Law Commission
Reforming the law
Comisiwn y Gyfraith
Diwygio'r gyfraith

(Law Com No 233)

A Planning Code for Wales:

Analysis of responses to Scoping Paper

March 2017

Chapter 1: Introduction

THE CONSULTATION PROCESS

1.1 This document analyses the responses received to the Law Commission's scoping paper, *Planning Law in Wales*.[1] It provides a summary of the views of consultees in relation to the 14 consultation questions asked in the scoping paper.

1.2 The scoping paper was published on 30 June 2016. The consultation ran for four months, closing officially on 31 October 2016. The consultation period was extended to take account of the fact that part of the consultation period ran over the summer. The scoping paper was made available online and a wide range of key stakeholders including planning authorities and other public bodies, professional organisations, heritage and other third sector groups, and individual practitioners were sent a copy or notified of its existence.

1.3 Since the publication of the scoping paper, we have continued to consult with a selection of respondents both generally and in response to specific points.

1.4 During our consultation period, we attended approximately 20 meetings and events across Wales, England and Northern Ireland. We presented to all three branches of the Planning Officers Society Wales in Flint (North Branch), Port Talbot (South West Branch) and Ystrad Mynach (South East Branch). We also presented at internal meetings of the Planning and Environmental Law Committee of the Law Society and the Annual General Meeting of the Planning and Environmental Bar Association.

1.5 We contributed to a number of conferences and seminars including the UK Environmental Law Association Seminar in Cardiff, the Joint Planning Law Conference in Oxford, the Planning Inspectorate Stakeholder Event in Cardiff and at the Legal Wales Conference in Bangor, in which we received views from academics, students, local practitioners, local government and the third sector.

1.6 In December 2016, we met with the Northern Irish Government in Belfast to discuss the methodology and logistics of their process of planning law consolidation. We met with the First Legislative Counsel, the Director and Assistant Director of the Planning Policy Division at the Department of Infrastructure and one of the lawyers from the Departmental Solicitors Office who was involved in the consolidation exercise. In that meeting, we discussed a number of issues including resources, the working relationships between the Department of Infrastructure and the Office of Legislative Counsel, technical amendments and the relationship between primary and secondary legislation.

1.7 In addition, we also held individual meetings with various stakeholders including Natural Resources Wales, Cadw, the Home Builders Federation, the Planning Consultants

[1] Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228.

Forum, the Planning Officers Society and with various individuals involved in the planning system.

1.8 Finally, we received 60 written consultation responses. Responses were received from the Planning Inspectorate, two branches of the Planning Officers Society Wales, individual planning authorities, community councils, a range of public bodies, professional organisations, representatives of landowners, heritage bodies, third sector groups and a range of private individuals.

1.9 A full list of consultees who responded to this scoping paper is appended to this consultation analysis.

1.10 In addition to the formal consultation exercise, we have also benefitted from the expertise of the 16 individuals on the Law Commission's Planning Law Advisory Group. We have also had conversations with individual professionals in relation to draft chapters of the consultation paper.

1.11 This project is commissioned by Welsh Government and therefore a written consultation response was required by the Welsh Government.

INTRODUCTION

1.12 The introductory chapter of the scoping paper explained that the paper was designed to set out the scope of the project, our current thinking and give stakeholders an opportunity to comment on our provisional views. This was designed to ensure that the project was manageable in its ambitions and likely to result in a product which has substantial public benefit.

1.13 We also set out the scale of the current problem. We explained that there are currently approximately 48 substantial pieces of primary legislation which regulate development and the use of land in Wales. Included within these are Acts which deal in part with planning topics, Acts which deal with topics that are distantly related to planning, and Acts which contain provisions which relate to planning matters that are now arguably redundant.

1.14 We enumerated five objectives of the scoping paper:

(1) consider the key statutes regulating the development and use of land and examine how this framework might be improved;

(2) identify the area of focus for our work;

(3) establish the scope of an initial piece of legislation (in other words, to decide which topics should be included and, equally importantly, excluded);

(4) establish the need for and extent of the technical reform which will be required in order to produce a better piece of legislation; and

(5) seek the views of stakeholders on issues of scope and technical reform in preparation for further work in these areas in the substantive phase of the project.

1.15 We also asked consultees two questions. First, we asked stakeholders to provide us with any available figures, estimates or experience of both monetised and non-monetised costs caused by over-complicated or otherwise defective planning legislation. Second, we asked stakeholders to provide us with examples of benefits that could be gained from consolidation and simplification of planning legislation.

CONSULTATION QUESTION 1-1: WE ASK STAKEHOLDERS TO PROVIDE US WITH ANY AVAILABLE FIGURES, ESTIMATES OR EXPERIENCE OF BOTH MONETISED AND NON-MONETISED COSTS CAUSED BY OVER-COMPLICATED OR OTHERWISE DEFECTIVE PLANNING LEGISLATION.

1.16 Sixteen consultees responded to this question. Consultees commented on the following principal monetised and non-monetised costs caused by the over-complicated or otherwise defective planning legislation: Delays to local planning authorities' decisions and work, the costs associated with needing to seek legal advice, the errors which local planning authorities are making and the inconsistencies amongst local planning authorities.

Delays to local planning authorities' work

1.17 Ten consultees told us that the over-complicated legislative framework causes delays in that local planning authorities have to spend time in trying to work out the legislative framework.

1.18 Six local planning authorities commented on delay to their work. Rhondda Cynon Taf County Borough Council gave a useful example of where they were required to defend a judicial claim which had an element issued on the basis of English legislation, which was not applicable in Wales. They told us that 'significant officer time and money had to be expended on the defence'. Neath Port Talbot County Council explained how trawling though the legislative framework 'results in a significant waste of time for officers'. Newport County Council also commented on this delay, noting that 'cross-referencing between documents which have not been consolidated is slow and gives rise to uncertainty that might require consultation with legal colleagues'. Similar comments were made by Cardiff Council, Torfaen County Borough Council and the Planning Officers Society Wales (South West Wales).

1.19 Two land developers also commented on the delays caused by the over-complicated legislative framework. The Residential Landlords Association commented on the 'sheer volume' of accumulated legislation, statutory instruments, European Directives along with a 'myriad of case law and ministerial decisions and policy statements'. They described the amount of time, effort and cost it takes to obtain planning consent for new residential development as 'something of a scandal'. They noted that this adds significantly to the cost of development, which feeds through into new house prices. Persimmon Homes West Wales told us that local planning authorities have previously failed to comply with the statutory eight week determination period to confirm relevant conditions have been discharged.

1.20 RWE Generation noted that there are monetised and non-monetized costs associated with overly complicated or defective planning processes, which relate mainly to

protracted project timelines (impacting on decisions to invest or procurement processes, for example). The Royal Town Planning Institute told us that Welsh local planning authorities have difficulty in keeping up dated with the changing position of planning law and guidance in Wales.

The need to seek legal advice

1.21 Five consultees commented on the need to pay for legal advice. One County Borough Council usefully provided the amount of money it had spent on legal advice because of legislative planning issues: £6,584 between 2014 and 2015 and £7,098 between 2015 and 2016. Newport Borough Council told us that as legal advice is done in-house, then it is not explicitly costed but it is 'likely to be significant over the financial year'. Torfaen County Borough Council gave two examples of where complicated legislation necessitated paying for legal advice. Rhondda Cynon Taf County Borough Council told us that the over complication of planning law in Wales 'means that subscriptions to costly software systems such as LexisNexis and Westlaw are essential'.

1.22 RWE Generation also noted that overly complicated or defective planning processes can lead to additional professional costs of legal and technical experts. Natural Resources Wales commented on the financial implications in the following terms:

> From our experience the absence of definitions to clarify certain terms within the current suite of legislation can lead to different interpretations of those terms by different actors within the planning system. This may lead to legal advice being sought to clarify terms. This process, time spent and costs associated with it, can potentially be avoided if ambiguous terms are defined in appropriate legislation.

Local planning authority errors

1.23 Four consultees commented on the errors which are currently being made by local planning authorities as a result of the complicated legal framework. Neath Port Talbot Council said that the legislation can lead to mistakes being made which can lead to judicial review which is time intensive and costly. They gave an example of a where a difference between English and Welsh legislation resulted in a successful challenge as the authority had used elements of the English legislation which did not apply in Wales. Newtown and Llanllwchaiarn Town Council thought that any clarification of the law is likely to reduce the number of appealed decisions, with resulting staff cost reductions. Similar comments were made by the CLA and the Planning Officers Society (South West Wales).

Inconsistencies amongst local planning authorities

1.24 Three consultees told us that inconsistencies can arise amongst local planning authorities because of, at least in part, the over-complicated planning framework. The CLA informed us that research which they have conducted suggests that the charging regimes services differ amongst local planning authorities. They noted that whilst some local planning authorities specifically explain that the standard service is free from value added tax, other local planning authorities are charging this at an additional 20% cost, a difference which they attributed to the interpretation applied by the individual local planning authorities. RTPI Cymru commented on the inaccuracies in the Encyclopaedia of Planning Law and Practice, suggesting that local planning authorities have difficulties

in keeping up dated with the changing position of planning law and guidance in Wales. Similarly, Natural Resources Wales told us:

> From our experience the absence of definitions to clarify certain terms within the current suite of legislation can lead to different interpretations of those terms by different actors within the planning system.

CONSULTATION QUESTION 1-2: WE ASK STAKEHOLDERS TO PROVIDE US WITH EXAMPLES OF BENEFITS THAT COULD BE GAINED FROM CONSOLIDATION AND SIMPLIFICATION OF PLANNING LEGISLATION.

1.25 Twenty eight consultees responded to this question. Consultees commented on the following principal benefits that could be gained from consolidation and simplification: clarity, a better use of resources and a better understanding and accessibility of the planning system in Wales.

Clarity

1.26 Nine consultees told us that the consolidation and simplification of planning legislation would lead to greater clarity. Two local planning authorities, Neath Port Talbot Council and the Planning Officers Society Wales – South West Wales, thought that a codified and simplified system would make it far more straightforward to train future planning officers. Planning Officers Society Wales – South East Wales thought that the process would lead to better decision making because the legislation would be clearer. This would also result in 'less room for dispute about the meaning of legislation'. According to Rhondda Cynon Taf County Borough Council:

> The codification of the law would establish and set out the law solely as it applies to Wales which would be a great benefit. It would provide clarity for those who may not deal in legal issues on a day to day basis but require clarity on the law as it applies to them. It would be of benefit to developers who propose to operate in Wales especially those that operate on both sides of the border as we frequently deal with developers who assume the law in Wales is the same in England which expends officer time in separating and explaining the separate jurisdictional issues.

1.27 National Trust Wales thought that 'the continuation of this process will undoubtedly provide clarity', which in turn would make planning law more accessible and hopefully increase engagement.

1.28 Natural Resources Wales thought that the consolidation of legislation will also help to avoid the risk of terms and duties which are currently identified in a number of regulations being defined differently. According to Natural Resources Wales, the duties arising out of Natural Resources Wales' role as a 'specialist consultee' differ between the Town and Country Planning (Development Management procedure) (Wales) (Amendment) Order 2016 and the Developments of National Significance (Procedure) (Wales) Order 2016.

1.29 The Town and Country Planning Association thought that the possible benefits would include the reduced likelihood of misunderstandings about the intention of the law and thus provide greater clarity on its application to specific issues.

1.30 The following consultees also agreed that consolidation and simplification would lead to greater clarity: RWE Generation and Innogy Renewables.

Better use of resources

1.31 Thirteen consultees thought that consolidation and simplification of the planning system would lead to a better use of resources including saving time and money. Merthyr Tydfil County Borough Council thought that time and money would be saved in not needing to seek legal advice. Monmouthshire County Council also thought that consolidation and simplification of planning legislation would make more efficient use of resources.

1.32 Newport Borough Council thought that consolidation and simplification would reduce the time spent in checking codes and would reduce the risk of missing important details, such as in relation to enactment or extent of geographical application.

1.33 Torfaen County Borough Council said the following on resources:

> It will mean resources will be able to be used more productively in that less time might be spent researching an every changing legal position and less money could be spent on England orientated publications. For example: The Planning Law Encyclopaedia (albeit deals in some sections with Welsh planning law) costs about £1700 for initial books and a yearly subscription of £1300 a considerable amount of the material covered in the books do not apply in Wales.

1.34 RWE Generation and Innogy thought that it would produce efficiency gains on costs incurred by applicants in terms of professional fees and on the time spent by decision makers, statutory consultees and other stakeholders in navigating the planning process. Persimmon Homes West Wales thought that the exercise would provide a 'more efficient planning service', resulting in fewer delays post-submission but pre-determination and an increased likelihood of getting a positive determination within the statutory time period for determining the application. They also noted the following financial savings:

> The financial savings of being able to start work on a site sooner because planning legislation has been consolidated and simplified could be significant especially with regard to the timely issuing of Decision Notices and discharge of pre-commencement planning conditions.

1.35 RSAW commented on the benefits in the following terms:

> We believe that the consolidation will make the process more effective, easier to understand for all stakeholders and more cost effective for the end user.

1.36 The following consultees also agreed that a codified and simplified system could lead to reduce time and money: RTPI Cymru, Cardiff Council, Planning Officers Society

Wales – South East Wales, Planning Aid Wales and the Town and Country Planning Association.

Greater understanding and accessibility of the planning system in Wales

1.37 Eleven consultees thought that consolidation and simplification of the planning system would lead to better public understanding and accessibility of the planning system in Wales. Rhondda Cynon Taf said that the simplification of planning legislation would make it more user friendly to both the legal and non-legal professional. Torfaen County Borough Council said that the major benefit of a consolidation and simplification of planning would be a system which benefits everyone; professionals and the public alike. They told us the following:

> From the public perspective the law in relation to planning should be more understandable and easier to access, this will mean that the public will be able to engage better with the system from a "householder" perspective.

1.38 Newtown and Llanllwchaiarn Town Council gave a useful example of where a lack of public understanding of the planning process during a public enquiry into the Mid-Wales wind farms meant that local people felt as though their views were disregarded. Monmouthshire County Council thought that consolidation and simplification of planning legislation would be welcome as it should be more accessible (for practitioners and the public), more user friendly which would hopefully facilitate more consistency in the interpretation of the law to aid decision making and make more efficient use of resources. Cardiff Council thought that consolidation and simplification would potentially lead to a reduction in enquiries as it would improve the ability of users to access and interpret the law.

1.39 The Bar Council noted that the benefits would be felt more obviously by members of the public who have had to approach planning questions without any previous experience. They commented on the importance of public understanding in the following terms:

> Benefits would also be conferred on by those who may have inadvertently committed a breach of planning law. This may be out of ignorance or because they have been poorly advised by professionals such as planning consultants or architects (who may not have a full understanding of the legal ramifications) who themselves can end up committing breaches of planning law. This can lead to both enforcement and eventually to the commission of a criminal offence. Clearly, if the public is able to understand more easily where such potential pitfalls lie and the consequences thereof justice is more effectively served.

1.40 The Town and Country Planning Association noted the following:

> It makes sense for all users of the planning system in Wales to have access to a code which, as well as providing a rational legal basis for planning, can be understood and operated effectively. This can best be achieved by consolidation and simplification of planning law in Wales.

1.41 Residential Landlords Association told us that currently only experts such as planning consultants and lawyers who specialise in planning law can ever really understand and advise on planning and development control, for even the smallest project.

1.42 Planning Aid Wales also noted that it will enable developers, planning authorities and interested parties to focus on the real issues involved and expedite decisions, facilitating development where appropriate.

1.43 CAMRA said that a clear, accessible code would greatly help campaign groups with little or no access to finance and legal or expert advice effectively engage with the planning system. They also consider that it would also further engagement between local authorities, key public bodies and community groups, in line with the Welsh wellbeing goals.

1.44 The Royal Society of Architects in Wales told us that consolidation would make the process more effective and easier to understand for all stakeholders.

Miscellaneous

1.45 A number of consultees used this question to comment on the codification and simplification process more generally. For example, the response from the National Grid to this question noted the following:

1.46 Planning in Wales is undergoing a significant change. This process of change will continue for a number of years. This process could be aided by having a clearly articulated strategy which makes the direction of travel, and the intended outcomes of the many changes, clear. This would help those operating and using the system as it evolves. It is also likely to help build investor confidence in the outcome that Wales seeks to achieve.

1.47 The Country Land Owners Association said the following:

> Unnecessary legislation that is no longer needed and that adds to the cost of providing new houses and enterprise in rural areas should be cut as part of this consolidation exercise to reduce and consolidate primary planning legislation. The changes must aim to simplify the planning process, but should not change planning policy or environmental protections. The outcomes must deliver sensible changes to regulatory burdens that deliver a smooth/streamlined journey through the planning application process, from pre-application advice, validation, decision-making and conditions, to planning permissions for applicants.

Chapter 2: The Wider Context of the Project

2.1 This section of the scoping paper detailed the wider context of the project. It highlights the historical development of planning law in Wales and the evolution of the principal pieces of planning legislation for Wales. This chapter asked no consultation questions.

2.2 As Joe noted in *Great Expectations*, “ask no questions, and you’ll be told no lies”.[2]

[2] Dickens, *Great* Expectations, Chapter 2; see also Goldsmith, *She Stoops to Conquer*, iii, 51; and Rowling, *Harry Potter and the Order of the Phoenix*.

Chapter 3: The Case for a Planning Code

INTROUCTION

3.1 The third chapter of the scoping paper explains that a codification exercise is likely to do more than produce an updated text. We explained that there is scope for this exercise to extend beyond a traditional consolidation exercise and that this could be a rare opportunity to question whether certain features of the law should be retained ore reformed for the future.

3.2 We concluded our chapter by noting that such an exercise is likely to produce real practical benefits for those who work with the law (such as legal practitioners, local planning authorities, the Planning Inspectorate and the courts), those concerned with making it (such as the Assembly and Government) and for those who need to access or use it (such as businesses and members of the public).

3.3 We also asked two consultation questions. First, we noted that there is a strong case for creating a new Planning Code and asked stakeholders if they agree. Second, we sought stakeholders' views on the distribution of provisions between the Planning Code – either in the main body of the legislation or in a Schedule – and secondary legislation made under it.

CONSULTATION QUESTION 3-1: WE CONSIDER THAT THERE IS A STRONG CASE FOR CREATING A NEW PLANNING CODE. DO STAKEHOLDERS AGREE?

3.4 The majority of consultees (94%) consultees who responded to this question agreed that there is a strong case for a new Planning Code.[1] For example, the Town and Country Planning Association thought a new Planning Code for Wales would help to 'clarify differences from planning law in England' and 'reduce the likelihood of there being anomalies or incompatibilities between parts of the legislation'. Richard Harwood QC also endorsed the view that there is a need to reform planning legislation:

> A problem in both Wales and England has been its increased complexity as a result of bolt-ons which do not materially assist the process. Planning legislation ought to be sufficiently clear that it can be operated by non-lawyers, in particular planners, architects, councillors and interested members of the public, without regular recourse to the legislation. It is not in that condition.

3.5 100% of local planning authorities agreed that there is a strong case for a new Planning Code. Rhondda Cynon Taf County Borough Council thought that there is a clear need to review the Planning Code which has become very convoluted, noting that 'a Planning Code which sets out clearly and succinctly as possible the law as it applies in Wales

[1] 48 consultees responded to this question: 45 agreed that there is a strong case for a new Planning Code, 2 disagreed and 1 held an equivocal position.

will be a benefit to the public and practitioners'. The Planning Officers Society Wales – South West Wales noted that even though there is a need to secure clarity and consistency going forward, they told us that the new Planning Code 'needs to be future proof'. They commented on the future-proofing of the Planning Code in the following terms:

> If this consolidation exercise is to be successful going forward, legislation needs to be designed so that any updates and future amendments replace the original legislation. For example Planning Policy Wales is a living document which is available as an electronic document on the Welsh Government website. Every time it is updated it is given a different version number.

3.6 Torfaen County Borough Council, whilst acknowledging that moving towards a more streamlined framework would 'reduce complexity and increase accessibility and transparency', they warned that what is proposed in the Scoping Paper is 'a large project which may need considerable resources'.

3.7 All professional bodies or groups that wrote to us agreed that there was a strong case for a Planning Code. The Bar Council agreed with the simplification of the planning system, noting that 'it ought to be made more accessible, whether this is through the creation of a new Planning Code as envisaged in the Scoping Paper, or by other means'. They did give a word of warning in the following terms:

> The process required to achieve this Planning Code nevertheless may well 'suffer' from the necessary complexity of 'unpicking' existing legislation and reflecting the latest reforms.

3.8 The Royal Town Planning Institute Cymru told us that planning law relating to Wales needs to be restated and consolidated in a single Act. They noted that the current position, exacerbated by the recent Planning (Wales) Act 2015 and the now significant diversion between the Welsh and English planning systems, makes it overly complex to understand the legal basis in Wales. Similarly, the Council for British Archaeology

3.9 A number of consultees gave their support for the production of a new planning code, without making any substantive comment.

3.10 Two consultees disagreed that there is a strong case for a new Planning Code. The Residential Landlords Association told us that they 'agree that codification of the law has the potential to provide benefits of clarity and accuracy of the law', provided that 'adequate protections' are put in place. Instead, the Residential Landlords Association would rather introduce the following:

> As an alternative what the Residential Landlords Association would like to see is a better system of interacting between common and statutory law and clearer notification of laws that apply to different geographical regions in the UK. The most reasonable route to achieving these objectives would be to organise existing databases to better cope with common and statute law, rather than introducing a system of codification.

> We are dubious about the whole "tear it up and start again" approach which is implicit in the Scoping Paper. Perhaps more significantly, we are very concerned about the substance of current planning law with the restrictions which it places on development, particularly the need for new homes to house people in Wales

3.11 Gwersyllt Community Council, who also disagreed, sent the following response:

> Council Members have asked me to inform you that they are opposed to the reforms outlined in the paper as they fear that these changes could be prejudicial to local democracy / decision making.

3.12 One consultee held an equivocal position. According to the Country Land and Business Association:

> It is difficult to make comment on the merit of the creation of a planning code. Whilst on the surface it would appear to be a good idea it is only in knowledge of the intended outcomes and whether they will deliver a streamlined process that full comment can be made.

CONSULTATION QUESTION 3-2: WE ASK STAKEHOLDERS' VIEWS ON THE DISTRIBUTION OF PROVISIONS BETWEEN THE PLANNING CODE – EITHER IN THE MAIN BODY OF THE LEGISLATION OR IN A SCHEDULE – AND SECONDARY LEGISLATION MADE UNDER IT.

3.13 The majority of consultees (42%) who responded to this question agreed that the balance is broadly correctly struck between primary and secondary legislation.[2] For example the Town and Country Planning Association reported that the current division between primary and secondary elements of planning law is broadly appropriate. They agreed with the caveats listed in the scoping paper, particularly that provisions are contained in a Schedule rather than conferring a power to make orders or regulations at some later date.[3] The Woodland Trust supported the use of secondary legislation as this 'prevents the creation of unwieldy and lengthy acts and allows more flexibility in altering and updating secondary legislation going forward'.

3.14 Planning Aid Wales, who also thought that the balance was broadly correctly, noted the following:

> A particular need is for members of the public and community councils to be able to identify applicable provisions contained in a Schedule and those in secondary legislation. It is generally easier to find provisions where the primary legislation refers to a Schedule in it, rather than conferring a power to make orders, rules or regulations at a later date.

---

2 24 consultees responded to this question: 10 agreed that the balance is broadly correctly balanced, 7 consultees thought that the balance is not broadly correctly balanced and 7 consultees held equivocal positions.

3 Law Commission: A Scoping Paper, paragraph 3.52.

3.15 The National Grid agreed that there would be advantages in having a single piece of legislation and that, at the same time, there would be benefits of using secondary legislation to complement primary legislation. They said the following:

> The consolidation and simplification exercise should also exploit the opportunities offered by online media and how these can be utilised to have an integrated, up-to-date resource.

3.16 Torfaen County Borough Council favoured the traditional approach of a main body of legislation with topics contained in secondary legislation as 'this prevents the main body of legislation from becoming unwieldy'. They gave the following example on the division:

> The right to appeal contained in the main body of legislation, with the rules on proceedings and all associated matters relating to appeals contained in one set of subordinate regulations.

3.17 Some consultees qualified their broad support for the current division. For example, according to Innogy Renewables UK, the current balance between primary and secondary planning legislation is broadly appropriate, subject to the caveats identified in the Scoping Paper.[4] However, they commented that some planning procedures currently in secondary legislation should be brought into primary legislation such as those relating to Environmental Impact Assessment (EIA) and the development plan making process.

3.18 Those consultees who disagreed with the current division thought that currently there is too much detail put in secondary legislation. For example, RWE Generation thought that the split between primary and secondary legislation is 'not necessarily right' and that certain provisions, especially relating to the development plan making process, should be brought into primary legislation. They noted the following on the division:

> RWE also believes that there are too much planning procedure currently in secondary legislation which should be brought together in primary legislation. Matters such as EIA should be brought into primary legislation given that after Brexit it may no longer be necessary to make frequent changes to transpose EU Directives (although it would be sensible to implement such changes after the "Brexit" strategy for the UK becomes clearer).
>
> On the other hand, permitted development rights are subject to frequent amendment and secondary legislation is appropriate for this, and for the definitions of types of development subject to EIA.

3.19 Cardiff Council also expressed a preference for the provisions of the Planning Code to be contained, so far as is reasonably practicable, in a single piece of legislation. The Residential Landlords Association stressed the importance of including secondary legislation and guidance in any final Planning Code:

> Planning law is probably unique in that its implementation very much depends on Ministerial policy which, of course, can change quite

[4] Law Commission: A Scoping Paper, paragraph 3.52.

> regularly either because of a change of Government or to meet changing circumstances and evolving Government policies. We would strongly argue that the implementation of a Code can only be a success if the vast amount of matter contained in statutory instruments is also incorporated in the Code. A clear example of this is the important role which is played by permitted development rights. These are fundamental, especially in the householder context. A planning policy framework, such as the National Policy Framework in England, needs to be an integral part of any Code, even if there is a different procedure for amending/updating it. Without addressing the issue of the important role of statutory instruments (and their volume) and the incorporation of planning policy, any proposed Code would be nothing of the sort.

3.20 Similar concerns on the overuse of secondary legislation were expressed by Rhondda Cynon Taf County Borough Council. They reported that locating secondary legislation can sometimes be a difficult task and that whilst it is accepted that some requirements will be a technical nature or subject to more frequent review this should be limited to where 'necessary'.

3.21 A number of consultees commented on the use of primary and secondary legislation generally, without passing specific comment on whether the balance between the two. For example, Neath Port Talbot Council thought that the code needs to ensure that it signposts the reader to the relevant legislation for that topic. They gave the following example:

> If dealing with an application where there is some dispute over the publicity which should be afforded to, the officer should be able to go to the code which deals with procedures associated with planning applications and should be a signpost to all the relevant pieces of legislation dealing with publicity. This is currently distributed between the Development Management Procedure Order, the advertisement regs, the listed buildings and Conservation Areas Act and associated circular, the Environmental Impact Assessment Regs, and the Planning (Wales) Act 2015 in relation to DNS etc.

3.22 Some consultees told us what they though should be included in primary legislation and what should be included in secondary legislation. Persimmon Homes West Wales thought that the Planning Code should include in primary legislation the provisions for development planning and the process of development management whilst secondary legislation sets out the relevant thresholds or procedures to enact the law as established by the primary legislation.

Chapter 4: Scope of the First Part of a Planning Code

INTROUCTION

4.1 The chapter on the scope of the first part of the planning code sought to set out the content of the present stage of the code and the wider context of eventual complete codification. We considered that the focus of the project should be on producing the first part of a Planning Code dealing with the core parts of the planning system, namely planning and development management.

4.2 We summarised future stages of work in the following terms:

(1) Development Planning and Development Management: in summary, this would deal with planning authorities, development plans, planning permission, appeals, statutory challenge, enforcement, and associated topics; we expand on this outline of subject-matter later in this chapter.

(2) Historic Environment: the Welsh Government have indicated that Cadw may be considering the possibility of an eventual consolidation of historic environment legislation being added to the Assembly programme; such a code could contain provisions regarding ancient monuments, archaeological areas and those parts of the legislation on listed buildings and conservation areas that are not codified along with planning and development management.

(3) Rural Environment: this would bring together the disparate body of legislation dealing with national parks, areas of outstanding natural beauty ("AONBs"), nature reserves, trees and forestry, hedgerows and the countryside generally.

(4) Regeneration and Development: this would deal with the powers of Ministers and local planning authorities ("LPAs") relating to the improvement and regeneration of land, the acquisition and development of land for planning purposes, requiring landowners to remedy the condition of their land, powers to improve derelict land, grants for improvements, and improving housing.

(5) Hazardous Substances: there could be a consolidation of the Planning (Hazardous Substances) Act 1990, incorporating the provisions relating to hazardous substances contained in the Town and Country Planning Act ("TCPA 1990").

4.3 The chapter details the scope of the first part of the code including the following topics:

(1) The core planning provisions;

(2) The statutory purpose of the planning system;

(3) How the planning system is administered;

(4) The nature of development;

(5) The plan making process;

(6) The process of seeking planning permission;

(7) Remedies;

(8) Enforcement;

(9) Validity of decisions;

(10) Financial provisions;

(11) Miscellaneous and general provisions;

(12) Development affecting highways;

(13) Statutory undertakers;

(14) Crown land;

(15) Rights to require purchase of land;

(16) Compensation;

(17) Land blighted by development proposals;

(18) Controls relating to listed buildings;

(19) Controls relating to conservation areas; and

(20) Controls relating to outdoor advertising.

4.4 The chapter goes on to ask two consultation questions. First, we invited stakeholders' comments on the proposed scope of an initial piece of codified planning law focussing on planning and development management. Second, we invited stakeholders' views on the subject matter of later phases of codification and the suggested wider scheme of codification.

CONSULTATION QUESTION 4-1: WE WELCOME STAKEHOLDERS' COMMENTS ON THE PROPOSED SCOPE OF AN INITIAL PIECE OF CODIFIED PLANNING LAW FOCUSSING ON PLANNING AND DEVELOPMENT MANAGEMENT.

4.5 The majority of consultees (67%) supported the scope of our initial piece of planning law, which focusses on planning and development management.[1] For example, Richard Harwood agreed with the broad scope of the project identified in the paper,

[1] 36 consultees expressed a view on the scope of the planning code: 24 agreed, 5 disagreed and 7 held equivocal positions.

noting that 'development management is the key part of the regime and there is plenty to be done'.

Scope of the initial piece of codified planning law generally

4.6 According to the Town and Country Planning Association, the initial focus of the code should be to prepare a planning code for plan-making and development management. Similarly, Monmouthshire County Council noted that concentrating on the areas of everyday use would be a more manageable exercise than attempting to tackle the whole gamut of planning legislation. The National Farmers Union thought that the planning code should specifically exclude the legislation which is 'read alongside a planning application, rather than used to determine it'. The Bar Council noted that:

> We agree with the Law Commission that this would represent quite an exceptional and extensive piece of work, with all the accompanying costs and in terms of both time and resource. In light of this, we have considered whether it is workable to further divide up the proposed initial phase. We have concluded that, on balance, the Law Commission is correct in its identification of the issues to be included in the first phase and this should address development management.

4.7 Torfaen County Borough Council, however, told us that 'the initial scope for the codification of planning law should be manageable'. They noted that the topic of development planning and development management is 'a significant and sizeable area of law'. They suggested that the topic should be further broken down into discrete areas which could effectively stand alone. They suggested the following further categorisations:

(1) Appeals

(2) Enforcement

(3) Planning permissions

4.8 Similarly, RTPI Cymru thought that five phases of work, as we suggest in the scoping paper,[2] is too many in terms of completing the project within a reasonable timescale. Instead, they suggested three phases of work would be better, either by combining phases two and three, and phases four and five or by leaving phase two as is proposed and then combining phases three, four and five.

Statutory statement of purpose

4.9 The proposal to include a statutory statement about the purpose of the planning system received considerable support. The Town and Country Planning Association told us that the code should include the statutory purpose for planning and that this should take into account the definition used in the Planning (Wales) Act 2015 as well as other relevant Welsh legislation, in particular the Well-being of Future Generations (Wales) Act 2015. They suggested the following definition:

---

2 Planning Law in Wales: Scoping Paper, Consultation Paper No 228, para 4.8.

> The planning system in Wales exists to promote and enable sustainable development by effective plan-making, decision-making and enforcement systems operated in the public interest by local planning authorities, and Welsh Government and its agencies.

4.10 The inclusion of a statutory statement of purpose was also supported by the County Landowners Association, Persimmon Homes West Wales, Planning Aid Wales and Innogy Renewables.

Definition of development

4.11 In the scoping paper, we suggest a definition including within the code a definition of development. Three consultees specifically supported including this definition in the planning code, namely Innogy Renewables UK, the Town and Country Planning Association and Planning Aid Wales.

Hazardous substances

4.12 Planning Aid Wales, the Town and Country Planning Association, and Persimmon Homes West Wales stated that they thought hazardous substances should not be included in the first part of the code. The Health and Safety Executive noted that hazardous substances consent being outside the scope of the code would not present any problems for them. According to the Health and Safety Executive:

> In relation to hazardous substances consent, we note the guidance regarding consultation with HSE on proposed development in the vicinity of hazardous installations contained in Circular 20/01 - Planning Controls for Hazardous Substances. HSE suggests that consideration is given to including some guidance for LPAs on the need to ensure that their land-use, or other relevant policies, takes account of controls set out in Article 13 of the Seveso III Directive aimed at preventing major accidents and limiting the consequences of such accidents for human health and the environment.

4.13 The Wales Planning Consultants Forum, however, thought that even though hazardous substances consent is not an everyday challenge for most planning authorities or consultants, it nevertheless forms an important part of the current planning legislation and the need for all to understand that seems an important first consideration.

Controls relating to trees

4.14 Persimmon Homes West Wales, Planning Aid Wales, the Bar Council, the Town and Country Planning Association and Planning Aid Wales expressly stated that controls relating to trees should not be included in the first part of the code.

4.15 The Woodland Trust disagreed that the scope of the first phase should exclude controls relating to trees. In the scoping paper, we suggested that controls relating to trees, in the form of tree preservation orders ("TPOs"), would be better codified elsewhere within the wider programme of work, but not within the core areas.[3] The Woodland Trust response highlighted that local planning authorities have a duty to ensure that in

[3] Planning Law in Wales: Scoping Paper, Consultation Paper No 228, para 4.75.

granting planning permission adequate provision is made for the preservation or planting of trees and to make such orders as appear to the authority to be necessary in connection with the grant of such permission.[4] Given this duty on local planning authorities, tree preservation orders are most frequently used in the context of development and play a very important part, together with planning conditions, in protecting trees. According to the Woodland Trust:

> Therefore we consider that to enable local authorities to carry out this duty effectively and efficiently and for all those affected to have the benefit of an updated and clearer and more accessible system, this should be included in the initial phase.

4.16 Similarly, RTPI Cymru had reservations about removing controls relating to trees from the scope of the first stage of the project. RTPI Cymru told us that the contribution of trees to the landscape and biodiversity and green infrastructure generally are an 'increasingly important aspect within the development management process and should not be overlooked'. Similarly, Newport Borough Council disagreed that tree control should fall outside scope, noting that 'trees are common applications and of public concern'.

4.17 The Country Land Owners Association noted that if codification does include the regulation of trees, then it will be worth considering including the Hedgerow Regulations 1997.

Compulsory purchase of land for planning-related purposes

4.18 The Country Land Owners Association agreed that the review of the compulsory purchase regime should not be a priority as part of this review. Instead they suggested the following approach:

> The Law Commission carried out an extensive review in 2003* that addressed many of the issues permanent to reform in England and Wales. However, attention needs to be drawn to the requirement to implement all of the Review's recommendations in full – it is only some 13 years later that some of these finding their way into legislation and these will be implemented in England, and whilst provision for implementation is Wales has been made it is unclear whether these will be taken up by the Welsh Government.

4.19 Additionally, the Country Land Owners Association called for a duty of care to be imposed on all those with compulsory purchase powers to protect claimants by limiting the impact on their businesses.

4.20 The Planning and Environmental Bar Association, whilst they agreed that compulsory purchase should remain outside scope, noted that the availability of a power of compulsory purchase for planning purposes (section 226 of the Town and Country Planning Act 1990) is a valuable tool enabling planning authorities to bring forward or

[4] Town and Country Planning Act 1990, section 197.

to facilitate schemes of development and improvement in their areas, commenting as follows in relation to scope:

> We consider that there is a case for the inclusion of those powers within the scope of the Commission's current project, whilst leaving the general law of compulsory purchase unaffected.

4.21 The Bar Council also thought that compulsory purchase should not form part of the initial code. Instead they noted that subsequent phases of codification should begin with compulsory purchase. Similarly, Planning Aid Wales, the National Grid, the Town and Country Planning Association and Persimmon Homes West Wales also believed that compulsory purchase should remain outside scope of the first stage.

4.22 The British Property Federation, however, disagreed that the scope of the first phase should exclude compulsory purchase. In the scoping paper, we suggested that compulsory purchase of land for planning-related purposes would be better codified elsewhere within the wider programme of work, but not within the core areas.[5] The British Property Federation consider that the compulsory purchase system regime is one that is intrinsically linked to planning and can be critical to strategic planning and to place-making. According to the British Property Federation:

> Although it will remain inordinately complicated in England, with no consolidation of legislation proposed, if such consolidation is to occur in Wales, the most recently proposed changes to the regime should be incorporated. A completely separate legislative system for planning in Wales, put together without considering the inclusion, consolidation and improvement of the CPO regime could mean that the planning regime in Wales, by this key element, remains overly complicated despite all of the efforts to consolidate and review every other aspect of planning law.

4.23 Similarly, RWE Generation and Innogy Renewables UK noted that the compulsory acquisition of land should be within the scope of the new planning code as this would, according to both of them, 'facilitate a one stop shop approach'.

The form of the code

4.24 As well as receiving comments on the substance of the code, we received a number of comments on the form that the code should take. For example, the Wales Planning Consultants Forum told us that whilst brevity is an important requirement, it is not as essential a requirement as clarity, structure and good, clear, drafting. According to the Wales Planning Consultants Forum:

> We note that it is hoped that the Code can be restricted to no more than 500 sections as compared to the 700 sections that exist within the legislative context at present. That still constitutes a very long document; however, as long as it is clear in its intent and structure and

[5] Planning Law in Wales: Scoping Paper, Consultation Paper No 228, para 4.80.

> allows the reader to quickly identify what he/she is seeking and where to find it, the length of the document will to a large extent be irrelevant.

4.25 Llanelli Town Council told us that the Welsh language and culture should be given appropriate consideration in the development of the new code. Churchstoke Community Council told us that the code should be written in plain language terms suitable for the non-expert so that the planning system is more easily available to the lay person.

Miscellaneous

4.26 A number of consultees suggested a series of miscellaneous provisions which ought to be included in the first phase of the codification project. We have identified a number of these suggestions below:

Statutory recognition of the role of the Planning Inspectorate Wales

4.27 This suggested inclusion was supported by the Planning Inspectorate given that its role is not clearly expressed in Welsh planning legislation, such as its involvement in relation to developments of national significant set out in the Planning (Wales) Act 2015.[6]

Statutory undertakers

4.28 Persimmon Homes West Wales, RWE Generation and Innogy Renewables agreed that statutory undertakers should fall within the scope of the first phase of the project. Welsh Water told us that the definition of statutory undertakers which we suggest in our scoping paper should be amended to include water and sewage undertakers as referenced in section 262(3) of the Town and Country Planning Act 1990.

Alternative Dispute Resolution

4.29 The Town and Country Planning Association thought it was important to highlight the advantages of greater use of mediation in plan-making, decision-making and enforcement as a means of building greater trust in the planning system as well as helping to devise more sustainable outcomes. Planning Aid Wales noted the following:

> The Commission also refers to the need to include the process of seeking planning permission and 'remedies' including appeal, legal challenge and non-statutory remedies including mediation. We welcome the Commission's proposal to include a legislative 'signpost' to the latter.

The role of Natural Resources Wales

4.30 We were told by Natural Resources Wales that the duties to consult Natural Resources Wales as part of the local development plan or development management process is mostly set out in secondary legislation and their duties to respond are entirely set out in secondary legislation. Natural Resources Wales thought that it may be useful to ensure that the detail of when to consult specialist consultees is clear and consistent and consideration may also be given to explore the benefits to clarify in legislation the reason as to why NRW is consulted.

---

6 Planning (Wales) Act 2015, s 62D.

European Union legislation

4.31 The Planning Officers Society Wales – South West Wales, Neath Port Talbot Council and Planning Aid Wales noted that a comprehensive incorporation of European Union legislation should be part of the codification exercise. Similarly, the Town and Country Planning Association noted the following on the topic of European Union legislation:

> In the light of their importance to sustainable development and minimising adverse environmental impact, relevant European Directives - many of which have been enshrined in England and Wales planning legislation already - should be included in the initial phase of codification.

CONSULTATION QUESTION 4-2: WE WELCOME STAKEHOLDERS' VIEWS ON THE SUBJECT MATTER OF LATER PHASES OF CODIFICATION AND THE SUGGESTED WIDER SCHEME OF CODIFICATION

4.32 In the scoping paper we suggested that after the phase on development planning and development management, there would be phases considering the historic environment, the rural environment, regeneration and development and hazardous substances.

Historic environment

4.33 Three consultees told us that it would be useful to consolidate historic environment law separately. Planning Aid Wales agreed that legislation on the historic environment would fit into the wider scheme of consolidation which should be pursued after this phase. Persimmon Homes West Wales agreed that Historic environment should be a later phase of codification. The Country Land Owners Association commented on the codification of the historic environment in the following terms:

> We agree in principle with the view, expressed widely in debates and discussions on the Historic Environment (Wales) Act 2016, and in this paper, that it would be beneficial to consolidate historic environment law. A full consolidation, however, might be resource-intensive, not only for Welsh Government, but also for other stakeholders, not least because it would be bound to change the law and raise issues of policy. We therefore suggest that any serious consolidation is delayed at least until after the completion of the current historic environment review, which is absorbing a lot of scarce stakeholder resource (the CLA for example is currently working on 8-10 consultations on secondary legislation and guidance).

4.34 RTPI Cymru told us that there may be considerable debate about 'unpicking listed building and conservation area provisions' between this first phase and the proposed second phase dealing with the historic environment.

4.35 Monmouthshire County Council and the Planning Officers Society Wales – South West Wales thought that conservation area legislation should be a priority area to follow the first phase of work given the link between heritage and development management.

Rural environment

4.36 The Country Land Owners Association implicitly agreed that the rural environment should form a separate phase of codification, noting the following:

> Given that CLA members are largely responsible for landscape delivery in rural Wales, we will give close scrutiny to the proposals suggested in para 4.8(3) above the proposals to consolidate rural environment legislation. We are unclear what is meant by "the countryside generally" and this phrase requires clarification. There is no doubt, however, that the outcomes for this consolidation work are crucial for the long term sustainability of farming and other land-based businesses, rural communities, tourism etc all of which will be included in the phrase "countryside generally". The consolidation work must deliver positive outcomes for the countryside, and those who live and work within it.

4.37 According to the National Farmers Union, rural and farming should be a separate topic or should have specific information provided under each topic. The National Farmers Union noted the following:

> How to implement planning law in rural areas is very different to an urban environment, for example, with respect of sustainable development, employment, highways and housing needs.

4.38 Persimmon Homes West Wales also agreed that the rural environment should be included as a later phase of codification. RWE Generation noted that in relation to the rural environment, this should include consolidation of the Wildlife and Countryside Act 1981 and create a unified set of nature conservation provisions. Innogy Renewables UK thought that the rural environment subject area should also include the Commons Act 2006 given that it has a significant impact on, for example, onshore wind development proposals on common land.

Regeneration and development

4.39 Persimmon Homes West Wales agreed that the later phase of codification should include regeneration and development. The Woodland Trust told us that 'urban woods and trees' do not obviously fit into any phase of codification. They believe that street trees are of particular concern as they make an important contribution to the urban streetscape. According to the Woodland Trust:

> The wider urban environment seems to be excluded from consideration as it falls between the historic environment and the rural environment. An explicit reference should be made to greening the built environment in section (4) Regeneration and Development.

Chapter 5: Technical Reform

INTROUCTION

5.12 In our scoping paper, we categorised any improvements made to the clarity, consistency and accessibility of the law as being 'technical' amendments. We set out four categories of technical amendments:

(1) clarification where the terms used in statute lack clarity or provisions are inconsistent in their wording;

(2) procedural improvements where there is a need to streamline procedure or amend discrepancies in the planning process;

(3) removal or rationalisation of obsolete, duplicative or uncommenced provisions; and

(4) adaptation where provisions do not reflect established practice.

5.13 We concluded that the inclusion of technical reform as an element of codification provides a unique opportunity to deal with issues which have not been sufficiently problematic to necessitate self-standing reform and that it provides an opportunity to address anomalies and modernise the system in minor but important respects.

5.14 We asked two consultation questions. First, we sought stakeholders' views on whether technical reform as discussed in this chapter should be pursued in the substantive phase of the project. Second, we sought suggestions from stakeholders as to desirable areas for technical reform that fall within our classification system.

CONSULTATION QUESTION 5-1: WE INVITE STAKEHOLDERS' VIEWS ON WHETHER TECHNICAL REFORM AS DISCUSSED IN THIS CHAPTER SHOULD BE PURSUED IN THE SUBSTANTIVE PHASE OF THE PROJECT.

5.15 The majority of consultees (92%) who responded to this question agreed that technical reform should be pursued in the substantive phase of the project.[7] For example, the Public Services Ombudsman Wales agreed that technical reform, as discussed in the scoping paper, would be a 'sensible way forward'. The Bar Council commented on technical reform in the following terms:

> The Law Commission's analysis and identification of the current aspects of the existing legislation and law which present issue, but which have not been sufficiently problematic to necessitate self-standing reform, is important. We agree that they detract from the accessibility and clarity of the law as it currently stands and that these issues warrant the attention of this paper and the proposals.

[7] 25 consultees responded to this question: 23 agreed that we should be pursuing technical reform in the substantive phase of the project. 2 consultees held equivocal views.

5.16 Some consultees qualified their support for technical reform as suggested in the scoping paper. For example, the Country Land and Business Association (CLA) was in general agreement 'insofar as the project proposes codification' but told us that the project is 'a missed opportunity as it merely seeks to tidy up around the edges as opposed to delivering change'.

5.17 Two consultees held equivocal views on pursuing technical reform. Torfaen CBC thought that technical reform should only be pursued if 'the topic areas are focussed' and 'within strict parameters', so as to 'provide a clearer picture of the law as it stands without attempting at this stage any alteration'. Then 'once a clearer picture has been provided then further reform could be attempted'. Similar comments were made by the Residential Landlords Association:

> We agree that technical reform should be pursued but we would argue, as we have done already above, that this should be a separate first phase of each stage. Otherwise, there is a grave danger that the changes (even if they are classified as technical) are "lost" in the midst of the consolidation process. At this stage as part of this phase it would also be important to identify the relevant case law which is to be incorporated so as to ensure that it is both identified and is consistent, bearing in mind the difficulties which can arise with conflicting case decisions.

5.18 A large number of consultees used consultation question 5-1 as an opportunity to discuss the areas of technical reform which they consider to be desirable, which we have taken into account as part of our analysis of consultation question 5-2.

CONSULTATION QUESTION 5-2: WE INVITE SUGGESTIONS FROM STAKEHOLDERS AS TO DESIRABLE AREAS FOR TECHNICAL REFORM WHICH FALL WITHIN OUR CLASSIFICATION SYSTEM.

LACK OF DEFINITIONAL CLARITY OR INCONSISTENCY IN WORDING

5.19 In the scoping paper, we noted that certain provisions in the current law are unclear in their application or inconsistent in their wording. A number of consultees commented on this lack of definitional clarity or inconsistency. Newport BC Council told us that clarification of areas where doubt exists is desirable and that 'this would be preferable to further evolution of legal code through case law.'

Considerations to be taken into account in making planning decisions

5.20 In the scoping paper, we identified that it might be helpful to local planning authorities if the various duties which apply to them when making planning decisions were brought into one place.[8] We suggested that, at the very least, the Planning Code could signpost provisions which point to other legislation where these various duties may be found.

---

[8] Town and Country Planning Act 1990, ss 70(2)(a),(c), 70A(1)(b),(4A)(b), 91(2), 92(6), 97(2), 102(1), 172(1), 177(1),(2), sch 9, para 1; Planning (Listed Buildings and Conservation Areas) Act 1990, ss 66(1), 72(1); Planning and Compulsory Purchase Act 2004, s 38(6); Planning (Wales) Act 2015, ss 3, 11, 31. See Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.28.

The National Grid agreed with our preliminary view on considerations to be taken into account in making planning decisions. The Planning and Environmental Bar Association (PEBA) considered that the "signposting" provisions might be better achieved through non-statutory guidance rather than being included in the Planning Code.

5.21 Richard Harwood QC suggested introducing a duty to have special regard to the following: scheduled monuments, registered parks and gardens and registered battlefields. He also suggested abolishing the duties to consider matters in planning applications for underground coal mining (Coal Industry Act 1994, s 53(2)) as 'these would have to be considered anyway'.

5.22 The Four Welsh Police Forces said the following:

> The Crime and Disorder Act 1998 places clear legal obligations on public bodies in Wales to consider crime and disorder issues. This needs to be reflected in any future planning laws in Wales.

Reserved matters

5.23 PEBA and Persimmon Homes West Wales agreed that the Planning Code should clarify the definition of reserved matters. According to Persimmon Homes West Wales, it is not a planning permission but an approval of matters limited exclusively to access, appearance, landscaping, layout and scale. They also noted the following:

> Furthermore, we would welcome the opportunity for the Planning Code to also clarify that a LPA can grant RM approval even if the information submitted does not necessarily discharge all of the pre-commencement or pre-occupation conditions attached to the outline permission as a separate application can be submitted at a later date to formally discharge them as long as the reserved matters submission includes the information specifically referenced in the conditions attached to the outline planning permission that the reserved matters submission must include.

5.24 Rhondda Cynon Taf CBC suggested that the Planning Code should clarify whether an application under section 73 and 96A of the TCPA 1990 can be submitted for a reserved matters application.

Operational land

5.25 In our scoping paper, we suggested clarifying the exclusion in relation to operational land contained in section 262 of the TCPA 1990.[9] Persimmon Homes West Wales thought that we should clarify the exclusion. The Planning and Environmental Bar Association 'were not so convinced' of the need for further legislative clarification in relation to operational land. The National Grid commented on the clarification of the exception in the following terms:

> The Commission intends to review the definition of exclusions relating to 'operational land' in the TPCA (paragraph 5.22). Statutory

[9] Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.20 to 5.22.

> undertakers, including National Grid, should be involved in this review to ensure that the outcomes enable them to meet their statutory duties and do not undermine the development, operation and maintenance of essential infrastructure.

Content of an enforcement notice

5.26 PEBA agreed that there is merit in the proposal to clarify the wording of section 173(4) of the Town and Country Planning Act 1990, which sets out the "purposes" for which the LPA can require steps or activities in an enforcement notice. PEBA also noted the following:

> It would also be helpful to consider whether the prescribed contents of an enforcement notice should include a statement by the issuing planning authority of its assessment of the lawful use of the land.

AMENDING DISCREPANCIES IN PROCESS AND STREAMLINING PROCEDURE

5.27 A number of consultees commented on the provisions in the law which currently have the potential effect of slowing down the operation of the system or producing inconsistencies.

Consistency in the grant of planning permission

5.28 In the Scoping Paper, we noted that the power for an LPA to grant planning permission unconditionally under section 73(2)(a) is, unlike section 70(1)(a), not subject to sections 91 and 92, which require that a planning permission be granted subject to the condition that the development must begin within a prescribed period.[10] The Planning and Environmental Bar Association agreed with the provisional view that the equivalent section 73(2)(a) should also be subject to the equivalent of sections 91 and 92 in the Planning Code.

Minor material amendments

5.29 The procedure in section 73 of the TCPA 1990, used to vary or remove conditions, is currently also invoked to make minor material amendments to planning permission. In the scoping paper, we took the preliminary view that there should be a self-standing application procedure for minor material amendments, mirroring the section 96A procedure for non-material amendments in order to facilitate the LPA responding in a reasonable manner to small changes to an approved scheme.[11] PEBA, the Country Land and Business Association (CLA) and the National Grid agreed with that preliminary view. Similarly, according to Persimmon Homes West Wales:

> We also agree that using the section 73 procedure for minor material amendments is disproportionate and that an application process similar to the section 96A procedure for non-material amendments should be introduced to avoid treating a minor material amendment as a new planning permission requiring it to be subject to the same consultation

---

[10] See Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, paras 5.33 and 5.34.

[11] See Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.38.

procedures and the same determination time period as a full or outline application.

5.30 Richard Harwood QC thought that section 96A (non-material modifications) should be extended to reserved matters approvals.

Concealed breaches of planning control

5.31 In the scoping paper, we noted that the statutory language of section 171B of the TCPA 1990 gives rise to the problem where a developer conceals a breach of planning control so that the time limit expires, meaning that the LPA can no longer take enforcement action.[12] PEBA agreed that we should consider the introduction of statutory provisions to address concealed breaches of planning control. Persimmon Homes West Wales also thought that the 'statutory language requires further clarification' in relation to section 171B.

OBSOLETE, DUPLICATIVE AND UNCOMMENCED PROVISIONS

5.32 The Wales Planning Consultants Forum told us that it is pleasing that the review is an opportunity to get rid of some dated requirements such as those that applied to development corporations and simplified planning zones. In our scoping paper, we note that there is a need to be cautious when considering provisions which are merely infrequently used and that infrequency of use should not detract from the possible continuing utility of a provision in limited circumstances.[13] The Planning Officers Society Wales (POSW) (South East) commented on this caution in the following terms:

> Yes, reform should be pursued, but a special plea is made that LPA practitioners are given the opportunity to assist and even guide those reforms. Mention is made in the consultation of the need to rationalise the substance of the law and improve process and procedure.
>
> […]
>
> Before deleting what appear to be obsolete areas of existing legislation, it may be worth asking could they be revived to good purpose.

Imposition of conditions

5.33 In the Scoping Paper, we reported that section 70(1)(a) of the TCPA 1990 enables LPAs granting planning permission to impose conditions "as they think it"; a provision which exists alongside a similar provision to impose conditions under section 72(1) of the TCPA.[14] Our preliminary view was that improvements might be made by considering the repeal of section 72(1) in the substantive phase of the project.

---

12 TCPA 1990, s 171B. See Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.50.

13 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.49.

14 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.79.

5.34 Richard Harwood QC thought that sections 70, 72, 73 and 73A should be brought together and commented that we should include the power to apply planning conditions in one provision. He noted that section 72(1)(a) is 'unnecessary' given the width of section 70(2), and suggested that sections 72(3) and(4) should be repealed.

Simplified planning zones

5.35 Persimmon Homes West Wales and PEBA supported the abolition of simplified planning zones.

Areas of archaeological importance

5.36 In the scoping paper, we noted that five areas had been designated as areas of archaeological importance in 1984 in England and no areas have ever been designated in Wales.[15] We suggested that this would be a good opportunity to repeal Part II of the Ancient Monuments and Archaeological Areas Act 1979 which makes provision for the establishment of such areas.

5.37 This suggestion was supported by the Country Landowners and Business Association, Richard Harwood QC, Persimmon Homes West Wales, and PEba.

Planning Inquiry Commissions

5.38 We noted in the scoping paper the merits of abolishing the power contained in section 101 of the TCPA 1990 which provides for the constitution of a Planning Inquiry Commission.[16] Richard Harwood QC agreed with the repeal of the section.

Urban development corporations

5.39 Even though the Country Land and Business Association thought that the whole project is a 'missed opportunity' as it merely seeks to tidy up around the edges as opposed to delivering change, they 'strongly support' the removal of the power to create urban development corporations (UDCs). They reported the following:

> Members have unfortunately seen the unelected representatives (who are often not directly affected by their decisions) on National Parks Planning committees, and those in AONBs too, blocking developments that have local support and that had the potential to serve those communities well.

5.40 The removal of the provisions allowing for setting up of the Urban Development Corporations was also supported by Persimmon Homes West Wales and PEBA.

Rural development corporations

5.41 Persimmon Homes West Wales and PEBA also supported the abolition of rural development corporations.

---

15 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.79.

16 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.52.

PROVISIONS NOT REFLECTING ESTABLISHED PRACTICE

Appeals under section 288

5.42 In the scoping paper, we identified that we would consider whether Part XII of the TCPA 1990 should continue to exist alongside judicial review given that the two procedures have converged considerably.[17] Only one consultee commented on this suggestion, namely the Planning and Environmental Bar Association, who agreed that there was a need to review the interrelationship between the two procedures:

> We share the Commission's view that, within the scope of this project, there is a need to review both the provisions of section 288 of the 1990 Act and the interrelationship between part 12 of the 1990 Act and the judicial review procedure (paragraphs 5.88-92). We note that the law on the exercise of judicial discretion in both statutory challenges to and applications for judicial review of planning decisions continues to be the subject of relatively frequent judicial commentary (paragraph 5.89).

5.43 Richard Harwood QC commented that there should be provision for a sole judicial review procedure for all planning challenges with exclusive judicial review and absolute time limits in certain cases (ss61N, 284-289 TCPA, section 113 PCPA, LBA, Hazardous Substances, ss 13, 118 Planning Act 2008). He suggested that this could replace the current five different procedures:

(1) applications to the High Court under TCPA 1990, sections 287 or 288, Listed Buildings Act 1990, section 63, and Hazardous Substances Act 1990, s xxx, and PCPA 20014, s 113;

(2) appeals to the High Court under TCPA 1990, section 289, and Listed Buildings Act, section 65;

(3) applications to the High Court for judicial review, under statutory time limits (which cannot be extended);

(4) applications for judicial review of other matters under the Planning Acts (subject to six-week, extendable, time limits); and

(5) applications for judicial review under conventional time limits (promptly and within three months, extendable), in particular of supplementary planning documents.

ADDITIONAL SUGGESTIONS FOR TECHNICAL REFORM

5.44 We received a number of additional suggestions for technical law reform which were not previously identified in the Scoping Paper.

---

[17] Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 5.91.

The need for planning permission

5.45 It was suggested that the various pieces of legislation providing permitted development rights should be incorporated into one consolidated order (which would include the General Permitted Development Order; the Advertisement Regulations and the EIA Regulations);

5.46 On specific points, it was suggested that there was scope for clarification:

(1) as to the doctrine of material change of use by intensification; and

(2) as to whether the conversion of two or more dwellings into a single dwelling house amounts to development.

5.47 It was also suggested that a separate use class should be introduced for holiday homes, similar to what has been done for HMOs.

5.48 Richard Harwood QC also suggested that:

(1) section 55(2)(a) of TCPA 1990 (operations and uses of land not taken to involve development of the land) should be amended to remove the phrase 'for making good war damage or works begun after 5th December 1968'; and

(2) section 90 of the TCPA 1990 (deemed planning permission for development authorised by Government departments) should be amended so as to be just as wide as for a normal planning permission.

The making of planning applications

5.49 As to the submission of planning applications, respondents suggested clarification as to:

(1) whether, under the TCP (Environmental Impact Assessment) (Wales) Regulations 2016, further publicity and public consultation is required where a previously provided ES remains fit for purpose; and

(2) the treatment of applications for development on land straddling the border between England and Wales or for development that could have 'trans-boundary' impacts (for example, the applications which require assessment under the EIA Assessment regulations).

5.50 More generally, it was suggested that the Development Management Procedure Order and the Orders amending it could usefully be consolidated – not least to clarify the requirements to consider environmental information under the Order and under the EIA Regulations.

5.51 It was also suggested that the new Planning Code should leave out as being unnecessary these provisions, relating to planning applications:

(1) section 65(5) (the offence of providing a false certificate of notification of owners); and

(2) section 56(1) (the provision which details when development of land is taken to be initiated);

The determination of applications and appeals

5.52 As to the processing of applications, the following suggestions were made:

(1) the criteria for validating applications contained in primary legislation should be clarified, as they sometimes contradict those in the circular;

(2) the local list (as to the matters to be submitted with applications) should be abolished entirely (rather than merely curtailed, as was attempted in relation to England, under the Growth and Infrastructure Act 2013);

(3) the meaning of 'days' should be clarified in the requirements as to consultation under the Town and Country Planning (DMP) Wales Order 2012 (as amended) and the Developments of National Significance (Procedure) (Wales) Order 2016, as there is confusion over whether this means working days or calendar days;

(4) there should be a duty on Welsh Ministers to notify the applicant of call-in, rather than on the LPA under the DMPO 2015, art 17;

(5) TCPA 1990, section 74(1)(b) (power to grant planning permission for development not in accordance with the development plan) should be omitted, as being unnecessary.

5.53 We were alerted to a number of problems with the current system of imposing conditions, including the following:

(1) LPAs can be reluctant to provide applicants with a draft of proposed planning conditions, preventing discussion prior to the granting of permission or approval of reserved matters – despite the guidance in the Welsh Government Circular 16/2014 which states that "cooperation and discussion between the parties involved in a planning decision can reduce the number of conditions attached to a decision";

(2) LPA planning committees may attach additional conditions which do not meet the six tests identified in the Circular; and

(3) LPAs sometimes simply copy conditions from the Circular without giving much thought to whether they are necessary and reasonable, enforceable, precise, relevant or suitable.

5.54 In light of these problems, it was suggested that applicants should be allowed to see draft conditions prior to the making publically available the planning committee report or (when an application is determined under delegated powers) the issuing of a decision notice. We were also told that the new Planning Code should introduce procedure to enable the deemed discharge of planning conditions in Wales subject to the same

exclusions that are in force in England[18], so as to enable an applicant to serve notice on the LPA that a condition has been deemed to be discharged.

5.55 As to appeals, it was suggested that there was no need for the existing requirement for the Secretary of State to copy to the planning authority appellants' documents (in Written Representations Regulations, reg 7(3)).

5.56 Several respondents noted that the rules providing for planning appeals and inquiries and enforcement procedures should be updated to more closely reflect current practice, and consolidated.

Unauthorised development

5.57 Mr Harwood suggested that section 57(4) of the TCPA 1990 (the provision which states that where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development had not been carried out) should be amended to allow 'reversion to previous lawful use if unlawful use carried out without needing an enforcement notice'.

5.58 He also queried whether the new Planning Code should leave out, as being unnecessary, section 302 and Schedule 15 (enforcement against World War II breaches by the Crown).

Other provisions

5.59 It was suggested that the law relating to planning obligations should be amended by:

(1) enabling local planning authorities to bind their own land in planning obligations;

(2) providing for a notice and criminal offence to enforce planning obligations; and

(3) providing a charge over land for non-payment of a planning obligation; and

(4) making plain that proceedings by LPAs to enforce planning obligations should be under Part 8 of the CPR.[19]

5.60 The following additional suggestions were made:

(1) the legislation governing action by planning, building control and environmental health departments when dealing with untidy land and dilapidated buildings (currently contained in section 215 of the Planning Acts and sections 76 to 83 of the Building Act 1984) should be consolidated; and

(2) legislation relating to protected species should be consolidated;

(3) there should be a review of the requirements for special parliamentary procedure in compulsory purchase / highways orders affecting statutory undertakers

---

[18] under Development Management Procedure Order (England) 2015, art 30 and Sched 6.

[19] Civil Procedure Rules, Part 8 Practice Direction

(following the precedent of the Growth and Infrastructure Act amendments to the Planning Act 2008.

5.61 A number of consultees also used this question as an opportunity to give their support for the consolidation or combination of procedures association with planning consent, which fed into our analysis of consultation questions 6-1 to 6-4.

Chapter 6: Merging Consent Regimes

INTROUCTION

6.12 We devoted an entire chapter of the scoping paper to one type of technical amendment which seeks to draw together certain planning-related consents within the mainstream planning system. We noted that this has the potential to improve transparency and clarity within the system, make the system more coherent and enable members of the local community to take a more rounded and informed view of development proposals.

6.13 We asked our consultees four consultation questions. First, we sought stakeholders' views on the practical benefits which might be derived from the exercise of unification. Second, We sought stakeholders' comments on whether we should be looking at the merging of consent regimes into one statutory process, or instead retaining the separation between the processes but presenting these together in the proposed Planning Code. Third, we asked whether stakeholders considered that any (and if so, which) of the statutory consents identified in this chapter are appropriate for unification. Finally, we sought evidence on the number of applications for planning permission which are currently accompanied by applications for listed building, conservation area or advertisement consent.

CONSULTATION QUESTION 6-1: WE CONSIDER THAT DRAWING TOGETHER CONSENTS AS SET OUT IN THIS CHAPTER IS LIKELY TO DELIVER A SYSTEM THAT IS MORE OPEN, ACCESSIBLE AND CONSISTENT. WE SEEK STAKEHOLDERS' VIEWS ON THE PRACTICAL BENEFITS WHICH MIGHT BE DERIVED FROM THE EXERCISE.

6.14 Even though this question asks stakeholders for the practical benefits of the drawing together of consents, a large number of consultees used this question to express their overall view on the merging of consent regimes generally, which we have used to inform our analysis of Consultation Question 6-2.

6.15 However, a large number of consultees did provide us with practical benefits which could be derived from the drawing together of consents, albeit the majority agreed with the benefits which we specified in the relevant section of the scoping paper.

6.16 Rhondda Cynon Taf County Borough Council thought that the unification of consent regimes would deliver a system that is more accessible to the public, remove the duplication of work and some of the administrative burdens placed on councils having to deal with applications which straddle consent regimes.

6.17 The Woodland Trust made the comment that the unification of consent regimes would lead to closer relationships between Natural Resources Wales and local planning authorities, particularly with regard to how unlawful operations and development in ancient woodland are dealt with. The Woodland Trust also noted that similar benefits are possible in relation to enforcement:

> Whilst consent regimes are important how enforcement is dealt with is also critical as this is where differing parties need to work closely

> together. Working closely together, sharing intelligence and resources would be beneficial to ensuring appropriate enforcement action is taken.

6.18 According to Neath Port Talbot Council, the removal of duplication will 'simplify the process, improve efficiencies and reduce uncertainty' and make the legislation more open and transparent. They also noted that this will make it more accessible to the planning profession in addition to third parties.

6.19 Natural Resources Wales said the following:

> We consider that exploring the potential to draw together consents as set out in the consultation exercise may help to identify measures to improve accessibility and consistent decision-making. It seems that the exercise will focus entirely on consents which are determined by the local authority. However, certain planning applications will be determined by Welsh Ministers (e.g. appeal decisions, 'call-in' planning applications) and it is unclear who will determine those other consents identified in this consultation document when planning applications are determined by Welsh Ministers.

6.20 Another group of consultees, such as the Town and Country Planning Association and Planning Aid Wales, noted that there may be benefits to the process of unifying consents, but that the process of achieving unification may be difficult in practice, especially as the regimes relate to enforcement and appeals.

6.21 Some consultees used this question as an opportunity to speak generally about the benefits of a planning code. For example, the Bar Council commented on the benefits of codification in the following terms:

> The sorts of benefits that could be gained from consolidation and simplification would clearly flow out of reform that would make the system more practical. These benefits would be felt more obviously by members of the public who have had to approach planning questions without any previous experience.

CONSULTATION QUESTION 6-2: WE SEEK STAKEHOLDERS' COMMENTS ON WHETHER WE SHOULD BE LOOKING AT THE MERGING OF CONSENT REGIMES INTO ONE STATUTORY PROCESS, OR INSTEAD RETAINING THE SEPARATION BETWEEN THE PROCESSES BUT PRESENTING THESE TOGETHER IN THE PROPOSED PLANNING CODE.

6.22 The majority of consultees (61%) supported the proposals to unify consent regimes.[20] In reaching this conclusion, we have considered consultees' answers to the other

[20] 39 consultees expressed a view on the merging of consents: 23 agreed, 11 disagreed and 5 held equivocal positions.

questions asked in the scoping paper on the unification of consent regimes, where appropriate.

6.23 64% of planning authorities who responded to the consultation supported the proposal to unify consent regimes.[21] Neath Port Talbot and the Planning Officers Society Wales (South West Wales) told us that the removal of duplication will simplify the process, and improve efficiencies but did note that there is a risk that merging consent regimes could downgrade impacts upon the historic environment. They told us that this can be addressed by including additional criteria in relation to applications relating to the historic environment. The Planning Officers Society Wales (South East Wales), who also broadly agreed with the unification of consent regimes, commented in the following terms:

> Unifying consents is welcomed. Most members of the public consider that in all cases they are applying for planning permission; it is only the LPAs that distinguish between the consents because of the legislation. The important thing is that the legislative and policy support makes it clear that the material considerations for determining an application for permission to do work to a conventional building will be different to work involving a listed building, or in a conservation area, and so forth. This is something that will have to be thought through as part of this process to ensure the submission of a planning application does not become too complicated.

6.24 The Planning Inspectorate thought that the bringing together of the consent regimes 'could be beneficial'.

6.25 A range of consultees who were in favour of unification caveated their support by explaining that any proposed merger of consents should not lead to a loss of any right to make representations or a dilution of protection of the historic environment. For example, the Bar Council commented on unification in the following terms:

> We consider that the unification or the principle of making a single relevant decision making process where it will not lead to the loss of any right to make representations, and indeed avoid confusing and costly duplication of the consideration of the same project under separate regimes, is to be supported.

6.26 The Residential Landlords Association, who generally agreed with the unification of consents, suggested the introduction of an opt-out so that applicants can apply separately for a particular consent should they wish:

> We agree the principle of unification of consents. After all a lay person, not unreasonably, often assumes that they have been given permission by the planning authority to do something covers anything else for which a consent is needed.
>
> We agree with the more radical approach of merging consent regimes into one but, importantly, there needs to be an opt-out so that

[21] 11 planning authorities responded to the consultation: 7 agreed, 1 disagreed and 3 held equivocal positions.

> applicants can apply separately for a particular consent. After all, for the change of use for a listed building you might want to establish the principle that a change of use is acceptable before you embark on the detailed design process, which in the case of a listed building could mean that you have to employ a conservation architect.

6.27 The Town and Country Planning Association thought it would be useful to merge consent regimes in the Code but 'at a later stage'. We were told that the unification would mean that the 'planning process would become more integrated', however it 'should not be pursued if it simply results in adding further layers of complexity and paperwork'.

6.28 Five of our consultees held equivocal positions, three of which were planning authorities. For example, Monmouthshire County Council agreed generally with the principle of bringing together some related consents, 'provided this simplifies the process for everyone concerned'. However, they had concerns in relation to merging planning applications and listed building consents:

> It is not clarified in the report how merging the consent regimes will deliver an open, accessible and consistent system. These problems are arguably better addressed by improving resources in LPAs for the protection of the listed building; this doesn't have to be in terms of recruiting more heritage / conservation officers; this could be in terms of collaborative working, improving shared services and increasing delegation in LPAs. The provision of specialist advice at pre - application level is considered to be a better way of delivering a more open and accessible system providing clear and accurate advice at the beginning of the process, avoiding potentially abortive work.

6.29 Cardiff Council said that there could be an advantage to a single application in certain circumstances but the matter will require careful consideration due the complexity of issues that sometimes arise. They noted the following:

> Combining relative areas of legislation could be an advantage, but not necessarily into a single application where it may be of an advantage to retain separation.

6.30 Newport County Borough Council, who also held an equivocal view, sent the Law Commission both a formal response from the County Borough Council and an email from the Conservation Officer appended to the response. The formal response notes that 'duplication adds to the bureaucratic burdens and can be confusing to the public and to applicants where a single scheme requires several consents'. That response goes on to note the following:

> The applications may contain common themes and seem like unnecessary duplication. In the light of this a single consent regime appears attractive but should not lead to any underplaying of conservation interests.

6.31 The Conservation Officer at Newport County Borough Council, however, states that he has 'serious concern regarding the unification of consents', noting the following:

> Firstly, though there may be merit on unifying all planning and heritage consents, we already have a split in the determining authorities in that SAM consent is determined by Cadw. I am assuming that this is unlikely to change and, especially given that some sites are both listed and scheduled, I am a little worried about the potential to reinforce this division at a time when much work is being done through the Historic Environment (Wales) in order to produce a unified suite of legislation and guidance on the historic environment.
>
> In particular, there is the possibility of works to nationally important (i.e. listed) buildings being seen as only a locally important issue if they become part of a broader LPA consent regime when SAMs are being considered at a national level. This leads me on to my second concern.
>
> If a larger development includes work that currently requires LBC or CAC, there seems to be a very real danger of these considerations becoming lost. Whilst technically it will be necessary for us to consider the issues as we do now, will LPAs really want to refuse applications for major development due to issues affecting only one (possibly relatively small) part of the site? Might it therefore cause delays or might there alternatively be risks associated with inappropriate decisions? And is there still a responsibility for Cadw to oversee decisions? Would this mean that all applications affecting LBs are subject to call-in provisions? And are statutory heritage consultees going to have to wade through all the documents associated with large applications in order to work out what concerns them? Overall, I can't see that this is going to be very helpful and it might actually just cause more confusion.

6.32 28% of consultees who responded to the proposals to unify consent regimes did not support them.[22] Consultees raised the following concerns about the merging of consent regimes:

(1) Internal works: It would be helpful that the regimes remain separate with regard to internal works to listed buildings which do not constitute 'development' for the purposes of planning (Section 55 of the Town and Country Planning Act 1990).

(2) 'Development' definition: The definition of development would need to be altered and would become more complicated and less straight forward for end users.

(3) Legal basis and objectives: The regimes are fundamentally different in legal basis and ethos. The presumption in favour of sustainable development outlined in Planning Policy Wales is often at odds with the requirement in the Planning (Listed Buildings and Conservation Areas) Act 1990 for decision makers to have 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'.

[22] 39 consultees expressed a view on the merging of consents: 23 agreed, 11 disagreed and 5 held equivocal positions.

(4) Dilute consideration to historic environment: There is a risk that the historic environment could become a secondary issue to general planning considerations.

(5) Symbolic: The separate process for listed building consent signifies to the applicant and decision-maker that they are dealing with something sensitive and valuable.

(6) Damage the character of the area: Studies have shown that the character and appearance of these areas have been damaged by inappropriate decisions or lack of control.

(7) Curtilage: There are different approaches to curtilage of buildings.

(8) Fee: It may lead to greater financial burdens and inefficiencies. There is no planning fee for a listed building consent application whereas there is a charge for planning permission applications. If costs are introduced for a listed building application this places an additional burden on owners of listed buildings. This could lead to more illegal works, resulting in a much greater burden of enforcement for the local planning authority and the loss of heritage assets and their significance.

(9) Consultees: Statutory consultees vary for both listed building and planning applications and their roll needs to be maintained in any streamlined process. Merging the systems would potentially increase the number of applications referred to consultees.

(10) Loss of expertise: The loss of local authority conservation specialists could means that conservation is side-lined and applications become decided by planners with little or no experience or expertise in building or monument conservation.

(11) Call-in procedure: There is currently a ‘call-in’ procedure for listed building consent applications which allows Cadw to prevent poor decisions by local planning authorities.

(12) Revisions: It may prevent applicants from revisiting only those consents that need to be amended if changes are proposed to the approved scheme.

(13) Appeals: It may lead to an increase in the number of appeals or appeals that are considered complex given their associated heritage issues.

(14) Criminal offence: It may result in applicants committing a criminal offence rather than breaching normal planning rules.

(15) Enforcement time limits: There is currently no statute of limitations for enforcing illegal works affecting a listed building, this is not so for works which require planning permission.

(16) Repairs notices: It could have unexpected consequences on repairs notices.

(17) Change of use: If consents were merged, an outright rejection of a change of use would reduce the number of applicants willing to take on our buildings at risk and lead to the loss of vulnerable buildings.

6.33 One planning authority disagreed with the merging of consent regimes, preferring instead that the separation of the processes be retained but presented together, akin to the model adopted in the Planning Act (Northern Ireland) 2011.

6.34 The Ancient Monuments Society told us that they were 'very alarmed' by the prospect of listed building consent in particular being merged with the broader planning regime. They told us:

> LBC is important precisely because its whole premise is the protection of the historic environment. The fact that there is a separate regime puts applicants and decision-makers on their mettle – it tells them that they are dealing with sensitive, valuable, precious structures. It is fundamentally different in its legal basis and ethos from planning permission. To have a single regime for the construction of a utilitarian industrial shed and the demolition of a listed building is to downgrade the significance of the latter.

6.35 Similarly, Civic Trust Cymru 'strongly object' to the proposal to merge planning permission and listed building consent, as well as conservation area consent. Their objection was framed in the following terms:

> We would be extremely concerned that there would be further loss of local authority conservation specialists as conservation is side-lined and applications decided by planners with little or no experience or expertise in building or monument conservation. The current trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility.
>
> The lack of specialists skills will mean that the historic environment is not given sufficient consideration and that a reduction in the quality of decision making will result in the historic environment being side-lined which would additionally prevent the fulfilment of the legal requirements for the protection of heritage assets in Wales.

6.36 The Institute of Historic Building Conservation noted that a system in which historic environment controls remain distinct from general planning controls enables decisions about change to nationally designated historic assets to take place with a full consideration of the special interest or importance of the asset. We were told that 'a merged consent process would lead to a dilution of heritage considerations in any decision-making'. They also noted the following:

> Currently breach of listed building consent is a criminal offence and this does not apply to planning permission. This difference should remain by retaining the separation of the processes, even if within a single Code.

> If breaches of control were to be merged this would require either the criminalisation of breaches of planning control or the decriminalisation of listed building control. We would strongly oppose any move to decriminalise breaches relating to Listed Buildings. Listed building control is fundamentally different to planning control of development. The enforcement provisions for listed building breaches are different and it is essential that unauthorized work to Listed Buildings continues to be a criminal offence. The emphasis on the protection of heritage assets developed in the Historic Environment (Wales) Act 2016 and the emerging on Technical Advice Note 24 should not be lost.

6.37 The Wales Heritage Group informed us that they would 'strongly object' to any change to the existing consent processes that would undermine the status of heritage assets, or a consent authority's responsibilities and powers to protect heritage assets. They expanded on their concerns in the following terms:

> The Group is concerned that consideration for preserving the historic environment would become a secondary issue to general planning considerations, particularly to the overarching presumption in favour of sustainable development outlined in Planning Policy Wales. This presumption is often at odds with the requirement in the Planning (Listed Buildings and Conservation Areas) Act 1990 for decision makers to have 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'.

6.38 The British Property Federations (BPF) concerns were slightly different in nature. They told us that it is generally perceived as helpful that listed building consent remains independent from planning permission, particularly with regard to internal works to listed buildings which do not constitute 'development' for the purposes of planning (Section 55 of the Town and Country Planning Act 1990). According to the BPF:

> There are a number of potential legal complexities which may arise if it is deemed that there has been a breach of listed building consent, which may inadvertently result in applicants committing a criminal offence rather than breaching normal planning rules (e.g. by undertaking internal works without LBC). We also believe that conjoining the systems would lead to greater financial burdens and inefficiencies, possibly resulting in an increase in the number of appeals, or appeals that are considered complex given their associated heritage issues and therefore placing additional burdens on an already overstretched Inspectorate.

CONSULTATION QUESTION 6-3: DO STAKEHOLDERS CONSIDER THAT ANY (AND IF SO, WHICH) OF THE STATUTORY CONSENTS IDENTIFIED IN THIS CHAPTER ARE APPROPRIATE FOR UNIFICATION?

6.39 In the scoping paper, we suggested focusing attention on those consents which are most closely associated with planning, namely listed building consent, conservation area consent and advertising consent.

Listed Building Consent

6.40 The majority of consultees (64%) who commented on the merging of listed building consent agreed that it should be subsumed into general planning permission.[23] For the most part, those who agreed with the proposal simply expressed their support without passing substantive comment, where those who disagreed explained their reasoning more fully.

6.41 The Planning Officers Society Wales – South East Wales told us that there would be 'merit in unifying planning permission and listed building consent to overcome the need for applicants to seek two permissions'. However, they thought that this process would be 'assisted by an exercise of working through various scenarios of combining each and every consent to try to identify any pitfalls'. Similarly, Wales Planning Consultants Forum thought that the listed buildings consent regime 'largely duplicates the planning application regime and could readily be incorporated within planning control'. RSAW, who also agreed that listed building consent is appropriate for unification usefully commented that proposals need to be consistent with the requirements in the proposed TAN 24.[24]

6.42 Cardiff Council held an equivocal view on the subject, noting that this could be 'of advantage' but that there are likely to be 'complications with combining currently separate processes together where they have no direct / tangible connection'.

6.43 Civic Trust Cymru commented on the differences between planning permission and listed building consent. They noted that the objective of planning permission is to 'encourage sustainable development' whilst listed building consent's objective is 'about managing change to retain significance'. They also noted the following:

> Planning permission and listed building consent are also required for different types of building work. There are also key and important differences in the practices between the two consent regime including: enforcement time limits vs no limit for unauthorised work on listed buildings; the call-in procedure vs appeal; if a cost is to be introduced for a Listed Building application this places an additional burden on owners of listed buildings one that is likely to encourage more unauthorised works; the different approaches to the curtilage of buildings.

---

[23] 22 consultees commented on the merging of listed building consent with planning permission: 14 consultees agreed, 7 disagreed and 1 held an equivocal position.

[24] Proposed Technical Advice Note (TAN) 24: The Historic Environment.

6.44 RTPI Cymru did not support the unification of planning permission and listed building consent. They told us that the regimes have 'distinctly different concerns' and that this 'would lose the specialised focus on the very detailed implications from the point of view of the listed features'. They also noted that it could result in 'issues being overlooked'. The Institute of Historic Building Conservation thought that the two approvals 'exist for entirely different reasons and each is considered on a different basis'. They told us that it is possible 'for heritage aspects in planning considerations to be overruled, possibly rightly, by considerations of public benefit'.

6.45 Monmouthshire County Council were not in favour of unification of listed building consent and planning permission:

> With the increasing nature of on-line applications and the future of a potentially paperless process, there is no need for two sets of drawings, applications forms etc. therefore duplication is not really a problem moving forward. Par. 6.50 identifies problems such as timing, duplication, poor interaction between regimes, inconsistency and lack of understanding. However, we are unsure how merging consents will address these problems and if the process is followed correctly then these should not be issues. There are concerns over the unification of the planning and listed building consent regimes, mainly over the potential decrease in the level of specialist skills to advise on the appropriate management of the heritage environment and that where specialist advice is provided this could get diluted in its importance when balanced against other material considerations. In addition it might be easy for smaller elements of proposals to become lost in the scale of a larger application. There are also concerns over LPAs being confident in refusing applications based purely on the impact on the character of the listed building; there will always be an 'on balance' judgement and where there are so many issues to consider these issues may be perceived as relatively minor.
>
> There would be a need to reconcile the general duty in s.66 of the Listed Buildings Act 1990 with the 'combined application' being considered against the Development Plan and any other material considerations. This would need to be the primary consideration for such applications if the regimes are merged. it is essential that core values are identified and that these form the basis of the objectives. There should be no dilution of the current level of protection of the historic environment.

6.46 The CLA expressed two concerns with the merging of listed building consent and planning permission. First, reducing the special interest of listed buildings to merely one of many planning considerations that might be material would reduce the protection of listed buildings. Second, the unification would freeze the listed building consent system and prevent vital reform. The CLA commented on this second issue in the following terms:

> Unification would only be possible if there were (as suggested in 6.61) a guarantee that there would be no dilution of heritage protection. Any proposal to change any aspect of the LBC system would then be interpreted as a breach of that guarantee, making change difficult or impossible for years after the change was implemented. The problem is that the current LBC system requires any change to any listed building to be scrutinised by experts in the local authority (and usually in Cadw), but that that requirement is less and less adequately resourced in local authorities. That lack of resource (i) makes it too difficult to get consent for sympathetic change of the kind needed to ensure that listed buildings are updated and will be valued and maintained by their owners and (ii) makes it too easy for malign owners to damage the special interest of listed buildings without sanction because lack of resource makes enforcement unlikely.

Conservation area consent

6.47 The majority of consultees (63%) who commented on the merging of conservation area consent agreed that it should be subsumed into general planning permission.[25] The Theatres Trust and Wales Heritage Group, who both in principle 'strongly object' to any change to the existing system, did note that conservation area consent has been abolished in England and thought that 'a similar rationalisation could be beneficial in Wales'. They went on to suggest the following:

> A supporting paper be prepared on whether the abolition has been without harm to these areas or if the character and appearance of these areas have been damaged by inappropriate decisions or lack of control.

6.48 Monmouthshire County Council said that there are benefits of merging conservation area consent into planning permission, 'as long as the need to preserve or enhance the character of the Conservation Area is given the first and foremost consideration'.

Advertising consent

6.49 The majority of consultees (69%) who commented on the merging of advertising consent agreed that it should be subsumed into general planning permission.[26] For example, the Canal and River Trust commented that advertisement consent is 'often sought later in the delivery timetable' and that therefore a requirement to address this earlier in the process as part of one unified consent 'could be an unnecessary burden'. Torfaen County Borough Council thought that the control of adverts should be the subject of a separate standalone code.

---

[25] 19 consultees commented on the merging of conservation area consent with planning permission: 12 consultees agreed, 6 disagreed and 1 held an equivocal position.

[26] 16 consultees commented on the merging of advertising consent with planning permission: 11 consultees agreed, 4 disagreed and 1 held an equivocal position.

Additional consents

6.50 A number of consultees suggested the unification of consent regimes outside of those identified in the scoping paper.

6.51 Four consultees called for scheduled monument consent to be subsumed into listed building consent. CLA, however, expressed their disagreement with the unification of listed building consent and scheduled monument consent in the following terms:

> We do not feel that scheduled monument consent and LBC should be merged into some kind of 'heritage asset consent', as suggested in England a decade ago. This is not only because of the decision-taker issues mentioned in 6.52, but because the issues in the decision process are very different. A single 'heritage asset consent' approach might encourage decision approaches focused on the 'preservation' of 'evidence' and of 'historic fabric' which might be appropriate for scheduled monuments, but would be very damaging to listed buildings with their high maintenance costs and their need for sympathetic change so that they can be kept usable and viable and survive in the long term.

6.52 Monmouthshire County Council reported that the process of scheduled monument consent 'appears to be complicated and onerous and when this is linked to planning permission then there are often delays'. They suggested 'considering the ability to merge scheduled monument consent with listed building consent as a single heritage consent' but in that case LPAs would need to be appropriately resourced to deal with these applications or to have a service level agreement with Cadw or the Archaeological Trust.

6.53 The Residential Landlords Association called for consent to be added in relation to trees such as the felling of a tree, as is incorporated at present, noting that 'trees often form an important part, especially in residential development context as well as more widely.' The Woodland Trust noted the following on the felling licence regime:

> Problems often arise when sites subject to a restocking notice are put forward for planning consent. The restocking notice is often not flagged as a constraint; this is of particular concern in ancient woodlands.

6.54 Monmouthshire County Council pointed out that there is no mention of the Commons Act 2006 in the scoping paper. They noted that it is sometimes necessary to obtain commons consent under Section 16 and/or 38 of the Commons Act 2006 in addition to consent under the TCPA 1990 for onshore wind projects in Wales.

> The requirement for separate consents (as well as the significantly higher level of detail required to accompany CA 2006 applications) adds significantly to a developer's 'at risk' development spend, doubles the opportunities for legal challenges by judicial review and increases the overall timescales for developments.

CONSULTATION QUESTION 6-4: WE SEEK ANY EVIDENCE WHICH STAKEHOLDERS ARE ABLE TO PROVIDE ON THE NUMBER OF APPLICATIONS FOR PLANNING PERMISSION WHICH ARE CURRENTLY ACCOMPANIED BY APPLICATIONS FOR LISTED BUILDING, CONSERVATION AREA OR ADVERTISEMENT CONSENT.

6.55 The CLA, whilst they were unable to provide statistics for Wales, did note that in England between 2014 and 2015, around 30% of listed building consent applications were accompanied by planning applications according to research carried out by Historic England.

6.56 The Three National Parks Authorities told us that the Pembrokeshire Coast National Park currently has four applications for planning permission which are currently accompanied by applications for listed building, conservation area or advertisement consent. Newport County Borough Council told us that they had 39 combined applications over the preceding two year period.

6.57 Cardiff Council were able to provide us with the figures below, who noted that these figures are relatively low when compared to the total number of applications that have been determined during each time period.

(1) 2014: 76

(2) 2015: 86

(3) 2016 (up to October 2016): 76

6.58 Rhondda Cynon Taf County Borough Council said that between 2015 and 2016, listed building consent resulted in the submission of four detailed planning applications. 76 applications for advertisement consent also resulted in the submission of nine detailed planning applications. They noted the following in relying on such data:

> Whatever the numbers are per year is largely academic as much of the work is simply duplication and is an unnecessary burden to the Planning process. It is of particular relevance when dealing with applications for supermarkets / shops as well as new shop fronts. It would be far more efficient to consider everything in one application.

6.59 The Planning Officers Society Wales – South East Wales provided us with statistics from the Vale of Glamorgan Council. In relation to applications for listed building consent, the Council made decisions on 259 applications for listed building consent between 1 April 2011 and 31 March 2016. Of these, 230 (89%) were approved, eight (3%) were refused and ten (4%) were withdrawn. A further nine (3%) were identified as being Welsh Government decisions to approve. The remaining two applications were approved at appeal and finally disposed of. In all ten cases that were withdrawn, an application for listed building consent was appropriate. Of the 249 applications that were considered:

(1) 112 (45%) were accompanied by an application for planning permission;

(2) 137 (55%) were not.

6.60 In terms of applications for conservation area consent, the Vale of Glamorgan decided 53 applications for conservation area consent in the period between 1 April 2011 and 31 March 2016. Of these, 35 (65%) were approved, four (8%) were refused and 14 (26%) were withdrawn. Of the 14 that were withdrawn, one was withdrawn because of an alteration to the conservation area boundary resulting in the site no longer forming part of the conservation area and another was withdrawn because although a significant part of the planning application site was within the conservation area, the building to be demolished was not. The remaining 12 were not for (substantial) demolition and were, therefore, not appropriate. Of the 35 approvals, 1 was not appropriate and should not have been registered. Of the 39 applications that were appropriate:

(1) 36 (92%) were accompanied by an application for planning permission.

(2) 3 (8%) that were not accompanied by planning applications related in two cases to the demolition of garages/outbuildings and the third such application related to the speculative demolition of a building considered to make a 'positive' contribution to the character or appearance of the conservation area.

6.61 The Vale of Glamorgan Council provided the following statistics for the period between 2015 and 2016:

(1) Listed Building Consent

(a) 37 approved;

(b) 1 refused;

(c) 3 withdrawn;

(d) 1 WG decision;

(e) 16 (41%) were accompanied by a FUL application

(f) 23 (59%) were not.

(2) Conservation Area Consent

(a) 5 approved;

(b) 2 refused;

(c) 4 withdrawn.

(d) All seven applications were accompanied by a FUL application.

6.62 The Vale of Glamorgan commented on these statistics in the following terms:

> A significant number of applications for LBC are stand alone as might be expected were issues of detail which are usually permitted development, or indeed not development at all, are potentially issues that are matters for listed building consent. On face value, it would

> seem that there is some confusion amongst applicants for CAC with a quarter of all applications in the five year period being inappropriate. There also appears to be some confusion at officer level, albeit this is limited to one case. It is noted that the vast majority of CAC applications are accompanied by planning applications.

6.63 The Canal and River Trust told us that the vast majority of their planning applications are not accompanied by listed building, conservation area or advertisement consent.

> In the case of Glandŵr Cymru it is our opinion (not evidenced) that the vast majority of our planning applications are not accompanied by listed building, conservation area or advertisement consent. We do however submit a number of heritage consents that do not warrant an associated planning permission.

6.64 We received two responses from landowners / developers to this question. The Residential Landlords Association gave the following anecdotal evidence:

> Anecdotally we understand that applications for listed buildings / conservation area consent would be accompanying applications for planning permission. As regards advertising, which is more applicable in the commercial field than the residential field anyway, these are often dealt with separately and at a later stage of the process.

6.65 Persimmon Homes West Wales told us that in the past three years, they have had to submit one application for an advertisement in conjunction with a planning permission and have never submitted one for a listed building or conservation area consent.

Chapter 7: Codification of Case Law

INTROUCTION

7.1 In our scoping paper, we noted that the law is often rendered more complex as the detail to understand provisions contained in the TCPA 1990 is often found outside primary legislation. We noted that the codification of case law can yield a number of benefits, including contributing towards producing a more complete formulation of the law in an easily accessible form. We also commented on the difficulties associated with extracting propositions of law from case law.

7.2 We asked two consultation questions. First, we sought stakeholders' views on the rules being brought into the Planning Code, in particular as regards interpreting undefined statutory terms, the principles of planning law and filling gaps where the scope of statutory provisions is unclear. Second, we sought suggestions for case law appropriate for codification.

CONSULTATION QUESTION 7-1: WE WELCOME STAKEHOLDERS' VIEWS ON THE RULES BEING BROUGHT INTO THE PLANNING CODE, IN PARTICULAR AS REGARDS INTERPRETING UNDEFINED STATUTORY TERMS, THE PRINCIPLES OF PLANNING LAW AND FILLING GAPS WHERE THE SCOPE OF STATUTORY PROVISIONS IS UNCLEAR.

7.3 Approximately two thirds of consultees who responded to this question thought that the new Planning Code should seek to codify case law, whereas one third either disagreed or held an equivocal view.[1] For example, the Planning Officers Society Wales – South West Wales thought that this was 'welcome news' noting that 'a new Code should include a glossary of terms, definitions and where there is clear case law that is fully established this should also be referred to'. The Residential Landlords Association thought that without an understanding of principles which have emerged from case law, as well as individual case law decisions, 'it is impossible to understand the current planning system'.

7.4 In the scoping paper, we set out a list of criteria for which we would use to selecting case law for codification. That list included the following:

(1) how settled the case law is;

(2) whether the proposition or principle for which the case law stands is sufficiently clear and precise to enable it to be drafted in the form of a legislative provision; and

[1] 29 consultees responded to this question: 18 agreed with this question, 4 disagreed and 7 held equivocal positions.

(3) whether there are exceptions to the proposition or principle or any other substantive reasons for not attempting to draft it in legislative form.[2]

7.5 RTPI Cymru told us that this criteria appears 'sensible'. However, they thought that there should be additions to the criteria, namely:

(1) benefits of providing clarity on a particular issue; and

(2) where there are recognised to be gaps in the current statutory provisions.

7.6 A large number of consultees who agreed with the principle of codifying case law qualified their support, emphasising the need to ensure that the case law which is codified reflects accurately and definitively the current legal position. For example, RWE Generation and Innogy Renewables UK told us that they welcome the inclusion of specific rules into the Planning Code that would simplify and consolidate the most accurate definitions and interpretations of planning law principles but suggested that 'only longstanding and well established case law is codified'. Similarly, the Public Services Ombudsman for Wales commented on codification of case law in the following terms:

> Whilst I believe it would be useful if codification of case law formed part of the wider codification exercise, with everything in one place, I wish to strike a cautionary note. It is my view that if this approach is to be undertaken it will be important that the Code is updated frequently. This in turn means that it will need to be properly resourced to ensure that this happens. Care will also need to be taken to ensure that whatever is included in the Code is generally agreed to reflect the definitive position. Therefore, where there is any ambiguity surrounding case law and / or the matter has potential to evolve further, this should not be included.

7.7 The National Grid expressed its support for the principle of seeking to increase clarity of terms, but only where there is 'clear evidence that the existing definitions through statute or case law are insufficient and where there are clear benefits of having a clearer definition in Welsh law'. Neath Port Talbot Council said that 'definitions are not necessarily easy to put in place' and accepted that a 'criteria based approach may then be appropriate'. This comment was made by a number of other consultees.

7.8 Six consultees held an equivocal view. For example, Planning Aid Wales questioned whether it would be 'practical to go beyond defining key principles deriving from case law', but noting that this could 'inhibit desirable flexibility in meeting new situations'. Rhondda Cynon Taf County Borough Council accepted that the introduction of these rules into the Planning Code can provide clarity but thought that 'care needs to be taken on the drafting and the application of such rules'.

7.9 Torfaen County Borough Council held an equivocal view in that they generally agreed that in the case of exhaustive definitions, this would be appropriate in relation to 'settled case law' but in the case of non-exhaustive definitions, careful consideration would have to be given to the 'specific nature of the provisions'. They also noted that codifying

---

[2] Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.7.

principles of planning law might result in complex principles being 'rigidly applied and adhered to', rather than being 'basic foundations on which to build answers to difficult questions'.

7.10 Similar equivocal caution was expressed by the Planning and Environmental Bar Association:

> We share the Commission's caution over the risks and potential unintended consequences of seeking to codify case law (paragraph 7.5). On balance, we consider that the opportunities to codify case law in the context of the Commission's current project may be limited. We bear in mind that formulating a new Planning Code is a challenging project in itself, for the reasons given by the Commission early in the Consultation Paper. Although the various elements of the current planning legislation are fragmented and complex, they are also fairly comprehensive, as noticed by the House of Lords as long ago as its decision in Pioneer Aggregates v Secretary of State [1985] AC 132. We suggest that this aspect of the project might best be confined to very clear cut cases, where there is a need to codify principles from case law in order to fill obvious "gaps" in the statutory code (paragraphs 7.62-7.74).

7.11 Four consultees disagreed with the principle of codification of case law. The Town and Country Planning Association thought that whilst wider codification as specified is a useful longer term aim, 'it may be a bridge too far to include case law in the wider codification'. They noted the following:

> The implications of codifying case law principles will need to be considered carefully. It may produce unintended difficulties if new decisions arise that conflict with previous interpretations.

7.12 Similarly, the Planning Inspectorate told us that they do not consider case law appropriate to codify. They describe the task as a 'huge undertaking', requiring 'much consideration' and that ultimately the consolidation of case law is 'unnecessary':

> Such consolidation of case law is unnecessary. For example, the matter of curtilage does not lend itself well to being set down in law; it is very much fact and degree. This is also the case for material considerations.

7.13 The British Property Federation expressed particular concern about the differences which may emerge in doing this exercise in Wales, but not in England:

> This divergence in the two regimes could result in not only two entirely different and competing strands of case law emerging from the then separate legislative systems, but including case law itself may then also lead to unintended re-interpretations of that case law as the new legislation itself will be open to detailed scrutiny and interpretation by the Courts. Ultimately, unless a joined-up, cross-border approach is taken, and a very careful approach taken to the integration of case law with legislation, revisions of the nature described may cause more

unanticipated complications and confusion which is precisely what the consultation is seeking to resolve.

CONSULTATION QUESTION 7-2: WE WELCOME ANY SUGGESTIONS OF CASE LAW WHICH STAKEHOLDERS CONSIDER PARTICULARLY APPROPRIATE FOR CODIFICATION.

7.14 Consultees both supported the suggestions for case law codification which were listed in our scoping paper and made additional suggestions, which we consider below under the heading additional suggestions for case law codification.

INTERPRETING UNDEFINED STATUTORY TERMS

7.15 In the scoping paper, we reported that statutory terms are often left undefined and noted that there may be a case for codifying certain exhaustive and non-exhaustive definitions.[3]

Engineering operations

7.16 In the scoping paper, we noted that the first limb of the definition of development under section 55 of the TCPA 1990 covers operational development, which includes "building, engineering, mining or other operations", and engineering operations, which is not defined except to extend it to include "the formation or laying out of means of access to highways".[4] We came to the preliminary view that there may be a case for defining the various types of operations provided for in the legislation, and doing so consistently. The National Grid agreed with the statement in our scoping paper which said that the lack of any discernible confusion with regard to understanding engineering operations militates towards leaving the definition in case law. They went on to note the following:

> As an infrastructure provider with operations across England, Scotland and Wales, National Grid considers that there are clear benefits of having consistent definitions of key terms that are fundamental to the planning system (such as "development", "building" etc.) across all jurisdictions. The review should therefore carefully consider:
>
> a. whether there is a proven need for introducing such definitions in Welsh law which would be specific to Wales; and
>
> b. whether introducing such definitions into Welsh law could lead to inconsistencies, confusion or inefficiencies (e.g. in respect of cross-border projects or developers and others involved in the planning process in England, Scotland and Wales).

7.17 The Wales Planning Consultants Forum thought that this review may also be an opportunity to 'consider whether there is scope to broaden the range of operations that

---

3 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.11 and 7.12.

4 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.20.

may be excluded from the definition of development'. Persimmon Homes West Wales also agreed that engineering operations should be defined in the new Planning Code.

Curtilage

7.18 In the scoping paper, we reported that the concept of "curtilage" is not defined in statute and held the preliminary view that such a definition would improve the transparency of the law. The majority of consultees (71%) who passed comment on whether a definition of curtilage should be included in the new Planning Code agreed that it should.[5] For example, the Residential Landlords Association thought that the very reason that there is uncertainty in the law is a reason to codify principles so as to improve the current state of the law:

> We agree that the vexed issue of what is in the "curtilage" should be addressed. As it covers many different circumstances clearly it can only set down principles but anything would be an improvement on the current uncertainty around this issue. Non-exhaustive examples could be employed where appropriate.

7.19 RTPI Cymru noted that their members expressed support for the view that a definition of "curtilage" would improve the transparency of the law and would improve matters from an operational point of view. They noted the following:

> Defining a curtilage, in the absence of any clear statutory definition, is extremely complicated and difficult – both in dealing with residential curtilage issues in relation to permitted development and in dealing with defining the extent of listed building protection (i.e. including fixtures and buildings within the curtilage). A series of articles on this topic has been published online in Martin Goodall's planning law blog. In relation to listed building / curtilage issues, a particular problem is that the curtilage and other fixtures and ancillary buildings within the curtilage, at the time of listing, are often not described or defined in the original listing.

7.20 Persimmon Homes West Wales agreed that a definition of "curtilage" should be included but noted that there should be further consultation regarding its meaning and the date at which the meaning should apply, giving the following example:

> The curtilage of a listed building should reflect the date the building was listed whereas the curtilage associated with a current planning application should be taken from the date the application was submitted.

7.21 Neath Port Talbot Council, Merthyr Tydfil County Borough Council, Planning Officers Society Wales – South West Wales also agreed that curtilage should be defined in the new Planning Code.

---

[5] 7 consultees commented on whether curtilage should be defined in the new Planning Code: 5 agreed and 2 disagreed.

7.22 The two responses suggesting we do not codify the definition of curtilage were convincing. The Planning Inspectorate thought that the matter of curtilage does not lend itself well to being set down in law, given that 'it is very much fact and degree'. Similarly, the Country Land and Business Association also explained that producing a definition of curtilage is not desirable given that the concept of curtilage in a rural context may be completely different to that of a curtilage in a more urban context. They noted that 'it would depend on how this was done, and this may well apply to other codifications / definitions'. They suggested that definitions such as this might be better addressed using guidance and referred to the recent Historic England guidance on listed building curtilage. According to the Country Land and Business Association:

> Curtilage undoubtedly causes confusion, but case law does often provide a degree of certainty, for example in making it clear that if building B is not and has never been ancillary to building A, then building B is unlikely to be in the curtilage of building A. In contrast, the approach suggested in 7.17 appears to be "here is a bullet-point list of about 10 factors, any of which might potentially be relevant in deciding this question, but the Code will not indicate either what each bullet point means in practice, or which factors might be more relevant in any particular case". That could be manifestly unhelpful and much worse than the current position. Any codification therefore needs to be carefully designed to increase certainty for all parties, not reduce it.

Building

7.23 In our scoping paper, we explained that a non-exhaustive definition of 'building' currently exists in statute.[6] That definition is supplemented by a clear approach in case law to establishing a building, namely by considering features of size, permanence and physical attachment.[7] We took the preliminary view that this approach enshrined in case law should remain in case law.

7.24 We received two comments on the inclusion of the definition of a 'building'. The National Grid said that as an infrastructure provider, there are 'clear benefits of having consistent definitions of key terms that are fundamental to the planning system (such as "development", "building" etc.) across all jurisdictions' and therefore suggested considering whether there is a need to introduce Wales-specific definitions and whether introducing such definitions into Welsh law could lead to inconsistencies in respect of cross-border projects. Persimmon Homes West Wales agreed that the definition of a "building" should take into considerations its size, permanence and physical attachment.

Material considerations

7.25 The scoping paper noted that there is scope for improving the accessibility of the law by codifying the case law on material considerations, with the caveat that careful thought would need to be given to whether the result would actually be greater clarity.[8] RTPI Cymru thought that more detail on 'the principles of what is and what is not a

---

6 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.25.

7 Barvis Ltd v Secreatary of State for the Environment (1971) 22 P&CR 710 (Lord Parker CJ).

8 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.36.

material consideration' would be useful. Similarly, Merthyr Tydfil County Borough Council suggested that the new Planning Code should codify the 'need' for development as a material planning consideration. The Planning Inspectorate noted that material considerations (as well as the definition of curtilage) does not lend itself well to being set down in law.

PLANNING LAW PRINCIPLES

7.26 The scoping paper outlined a number of principles which we considered may be suitable for codification.[9] We also noted that such principles are, by their very nature, mutable, evolutionary and non-exhaustive and, as a consequence, noted that particular care must be taken when selecting cases establishing principles of planning law of codification.

The *Whitley* principle

7.27 In the scoping paper, we outlined that the viability of codifying the Whitley principle depends on whether future exceptions are envisaged and the workability of codifying the existing exceptions. RTPI Cymru were in favour of including codification of the *Whitley* principle in the new Planning Code:

> We would also support further consideration in relation to the issues around pre-commencement conditions arising from *Whitley* and subsequent cases. This is an area where the courts have developed more detail over time, particularly in relation to exceptions to the original *Whitley* principle. We therefore believe further consideration is required.

Approval of reserved matters

7.28 The scoping paper detailed the principle of approval of reserved matters and suggested that it is sufficiently clear and well-established to be capable of codification. Persimmon Homes West Wales agreed that the Planning Code should include the principle that the granting of an outline permission constitutes a commitment by the LPA to the principle of the development thus preventing them from refusing to approve any reserved matter grounds which goes to the principle of the development.

Validity of an enforcement notice requiring removal of incidental development

7.29 One consultee, Persimmon Homes West Wales, agreed that we should consider codification of the principle that a valid enforcement notice can require the removal of any incidental development.

---

9 Planning Law in Wales: Scoping Paper (2015) Law Commission Consultation Paper No 228, para 7.38 to 7.61.

The principle of abandonment

7.30 In the scoping paper, we came to the preliminary view that there is scope for further consideration of the approach to the principle of abandonment established by case law such as *Harley v Minister of Housing and Local Government* and *Hall v Lichfield DC*.[10]

7.31 Rhondda Cynon Taf County Borough Council thought that care needed to be taken on the drafting of these rules, commenting on 'the limitation of the principle of abandonment to existing use rights and not a planning permission'. Monmouthshire County Council told us that the principle of abandonment could be an area of focus which would add clarity to an area where there is too much scope for doubt at present. Persimmon Homes West Wales, Neath Port Talbot Council and the Planning Officers Society Wales – South West Wales also agreed that the principle should be codified.

GAP-FILLING WHERE THE SCOPE OF STATUTORY PROVISIONS IS UNCLEAR

7.32 In our scoping paper, we make a number of suggestions to fill gaps which have emerged through cases due to unclear provisions in planning legislation. We received very few comments on gap-filling. Persimmon Homes West Wales commented on such case law in the following terms:

> With regard to filling the gap where the scope of statutory provision is unclear, we agree with the Scoping Paper that the time limit for making an application under s288 of the TCPA 1990 should be clarified in the new Planning Code.
>
> We also agree that the criteria for the validity of planning conditions as set out in WG Circular 016/2014 should be incorporated into the new Planning Code but only once further technical reform has taken place that focuses on the drafting, agreeing and discharging of them as per our response to Consultation Question 5-2 above.
>
> We agree that the distinction between the types of an invalid conditions and their effect on the validity of planning permission can be and should be included in the new Planning Code subject to further investigation regarding the trivial/fundamental dichotomy and the ability of a planning permission to continue to exist if the planning condition in question is invalid and severed from the planning permission or reserved matters approval.

7.33 Monmouthshire County Council, RTPI Cymru and the Planning Officers Society Wales – South West Wales thought that the tests for planning conditions should be included.

ADDITIONAL SUGGESTIONS FOR CASE LAW CODIFICATION

7.34 We also received support for additional matters to be defined or clarified in the new Planning Code. These suggestions were often simply mentioned without further comment:

---

[10] *Harley v Minister of Housing and Local Government [1970] 1 QB 413; Hall v Lichfield DC [1979] JPL 246; See*

(1) the meaning of “material change of use”, and the scope of the “planning unit” doctrine;

(2) the correct method to calculate “ground level”;

(3) whether applications for listed building consent should attract a fee – at least to cover press notices;

(4) what constitutes a valid planning application;

(5) the status of objections made after the end of the 21-day consultation period;

(6) clarification as to the time when development is “commenced” or “started” or “begun”;

(7) the significance of the “fall-back position”;

(8) the significance of the Welsh language;

(9) the assessment of community benefits in relation to proposals for wind farms; and

(10) the significance of the *Wheatcroft* principle; and

(11) the meaning of “abutting”, “adjacent”, “amenity”, “dwelling” and “dwellinghouse”, “highway”.

Appendix 1: List of Consultation Responses

(1) Adrian Penfold

(2) Ancient Monuments Society (AMS)

(3) Ashley Bowes

(4) Association of District Judges

(5) Bar Council

(6) British Property Federation (BPF)

(7) CAMRA

(8) Canal and River Trust (Glandwr Cymru)

(9) Cardiff Council

(10) Churchstoke Community Council

(11) Civic Trust Cymru

(12) Community Housing Cymru

(13) Council for British Archaeology

(14) Country Landowners Association (CLA)

(15) Four Welsh Police Forces

(16) Gwersyllt Community Council

(17) Health and Safety Executive

(18) Home Builders Federation (HBF)

(19) Innogy Renewables UK

(20) Institute of Historic Building Conservation

(21) Leonora Rozee

(22) Llandrinio & Arddleen Community Council

(23) Llanelli Town Council

(24) Martin Goodall

(25) Merthyr Tydfil CBC

(26) Monmouthshire County Council

(27) National Farmers Union Cymru

(28) National Grid

(29) National Trust Wales

(30) Natural Resources Wales (NRW)

(31) Neath Port Talbot BC

(32) Newport CBC

(33) Newtown and Llanllwchaiarn Town Council

(34) Pembrokeshire Coast National Park Authority

(35) Penstrowed Community Council

(36) Persimmon Homes West Wales

(37) Planning Aid Wales

(38) Planning and Environmental Bar Association (PEBA)

(39) Planning Inspectorate (PINS)

(40) Planning Officers Society Wales - South West Wales

(41) Planning Officers Society Wales South East Wales

(42) Public Services Ombudsman for Wales

(43) Residential Landlords Association

(44) Rhondda Cynon Taf CBC

(45) Richard Harwood

(46) RICS

(47) RSAW

(48) RTPI Cymru

(49) RWE Generation UK

(50) Society for the Protection of Ancient Buildings

(51) The Coal Authority

(52) Theatres Trust

(53) Torfaen County Borough Council

(54) Town and Country Planning Association

(55) UK Environmental Law Association (UKELA)

(56) Wales Heritage Group

(57) Wales Planning Consultants Forum (WPCF)

(58) Welsh St Donats Community Council

(59) Welsh Water

(60) Woodland Trust and Ancient Tree Forum