Chapter 15: Protected trees and woodlands

INTRODUCTION

15.1 In the Consultation Paper, we explained the existing position relating to the control of works to trees of value in Wales. The relevant legislation is to be found in Chapter 1 of Part 8 of the Town and Country Planning Act ("TCPA") 1990 and the Town and Country Planning (Trees) Regulations 1999 (the 1999 Regulations).

15.2 We explained that Chapter 1 of Part 8 is due to be substantially amended by the sections 192 and 193 of the Planning Act 2008. The new system came into force in England in 2012, but is yet to be brought into force in Wales. We have assumed that it will be brought into force (along with new regulations) at the same time as the new Bill that is the subject of this Report, subject to any changes that may be made as a result of this project.

15.3 Under the new system, a Tree Preservation Order ("TPO") is made under section 198 of the TCPA 1990, taking effect immediately but needing to be confirmed within six months. Any works need consent from the planning authority; the carrying out of works without consent is a criminal offence, under section 210. The regulations, made under powers in sections 202A to 202G of the TCPA 1990, prescribe the procedure for the making of a TPO, the exceptions to the need for consent for works; and the procedure for obtaining consent.

15.4 Works to a tree in a conservation area must be notified to the authority, under section 211 of the TCPA 1990, which then has six weeks to decide whether to impose a TPO. Failure to notify works is an offence – again, subject to a range of exceptions prescribed in regulations.

15.5 In addition to the controls under the TCPA 1990, the Forestry Act 1967 requires a felling licence to be obtained from Natural Resources Wales.

15.6 We noted that the three statutory codes (TPOs, trees in conservation areas, and felling licences) are linked to each other, in such a way as to avoid overlapping control. Further, since works to trees are often (although by no means always) linked to development proposals, each code is also linked to mainstream planning legislation, in that no consent needs to be obtained for tree works that are required in

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Note:
1 SI 1999 No 1892, revoked insofar as they apply to England by SI 2012 No 605, reg 26(1).
2 Consultation Paper, paras 15.3 to 15.14.
3 Consultation Paper, para 15.15.
4 The Forestry Act 1967 applies in Great Britain, but in England and Scotland a licence is required from the Forestry Commission. Once the Forestry and Land Management (Scotland) Act 2018 has been brought into force, probably in 2019, felling north of the border will require “felling permission” from the Scottish Ministers.
5 See, in particular, Forestry Act 1967, s 15.
order to carry out development that has been permitted in response to a planning application.

Possible reforms

15.7 In the Consultation Paper, we focussed particularly on the relevant primary legislation. However, as with the control of advertisements, much of the detail as to the management of works to trees is contained in secondary legislation, and we therefore also raised some points that could be considered for reform when regulations are being drafted to underpin the introduction of the new system.

15.8 We realise that this might not seem to be a high priority for new legislation. However, the changes introduced in the Planning Act 2008 have not yet been brought into force in Wales, and it would be perverse to restate in the Bill the relevant provisions of the TCPA 1990 in their unamended form. But when the new primary legislation is brought into force there will be a need for new regulations. And six years’ experience has now been obtained of how such regulations operate in England. We therefore consider that this exercise provides a good opportunity to bring the tree preservation order system up-to-date. We understand that any such regulations will be the subject of a further consultation exercise before they are introduced.

15.9 It may also be noted that our proposals relating to the control of works to trees attracted a large number of responses, including a number from specialist bodies such as the Institute of Chartered Foresters (“ICF”), the Arboricultural Association (“AA”), the Woodland Trust, the Ancient Trees Forum, and the Association of Local Government Ecologists (“ALGE”) and the London Tree Officers’ Association (“LTOA”).

TREE PRESERVATION ORDERS

What may be protected

We provisionally proposed that it would not be helpful to define a “tree” or a “woodland”, in the context of what can be protected by a tree preservation order (Consultation Question 15-1).

15.10 The first obvious question is what may be protected by a tree preservation order – what is a tree? The question was considered, in the context of references to “trees” in planning legislation, by Cranston J in Palm Developments v Secretary of State. He adopted the approach of Phillips J in Bullock v Secretary of State:

Bushes and scrub nobody, I suppose, would call “trees”, nor, indeed, shrubs, but it seems to me that anything that ordinarily one would call a tree is a “tree” within this group of sections in the 1971 Act [the predecessor of Chapter 1 of Part 3 of the TCPA 1990].

7 (1980) 40 P&CR 246 at p 251. See also Technical Advice Note (TAN) 10, para 5.
15.11 And he concluded that a “sapling” (of any size) is a tree, and are capable of being protected by a woodland order. His decision on that point has been upheld by the Court of Appeal in *Distinctive Properties (Ascot) v Secretary of State*.  

15.12 After examining the relevant case law, we concluded that there is not likely to be any exclusive definition of “tree” that will be entirely satisfactory. We considered a partial definition, stating that a “tree” does not include a bush or a shrub. On balance we provisionally concluded that such a definition – if in the form of a legislative provision – would create as much uncertainty as it would avoid and that the term “tree” should not be defined in primary or secondary legislation.

15.13 A TPO may also protect a “woodland” – and the law relating to woodland orders is slightly different from that applying to orders protecting individual trees and groups. The Court of Appeal has noted that a woodland order is “a different animal” from an area order. Here too, we considered that a statutory definition would not assist.

15.14 Of the 41 consultees who responded to this question, all but one agreed. Some agreed that a statutory definition might at first sight appear to be useful, but accepted that it appeared to be impossible to find one that would be satisfactory.

15.15 Mark Mackworth-Praed was attracted by the idea of a negative definition of a tree, so as to exclude a hedge, bush or shrub. He also suggested some criteria for identifying a woodland, as did Andy Lederer of the Institute of Chartered Foresters (ICF). The Woodland Trust and the Ancient Tree Forum emphasised the importance of protecting various other categories of wooded landscapes and special habitats – notably wood pasture and parkland.

15.16 We continue to be of the view that a statutory definition of the terms “tree” and “woodland” would be of little value, and might indeed be unhelpful. But that would still leave open the possibility of non-statutory guidance as to what types of trees, groups of trees and woodlands may appropriately be protected, and some of the suggestions we received could usefully be included in such guidance – which would be updated when the new system is introduced.

**Recommendation 15-1.**

We recommend that the Planning Act should not attempt to define a “tree” or a “woodland”, in the context of tree preservation orders.

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8 Consultation Paper, paras 15.22 to 15.26.
9 [2016] 1 WLR 1839.
10 Consultation Paper, Chapter 15, fn 17.
11 *Evans v Waverley BC* [1995] 3 PLR 81, CA, per Hutchinson LJ at p 93D. As to area orders, see para 15.24 to 15.38.
12 Consultation Paper, para 15.28.
13 See paras 15.30 to 15.32.
**Policy basis for protection**

We provisionally proposed that the Bill should provide that: (1) that functions under the Code relating to the protection of trees should be exercised in the interests of amenity; (2) that “amenity” for that purpose includes appearance, age, rarity, biodiversity and historic, scientific and recreational value; and (3) that tree preservation regulations may prescribe matters considered to be relevant to amenity (Consultation Question 15-2).

15.17 A planning authority may only make a TPO where it appears to the authority that it is expedient to protect a tree or woodland “in the interests of amenity”. Unfortunately, the meaning of the term “amenity” is not entirely clear, and its usage in everyday speech has gradually changed over the last 70 years. In the Consultation Paper, we noted that the courts have tended to encourage wider definitions, such as “visual appearance and the pleasure of its enjoyment”; and “pleasant circumstances or features [and] advantages”. One dictionary definition suggests that it means “the pleasantness or attractiveness of a place”.

15.18 The general perception as to the value of trees, both by professionals and the public, is now based on a significantly wider range of factors than visual amenity alone. This is particularly so in relation to ancient, veteran and heritage trees. We thus considered that it would be desirable to make it plain that a tree preservation order may be made on the basis of factors other than visual appearance. To do so would both clarify the law and bring it into line with current thinking as to the basis on which an order ought to be made.

15.19 We therefore suggested that the Bill could state that the functions in and under the Act are to be exercised in the interests of amenity, that “amenity” for these purposes includes appearance, rarity, biodiversity and historic, scientific and recreational value; and that the Welsh Ministers may provide in regulations a list of factors relevant to amenity. That would enable the legislation to be changed more readily to reflect changing policy imperatives.

15.20 Of the 47 consultees who responded to this question, 39 agreed. Several suggested additional criteria to be included – “landscape value”, “green infrastructure value”, and “cultural value”. These are good examples of the sort of terms that could be included in secondary legislation. Mark Chester suggested that the word “amenity” should be replaced with “public good”; but we consider that this could be interpreted as restricting the use of TPOs to trees that are publicly visible.

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14 TCPA 1990, s 198(1). This will not be affected by the changes to be made by the Planning Act 2008 (see para 15.2).


17 Oxford Living Dictionary (website accessed September 2018)

18 Consultation Paper, paras 15.30 to 15.38.
The Planning Inspectorate (PINS) and Julian Morris found widening the definition of “amenity” in the way proposed to be somewhat contrived. PINS suggested that the legislation could refer to “amenity and the special value of a tree in terms of age, rarity [etc]”. Mr Morris went further, arguing that it was in principle wrong to use TPOs to protect trees that cannot be seen by the public.

Given the approach of the courts, noted above, to the meaning of the word “amenity”, and the increasing awareness of factors other than merely visual amenity – and in particular the recognition by both the UK Parliament and the National Assembly of the value of biodiversity – we still consider that the inclusion of a wider definition of amenity would be of assistance. We note the view of Mr Morris, and suspect that many tree owners would share it; but we consider that such arguments are better made in the context of specific proposals to carry out works to particular trees.

As with the definition of “tree”, this is clearly a matter where guidance should play a major role. However, we consider that it would be helpful, by one means or another, to confirm in legislation the broad principle that trees may be protected for reasons other than just their appearance.

**Recommendation 15-2.**

We recommend that the Bill should provide

1. that functions under the Code relating to the protection of trees must be exercised in the interests of amenity; and

2. that amenity for that purpose includes appearance, age, rarity, biodiversity and historic, scientific and recreational value; and

3. that tree preservation regulations may prescribe matters considered to be relevant to amenity.

**The making of tree preservation orders**

We provisionally proposed: (1) that the Bill should make it clear that tree preservation orders can in future be made to protect trees – specified either individually or by reference to an area – or groups of trees or woodlands; (2) that area and group orders only protect only those trees that were in existence at the time the order was made; (3) that new area orders provide protection only until they are confirmed, at which time they must be converted into orders specifying the trees to be protected either individually or as groups; (4) that existing area orders, already confirmed as such, cease to have effect after five years; and (5) that woodland orders protect all trees, of whatever age and species, within the specified area, whether or not they were in existence at the date of the order (Consultation Question 15-3).
15.24 The TCPA 1990 provides that a planning authority may make an order to preserve “trees, groups of trees or woodlands”. The 1999 Regulations require that an order “shall specify the trees, groups of trees or woodlands to which it relates”. And the current model order (in the Schedule to those Regulations) prohibits the cutting down of “any tree specified in Schedule 1 to this Order or comprised within a group of trees or in a woodland so specified”. All orders must be confirmed if they are to have effect for more than six months after they are made.

15.25 In the Consultation Paper we explored the distinction between the various categories of TPOs. In particular, we noted uncertainty as to which trees are protected by area, group and woodland orders. We considered that it would be helpful to make explicit that area orders protect only those trees in existence at the time the order was made, whereas woodland orders protect all trees (including saplings) within the woodland, of whatever age. This became points (2) and (5) of our Consultation Question.

15.26 We also noted that area orders are in a number of cases used on a precautionary basis to protect all trees on a large site on which development seems likely. The hope is that, once the development has been approved and completed, the remaining trees (including any new ones planted in pursuance of landscaping conditions) can then be protected by individual or group orders as appropriate. But in many cases the old area order remains in place indefinitely, even though the position on the ground will be completely different from when the order was made.

15.27 The use of area orders has for many years been discouraged by the UK Government. TAN 10 says that “the area classification should only be used exceptionally, and only until the trees can be given individual or group classification”. The courts too have urged authorities to avoid “blanket TPOs”. The United Kingdom Government proposed in 1994 to introduce a new provision requiring that area orders, after they had been confirmed, should be converted to orders specifying the trees protected individually or by reference to groups; and that existing area orders would cease to have effect after a five-year transitional period. We suggested that that is a sensible approach. This became points (3) and (4) of our Consultation Question.

15.28 Of the 47 consultees who responded to this question, 16 were in agreement to all five of the suggested reforms. A further 16 agreed to all except (4); and a further 13 provided equivocal responses, including (in most cases) an objection to point (4). The Central Association of Agricultural Valuers queried the practicality of woodland

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19 TCPA 1990, s 198(1).
20 TCP (Trees) Regulations 1999, reg 2(1)(a).
21 Consultation Paper, paras 15.39 to 15.47.
23 TAN 10, Annex A, para A.5; see also Welsh Office Circular 64/78, Memorandum, para 43.
25 Tree Preservation Orders: Review, Department of the Environment, 1994, paras 2.16 to 2.19.
orders; and the Canal & River Trust queried the distinction between them and area orders.

15.29 The clarification of the distinction between area and woodland orders – points (2) and (5) in our Consultation Question – obtained widespread support. Indeed, in the light of responses to several Consultation Questions (notably 15-8), we have considered further the question of woodland orders.

15.30 The differences between woodland orders and other types of tree preservation orders are as follows:

1) a woodland order applies to protect all trees within the specified woodland, regardless of whether they were planted (or self-seeded) before or after the order was made, whereas any other order applies so as to protect only individual trees that were in existence when the order was made;

2) there is, arguably, a presumption in favour of consent being granted – at least for operations that accord with the practice of good forestry. For other orders, there is a presumption against consent being granted;\(^{26}\)

3) there are special provisions as to imposing a requirement to replant woodlands felled with consent under a woodland order in the case of forestry operations;\(^{27}\)

4) there are special provisions as to the compensation that may be claimed following the imposition of such a requirement;\(^{28}\) and

5) the duties as to the replacement of trees are slightly less onerous, in that they do not apply to trees felled in a woodland without consent because they are dying, dead or dangerous.\(^{29}\)

15.31 For these reasons, the Court of Appeal has recognised that a woodland order is a “different animal” from an area order\(^{30}\) – and, by implication, even more different from an individual or group order. We agree.

15.32 We consider that it would significantly clarify the law if the basic provision in primary legislation stated that an authority may make an order with respect to such individual trees, groups of trees, areas of trees or woodlands as may be specified in the order.\(^{31}\) Section 198(2) could then provide that an order protecting individual trees, groups of trees, or areas of trees is to be referred to as a “tree preservation order” and an order protecting a woodland is to be referred to as a “woodland preservation order”.

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\(^{26}\) TCPA 1990, s 70(1A), applied by sch 2 to 1999 Model Order (at sch 1 to 1999 Regulations).

\(^{27}\) 1999 Model Order, art 8; TCPA 1990, s70(1B), applied by sch 2 to 1999 Model Order.

\(^{28}\) TCPA 1990, s 204.

\(^{29}\) TCPA 1990, s 206(1)(b).


\(^{31}\) The relevant basic provision in primary legislation is currently section 198(1) of the TCPA 1990.
We emphasise that this would not in any way change the law, but it would clarify the distinction between the two types of order, and would enable the regulations to be drafted appropriately. Existing tree preservation orders protecting trees by reference to woodlands would automatically become woodland preservation orders.

We note the point made by several consultees that some planning authorities use woodland orders to protect groups of trees that were considered not to constitute woodlands. We have sympathy for this point, but it seems to us more suitable to be dealt with by guidance, as woodlands (however conceived or defined) come in all shapes and sizes, and it would be difficult to devise a satisfactory statutory rule to prevent the misuse of woodland orders.

As to the use of area orders, we observe that it is practical as a means of providing interim protection, sometimes on an emergency basis, where development is in prospect. But when an area order is confirmed, it should then be converted into an individual, group or woodland order. That will not occur particularly often, and can be achieved without an undue burden on authorities.

We noted that there was little opposition to point (3) – other than from two consultees, on the basis of problems with gaining access to the land, although they themselves pointed to the availability of powers under section 214 to deal with that problem.

But there was general opposition to the idea of existing area orders ceasing to have effect after five years, due to resource limitations. We understand such concerns, and suggest that guidance should emphasise the desirability of gradually converting existing area orders, so that they can be done away with in the future.

We have modified our recommendation accordingly.

An area order must be confirmed not later than six months after it was first made.
Recommendation 15-3.

We recommend that the Bill should provide that:

(1) tree preservation orders can in future be made to protect individual trees, groups of trees, or areas of trees;

(2) that a group or area order protects only those trees that were in existence at the time the order was made;

(3) that a new area order provides protection only until it is confirmed, at which time it must be converted into an order specifying the trees to be protected either individually or as a group;

(4) that woodland preservation orders can in future be made to protect woodlands; and

(5) that a woodland preservation order can protect all trees, of whatever age and species, within the specified woodland, whether or not they were in existence at the date of the order;

and that the new regulations should be drafted accordingly.

Notification of new orders

We provisionally proposed that it should be clarified that a tree preservation order is to be notified to the owners and occupiers of any parcel of land on, in or above which is located any part of any of the trees protected by the order (Consultation Question 15-4).

15.39 Any breach of a tree preservation order is a strict liability offence. In order to minimise the chance of anyone inadvertently committing an offence, it is important that the order is promptly and properly notified to all those likely to be affected, who may be about to carry out works on the tree in question.\(^{33}\)

15.40 The 1999 Regulations require an order to be notified to the owners and occupiers of any land affected by an order and any neighbouring land.\(^{34}\) In some cases, this can be a major administrative exercise. It may lead to complaints from the owner of a large estate about a tree which is several miles away.

15.41 We noted that the 2012 Regulations in England had sought to simplify this, by limiting the notification to the owners and occupiers of “the land on which the trees [etc] are situated”. However, that leaves unclear precisely what is required in the common situation of a tree growing close to the boundary of a plot, overhanging a neighbouring plot. We suggested that the regulations should make it clear that an order is to be

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33 See for example *Knowles v Chorley BC* [1998] JPL 593.

notified to the owners and occupiers of any parcel of land on, in or above which any part of the protected trees is located.

15.42 Of the 40 consultees who responded to this question, 37 were in agreement, generally without comment. Julian Morris pointed out the difficulties of determining with precision the land in which any part of the tree is located, given the different rooting habits of trees. In practice, however, the planning authority will no doubt err on the side of caution in notifying the owners of land in which the roots might be found, without needing to excavate.

15.43 One consultee pointed to the excessive burden that could arise in relation to an area TPO on a large plot of land, with a number of trees overhanging boundaries. Another suggested specifying a distance.

15.44 We consider that the precise formulation of the requirements as to notification will be finalised when the regulations are being drafted; and the points made in response to this question will be taken into account at that time.

**Recommendation 15-4.**

We recommend that new trees regulations should require that a tree preservation order is to be notified to the owners and occupiers of any parcel of land on, in or above which any part of the protected trees is located.

**WORKS TO PROTECTED TREES**

**Overlap with planning permission**

*We provisionally proposed that there would be no benefit in bringing works to trees within the scope of development requiring planning permission (Consultation Question 15-5).*

15.45 In the Consultation Paper, we noted that works to trees could arguably be classified as “development”, requiring planning permission. However, we are not aware of any reported case in which this is suggested, nor successfully argued. We therefore provisionally considered that there would be no benefit achieved by including tree works within the scope of development.

15.46 All of the 41 consultees who answered this question were in agreement.

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35 Consultation Paper, para 15.54.
Recommendation 15-5.

We recommend that works to trees should not be brought within the scope of development requiring planning permission.

Need for consent

15.47 As would be expected, there are many exceptions to the general rule that consent is required for all works to a tree protected by a tree preservation order. At present, some are in the TCPA 1990, and some are in the relevant order itself (the wording of which will vary depending on when it was made). Under the new system, all exceptions to the need for consent will be in the regulations, which are likely to be amended from time to time.

15.48 However, we noted in the Consultation Paper that there are some difficulties with the present exceptions, which could usefully be resolved when consideration is being given to the exceptions to be included in the new regulations.

Works to dead, dying or dangerous trees

We provisionally propose that the exemption from the need for consent under a tree preservation order relating to works to “trees that are dying or dead or have become dangerous” (currently in section 198(6)(a) of the TCPA 1990) be replaced in the new trees regulations with an exemption relating only to the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken (Consultation Question 15-6).

15.49 Under the current law, section 198(6)(a) of the TCPA 1990 provides that a tree preservation order may not prevent the cutting down, uprooting, topping or lopping of “trees which are dying or dead or have become dangerous”.

15.50 In the Consultation Paper, we noted that it has long been recognised that determining whether a tree is “dying” is fraught with uncertainty. And it is often claimed, after a tree has been felled, that it was dangerous.

15.51 When the new system was introduced in England, therefore, the Regulations excepted from the need for consent only the following categories of works:

(a) the cutting down, topping, lopping or uprooting of a tree which is dead;
(b) the removal of dead branches from a living tree;
(c) the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of

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36 See para 15.2. The new system will be introduced when the Planning Act 2008 is brought into force.
serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken..."37

This effectively removes the “dying” element of the exception in section 198(6)(a), and tightens up the “dangerous” element.38

15.52 In Scotland, by contrast, the corresponding exception in the TCP (Scotland) Act 1997 provides that an order is not to prohibit “the uprooting, felling or lopping of trees if it is urgently necessary in the interests of safety”.39 That makes no provision for the felling without consent of trees that are “dying” or “dead”. Nor is there any such exception in the current model order.40 That means that if a tree is dead (or dying) and dangerous, consent will not be required to make it safe. But the need for consent cannot be avoided merely because a tree is dead or dying, so long as it is not dangerous.

15.53 We are aware that a dead or dying tree may in some cases be a significant habitat for wildlife; and that its removal may therefore be undesirable. In other cases, the removal of a dead or dying tree may be appropriate where it has become unsightly, possibly followed by the planting of a suitable replacement. Distinguishing between these two situations is a matter best left to the discretion of the planning authority. But there is no reason why such works should be exempt from the need for consent, unless the tree in question is dangerous.

15.54 We provisionally suggested, therefore, that in relation to dead and dying trees, the approach taken in Scotland was preferable. Thus, exceptions equivalent to those in regulation 14(1)(a)(i) and (b) of the new English Regulations need not be included when corresponding regulations are introduced in Wales.41 However, in relation to dangerous trees, the approach in regulation 14(1)(c) of the new English Regulations (more tightly drafted than the equivalent provision in Scotland) seemed preferable to that envisaged by the current wording of section 198(6)(a) of the TCPA 1990. The former focusses on the necessity of the particular works proposed, rather than on the state of the tree.

15.55 Of the 45 consultees who responded to this question, 40 were in agreement – in several cases strongly. PEBA observed that “this proposal helpfully clarifies and tightens up the scope of the exemption”.

15.56 A few consultees disagreed, on the basis that the proposal removed the right – indeed, arguably, the duty – of tree-owners to remove dead branches, and where appropriate dead trees.

15.57 We are aware of the duty of the occupiers of land, under the Occupiers’ Liability Acts 1957 and 1984 and the law of negligence, to ensure that those on the land and on

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38 Consultation Paper, para 15.63 to 15.65.
40 Scottish Government Circular 1 of 2011, Tree Preservation Orders, Annex A.
41 Taking Forward Wales’s Sustainable Management of Natural Resources, Welsh Government, June 2017, p 26 – para (b).
neighbouring land are reasonably safe. This will involve carrying out works to trees when so advised. We have therefore specifically allowed for that, by retaining in the proposed exception “the lopping … of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm”.

15.58 That obviously leaves open the meaning of the words “urgent”, “immediate" and “serious”, but that must be a matter of professional judgment. It may also be noted that the phrase used is “immediate risk” not “immediate certainty”.

Recommendation 15-6.

We recommend that the exemption from the need for consent under a tree preservation order relating to works to “trees that are dying or dead or have become dangerous” (currently in section 198(6)(a) of the TCPA 1990) should be tightened up when the trees regulations are next updated. We recommend it should extend only to the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm (or to such other extent as agreed in writing by the authority prior to the works being undertaken).

Works to prevent or abate a nuisance

*We provisionally proposed that the exemption from the need for consent under a tree preservation order relating to works that are “necessary to prevent or abate a nuisance” (currently in section 198(6)(b) of the TCPA 1990) should not be restated either in the Bill or in the new trees regulations (Consultation Question 15-7).*

15.59 Under the current law, section 198(6)(b) of the TCPA 1990 (prior to amendment by the Planning Act 2008) provides that a tree preservation order may not prevent “the cutting down, uprooting, topping or lopping of any trees …so far as may be necessary for the prevention or abatement of a nuisance”. The corresponding provision in Scotland is identical.\(^{42}\)

15.60 In the Consultation Paper, we noted that this provision has given rise to considerable uncertainty.\(^{43}\) Many trees overhang property boundaries. On one interpretation of s 198(6)(b), the branches or roots of a protected tree that cross a boundary can only be removed without consent where they can be shown to cause “actionable damage” – notably by roots extracting moisture from soil beneath the foundations of a neighbouring building. On the other interpretation (sometimes referred to as “pure encroachment”), they can be removed wherever they encroach into neighbouring airspace or soil, without showing that they have caused damage.

15.61 We summarised the case law on this point, up to the decision in *Perrin v Northampton BC*. At first instance, Judge Peter Coulson QC, sitting in the Technology and

\(^{42}\) TCP (Scotland) Act 1997, s 160(6)(b).

\(^{43}\) TAN 10, para 26 notes that “the legality of such action is uncertain”.
Construction Court, favoured the “actionable nuisance” approach.\footnote{44} However, in the Court of Appeal, both Sir John Chadwick and Blackburne J doubted whether it was possible to distinguish between “actionable nuisance” and “pure encroachment”. However, the Court allowed the appeal on other grounds, and did not decide the point.\footnote{45}

The precise meaning of the phrase “abatement of a nuisance” thus remains uncertain. It is probably one of the most significant legal issues raised in this Chapter, particularly in the light of the number of protected trees growing on or close to property boundaries. We provisionally considered that it would be helpful to resolve that uncertainty.

We suggested that the best solution would be to abolish the “nuisance” exemption, so that landowners would still have a common law right (as per \textit{Lemmon v Webb}\footnote{46}) to remove an encroaching root or branch, but would have to apply to the planning authority for consent under any TPO protecting the tree. Such an application could presumably be dealt with on the same basis as where a tree is causing similar problems on the land on which it is growing. No doubt the authority (or, on appeal, the Welsh Ministers) would give those problems appropriate weight, and balance them against any effect on amenity that would arise as a result of the proposed remedial works.

We noted that this proposal could potentially lead to more applications for consent. However, because of the uncertainty as to the current law, we suspect that few people proposing to carry out works to protected boundary trees rely on the exemption at present.

Of the 41 responses to this question, 37 were in agreement. Mark Mackworth-Praed described it as “brilliant and long overdue, as the Courts have steadfastly refused over the years to cut this Gordian knot. As the paper quite rightly says, very few people are so rash as to rely on the exemption, in view of the uncertainties surrounding it.” Several planning authorities suggested that any new regulations should make it clear that TPO approval will be required for works proposed to prevent or abate a nuisance; this would remove any confusion. However, we consider that merely removing the exemption would be sufficient.

Two consultees drew attention to the problems caused by boundary trees, and the desirability of being able to carry out necessary remedial works – removing overhanging branches or, where appropriate, felling the tree in question. We do not doubt the desirability of such works, seen from the point of view of the person suffering from the falling leaves, or worrying about a possible falling branch. Equally, the planning authority may consider that the branch should be retained, in the interests of amenity – so long as it is not dangerous. But the key point is that this is precisely the type of disagreement that occurs all the time in relation to protected

\footnote{44} [2006] EWHC 2331 (TCC), [2007] 1 All ER 929, at [34] and [35].

\footnote{45} [2007] EWCA Civ 1353, [2008] 1 WLR 1307, CA at [27], [29], [66] and [67]. Wall LJ agreed with both judgments.

\footnote{46} [1894] 3 Ch 1, CA, upheld at [1895] AC 1, HL.
trees, and the need for consent should not be determined on the basis of who owns the tree.

**Recommendation 15-7.**

We recommend that the exemption from the need for consent under a tree preservation order relating to works that are “necessary to prevent or abate a nuisance” (currently in section 198(6)(b) of the TCPA 1990) should not be restated either in the Act or in new trees regulations.

**Works to saplings**

_We provisionally proposed that a new exemption from consent under tree preservation regulations should be introduced, to allow the carrying out without consent of works to trees having a diameter not exceeding a specified size, save in the case of trees that were planted as a result of a requirement under section 206 or a condition of planning permission (Consultation Question 15-8)._ 

15.67 Tree preservation orders are generally made to protect trees of reasonable size. But they may in some situations protect saplings from the moment they are planted – notably when they are introduced to replace a mature tree whose felling has been permitted, or are required by a landscaping condition attached to a planning permission for new development, or (under section 206 of the TCPA 1990) following the removal of a tree because it was dead or dangerous or removed unlawfully. In such a case it would be illogical for the owner of the sapling to be able to remove it without consent.

15.68 However, we noted in the Consultation Paper that an order will also apply to self-seeded saplings within a protected woodland – since a woodland order protects all trees, even those appearing many years after it was made. We suggested that it would therefore be unhelpful to require consent to be obtained for the removal of undergrowth and scrub (which is likely to contain such saplings). As Lord Denning put it, “in woodland like this, it is often, from the agricultural point of view (especially in a derelict area such as this) very important to get out the bushes, scrub and saplings and to replant”.

15.69 There is an exemption from the need to notify the planning authority of works to a tree in a conservation area where the tree in question is smaller than a specified size. But there is no equivalent exemption from the need to obtain consent where the tree is protected by a TPO. However, the most recent model order in Scotland contains a provision whereby consent is not required for the cutting down, uprooting, topping or lopping of a tree having a diameter not exceeding 75mm (or 100mm in a...
woodland where the work is to improve the growth of other trees). This allows for the thinning of woodlands.

15.70 We provisionally considered that there should be a limited exemption from the need for consent in relation to small saplings, but not where they were planted as a result of a requirement under section 206 or a condition of a planning permission or a consent to fell another tree. That would protect saplings that had been deliberately planted and merited preservation, but would enable undergrowth and scrub to be removed in woodlands on a regular basis without fear of prosecution.

15.71 This proposal generated a large number of responses. Of those who responded, 16 were in agreement, whilst 23 disagreed.

15.72 Those who disagreed did so on the basis that the purpose of a woodland order is quite distinct from that of an order protecting individual trees. We have already drawn attention to the difference. In particular, a tree preservation order (other than one relating to a woodland) protects specific plants, for as long as they are in existence. By contrast, a woodland preservation order protects a continuously evolving ecosystem. The introduction of an exemption for works to “trees” of less than a specified size would accordingly seem to allow saplings to be freely removed without any control.

15.73 We have considered this issue carefully. It is almost inevitable that the routine management of woodlands at present includes in many cases the pruning of some saplings, and the removal of others, probably without specific consent being obtained. Where a woodland preservation order applies, the carrying out of such works currently constitutes a criminal offence. That seems unsatisfactory in principle, and relying on the discretion of planning authorities not to prosecute is not a sufficient solution. On the other hand, the existence of the criminal sanction presumably does not prevent the necessary work being carried out.

15.74 We accept that a specific exemption of the kind proposed might send out the wrong message, encouraging inappropriate woodland management. But we note that none of those who disagreed with the proposed exemption put forward any suggestion as to how to avoid landowners being liable to prosecution when carrying out beneficial management works.

15.75 We observe that the corresponding exemption from the need to notify the planning authority of works to a tree in a conservation area is framed by reference to the cutting down or uprooting

(i) of a tree whose diameter does not exceed 75 mm; or

(ii) where carried out for the sole purpose of improving the growth of other trees, of a tree whose diameter does not exceed 100 mm.

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51 Art 4(c) and (d) of the model order at Scottish Government Circular 1 of 2011, Tree Preservation Orders, Annex A.

52 See paras 15.30 and 15.31.
On that basis, it would be possible to introduce a similarly phrased exemption to allow the carrying out without consent of works to a tree protected by a woodland preservation order whose diameter does not exceed a specified size, but only where carried out for the sole purpose of improving the growth of other trees. That would allow saplings to be removed without consent as part of a responsible management programme, but not the removal of all understorey.

We consider that this point should be considered when the regulations are next updated, so that a possible exemption can be the subject of a further consultation exercise.

**Recommendation 15-8.**

We recommend that, when the regulations are next updated, consideration should be given to introducing a new exemption to allow the carrying out without consent of works to a tree protected by a woodland preservation order smaller than a specified size, but only where carried out for the sole purpose of improving the growth of other trees.

**Certificate as to need for consent**

*We recommend that a provision be introduced in the trees regulations (along with an appropriate enabling provision in the Bill) to enable a certificate of lawfulness to be issued in relation to proposed works to a tree or woodland (Consultation Question 15-9).*

As with the display of advertisements, there can be considerable uncertainty as to whether consent is required for proposed works to a tree or woodland, and particularly as to whether it falls within one or more of the exemptions in the Act or the order (or, under the new system, in the regulations). And here too, this is particularly unfortunate given that carrying out works to protected trees and woodlands without consent is a criminal offence.

Again, therefore, we provisionally proposed that it would be more straightforward for there to be a mechanism, similar to that governing applications for certificates of lawfulness of proposed development (CLOPUDs), whereby anyone could seek a binding decision as to the lawfulness of proposed works to protected trees or woodlands. Such a certificate would then prevent the authority from instituting a prosecution.

Of the 40 consultees who responded to this question, 21 supported the proposal. The Central Association of Agricultural Valuers, for example, agreed that it would be useful for an applicant to have the option to gain a decision on the lawfulness of proposed works to protected trees that could be relied upon in any enforcement

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53 See paras 14.47.
Newport City Council made the sensible point that the resulting certificate would need to be subject to a time limit, to reflect the fact that trees grow.

But 5 responses were equivocal – questioning the need for a formal certificate procedure – and 14 disagreed.

The issues raised by this proposal are identical to those raised by the equivalent proposal relating to the need for advertisements consent, considered in the previous Chapter. We consider that, as a matter of principle, anyone should be able to find out whether consent is required for a proposed operation – whether, for example, the authority consider that an exception applies. The procedure as to such applications would probably best be included in the new Regulations when the new system is brought into effect. The enabling provisions in the Bill would need to be adjusted accordingly.

**Recommendation 15-9.**

*We recommend that a provision should be introduced in the trees regulations (along with an appropriate enabling provision in the Act) to enable a certificate of lawfulness to be issued in relation to proposed works to a tree or woodland.*

**Applications for consent**

*We provisionally propose that planning authorities be required to acknowledge applications for consent under the trees regulations (Consultation Question 15-10).*

We noted in the Consultation Paper that there is at present no requirement for a planning authority to acknowledge receipt of an application for consent under a tree preservation order, unlike other types of application under the TCPA 1990. Government guidance in England suggested that to do so would be good practice. We suggested that this omission could be rectified when new regulations are made.

Of the 42 consultees who responded to this question, 40 agreed. The other two considered that it should be left as a matter of good practice.

We see no reason why tree applications should be treated differently from other applications under the TCPA 1990.

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54 See paras 14.48 to 14.53.

55 “Land-owners should have a reasonably accessible means of establishing what can be done lawfully with their property” – Robert Carnwath QC, *Enforcing Planning Control*, HMSO, 1989, para 7.2.

Recommendation 15-10.

We recommend that planning authorities should be required to acknowledge applications for consent under the trees regulations.

REQUIREMENT TO PLANT REPLACEMENT TREES

Location of the replacement tree

We provisionally proposed that the requirement to plant a replacement tree following the felling of a dangerous tree or following unauthorised works should be limited to the planting of a tree of appropriate species at or near the location of the previous tree (rather than, as at present, in precisely the same place) (Consultation Question 15-11).

15.86 Section 206 of the TCPA 1990 imposes a duty to plant a replacement tree where

1) a tree protected by a tree preservation order or a woodland preservation order is removed, uprooted or destroyed unlawfully, or

2) a tree protected by a tree preservation order is removed without consent because it is dead, dying or dangerous.

15.87 The replacement tree is to be planted “at the same place”, unless the planning authority agree to vary the requirement. In practice, planting at precisely the same place is often not practical – or it is unnecessarily expensive due to the need to remove the remains of the previous tree. We suggested that it would be sensible to relax the requirement slightly, to allow the replacement tree to be planted “at or near” the location of the original tree.\(^{57}\)

15.88 Of the 46 consultees who responded to this question, all agreed. A few stated that the planning authority should decide the location of the replacement tree.

15.89 Mark Mackworth-Praed raised a further point relating to replanting requirements under section 206. He drew attention to section 206(3) of the TCPA 1990, which provides that, “in respect of trees in a woodland, it shall be sufficient to replace the trees removed, uprooted or destroyed by planting the same number of trees”. This provision was considered by the Court of Appeal in *Distinctive Properties (Ascot) v Secretary of State*,\(^{58}\) which concerned a decision by an inspector to uphold a tree replacement notice that had been drafted by reference to the area of woodland felled, and standard planting densities. The Court accepted that it was difficult if not impossible to calculate the number of trees that had been lost where a woodland had been completely felled, and accepted the inspector’s approach as being correct.

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\(^{57}\) And see Department of the Environment, *Tree Preservation Orders: Review* (1994) at paras 2.44 and 2.45.

\(^{58}\) [2015] EWCA Civ 1250.
Mr Mackworth-Praed points out that it would be much clearer if the requirements of section 206(3) were framed by reference to the same number of trees or the same area of woodland. We agree, and consider that would indeed be useful.

**Recommendation 15-11.**

We recommend that:

1. the requirement to plant a replacement tree following the felling of a dangerous tree or following unauthorised works should be limited to the planting of a tree of appropriate species at or near the location of the previous tree (rather than, as at present, in precisely the same place); and

2. the requirement to plant trees to replace trees in a woodland that have been lost should be specified by reference to either the same number of trees or the same area of woodland.

**Variation of tree replacement notice**

We provisionally propose that there be introduced an explicit power enabling a planning authority to waive or relax a replacement notice (Consultation Question 15-12)

15.91 If a landowner fails to comply with a requirement to plant a tree either under section 206 of the TCPA 1990 or under a condition of a consent to fell a protected tree, the authority may enforce the requirement by the service of a replacement notice under section 207. There is a right to appeal against such a notice under section 208.

15.92 We noted in the Consultation Paper that there is at present no power for a planning authority to waive or relax a replacement notice. However, the Courts have held that an authority may enforce only some of the requirements of a planning enforcement notice. There is no reason why it should not be able to vary a tree replacement notice, albeit not in such a way as to extend its scope. We provisionally suggested that this omission should be rectified.

15.93 Of the 36 consultees who responded to this question, all agreed.

**Recommendation 15-12.**

We recommend that there should be introduced an explicit power enabling a planning authority to waive or relax a tree replacement notice.

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59 Consultation Paper, paras 15.95 to 15.97.

60 *Arcam Demolition & Construction Co. Ltd. v Worcestershire CC* [1964] 1 WLR 661.
Costs incurred by the planning authority

We asked whether it would be helpful to introduce powers enabling a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice, under Section 209 of the TCPA 1990 (Consultation Question 15-13).

15.94 Section 209 of the TCPA 1990 provides that, where a replacement notice is not complied with, a planning authority may take action to carry out the required work, and recover the cost from the owner of the land. Section 209(5) provides that regulations may provide for any expenses incurred by an authority to be registered as a charge on the land, to enable recovery from subsequent purchasers. However, no such regulations have been made.61

15.95 We suggested in the Consultation Paper that such a recovery exercise might not be worthwhile in some cases. We asked consultees whether it would be helpful for the authority at least to have the power.62

15.96 Of the 40 consultees who responded, 35 agreed that the existence of such powers might be helpful; three felt that they would not be necessary. On balance, we consider that it would be do no harm to include such powers when the regulations are next updated, even if they are not often used.


We recommend that powers to enable a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice should be introduced when the regulations are next updated.

UNAUTHORISED WORKS TO TREES

15.97 Section 210(1) of the TCPA 1990 makes it an offence to cut down, uproot, or wilfully destroy a protected tree; wilfully to damage, top or lop the tree in such a manner as to be likely to destroy it; or to cause or permit any of those activities. A person guilty of an offence under section 210(1) is liable on summary conviction, or on conviction on indictment, to a fine (of any amount).63

15.98 Section 210(4) provides that any other breach of a tree preservation order is an offence, attracting a maximum penalty of a Level 4 fine on the standard scale (currently £2,500).

61 Compare TCP General Regulations 1992 (SI No 1492), reg 14(2) (enforcement notices) and reg 14(3) (waste land notices).

62 Consultation Paper, paras 15.98 and 15.99.

63 TCPA 1990, s 210(2), amended by 2015 SI 664, Sched 4, para 18.
Reckless or indirect damage

We provisionally proposed that the scope of the matters prohibited by a tree preservation order be extended to include causing harm to a tree: (1) intentionally; or (2) recklessly (for example, by raising or lowering soil levels around the base of a tree, or grazing animals in woodlands) (Consultation Question 15-14).

15.99 The wording of section 210(1) indicates that the offence under that subsection is only committed where destruction or damage is “wilful”. In the Consultation Paper, we provided examples of various activities that might or might not come within that categorisation.64

15.100 We noted that the courts have held that “wilful” in a criminal statute includes recklessness.65 We suggested that the phrase “intentional or reckless” would be clearer than “wilful” – and arguably has the same meaning.66

15.101 All of the 40 consultees who responded to this question were in agreement.

15.102 The Central Association of Agricultural Valuers, the Woodland Trust and the Ancient Tree Forum all pointed out that grazing animals in woodlands may in some cases be desirable to maintain the habitat, and should not always be categorised as detrimental. We consider that this point could be highlighted in guidance.

Recommendation 15-14.

We recommend that the scope of the matters prohibited by a tree preservation order should be extended to include causing harm to a tree:

(1) intentionally; or

(2) recklessly.

One offence or two

We provisionally proposed that the two offences currently in section 210 of the TCPA 1990, relating to works liable to lead to the loss of the tree (subsection (1)) and other works (subsection (4)) be replaced with a single offence, triable either summarily or on indictment, of contravening tree preservation regulations (Consultation Question 15-15).

15.103 In the Consultation Paper, we explored the history of what is now section 210 of the TCPA 1990, noting that there was originally just one offence, referring to any breach of a tree preservation order. This was split into two offences – one relating to breaches likely to lead to the loss of the tree, and one relating to other, lesser works.

64 Consultation Paper, paras 15.102 to 15.103.
We observed that this could cause practical problems, and open up potential abuses. We also noted that the corresponding statutory code relating to listed buildings was framed by reference to a single offence, covering all works from the major to the trivial.

15.104 We therefore suggested that it would be preferable to replace the two offences with a single offence, consisting of any breach of tree preservation regulations.

15.105 Of the 43 consultees who responded to this question, all but one were in agreement.

15.106 One observed that there is a difference between poor pruning and felling a tree. We agree, but note that the penalty imposed in any particular case would be at the discretion of the sentencing court. We also note that it is possible to carry out a series of minor operations to a tree, which together result in it not being worth saving, and thus unlocking a development site yielding a substantial financial gain. It is accordingly worth the court having the full range of possible fines available to it in every case.

**Recommendation 15-15.**

We recommend that the two offences currently in section 210 of the TCPA 1990, relating to works liable to lead to the loss of the tree (subsection (1)) and other works (subsection (4)) should be replaced with a single offence, triable either summarily or on indictment, of contravening tree preservation regulations, punishable on conviction with a fine of any amount.

**The need to prove an order is available for inspection**

*We provisionally proposed that the offence under section 210 (of contravening tree preservation regulations) and the regulations made under section 202A prohibiting works to a tree subject to a tree preservation order should be framed so as to require the prosecution to prove that: (1) a copy of the order had been served on the person carrying out the works before the start of those works; or (2) a copy of the order was available for public inspection at the time of the works; and that a defence should be available to a person charged with such an offence if able to show that he or she had not been served with a copy of the order and did not know, and could not reasonably have been expected to know, of its existence (Consultation Question 15-16).*

15.107 We noted in the Consultation Paper that problems can arise in instituting a prosecution for unauthorised works to protected tree or woodland – or in mounting a defence to such a prosecution – if a copy of the order has not been served on those who need to know about it, or if one has not been made available for inspection.

15.108 We suggested that it would be preferable for the prosecution to have to prove that the order was available for inspection at the time of the offence – or that a copy of it

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67 Consultation Paper, paras 15.105 to 15.113.

68 Consultation Paper, paras 15.114 to 15.119.
had been served on the person carrying out the works — rather than for those who are accused to have to show that the order has neither been served on them nor made available for inspection.

15.109 The offence in section 210 (as it will be following amendment by the Planning Act 2008) relates to the carrying out of various categories of works to a protected tree in contravention of tree preservation regulations; and the regulations (in England) prohibit works to “a tree to which an order relates”.69 We provisionally considered that the equivalent regulations in Wales should refer to the carrying out of works to a tree that is the subject of an order of which a copy had been served on the person carrying out the works, or of which a copy had been made available for inspection at the time of the works.

15.110 We also suggested that it would be appropriate for there to be a defence if the accuse shows he or she had not been served with a copy of the order, and did not know, and could not reasonably have been expected to know, of its existence. That would enable the authority to prosecute contractors who had been personally served with a copy of the order, but would avoid liability attaching to, for example, an absentee owner to whom a copy of the order had not yet been sent.

15.111 Of the 46 consultees who responded to this question, 19 agreed, and a further 21 provided equivocal responses — making a number of useful points. In particular, a number of planning authorities pointed out that the suggested defence might open up the possibility of a contractor escaping liability by claiming to have asked the landowner and been told that there was no TPO. Equally, an owner could escape liability by claiming to have been persuaded by contractors to let them carry out the works, unaware of the TPO.

15.112 On reflection, we consider that the defence is not required. However, the first limb of what needs to be proved could usefully be widened to refer to a copy of the order having been served in accordance with the relevant statutory provisions as to service. Those provisions would then require a copy of the order to be served on persons interested in the land — which includes “every owner and occupier … and every other person whom the authority know to be entitled to fell any of the trees”.70

15.113 Other consultees observed that a requirement to prove that an order was available “at the time of the works” could be problematic where works were carried out, possibly at a weekend, some while after the order was made. We consider that this evidential problem would be alleviated if there were to be introduced a further requirement to record on the order the date on which it was first made available.

15.114 We have already discussed the similar issues that arise in relation to offences under section 179 (resuming activity prohibited by an enforcement notice).71

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69 TCP (Tree Preservation) (England) Regulations 2012 SI No 605.
70 1999 Regulations, regs 3(1) and 1(2).
71 See paras 12.140 to 12.144.
Recommendation 15-16.

We recommend that the offence under what is now section 210 of the TCPA 1990 (contravening tree preservation regulations) and under regulations made pursuant to the provision restating section 202A (prohibiting works to a tree subject to a tree preservation order) should be framed so as to require the prosecution to prove that:

(1) a copy of the order had been served in accordance with the relevant statutory requirements before the start of those works; or

(2) a copy of the order was available for public inspection at the time of the works.

We also recommend that the regulations should include, alongside the requirement to make the order available for inspection, a further requirement to record on the order the date on which it was first thus made available.

TREES IN CONSERVATION AREAS

We provisionally proposed that it would be more straightforward if an authority, on being notified under section 211 of the TCPA 1990 of proposed works to a tree in a conservation area, were to have four possible responses open to it: (1) to allow the works; (2) to allow the tree to be felled; (3) to impose a tree preservation order, and to allow works to the tree; or (4) to impose a tree preservation order, and to refuse consent for the works (Consultation Question 15-17).

15.115 We outline in the Consultation Paper the unsatisfactory statutory regime relating to the control of works to trees in conservation areas, involving a two-stage approval process whereby notice has to be given of proposed works, under section 211 of the TCPA 1990, and the planning authority can then decide whether it wishes to make a tree preservation order to protect the tree in question.

15.116 We suggested that it would be more straightforward if an authority, on being notified of proposed works to a tree in a conservation area, were to have four possible responses open to it:

1) to allow the works (either felling of the tree or other works to it) to proceed, with no conditions (other than as to the two-year time limit);

2) to allow the tree to be felled, subject to a condition as to a replacement tree being planted;

3) to impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or

4) to impose a tree preservation order, and to refuse consent for the works.
15.117 This would not introduce a new procedure, so much as condense the convoluted procedure that already exists. That would save time and effort for the planning authority in cases where it wishes to do anything other than simply allow the works to proceed.

15.118 Some 43 consultees responded to this question, of whom 32 were in agreement (in a few cases on a hesitant basis). In relation to option (2), Mark Mackworth-Praed considered that it would be unreasonable for an authority to allow felling and then require a replacement. The Arboricultural Association, by contrast, considered this to be a positive step, as the loss of trees in a conservation area can have significant cumulative effect. We understand the concern, but note that frequently authorities grant consent for the removal of a protected tree, subject to a replacement condition. But we agree that such a condition should not be included in every case.

Recommendation 15-17.

We recommend that the provision restating section 211 of the TCPA 1990 should empower an authority notified of proposed works to a tree in a conservation area, to:

(1) allow the works to proceed, with no conditions other than a two-year time limit;

(2) allow the tree to be felled, subject to planting a replacement tree;

(3) impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or

(4) impose a tree preservation order, and to refuse consent for the works.