

SUMMARY

Chapter 1: Summary

INTRODUCTION

- 1.1 The Law Commission was invited by the Welsh Government to consider the codification of planning law in Wales, and to make recommendations for technical reforms. We published a Consultation Paper in November 2017, containing over 180 provisional proposals and consultation questions. We then carried out a programme of meetings and events over the following three months; and we received over 160 written responses. We are grateful to all those who accepted our invitation to comment.
- 1.2 In the light of what we heard at those meetings and the written responses, we reviewed our proposals, and this Report sets out our final recommendations. As would be expected, in many cases these recommendations reflect the provisional proposals in the Consultation Paper; but in several instances we have withdrawn or amended proposals, and in a few we have added new recommendations, based on our research and consultees' responses.
- 1.3 This introductory summary provides a brief outline of the Report. It is available, along with the whole Report, and individual chapters of it (in both languages), on the Commission's website www.lawcom.gov.uk/planning-law-in-wales.
- 1.4 Part One of the Report deals with general principles. Chapter Two opens with a brief outline of the project so far – from the initial invitation to the Commission from the Welsh Government, via the Scoping Paper published in 2016, to the Consultation Paper in 2017 and now the Final Report in 2018 (Chapter One). Chapter Three describes the consultation exercise. We received a number of general responses, relating to the codification exercise as a whole, summarised in Chapter Four.
- 1.5 The fourteen chapters in Part Two of the Report then summarise the responses to our proposals in the Consultation Paper relating to each of the major areas in this field, and set out our recommendations as to the way in which the law can best be presented and, in some respects improved, for the benefit of all those who use it. We list our recommendations at the end of Part Two.

Terminology

- 1.6 We have, in many places throughout this chapter and the remainder of this Report, made a recommendation that such-and-such a statutory provision, currently in force in both England and Wales, should be repealed, omitted, abolished or amended. What is meant by such a statement is that the provision in question should either no longer apply in Wales or apply there in an amended form; and that an appropriate amendment should be made to the existing provision to ensure that it continues to operate in England in the same way as it does at present. Provisions that currently only apply in Wales, and are no longer needed, can be repealed in the formal sense (that is, removed from the statute book).

Acknowledgements

- 1.7 The following members of the Public Law Team have contributed to this project at various stages: David Connolly and Henni Ouahes (team managers); Beth Gascoyne and Dr Charles Mynors (team lawyers); and Anjoli Foster, Gayatri Parthasarathi, Thomas Jones, Ffion Bevan and Alex Shattock (research assistants).
- 1.8 We are grateful for the considerable assistance given to us by a number of officers of the Welsh Government throughout this project, as well as by many others with whom we have shared ideas. We emphasise, however, that the Final Report represents the views of the Commission, and not those of any who have assisted us.

PART ONE: GENERAL PRINCIPLES

CHAPTER TWO: TOWARDS A NEW PLANNING CODE FOR WALES

Background

- 1.9 The first significant piece of planning legislation in the UK was the Town and Country Planning Act (“TCPA”) 1947, which applied uniformly in England and Wales. This was followed by the TCPA 1962 and the TCPA 1971 (both consolidating measures); each was amended many times. The most recent consolidation measures were the TCPA 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous (Substances) Act 1990, which incorporated some minor changes recommended by the Law Commission.
- 1.10 The 1990 Acts have themselves been amended, or supplemented, on a number of occasions – notably by the Planning and Compensation Act 1991, the Environment Act 1995, and the Planning and Compulsory Purchase Act (“PCPA”) 2004. Since 2004, planning Acts passed by the Westminster Parliament have generally, but not entirely, applied only in England.
- 1.11 Distinctive national planning policy started appearing in Wales from around 1996, and separate secondary legislation from the late 1990s. Under the Government of Wales Act 2006, amended by the Wales Act 2017, the Welsh Assembly now has legislative competence in relation to all planning matters. The first results of that were the Planning (Wales) Act (“P(W)A”) 2015 and the Historic Environment (Wales) Act 2016.

The involvement of the Law Commission

- 1.12 Against this background, the Law Commission was invited to review the law relating to town and country planning in Wales, and to make recommendations to modernise and simplify the law. This led to the production of a Scoping Paper, published in June 2016 – alongside the Commission’s final report on the Form and Accessibility of the Law Applicable in Wales.¹ The Scoping Paper focussed on the scope of the exercise, and described our approach to consolidation and technical reform.

¹ *Form and Accessibility of the Law Applicable in Wales*, Law Com No 366.

- 1.13 Following consultee responses to the Scoping Paper, and in the light of continuing liaison with the Welsh Government and further research, we published a Consultation Paper, Planning Law in Wales, in November 2017, setting out 186 possible technical reforms, in the form of Consultation Questions. This Final Report builds on the responses we received to the Consultation Paper, and makes a similar number of final recommendations addressed to the Welsh Government.

CHAPTER THREE: THE CONSULTATION EXERCISE

Those we met

- 1.14 Following the publication of the Consultation Paper, we met with a wide range of stakeholders. We attended meetings organised by the Royal Town Planning Institute (“RTPI”), the Royal Institution of Chartered Surveyors (“RICS”), Planning Aid Wales, and the Town & Country Planning Association. We also held very helpful meetings with each of the three regional groups of the Planning Officers Society of Wales (“POSW”).
- 1.15 We also gave presentations at meetings organised by various groups – including the Welsh Government, the Law Society, two barristers’ chambers specialising in planning law, the Home Builders Federation, the Residential Landlords Association, Community Housing Cymru, the National Assembly Cross-Party Group on Housing, the Historic Environment Group, and One Voice Wales.
- 1.16 And we met with representatives of a wide variety of stakeholders, including the Royal Society of Architects in Wales, the Welsh Planning Consultants’ Forum, the Mineral Products Association, the Woodland Trust, and the Royal Society for the Protection of Birds.

The response we received

- 1.17 We received 165 written responses from a wide range of individuals and organisations, including local authorities, community and town councils, the Planning Inspectorate (“PINS”), developers, landowners, third sector organisations, and professional bodies – see Appendix A for a complete list.
- 1.18 The responses we received generally supported our proposals. Some were almost unanimously popular. But a small number (for example, the questions relating to the possible unification of listed building consent and planning permission, and those relating to outline planning permission) attracted a large volume of responses, mainly from those with a specialist interest in the topic concerned, expressing a wide range of views.

CHAPTER FOUR: GENERAL RESPONSES TO THE CONSULTATION PAPER

- 1.19 In this Chapter, we outline the general responses we received that related to the codification exercise as a whole. The more detailed responses relating to specific topics are considered in the later chapters.

- 1.20 Several stakeholders expressed concerns about reform for the sake of it (along the lines of “if it isn’t broken, don’t fix it”), both in general and in relation to specific proposals. However, the great majority of consultees agreed that codification was in principle desirable, with overwhelming support for simplification and consolidation of the legislation.
- 1.21 Some stakeholders from specialist interest groups (including those concerned with rights of way, and minerals) expressed disappointment that their particular area of interest was not within the scope of our project.
- 1.22 Many stakeholders expressed concerns about the practicalities of a planning Code – what it should contain (especially whether guidance should be included), how it will be presented and updated, and how it can be made as accessible and navigable as possible. We agree that these issues are of critical importance if the Code is to work effectively.

PART TWO: SPECIFIC TOPICS

References in square brackets in the remainder of this Summary are to the principal Recommendations within the remainder of the Report. A full list of our recommendations is at Appendix B.

CHAPTER FIVE: INTRODUCTORY PROVISIONS

Principles underlying the Planning Code

- 1.23 We first consider the statutory purpose of the planning system, and the duties that should guide public bodies exercising functions under the Planning Code.
- 1.24 The duty to have regard to the development plan, so far as material to the matter in hand, currently applies to the determination of planning applications and appeals (under sections 70 and 79), and to many other functions under the planning Acts – but by no means all. And that duty, where it applies, is paramount. We recommend that the duty should be extended so as to apply explicitly to the exercise by a public body of any of its functions under the Code – other than those relating to the formulation of the development plan, the determination of applications for certificates of lawfulness, and the making of subordinate legislation. **[5-1]**.
- 1.25 Every public body in exercising its functions is under a general duty to have regard to all matters that are relevant, and disregard all those that are irrelevant. But the TCPA 1990 explicitly requires those exercising certain functions under the planning Acts to have regard to “all other material considerations”. We do not consider that it would be helpful to try to define that phrase, but we recommend that it would be helpful for the duty to be applied explicitly to the exercise by planning authorities, strategic planning panels and the Welsh Ministers of any functions under the Code. We also recommend that the word “material” be replaced in the English language version by “relevant”, in line with modern usage. **[5-2; 5-3]**

- 1.26 The Listed Buildings Act imposes a duty on those determining applications for planning permission and listed building consent to have special regard to the desirability of preserving listed buildings, and to have regard to the desirability of preserving or enhancing conservation areas. We recommend that there should be a requirement for any public body exercising any function in relation to any historic asset (including a scheduled monument and a world heritage site) to have regard to the desirability of preserving or enhancing the asset, its features and its setting, and for any decision-making body exercising functions under the planning Act to have special regard to such matters. **[5-4]**
- 1.27 The P(W)A 2015 introduced duties to have regard to considerations relating to the use of the Welsh language, but only in relation to the appraisal of draft development plans and the determination of planning applications. We recommend that such considerations should apply in relation to the exercise by planning authorities, strategic planning panels and the Welsh Ministers of any functions under the Code, so far as relevant to the exercise of that function, by being explicitly included as a relevant consideration – again, except in relation to the formulation of the development plan and the determination of applications for certificates. **[5-5]**
- 1.28 Planning authorities are required to have regard to the policies of the Welsh Government in preparing a local development plan. But such policies are mentioned nowhere in the TCPA 1990, even though they are in reality a major factor in most if not all planning decisions. We therefore recommend that they too should be explicitly included in the list of relevant considerations to be considered by planning authorities, strategic planning panels and Welsh Ministers. **[5-6]**
- 1.29 Section 2 of the P(W)A 2015 introduced a duty for public bodies exercising some functions under the planning Acts – but, again, not all of them – to do so as part of their duty to carry out sustainable development under the Well-being of Future Generations Act 2015. We observe that the general duty under section 3 of the Well-being Act applies to all planning functions; and we therefore recommend that it will not be necessary to restate the more limited duty currently imposed by section 2 of the P(W)A 2015. **[5-7]**
- 1.30 In the light of the above considerations, we recommend that there is no need for the Bill to include a statutory provision as to the overall purpose of the planning system. **[5-10]**

Administration of the planning system

- 1.31 We recommend that persons appointed by the Welsh Ministers to discharge various functions be referred to in primary and secondary legislation not as “persons appointed” but as “inspectors”, so as to conform to current practice. **[5-11]**
- 1.32 We note that no body other than a local authority or a national park authority has ever been designated as a “local planning authority”. We accordingly recommend that there is no need to include in the Bill powers for enterprise zone authorities, urban development corporations, housing action trusts and new own development corporations to be designated as planning authorities. **[5-12]**

- 1.33 We also recommend that, in the light of the unitary system of local government in Wales, the simpler term “planning authority” should be used in place of “local planning authority” and “minerals planning authority”. **[5-13]**

CHAPTER SIX: FORMULATION OF THE DEVELOPMENT PLAN

The development plan

- 1.34 The preparation of the various components of the development plan in Wales is the subject of Part 6 of the PCPA 2004, which was substantially amended by the P(W)A 2015. Once those amendments have been brought fully into force, the “development plan” will consist of the National Development Framework, the strategic development plan and the local development plan.
- 1.35 The amendments to the relevant primary legislation are of recent origin, and have not yet been tested in practice. We therefore recommend that the provisions currently in Part 6 of PCPA 2004, as amended, should simply be restated in the Bill. **[6-1]**
- 1.36 The process for formulating each component of the development plan involves a sustainability assessment (SA). In addition, an environmental assessment of each component must be carried out, in accordance with regulations implementing the EU directive on sustainable environmental assessment (SEA). The Local Development Plan Manual produced by the Welsh Government notes that the requirements of the SEA Regulations are best incorporated into the SA process. In the Consultation Paper we invited views as to the need for the SEA process as a separate requirement alongside the requirement for SA. In the light of the responses received, we recommend that the SEA process should be retained; but that the guidance on implementing the SA requirement should be drafted so as to minimise the burden in practice. **[6-3]**

Planning blight

- 1.37 We recommend that the statutory provisions relating to blight notices (in Chapter 2 of Part 6 of the TCPA 1990) should be restated in the Planning Bill in broadly their present form. **[6-5]**

CHAPTER SEVEN: THE NEED FOR A PLANNING APPLICATION

Definition of “development”

- 1.38 The provisions of section 55 of the TCPA 1990, providing an extended definition of “development” – for which planning permission is generally required – are at the heart of the planning system.
- 1.39 The law regarding the need for planning permission to be obtained for demolition is notoriously complex. We recommend that it could be simplified by omitting the power of the Welsh Ministers to exempt certain types of demolition from the definition of “development”, with the same result being achieved by the use of the GPDO. **[7-1]**

- 1.40 Building operations are generally exempt from the need for planning permission, save for works to create new space underground, and works to create a significant amount of additional space in retail stores. We recommend that the law could be simplified by introducing a single provision to the effect that any works to increase the floorspace of a building, underground or otherwise, would always be development – with the GPDO providing for the cases in which such works would be automatically permitted. **[7-2]**
- 1.41 The TCPA 1990 includes no definition of the term “engineering operations”. We suggested in the Consultation Paper that it might be appropriate for one to be included; but in the light of responses received, we have not pursued that. **[7-3]**
- 1.42 The TCPA 1990 currently provides that a change of use of a building (or a part of a building) from one dwelling to two is development requiring planning permission; but the position is less clear as to a change in the other direction. We recommend that any change in the number of dwellings in a building should be categorised as a material change of use, and thus development. **[7-5]**
- 1.43 There are other exceptions from the definition of development, which have been in the Act for many years; we make no proposals to change these. We consider that any new exceptions are generally best provided for in the GPDO, rather than by provisions in the Act.

Redundant methods of granting planning permission

- 1.44 The Act provides that planning permission can be granted by an enterprise zone scheme; no such scheme has been created in Wales for over thirty years. Simplified planning zones, created in 1986, have hardly been used at all, and apparently never in Wales. We consider that both procedures are redundant, not least in view of the existence of local development orders, and recommend that they should be abolished. **[7-9, 7-10]**

Certificates of lawfulness

- 1.45 Landowners should have a reasonably accessible means of establishing what can be done lawfully with their property. A procedure exists to enable anyone to obtain a certificate of lawfulness of existing (or proposed) use or development. We recommend that the statutory provisions relating to such certificates be included alongside those relating to the need for planning permission – as they were prior to 1991 – rather than linked to enforcement. **[7-11]**
- 1.46 In the Consultation Paper, we proposed that an application for planning permission should automatically be deemed to include an application for such a certificate in respect of the development that is the subject of the application. In the light of the responses we received, we have decided not to pursue that idea. **[7-12]**

CHAPTER EIGHT: APPLICATIONS TO THE PLANNING AUTHORITY

Seeking planning permission

- 1.47 At present, planning permission can be sought in three ways. First, it is possible to submit an application for full planning permission to carry out development. Such permission may be granted subject to conditions requiring certain matters to be approved before the development is started. Secondly, it is possible for permission to be sought and granted after the development has been carried out. Thirdly, it is possible to apply for outline permission, reserving certain matters for subsequent approval.
- 1.48 In the Consultation Paper, we suggested that it would be simpler to abolish outline planning permission, and for there to be a single procedure whereby anyone proposing to carry out development that is not permitted by a development order – or seeking to authorise development that has already been carried out – needs to make a planning application, accompanied by sufficient material to describe the development; this would effectively do away with the concept of “outline planning permission”. In the light of concern expressed by a number of consultees as to the effect of such a change on investor confidence, we have decided not to pursue our provisional proposal; but we recommend that the primary legislation be restructured to increase clarity. **[8-1]**
- 1.49 It is important that every planning application is supported by sufficient material to enable the planning authority and other interested parties to know precisely what is proposed. Where an application is accompanied by material considered to be insufficient, the authority is able to serve on the applicant a notice that the application is invalid – against which there is a right of appeal. In the light of that provision, we consider that section 327A of the TCPA 1990 – which provides that an authority must not entertain such an application – is unhelpful, and recommend that it should not be restated in the new Bill. **[8-2]**

Determining planning applications

- 1.50 Under section 70A of the TCPA 1990, a planning authority has a power to decline an application where the applicant is seeking to wear down the authority by repeatedly submitting similar applications. We consider that the revised version of section 70A, introduced by section 43 of the PCPA 2004, should be brought into force in Wales. But we see no purpose in section 70B, which prevents twin-tracking – a practice that appears to have several practical advantages. We recommend accordingly. **[8-5, 8-6]**
- 1.51 A planning authority is currently required to produce a “community involvement scheme”, specifying those who will be consulted during the formulation of the development plan. We recommend that a similar duty should apply to determine those who are to be consulted during the determination of applications for planning permission. **[8-7]**

Conditions attached to planning permission

- 1.52 We recommend that “conditions” be defined to include “limitations”, doing away with the distinction between the two terms. **[8-9]**
- 1.53 The test for the validity of a condition is currently as explained by the House of Lords in *Newbury DC v Secretary of State* [1981], and elaborated in Welsh Government guidance. We recommend that this should be included in primary legislation. We also recommend that there should be a right to see draft conditions proposed by the planning authority. **[8-10]**
- 1.54 We noted in the Consultation Paper that it would be possible to include in the Bill an explicit power to impose certain types of conditions. On reflection, we recommend that such a provision should only be included where explicit statutory authority is necessary. Advice as to particular types of conditions should otherwise generally be in guidance – for example, as to *Grampian* conditions.² **[8-11, 8-12, 8-15, 8-16 and 8-18]**
- 1.55 There is currently uncertainty as to the status in law of pre-commencement conditions – that is, conditions requiring something to be done before the development is started. We suggested that it might be helpful for authorities to have a power (but not a duty) to categorise certain conditions as “true conditions precedent”, going to the heart of the permission, such that a failure to comply with them would mean that starting any of the development would be unlawful. Such a categorisation would be subject to a right of appeal. This was not supported by consultees, who considered that the suggested procedure would be bureaucratic and burdensome. On reflection, we recommend against it. **[8-13]**
- 1.56 But we recommend that it should be possible for a developer to apply for a certificate that all pre-commencement conditions have been complied with. And where a development has commenced in breach of such a condition, the permission that would otherwise have authorised it should be deemed to have been granted without the conditions in question, so that the other conditions may subsist and be enforceable. **[8-13]**

Approval of details required by conditions

- 1.57 In some cases, conditions attached to a planning permission require certain matters to be approved before the start of development. The procedure governing the obtaining of such approval is not as clear as would be desirable, and we recommend that it should be tightened up. **[8-19 to 8-21]**

Variation of planning permission

- 1.58 It is currently possible to seek to amend a planning permission, or a condition attached to it, under section 73 or 96A of the TCPA 1990. The precise procedure is determined by the nature and magnitude of the proposed change. In the Consultation Paper, we suggested that these procedures should be brought together into a single

² A *Grampian* condition is one that prevents development starting – or, possibly, being occupied – until some other event has occurred (for example, a new housing development cannot be built or occupied until the access to the highway has been improved).

procedure to enable an applicant to apply for the variation of a permission. However, on reflection, we recommend that section 96A should be retained, as it provides a useful way to deal with non-material amendments. But section 73 should be amended to apply to any amendment to a planning permission, not just to conditions. **[8-23]**

- 1.59 We also recommend the introduction of an expedited procedure to enable an applicant to seek approval for the variation of a permission once the development has started, but only in non-controversial cases. **[8-25]**

Other points

- 1.60 In response to a number of comments from consultees, we recommend that there should be an explicit power for an authority to make a split decision, granting permission for only some of the development that was the subject of an application. And, in addition to the existing cases where reasons are required, an authority should be required to give reasons for a grant of permission in the face of a recommendation by officers to refuse. **[8-30, 8-31]**

CHAPTER NINE: APPLICATIONS TO THE WELSH MINISTERS

- 1.61 The provisions in the TCPA 1990 enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority are of recent origin – introduced by the P(W)A 2015 – and we do not recommend any change. **[9-1]**
- 1.62 Applications for planning permission for developments of national significance (DNSs) are decided by the Welsh Ministers in the light of a report by an inspector. Here too, the relevant primary and secondary legislation is of recent origin and has yet to be fully tested in practice; and we do not recommend any change other than as to one or two minor details **[9-2 to 9-4]**
- 1.63 The procedures allowing for the establishment of planning inquiry commissions to decide on proposals for major importance or raising novel technical considerations were introduced in 1968, and have never been used. We recommend that they should be abolished. **[9-5]**

CHAPTER TEN: THE PROVISION OF INFRASTRUCTURE AND OTHER IMPROVEMENTS

Community infrastructure levy (CIL)

- 1.64 The Community Infrastructure Levy (CIL) was introduced by the Planning Act 2008. It will only be within the legislative competence of the Welsh Assembly once the changes introduced by the Wales Act 2017 have been brought into effect. It is likely that the Welsh Government will then wish to review its policy on the operation of CIL in Wales, and it would seem to be premature to pre-empt such a review.

- 1.65 We therefore recommend that the statutory provisions relating to CIL, currently in Part 11 of the 2008 Act (as amended by the Localism Act 2011), should be incorporated in the Bill. **[10-1]**

Planning obligations

- 1.66 We recommend that the provisions of the TCPA 1990 relating to planning obligations (in sections 106 to 106B) should be incorporated in the Bill. The rules as to the purpose for which a planning obligation may be entered into, currently in regulation 122 of the CIL Regulations 2010, should also be included. **[10-2, 10-3]**
- 1.67 In the Consultation Paper, we suggested that it might be helpful for a power to be introduced enabling a single agreement to operate both as a planning obligation, under section 106, and as an agreement under the Highways Act 1980. And we provisionally proposed that the enforcement of a planning obligation could be made more straightforward by including the breach of such an obligation within the definition of a breach of planning control. In both cases, in the light of points raised by consultees, we have decided not to pursue the proposals at this stage, but recommend that they be considered in any future review of planning obligations. **[10-4, 10-5]**
- 1.68 We also suggested that it might be useful to introduce in Wales a procedure to enable the resolution of disputes as to the terms of a planning obligation, similar to the one envisaged by Schedule 9A of the TCPA 1990, which is to be introduced in England by the Housing and Planning Act 2016. And we asked whether the Welsh Ministers should be able to limit the enforceability of certain clauses in obligations, again in line with the 2016 Act. Here too, we were persuaded by consultees that such proposals would be better considered as part of an overall review of planning obligations, and we therefore do not pursue either. **[10-8, 10-9]**
- 1.69 We do however recommend that it should be possible for a planning authority to bind its own land by a planning obligation, and for a person other than the owner of land (such as a prospective purchaser) to be able to enter into such an obligation. In each case, we provide more detail as to how this might be achieved. **[10-10, 10-11]**

CHAPTER ELEVEN: APPEALS AND OTHER SUPPLEMENTARY PROVISIONS

Appeals

- 1.70 The TCPA 1990 provides that those determining an appeal “*may deal with the application as if it had been made to them in the first instance*”. We provisionally proposed that the Bill should make it plain that they will always consider the applications afresh. In the light of comments received from stakeholders, and in particular those from the Inspectorate, we have decided not to proceed with this proposal. **[11-1]**
- 1.71 At present the Welsh Ministers can prescribe classes of appeals to be determined by a person appointed by them (in practice, an inspector). The vast majority are determined by inspectors. We therefore recommend that the Bill should provide that

all appeals are determined by inspectors unless the Welsh Ministers prescribe otherwise – rather than the reverse. **[11-2]**

- 1.72 We also recommend that the power to appoint assessors to assist inspectors be extended to apply to all appeals, including those determined on the basis of written representations. **[11-3]**

Other supplementary provisions

- 1.73 Where a purchase notice is to be served following an unsuccessful appeal to the Welsh Ministers against a refusal of planning permission, it is not clear when the 12-month time period within which to serve the notice starts. We recommend that the Bill should clarify that it runs from the decision on the appeal. **[11-5]**
- 1.74 The powers of a Welsh Ministers to extinguish public rights over a highway where a planning authority wishes to pedestrianise it in connection with the scheme to improve the area, under section 249 of the TCPA 1990, are similar to (but less extensive than) the power of an authority to pedestrianise a road (including a public road) under section 1 of the Road Traffic Regulation Act 1984. We therefore recommend that sections 249 and 250 of the TCPA 1990 are not restated in the Bill. **[11-8]**

CHAPTER TWELVE: UNAUTHORISED DEVELOPMENT

- 1.75 In this Chapter, we make several relatively minor recommendations as to technical reforms to procedure, designed to improve the operation of the enforcement system – not least in the light of relevant case law. We only highlight a few below.

Preliminary procedure

- 1.76 At present, there are two procedures enabling a planning authority to obtain information as to the ownership of land and its use – under sections 171C and 330 of the TCPA 1990. We recommend that it would be preferable for there to be a single procedure, resulting in the service of a “planning information order”. **[12-1]**
- 1.77 Some enforcement procedures are modified in their application to “dwellinghouses” – entry without prior warning; service of temporary stop notices and stop notices. We recommend that this should apply in relation to all dwellings, including flats. **[12-2, 12-5, 12-16]**

Enforcement notices

- 1.78 We recommend that it should be possible for an enforcement notice to require steps to be taken to achieve either or both the of the purposes specified in section 173(4) of the TCPA 1990. And a notice relating to an unauthorised change of use should be able to require the removal of building works integral to a change of use. **[12-9, 12-10]**
- 1.79 At present, an appellant who appeals against an enforcement notice on “ground (a)” (that permission should be granted for the allegedly unauthorised development) is deemed to have applied for planning permission. We do not consider that any purpose is served by this reference to a “deemed planning application”. We

recommend that the Welsh Ministers, on determining a ground (a) appeal, may grant planning permission, or discharge the condition in question, or issue a certificate of lawfulness, as appropriate. [12-12]

Stop notices

- 1.80 A stop notice is currently “served” on those responsible. We recommend that, as with an enforcement notice, a planning authority should “issue” a stop notice, which would come into effect on the date stated in it; copies could then be served as appropriate. The offence of non-compliance with a stop notice would then relate to a notice that has come into effect, rather than one that has been served. [12-17, 12-18]

Criminal penalties

- 1.81 We have reviewed the penalties for the various offences created by the TCPA 1990, and recommend that they be made more consistent. The offence of supplying false information in response to a request should attract a fine, not a sentence of imprisonment. Failure to comply with a breach of condition notice, or reinstating an unauthorised building [etc] after complying with an enforcement notice, should each be triable either by magistrates or in the Crown Court, and (in either case) punishable on conviction by a fine of any amount. [12-24, 12-25]

CHAPTER THIRTEEN: WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS

Overlapping consents

- 1.82 At present, some development affecting a listed building requires planning permission, some requires listed building consent (“LBC”), and some requires both. In some cases, the limits of development permitted by a development order are different in the case of works affecting a listed building. Demolition of an unlisted building in a conservation area requires planning permission and conservation area consent (“CAC”), but planning permission is granted automatically (by a development order). Determining which forms of approval are required for any particular proposal can be bewilderingly complex.
- 1.83 Where two types of permission are required, that will require two applications, two committee reports, two decisions (although the online portal recognises the problem, and allows for a single composite application); and, where appropriate, two appeals, two appeal decisions, two enforcement notices, two enforcement appeals, and again two appeal decisions. Usually both permissions are granted, or both refused. Split decisions are possible, but rare.
- 1.84 The same policy considerations will underlie both types of decisions – the duty to preserve the listed building, and the duty to preserve and enhance the conservation area; the development plan; and all other relevant considerations.
- 1.85 In view of the significant overlap between the various consents, we suggested in the Scoping Paper that it might be worth unifying them into a single form of approval. In the Consultation Paper we considered range of options, from no change – retaining

planning permission, LBC and CAC, as at present – through to merging the three consents into one.

- 1.86 There was considerable opposition, especially from within the heritage sector, to the idea of losing LBC. We discuss the issue, and the views of consultees, at length in Chapter 13. For the reasons we give there, we consider on balance that to merge the consents would be a considerable simplification of the legislation and would not lead to any loss of control, nor to a loss of specialist expertise. As noted in paragraph 1.26 above, we also recommend the strengthening of the general duty to have regard to the desirability of preserving listed buildings. We therefore recommend that LBC should be merged with planning permission, by extending the definition of “development” to include any works affecting the special character of a listed building. **[13-1A]**
- 1.87 There was significantly greater support for the merger of CAC with planning permission than for the merger of LBC with planning permission. Both CAC and planning permission will usually be required for demolition in a conservation area (as well as planning permission for the ensuing new building). We recommend that demolition should only require planning permission. **[13-1B]**

Detailed points

- 1.88 We recommend that it should not be possible for a development order to grant planning permission for works to listed buildings; but that heritage partnership agreements should be able to do so. We also recommend that certificates of lawfulness should be available for works that currently require only LBC or CAC. **[13-2 to 13-4]**
- 1.89 We further recommend that grounds of appeal against the refusal of planning permission should be amended, to include the existing specific grounds relating to listed buildings and conservation areas. **[13-5]**

Unauthorised works

- 1.90 We recommend that unauthorised works to listed buildings and unauthorised demolition in a conservation area should remain a criminal offence, as at present – with the same penalties and defences as the corresponding existing offences under the Listed Buildings Act. **[13-6]**
- 1.91 We similarly recommend that the time limits within which it is possible to take enforcement action should not apply in the case of unauthorised works to listed buildings and unauthorised demolition in a conservation area, and that the grounds of appeal against enforcement notices be amended to include the existing specific grounds relating to listed buildings and conservation areas. **[13-7, 13-8]**

Other points

- 1.92 We do not recommend that scheduled monument consent be merged with planning permission, as the consenting authority is different, and the works involved will rarely overlap with those requiring planning permission. **[13-9]**
- 1.93 The law as to the extent of the protection offered by listing (currently in section 1(5) of the Listed Buildings Act 1990) is not clear in respect of objects and structures in

the curtilage of a building included in the list. We recommend that it should be made plain that pre-1948 objects and structures are to be included if they were within the curtilage of the building in the list as it was on 1 January 1969 or, if the building was listed after that date, if they were within its curtilage at the date it was listed. **[13-10]**

- 1.94 Areas of archaeological importance were introduced in 1979; and five were designated in 1984, all in England. They have never been used in Wales. We recommend that the power to designate them should be abolished. **[13-11]**

CHAPTER FOURTEEN: OUTDOOR ADVERTISING

Definitions

- 1.95 The definition of “advertisement”, in section 336 of the TCPA 1990, is unsatisfactory – not least because it is circular. We recommend that it should be clarified. We also recommend that the word “land” should be used in place of “site”, with the Bill and the Regulations where appropriate being drafted to refer to an advertisement being displayed “on or at” land. A clearer definition should be provided of “person displaying an advertisement”. And these definitions should be included in the Bill alongside the other provisions relating to advertising. **[14-1 to 14-4]**

Deemed consent

- 1.96 Because the control of advertisements is primarily the subject of regulations, rather than in primary legislation, we have also included some recommendations for changes to be introduced when the regulations are next updated.
- 1.97 We provisionally recommend that the procedures relating to discontinuance notices – removing the deemed consent for particular advertisements – should be tightened up, so that such a notice is “issued” by the authority, with copies “served” on those deemed to be displaying the advertisement, and comes into force on a date stated in it. This would bring such procedures into line with those relating to enforcement notices. **[14-5]**
- 1.98 We recommend that deemed consent should be granted for an display of advertisements that has the benefit of planning permission (such as a shop fascia) – to avoid two approvals being necessary. We also recommend that the display of an advertisement on the exterior of a vehicle not on a highway (or one stationary on a highway for more than 21 days) should be brought within the scope of the regulations, and normally benefit from deemed consent, to enable planning authorities to bring particular displays within control. **[14-7, 14-8]**
- 1.99 We recommend that there should be a procedure, similar to applying for a certificate of lawfulness of existing or proposed development, to enable anyone to discover whether a particular display of advertisements is or would be lawful. And we recommend that deemed consent be granted for an advertisement on land that has been used for advertising for ten years – rather than, as at present, for an advertisement on a site that has been used since 1974. **[14-9, 14-10]**

Unauthorised advertisements

- 1.100 At present, there is a power to remove an unauthorised poster or placard, under section 225 of the TCPA 1990, but not the hoarding or structure on which it is being displayed (other than under the Dyfed Act 1987). We recommend the introduction of a new procedure, equivalent to the one currently available in Dyfed, enabling the removal of an unauthorised advertisement anywhere in Wales. **[14-12]**
- 1.101 In view of the ease with which advertisements can be put up and taken down, and in the light of the substantial gains that can be made from unauthorised advertising, we recommend that the maximum sentence on conviction for unauthorised advertising be increased to an unlimited fine. **[14-13]**

CHAPTER FIFTEEN: PROTECTED TREES AND WOODLANDS

Making of tree preservation orders

- 1.102 Tree preservation orders can be made to protect trees and woodlands in the interests of amenity. We conclude that it would not be helpful to include in the Bill a definition of “tree” or a “woodland” in this context; but that it would be helpful to make it clear that “amenity” includes appearance, age, rarity, biodiversity and historic, scientific and recreational value. **[15-1, 15-2]**
- 1.103 We recommend that the Bill (as well as the regulations) should make it plain that a tree preservation order can protect trees specified individually or by reference to a group of trees or an area. An area order is one that protects trees, of whatever species, anywhere within a specified area – and is typically used either to protect trees in open parkland or to provide interim protection for trees on a large development site. However, the use of area orders, other than on a short-term basis, can be problematic; and we therefore recommend that, when an area order is confirmed, it must should be converted into an individual, group or woodland order. We recommend that guidance should emphasise the desirability of converting existing area orders into individuals, groups or woodlands; but we do not recommend that area orders, if not converted, should cease to have effect. **[15-3]**
- 1.104 We also recommend that woodland preservation orders, as distinct from tree preservation orders, should be able to protect woodlands – including trees planted or self-seeded after the order was first made. **[15-3]**

Need for consent

- 1.105 The new system introduced by the Planning Act 2008 (whereby the details as to the need for consent for works to trees protected by an order, and the procedures for seeking such consent, are contained in regulations rather than in the order itself) has not yet been brought into effect in Wales. We assume that it will be.
- 1.106 Consent is currently not required for works to a protected tree that is dying or dead or has become dangerous. Dead and dying trees can often continue to provide habitats for wildlife; and the categorisation of a tree as dangerous is open to abuse. We recommend that the exemption from consent should only apply where works are urgently necessary to remove an immediate risk of serious harm. **[15-6]**

- 1.107 Consent to carry out works to a protected tree is not required where the works are necessary to prevent or abate a nuisance. The scope of this exemption is unclear – in particular, whether it applies where a tree is merely encroaching into neighbouring soil or airspace. We recommend that it would be preferable to remove the exemption altogether. **[15-7]**
- 1.108 We suggested in the Consultation Paper that it should be possible to carry out without consent works to a sapling not exceeding a specified size, save where it has been planted as a result of a tree replacement notice or a planning condition. In response to points made by those objecting to this suggestion, we have not pursued it. **[15-8]**
- 1.109 We recommend that there should be a procedure, similar to applying for a certificate of lawfulness of proposed use or development (CLOPUD), to enable anyone to discover whether particular works to a tree would be lawful. **[15-9]**

Tree replacement

- 1.110 We recommend that, where a protected tree has been felled unlawfully, or removed because it is dead, dying or dangerous, and a replacement must be planted, it should be sufficient to plant the replacement at or near the location of the tree being replaced – rather than, as at present, at precisely the same location. We also recommend that, where trees in woodland are to be replaced, the planting requirement should be expressed by reference either to the number of trees to be replaced or the area of woodland to be replanted. **[15-11]**

Unauthorised works

- 1.111 It is currently an offence (under section 210(1) of the TCPA 1990) to destroy a tree wilfully, or to damage it wilfully so as to be likely to destroy it. We recommend that the wording be changed to refer to “intentional or reckless” destruction or damage, so as to apply in the case of reckless or indirect damage, such as digging trenches for pipes and cables, using harmful chemicals, changing soil levels or grazing animals in woodlands. **[15-14]**
- 1.112 At present there are two offences under section 210 – works resulting in the death of a tree (s 210(1)) and other works (s 210(4)). We recommend that it would be more straightforward, and result in less scope for abuse, if there were to be a single offence, applicable in the case of any breach of a preservation order (or tree preservation regulations under the new system) – with the sentence varying in accordance with the seriousness of the offence. We also recommend that the prosecution should have to prove that the order had been served on the accused, or was available for public inspection; and that the order should record the date on which it was first made available for public inspection. **[15-15, 15-16]**

Trees in conservation areas

- 1.113 At present, a person carrying out works to a tree in a conservation area must give six weeks’ notice to the planning authority. The authority can then, if it wishes, impose a tree preservation order; if it does, the applicant then must seek consent under the order. We recommend that this be simplified by enabling the authority to allow the works, possibly subject to a condition, or to impose a tree preservation order, without the need for a second application. **[15-17]**

CHAPTER SIXTEEN: IMPROVEMENT, REGENERATION AND RENEWAL

Unightly land and buildings

- 1.114 It is possible for a planning authority to serve a notice under section 215 of the TCPA 1990, requiring land (including buildings) to be improved. We recommend that the law be clarified by making plain that a notice can only be issued where land is unsightly and where the unsightliness does not arise in the normal course of events from a lawful use of the land. We also recommend that a notice under section 215 cannot be served where the condition of the land results from the unlawful deposit of waste (which can be dealt with under powers in the Environmental Protection Act 1990). **[16-1]**
- 1.115 We recommend that appeals against such notices should generally be determined by inspectors. **[16-4]**
- 1.116 Alongside the procedure in section 215, there is also a procedure under section 89 of the National Parks and Access to the Countryside Act 1949, whereby an authority can carry out remedial works to any unsightly land, and can carry out landscaping works on any land; and can if necessary acquire the land. We recommend that this be brought into the new Bill. We also recommend that there should be a new power enabling the authority to act where the owner is unknown or cannot be contacted – but that the power of compulsory acquisition should apply only where it wishes to carry out works to remediate the state of land in poor condition, and not where it wishes to carry out improvement works to land already in reasonable condition (except where the owner cannot be traced). **[16-5, 16-6]**

Graffiti and fly-posting

- 1.117 There used to be specific provisions to enable planning authorities in Wales to deal with graffiti and fly-posting. We are recommending that these should be reinstated, so as to enable the Welsh Ministers to make regulations that enable planning authorities to take appropriate action to secure the removal of unsightly or offensive graffiti and to deal with persistent unauthorised advertising, and community councils to serve fixed penalty notices in appropriate cases. **[16-7]**

Area-based initiatives

- 1.118 Enterprise zones were introduced in the Local Government, Planning and Land Act 1980. Four orders were made in the early 1980s designating zones in Swansea and Milford Haven; each lasted for ten years. No further orders have been made. A new type of “enterprise zone” was subsequently introduced in the Finance Act 2012. We recommend that the system of enterprise zones set up under the 1980 Act be abolished in Wales (leaving in place the system of enterprise zones under the 2012 Act). **[16-8]**
- 1.119 New town development corporations at Cwmbran and Newtown (Powys) were designated under the New Towns Act 1949; both were effectively wound up in the 1980s. Only one urban development corporation was ever designated in Wales (at Cardiff Bay), under the 1980 Act; it was dissolved in 2000. No housing action trusts have ever been designated in Wales under the Housing Act 1988. One rural development board, in mid-Wales, was proposed in the late 1960s; but none was ever set up. We recommend that all these schemes be abolished. **[16-9 to 16-12]**

Acquisition of land for planning purposes

- 1.120 In the Consultation Paper, we suggested that it would not be appropriate to include the provisions of the TCPA 1990 relating to acquisition of land for planning purposes. However, on reflection, we consider that it would be straightforward to incorporate Part 9 (other than section 231), and sections 251, 258, and 271 to 282 – without any amendments other than purely as to drafting style. This would have the advantage that the whole of the TCPA 1990, not merely most of it, would apply only in England. That would make the drafting of the amendments to the TCPA 1990 much more straightforward. More importantly, users of the legislation, on both sides of the border, will know that, in future, it will only be necessary to refer to one piece of legislation. **[16-13, 16-14]**

CHAPTER SEVENTEEN: HIGH COURT CHALLENGES

- 1.121 Part 12 of the TCPA 1990 provides for challenges in the High Court to the validity of certain orders and decisions. These include various orders made by planning authorities, and local or strategic development plans; as well as most decisions of the Welsh Ministers, including in response to applications decided by them (for a development of national significance, or following a call-in) and appeals.
- 1.122 The time limit within which to bring a High Court challenge under Part 12 has always been within six weeks of the date of the decision being challenged (or four weeks in the case of certain decisions relating to enforcement appeals). There used to be an automatic right to institute such a challenge; but the permission of the court is now required (since the coming into force of the Criminal Justice and Courts Act 2015).
- 1.123 Other decisions, notably those of planning authorities to grant planning permission, may only be challenged by way of an application for judicial review, under Part 54 of the Civil Procedure Rules (CPR). Such a challenge may only be brought with the permission of the Court. The time limit within which permission must be sought used to be “promptly, and in any event within three months”; since 2013 it has been six weeks.
- 1.124 Very few other Acts contain special challenge procedures equivalent to those in Part 12 of the TCPA 1990. And the procedure under Part 12 is now virtually identical to that under Part 54 of the CPR – particularly as regards time limits and the need for permission from the Court.
- 1.125 We therefore recommend that Part 12 should not be restated in the new Bill, so that all High Court challenges must in future be brought by way of an application for judicial review under Part 54 of the CPR. **[17-1]**

CHAPTER EIGHTEEN: MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

- 1.126 The last Chapter of the Consultation Paper deals with a variety of topics that relate to the whole of the Bill, and its application in particular situations.

Statutory undertakers

- 1.127 Part 11 of the TCPA 1990 deals with the special position of statutory undertakers – that is, broadly, bodies that provide various public services – in relation to planning law. There are various definitions of “statutory undertaker”, in the TCPA 1990 and in the GPDO 1995. Any reforms in this area would not be possible if they involve change to legislation outside the legislative competence of the Assembly. However, subject to that, we recommend that the Bill should rationalise as far as possible the categories of bodies that are to be treated as statutory undertakers, and to clarify in each case what is to be considered as operational land and who is the appropriate Minister. **[18-1]**

Minerals

- 1.128 There are in the TCPA 1990 and in the GPDO 1995 a series of interlocking definitions of “minerals”, “the winning and working of minerals”, and “mining operations”. We recommend that these are rationalised as far as possible. **[18-5]**
- 1.129 It has long been recognised that mineral working is different from other forms of development in a number of respects. As a result, planning law and procedures for such development have been the subject of many changes over the years. We provisionally consider that the special provisions regarding minerals permissions granted before 22 February 1982 (in Schedule 2 to the Planning and Compensation Act 1991 and Schedule 13 to the Environment Act 1995) need not be restated in the Bill, but should remain as they are. However, the special provisions relating to more recent permissions (in Schedule 14 to the 1995 Act and Schedule 9 to the TCPA 1990) should be included. **[18-6, 18-7]**

Fees

- 1.130 There are an increasing number of situations in which the Welsh Ministers and planning authorities may charge for the performance of planning functions. We recommend that the Bill includes a power enabling Welsh Ministers to amend the scale of fees relating to the performance of any such functions, by publishing the new scale rather than prescribing it in regulations – on the understanding that the income from the fees so charged does not exceed the cost of performing the function in question. **[18-9]**

Inquiries, hearings and other proceedings

- 1.131 The principles on which parties to inquiries and other proceedings have been entitled to claim their costs have become established over many years. In short, the party claiming costs must be able to show it has been led to incur unnecessary expense by the unreasonable behaviour of the opposing party. We recommend that this principle should be included in the Bill. **[18-12]**

Definitions

- 1.132 The term “dwellinghouse” is used in a variety of contexts, and there are several different statutory definitions, which are inconsistent and sometimes mutually contradictory as to whether they include a flat. We recommend that the word be replaced with the term “dwelling”, defined so to include a house and flat (and by

implication other forms of dwelling, such as maisonettes, houseboats, and yurts).
[18-15]

- 1.133 “Curtilage” is another word not in everyday use, and for which there is no obvious synonym. We recommend that the curtilage of a building should be defined as land closely associated with it, and the question of whether a structure is within the curtilage of a building be determined with regard to the physical layout of the building, the structure, and the surrounding buildings and land; the ownership, past and present, of the building and the structure; and their use and function, past and present. **[18-16]**
- 1.134 We also recommend that the definitions of “agriculture”, “agricultural land” and “agricultural unit” should be rationalised and simplified. **[18-17]**