duties, it might at first sight seem appropriate to restate them in the Bill. However, to do so would add to the length of the Bill, and might lead to a number of problems, including the following:
- 1) it would initially duplicate the provisions in the non-planning statutes, but would lead to a risk that, when those statutes were updated, amended or replaced, the Planning Act would not be amended identically;
  - 2) it might be difficult to know which duties to include in such a list, and which to exclude;
  - 3) it would lead to a risk of one or more of such duties being omitted, inadvertently or otherwise, especially as further duties are added in future legislation – with the consequence that duties not mentioned might be come to be ignored or at least given less weight;
  - 4) the order of any such list might be seen to imply greater weight being given to some duties than to others.

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<sup>62</sup> Listed Buildings Act 1990, ss 16, 66, 72 (listed buildings and conservation areas); Well-being Act 2015, s 3 (sustainable development); Countryside Act 1968, s 11 (countryside); National Parks and Access to the Countryside Act 1949, s 11A (national parks); Countryside and Rights of Way Act 2000, s 85 (AONBs); Environment (Wales) Act 2016, s 6(1) (biodiversity and resilience of ecosystems); Conservation of Habitats and Species Regulations 2010, reg 9; Waste (England and Wales) Regulations 2011, reg 18; Water Environment (Water Framework Directive) (England and Wales) Regulations 2017; Crime and Disorder Act 1998, s 17; Equality Act 2010, s 149 ; see **paras 5.18 to 5.27**.



- 5.149 It would, secondly, be possible not to repeat the wording of each duty, but simply to include a “signpost” provision as to where the duty is to be found (“section 70 is subject to the provisions of section 11 of the Countryside Act 1968 [etc]”). That would still give rise to most of the above problems, and would in addition require users of the Planning Act to look at another Act to find the precise wording of the duty.
- 5.150 On balance, therefore, whilst we considered (and suggested in our Scoping Paper) that there might be merit in the second approach outlined above, we considered on reflection that the inclusion of such a list in the Bill might cause as many problems as it would solve.
- 5.151 We therefore considered that it would be more appropriate for consideration to be given to the inclusion of a series of signpost provisions to duties in non-planning legislation be included within the guidance forming part of the Code – possibly along with appropriate commentary outlining the likely relevance of each category to various types of planning functions.
- 5.152 Of the 37 consultees who responded to this question, 36 agreed. The Association of Local Government Ecologists (Wales) made the sensible comment that it would be helpful if the Welsh Government were to maintain an up-to-date list of the duties in question on their planning website and via the Planning Portal.
- 5.153 The Bar Council commented that this approach would make the provisions vulnerable to changes in Ministerial guidance, and suggested that the list of relevant duties be contained in a document with formal permanence, such as a Schedule to the main Planning Bill.
- 5.154 For the reasons stated above, we remain of the view that guidance, not legislation, is the most appropriate place for signposting in this instance, which also enables commentary to be provided as to the relevance of the duty in question to the exercise of planning functions.

#### **Recommendation 5-8.**

**We recommend that references to the duties in non-planning legislation that may be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance, and be made available on the Welsh Government and Planning Portal websites.**

## **COAL MINING**

- 5.155 Section 53(3) of the Coal Industry Act 1994 – which was enacted at the time the coal industry was being privatised – requires that those who formulate proposals for inclusion in a planning application for coal mining, land restoration following mining, and incidental operations must:



- 1) have regard to the desirability of preserving natural beauty, conserving flora and fauna and geological or physiographical features of special interest, and protecting sites, buildings, structures and objects of architectural, historic or archaeological interest; and
  - 2) mitigate any adverse effects of their proposals on flora, fauna [etc].
- 5.156 Further, when a planning authority is considering a planning application for such mining etc proposals, it is required by section 53(2) of the 1994 Act to have regard to the desirability of preserving natural beauty etc., and to whether the applicants have complied with their duties under section 53(3).
- 5.157 We noted in the Consultation Paper that a planning authority will generally be required by other legislation – including the Well-being Act – to have regard to the matters mentioned in section 53 of the 1994 Act. Even where it is not explicitly under such a duty, it will be under the general duty, already noted, to take into account everything relevant – which is likely to include those matters. Further, it is inconceivable that the development plan will not have relevant policies on those matters – which the planning authority will of course have to take into account.
- 5.158 We accordingly considered that section 53(2) (the duty on the planning authority) added nothing. Further, we suggested that, if the authority was required to take those matters into account when assessing proposals, those formulating the proposals would equally have to take them into account – either avoiding any adverse impacts or mitigating them as far as possible. Section 53(3) would therefore be unnecessary. We therefore suggested that none of section 53 needed to be reproduced in the new Bill.
- 5.159 Of the 32 consultees who responded to this question, 23 agreed to the omission of section 53; six agreed with omitting section 53(2) (the duty on planning authorities) but not section 53(3) (the duty on mineral operators).
- 5.160 In addition to the duties on a planning authority referred to above, any planning application for a significant mining operation is subject to the requirements of the TCP (Environmental Impact Assessment) (Wales) Regulations 2017, which implement in UK law the requirements of EEC Directive 85/337/EEC. These classify as Schedule 2 development, requiring an assessment, all proposals for open-cast mining and underground mining that are likely to have significant effects on the environment by virtue of their nature, size or location. Schedule 4 to those Regulations specifies the matters to be contained in an assessment, which include all those referred to in section 53 of the Coal Industry Act 1994, and others, in significantly greater depth.
- 5.161 It follows that any proposal and planning application that are subject to the requirements of section 53 of the 1994 Act will also be subject to the much more detailed requirements of the 2017 Regulations – both as to the preparation of an assessment of the effects of the proposal and as to the consideration of those effects by the planning authority. We therefore remain of the view that section 53 of the 1994 Act is wholly redundant, and need not be reproduced.

#### **Recommendation 5-9.**

**We recommend that section 53 of the Coal Industry Act 1994 (environmental duties in connection with planning) should be repealed.**

### **A STATUTORY PURPOSE FOR PLANNING CONTROL**

- 5.162 In the light of the previous proposals in Chapter 5 of the Consultation Paper, we provisionally proposed that there is no need for the Bill to contain a provision explaining the purpose of the planning system in Wales.
- 5.163 We suggested in the Scoping Paper that it might be appropriate for the Bill to contain a provision setting out a statutory purpose for the planning system in Wales.<sup>63</sup> However, in the Consultation Paper we considered that such a provision would not be necessary, in the light of the collection of other statutory duties that we were proposing and that to include a statutory purpose alongside such those various duties would possible cause unnecessary and unhelpful duplication and possible conflict.
- 5.164 Of 35 consultees who responded to this question, 26 were in agreement; a number of planning authorities pointed out that a statement of the purpose of the planning system could be the subject of much debate and differences of opinion both as to the principles and as to the detailed wording; and governments of different political persuasions might have different views, so there could be scope for regular changes. The Law Society observed that further clarity would be introduced if the Code has an overview section at the start (as with most modern Assembly legislation) – although we note that such a provision usually sets out the content of the piece of legislation rather than its overall purpose.
- 5.165 Some disagreed. Cardiff and Caerphilly Councils and POSW South West Wales suggested that the purpose of planning could be “the management and delivery of development in the public interest in a sustainable manner that takes account of its impact on people, heritage and natural assets, and other material considerations”. This echoes the formulation suggested by the Chartered Institute for Archaeologists: “the achievement of sustainable development in the public interest, which involves balancing environmental, social and economic interests”. The Bar Council drew attention to Art L 101-2 of the French *Code de l’Urbanisme* and s II-1-1 of the German *Baugesetzbuch*; each of which is a statement of the principles that are to guide public authorities, set out in considerable detail.
- 5.166 We have concluded that any statement of purpose that went into any detail would stray into making statements of the policy to be followed by the planning control system – as the French and German Codes do. Formulations that avoided making statements of policy, such as the first of those referred to above, would not be at all informative. In the UK system, policy is set in policy documents rather than frozen in legislation. Earlier in this chapter we have recommended the inclusion of duties to

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<sup>63</sup> Consultation Paper, paras 5.4 to 5.8, 5.119 to 5.121.

have regard to such policies, either in the development plan or other policy documents which amount to relevant considerations.

- 5.167 We therefore do not recommend the inclusion in the Bill of a formal statement as to the purpose of the planning system.

#### **Recommendation 5-10.**

**In the light of the previous proposals in this Chapter, we do not recommend that the Bill should contain a provision explaining the purpose of the planning system in Wales.**

## **THE ADMINISTRATION OF THE PLANNING SYSTEM**

### **The Planning Inspectorate**

*We provisionally proposed that persons appointed by the Welsh Ministers for the purpose of determining appeals, conducting inquiries and other similar functions should be referred to in the Planning Code as “inspectors” or “examiners”, but in either case in such a way as to make it clear that this was not to prevent the Welsh Ministers appointing for a particular purpose a person other than an employee of the Planning Inspectorate (Consultation Question 5-11).*

- 5.168 Schedule 6 to the TCPA 1990 is titled somewhat obliquely “Determination of certain appeals by persons appointed by the [Welsh Ministers]”; and there are other references, particularly in secondary legislation, to “appointed persons”. But there is at present no other provision in primary legislation relating to the role of the Planning Inspectorate in the planning system. This might seem surprising, in view of its critically important role.
- 5.169 In the Consultation Paper, we considered briefly whether there should be a brief provision in the Bill, perhaps following the model of section 203 of the Planning Act (Northern Ireland) 2011, recognising the existence and role of the Planning Inspectorate (“yr Arolygiaeth Gynllunio”). The Inspectorate had suggested that the legislation does not need to refer to the Inspectorate explicitly; the only desirable change would be to refer to “an inspector appointed by the Welsh Ministers”, rather than “a person appointed”.
- 5.170 We noted that the Planning Inspectorate is an executive agency funded jointly by the relevant departments of central Government in England and Wales. We noted too that in exceptional cases the Welsh Ministers might wish to appoint as an inspector someone other than an employee of the Inspectorate, and that in due course it might be considered appropriate to create an equivalent body or agency operating only in relation to Wales.
- 5.171 We accordingly suggested that those persons appointed by the Welsh Ministers to discharge various functions – whether employees of the Inspectorate, independent contractors or others – should be referred to in primary and secondary legislation not

as “persons appointed” but as “inspectors”, so as to conform to current practice<sup>64</sup>, or possibly as “examiners”; but that otherwise no changes should be made.

- 5.172 Of the 35 consultees responded to this question, 34 were in agreement that “persons appointed” should be referred to either as “inspectors” or “examiners”. 24 preferred “inspectors”, largely on the basis of that being the well-established term; one preferred “examiner”; the Law Society suggested “assessor”; and 11 had no preference.
- 5.173 The Inspectorate, however, disagreed – principally on the basis that amending the wording to “an inspector [or examiner] appointed” could remove its ability to appoint planning officers to conduct some types of casework (such as non-validation appeals).
- 5.174 We consider that it would be perfectly possible for the interpretation section of the Bill to include a definition of “inspector” or “examiner” along the lines of “a person appointed by the Welsh Ministers for the purpose of carrying out the function in question”. Such a change would not hinder the appointment of a planning officer, or indeed an independent person. As for which term should be used, we tend to agree with those who supported the use of the term “inspector”, as it is the established term that is likely to be universally understood.
- 5.175 An example of such a provision is section 77(5) of the TCPA 1990, which currently states:

Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by a person appointed by the Secretary of State for the purpose.

This would then become:

Before determining an application referred to them under this section, the Welsh Ministers shall, if either the applicant or the planning authority wish, give each of them an opportunity of appearing before and being heard by an inspector.

- 5.176 Similar provisions are to be found in a number of other places in the TCPA 1990.<sup>65</sup>
- 5.177 We consider that this would be a modest but useful simplification of the legislation, so that it accords with current practice.

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<sup>64</sup> And see, for example, PCPA 2004, s 59(2).

<sup>65</sup> Including TCPA 1990, ss 62ZC, 76D, 76E, 95, 98, 99, 100, 103, 104, 106B, 140, 175, 196, 208, 217, 278, 303A, 322, 322A, 323 and 323A; and Schs 4D, 6, 7, 9, 14 and 15.

#### **Recommendation 5-11.**

**We recommend that persons appointed by the Welsh Ministers for the purpose of determining appeals, conducting inquiries and other similar functions should be referred to in the Planning Bill as “inspectors”.**

#### **Local planning authorities other than local authorities and national park authorities**

***We provisionally proposed that the Bill should not include the provisions currently in the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities (Consultation Question 5-12).***

- 5.178 Enterprise zone authorities, created under powers in the Local Government, Planning and Land Act 1980, can be designated as local planning authorities for the purposes of the TCPA 1990. We noted in the Consultation Paper that no enterprise zone has been created under the 1980 Act for over 30 years, and that no enterprise zone authority in England or Wales has ever been designated as a local planning authority (other than one which was a planning authority already). We accordingly proposed to repeal the power to designate enterprise zones and the provision (in section 6 of the TCPA 1990) enabling an enterprise zone authority to be designated as a planning authority.<sup>66</sup>
- 5.179 We noted that only one urban development corporation (Cardiff Bay) had ever been created in Wales, in 1987, and that it had not designated as the local planning authority. We therefore proposed the repeal of the power to create an urban development corporation and the provision (in section 7 of the TCPA 1990) enabling such a corporation to be designated as a planning authority.<sup>67</sup>
- 5.180 Thirdly, we noted that, although six housing action trusts were constituted in the 1990s, all were in England, and none of those was designated as the local planning authority. Here too, we considered that it was unlikely that the provision enabling a housing action trust to be designated as a planning authority (in section 8 of TCPA 1990) would ever be used in the future, and we propose that it should not be included in the new Code.
- 5.181 The remainder of section 1 of TCPA 1990, and Schedule 1, apply only to local authorities in England. Sections 2A to 2E, 3 and 7A apply only to London. Section 5 relates to the Norfolk and Suffolk Broads. Section 8A applies to the Homes and Communities Agency, which only operates in England. It follows that none of those provisions need be restated in a Planning Code for Wales.

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<sup>66</sup> See paras 5.xx and 16.xx.

<sup>67</sup> See paras 5.xx and 16.xx.

- 5.182 Section 9 of TCPA 1990 (consequential and supplementary provisions about planning authorities), as amended by section 42 of P(W)A 2015, would need to be adjusted accordingly.
- 5.183 Of the 33 consultees responded to this question, 29 agreed. A number of planning authorities, for example, observed that the various authorities are not used; and enterprise zones are now duplicated by zones designated under the Capital Allowance Act 2001. A few disagreed, on the basis that these designations might be useful at some time in the future.
- 5.184 We accept that it must be theoretically possible that the Welsh Ministers might wish to use one or more of these designations in future. However, we remain of the view that it is more likely that they (or planning authorities) could use local development orders, or that the Assembly would introduce entirely new powers. We therefore still consider that these various categories of “special” planning authorities are not required, and that the power for the Welsh Ministers to designate the various types of bodies as planning authorities can therefore be removed.

### **Recommendation 5-12.**

**We recommend that the Bill should not include the provisions currently in Part 1 of the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities.**

### **Planning authorities: terminology**

***We provisionally proposed that the term “planning authority” should be used in the Planning Code in place of the terms “local planning authority” and “minerals planning authority” in existing legislation (Consultation Question 5-13).***

- 5.185 We observed that the term “local planning authority” appears throughout the 1990 Planning Acts, the PCPA 2004, the Planning Act 2008, the P(W)A 2015, and the Historic Environment (Wales) Act 2015 – all of which are to be incorporated into the Planning Code or the Historic Environment Code. It is in essence a hangover from the TCPA 1947, which provided for local planning authorities, minerals planning authorities, waste planning authorities, district planning authorities and county planning authorities. However, in Wales, there can now be only one planning authority in any area – which may be a local authority or a national park authority or a joint planning board.
- 5.186 By contrast, “local authorities”, as defined in the Local Government Act 1972, the Local Government (Wales) Act 1994<sup>68</sup> – as opposed to “local planning authorities” – are referred to in the TCPA 1990 only in very limited contexts, generally outside the main scheme of the planning Acts.<sup>69</sup> These references to local authorities should not

<sup>68</sup> See TCPA 1990, s 336.

<sup>69</sup> TCPA 1990, s 178, 190, 207, 219.

simply be translated into references to “local planning authorities” when the provisions in question are incorporated into the Planning Code.

- 5.187 However, we noted that when a unitary system of local government was introduced in Scotland, in 1974, the term “local planning authority” was replaced by “planning authority”.<sup>70</sup> We suggested that that seemed to be a helpful change, as it made it clearer that a planning authority would not always be a local authority – as well as being a simpler (and shorter) term. We also observed that every “local planning authority” is also a “minerals planning authority” – so that phrase is not required either.
- 5.188 It is true that a number of statutes other than those directly relating to planning also refer to “local planning authorities”.<sup>71</sup> It would be relatively straightforward for those to be amended accordingly.
- 5.189 We accordingly suggested that the term “planning authority” should be used in place of both “local planning authority” and “minerals planning authority”.
- 5.190 44 consultees responded to this question; 33 of whom agreed. Two were equivocal; and four disagreed. Carmarthenshire CC said: “stick with Local Planning Authorities – shows they are ‘local’ bodies, not national etc.” Bridgend CBC suggested that the existing term should be retained for continuity and to differentiate between the body responsible for the planning function at a local level and any bodies responsible for strategic planning in the future. As to the latter point, we were not suggesting any change to the term “strategic planning panel”, responsible for formulating strategic development plans.<sup>72</sup>
- 5.191 We remain of the view that the term “planning authority”, as in Scotland, would be simpler – although obviously such a change would not alter the substance of the legislation at all.

### **Recommendation 5-13.**

**We recommend that the term “planning authority” should be used in the Planning Code in place of the term “local planning authority” and “minerals planning authority” in existing legislation.**

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<sup>70</sup> Local Government (Scotland) Act 1973, s 172(2).

<sup>71</sup> The phrase “local planning authority” occurs in 21 other environmental, local government and related statutes (of which one third apply only in Wales), most if not all of which will need to be amended as a result of the introduction of the Planning Code in any event – National Parks and Access to the Countryside Act 1949, Countryside Act 1968, Land Compensation Act 1961, Local Government Act 1972, Welsh Development Agency Act 1975, Local Government, Planning and Land Act 1980, Wildlife and Countryside Act 1981, Environmental Protection Act 1990, Transport and Works Act 1992, Leasehold Reform, Housing and Urban Development Act 1993, Coal Industry Act 1994, Local Government (Wales) Act 1994, Environment Act 1995, Public Audit (Wales) Act 2004, Government of Wales Act 1998, Countryside and Rights of Way Act 2000, Clean Neighbourhoods [etc] Act 2005, Local Government Byelaws (Wales) Act 2012, Mobile Homes (Wales) Act 2013, Environment (Wales) Act 2016 – and once or twice in around 35 other statutes. The phrase also occurs in 50 other statutes, applying only in England or Scotland, but they would not need to be amended.

<sup>72</sup> See Consultation Paper. paras 6.19 to 6.21.