



## **Bar Council response to the Law Commission Consultation Paper No 233 'Planning Law in Wales'**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The Bar Council's Law Reform Committee takes an active interest in the Law Commission's work, including with its terms of Reference of the Committee are:
  - a. To consider and develop proposals for law reform and to submit views to the Government and others where appropriate; (paragraph 30 of Standing Orders for Joint Committees)
5. The Bar Council submitted a response to the Scoping Paper (June 2016), recorded in Appendix A: Responses (page A-2), and we gratefully acknowledge references to that response in the Analysis of Response document at paragraphs 1.39, 3.7, 4.6, 4.14, 4.21, 5.15, 6.21 and 6.25.

### **Overview**

6. The Bar Council supports the Law Commission’s objectives in proposing reforms to planning legislation in Wales through a consolidation and simplification of the current legislation. The proposed reforms would also seek to incorporate some of the legal principles established through case law but which are not currently set out in the current legislation. We agree that such an approach would make the planning system in Wales far more accessible to the public as well as to those more used to dealing with the planning system, would help avoid inconsistent decisions being made and bring about greater fairness overall.

7. For this reason, we agree with the majority of the proposals in the consultation paper. Those that we do not agree with are few in number and the disagreements are small. Our responses reflect the Bar’s overall position and do not specifically reflect the views of the Planning & Environmental Bar which more helpfully may respond in its own right. In addition, it has not been possible to respond to those questions which the invite specific examples of statistical evidence.

8. The Planning Bar in England and Wales is represented by the Specialist Bar Association, the Planning and Environmental Law Bar Association (“PEBA”).

9. The Bar Council is aware of the separate consultation response on behalf of PEBA. That separate response examines the individual proposals in specific detail, mindful of the specific issues that will arise in practice.

10. This consultation response is formally distinct from that provided by PEBA.

11. The primary concern is to ensure that the provisions meet the Bar Council’s overarching interests:

- (1) Promoting access to justice for all;
- (2) Clarity in legislative drafting;
- (3) Advising on matters related to the rule of law

12. Many of the consultation questions are specialist matters, in which the Bar Council does not seek to duplicate or contradict the specialist opinion offered by PEBA.

13. The Chapters of particular interest to the Bar Council are:

Chapter 5: Introductory Provisions  
Chapter 6: Formulation of the Development Plan  
Chapter 11: Appeals and Other Supplementary Provisions  
Chapter 17: High Court Challenges

14. The Bar Council has no substantive response on the following Chapters for the reasons indicated above:

Chapter 7: The Need for a Planning Application  
Chapter 8: Applications to the Planning Authority  
Chapter 9: Applications to the Welsh Ministers  
Chapter 10: The Provision of Infrastructure and Other Improvements

Chapter 12: Unauthorised Development  
Chapter 13: Works Affecting Listed Buildings  
Chapter 14: Outdoor Advertising  
Chapter 15: Works to Protected Trees

Chapter 18: Miscellaneous and Supplementary Provisions

13. In addressing the consultation questions, we have recited the question in full (for ease of reference), using a single number paragraph system.

15. We do not wish to keep this consultation response confidential.

### **Introductory Comments**

16. In our earlier Consultation response, we set out our support for the Proposals, within the broader context of the Law Commission's project on the Form and Accessibility of the Law Applicable in Wales, reflecting its report ("Form and Accessibility Report") which was published contemporaneously with the previous Paper.

17. We reiterate that it is self-evident in the Bar Council's view that the aims behind a wholesale re-drafting or rather re-configuration of planning related legislation in Wales will require significant political will and support for the project accompanied by a recognition that the process is most likely to take a considerable period of time. The envisaged benefits therefore from this proposal will also have to await. The alternative of more piecemeal reform may necessarily be more attractive.

18. The Bar Council will continue to seek to assist as best it can in this process in the event that it goes forward.

## **Consultation questions**

### **Chapter 5. Introductory Provisions**

#### **Consultation question 5-1.**

**We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code:**

**(1) must have regard to the development plan, so far as relevant to the exercise of that function; and**

**(2) must exercise that function in accordance with the plan unless relevant considerations indicate otherwise.**

#### **Do consultees agree?**

19. The Bar Council supports this drafting proposal, including the constituent elements sets out under Questions 5-2 and 5-3 below

20. There is merit in (i) the combination of the existing separated statutory provisions separate between two different Acts and (ii) the adjectival change to “relevant” considerations to bring the provision in line with administrative law (see further Q5-2(2) below).

21. We would however recommend that those “functions” are clearly listed comprehensively (perhaps by Schedule), such that, in particular, those officers who exercise the applicable functions are aware of the duty, and compose their formal decisions or reports to councils and constituent committees accordingly (see further Q5-3 below).

22. We would further recommend that the term “Code” is defined within the provisions. Whilst it is accepted that the term is familiar to planning practitioners as a collective description in Compulsory Purchase legislation and case law, it is not yet well-established in the Law of England and Wales and requires some definitional precision,

particularly in respect of the interaction between primary legislation, secondary legislation and (national) planning policy.

**Consultation question 5-2.**

**We provisionally consider that;**

**(1) to attempt to define relevant or material considerations in the Planning Code would cause as many problems as it would solve; and**

**(2) the term “relevant considerations” would be more appropriate than “material considerations.”**

**Do consultees agree?**

23. The Bar Council agrees with point (1) that it is not possible as a matter of administrative law or practical reality to define the list of relevant or material considerations exhaustively. A list that is expressly defined as non-exhaustive would itself cause uncertainty and potentially generate unnecessary litigation. With regard to point (2) the Bar Council agrees that ‘relevant considerations’ is clearer and more appropriate than ‘material considerations’.

**Consultation question 5-3.**

**We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code must have regard to any other relevant considerations. Do consultees agree?**

24. The Bar Council supports this approach, subject to comprehensive listing of the relevant functions (as set out above under Consultation question 5-1).

**Consultation question 5-4.**

**We provisionally propose that a provision or provisions should be included to the effect that:**

**(1) a body exercising any statutory function must have regard to the desirability of preserving or enhancing historic assets, their setting, and any features of special interest that they possess; and**

**(2) a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to those matters;**

**(3) and that “historic assets” be defined so as to include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe.**

**Do consultees agree?**

25. The Bar Council has no substantive observation on this proposal, save that the duty should be stated at the end of any initial section.

26. We suggest that considerable care needs to be taken in drafting what are envisaged as introductory sections within the Bill, to ensure that the provisions are narrowly drafted, without multiple qualifications and exceptions. As the Consultation Paper suggests there is a risk of accretion in lists of applicable provisions, which can obscure the clarity of the most commonly encountered requirements.

**Consultation question 5-5.**

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

**(1) the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; and**

**(2) the duty to consider the effect on the use of the Welsh language is not to affect:**

- whether regard is to be had to any other consideration when exercising that function or**
- the weight to be given to any such consideration in the exercise of that function.**

## **Do consultees agree?**

27. The Bar Council supports this proposal, on the basis that it would improve access to justice to those whose first or only language is Welsh. There is clear merit in including this within the text of the leading section, given the importance of the interest at stake.

## **Consultation question 5-6.**

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

**(1) the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, include the policies of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; and**

**(2) the consideration of Welsh Government policies is not to affect:**

- whether regard is to be had to any other consideration when exercising that function, or**
- the weight to be given to any such consideration in the exercise of that function.**

## **Do consultees agree?**

28. The Bar Council supports this proposal, which is in principle a major benefit in the light of the absence of such a reference under section 38(6) of the Planning and Compulsory Purchase Act 2004 ('PCPA').

29. However two practical issues may arise, and merit detailed consideration with the Welsh Ministers and their respective civil servants.

30. First, it would seem important for the legislative provisions to define, soon after this provision, the full scope of qualifying documents that constitute the statutory development plan: see by contrast the structure of section 38 PCPA and the corresponding provisions in sections 15 and 17 PCPA, and the further regulations. Otherwise there is the risk that the definition of the "development plan" will continue to be obscure to lay readers.

31. Second, the final clause : *“not to affect...the weight to be given to any such consideration in the exercise of that function”* does appear to intrude upon an area which the Bar Council is aware is the subject of some controversy in respect of English national planning policy, namely the interaction between section 38(6) PCPA and the NPPF’s paragraph 14: as summarised in *East Staffordshire DC v Barwood Developments Ltd & SSCLG* [2017] EWCA Civ 893.

32. In practice, both English and Welsh national policies frequently make directions as to where the *“weight”* to be given to adopted policies is affected either through express reference: PPW 2.14.4 *“decreasing weight”* to *“outdated”* Local Development Plan policies; NPPF 216: *“the greater the weight”* or through parallel concepts, e.g, the PPW presumption *“in favour of proposals in accordance with the key principles (see 4.3) and key policy objectives (see 4.4) of sustainable development”* and NPPF 14 *“significantly and demonstrably outweigh”* albeit that the ultimate degree of weight is always for the decision maker.

33. It is recognised that this situation is not free from difficulty, but, in principle, we suggest it may be clearer and better resolved by stating the duty positively: i.e. the decision-maker has full discretion as to the weight to be accorded to Welsh Government planning policies, subject to the duty to determine in accordance with the development plan, unless relevant considerations indicate otherwise.

### **Consultation question 5-7.**

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

### **Do consultees agree?**

34. The rationale for this omission appears to be at odds with what we understand is one of the chief purposes of the Codification exercise, namely better presentation and simplification in order to enable the public to understand the planning system more readily as well as being comprehensive.

35. We respectfully therefore recommend that the above proposal is re-considered.



36. The duty to carry out sustainable development is an important one, and may not be well-understood by members of the public. In the Planning and Compulsory Purchase Act 2004, a similar duty is contained within the main text (albeit only in later provisions under section 39).

37. The concept of “sustainable development” is also much-used in Welsh and English national policy and development plans.

38. Given the importance of ensuring that the Code is comprehensive, we would suggest that there is real merit in re-stating the statutory duty.

**Consultation question 5-8.**

**We provisionally propose that a series of signpost provisions to duties in non-planning legislation that may be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance.**

**Do consultees agree?**

39. The Bar Council’s view is that the reference to “signposting” is not entirely clear and may also frustrate the overarching aim of codification – as this would make the provisions vulnerable to changes in the Ministerial guidance.

40. We would recommend that further consideration is given to how these duties might be contained in a document with greater formal permanence, such as the inclusion within a Schedule to the main statute.

**Consultation question 5-9.**

**We provisionally propose that section 53(2) of the Coal Industry Act 1994 (environmental duties in connection with planning) should be amended so that they no longer apply to Wales.**

**Do consultees agree?**

41. This is the first of a significant number of Consultation questions, where the Bar Council adopts a position of general support, but provides no detailed comment on any consequences of the text.

42. The Bar Council strongly supports improving the navigability of the proposed future statutory context by the removal of provisions which are no longer relevant.

43. Specialist consultees may be able to advise if this omission would have any unintended consequences or represents a missed opportunity to update the position at law.

### **Consultation question 5-10.**

**In light of the previous proposals in this Chapter, we provisionally consider that there is no need for the Bill to contain a provision explaining the purpose of the planning system in Wales.**

#### **Do consultees agree?**

44. The Bar Council recognises the concern in respect of having a formal provision within the Bill setting out of the statutory purpose of the planning system on the basis of possible conflict.

45. Such provisions are a routine feature of planning and land use legislation in civil law jurisdictions, e.g. the French Code de l'Urbanisme (Art L 101-2) and the German Baugesetzbuch (II-1-1).

46. In the UK context, however, there is less universal agreement on the core purposes of planning. These are multifarious, and ultimately dependent upon the nature of any given development proposal and its impact both negative and positive.

47. The Bar Council understands that such purpose is a matter for the relevant national body to set out

48. We do not agree though that the type of section as proposed in 5.120 would necessarily "*encapsulate*" the statutory purposes as suggested at 5.121 of the PLW Consultation. This is because this proposed provision makes no reference to key national planning matters, e.g. the provision of sufficient housing. It would therefore be necessary in our view for the attendant national policy to set out clearly the overarching purposes.

**Consultation question 5-11.**

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

**Do consultees agree, and if so which term do consultees think is most appropriate?**

49. The Bar Council suggest that the retention of the singular term “Inspector” would be clearer. This reflects the most common position, and avoids the confusion that can arise in the neighbourhood plan context in England, where the term “Examiner” is used instead.

50. If the term “Examiner” is to be used, the status should be very tightly defined.

**Consultation question 5-12.**

**We provisionally propose that the Bill should not include the provisions currently in the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities. Do consultees agree?**

51. The Bar Council agrees with this removal, which simplifies the statutory text and reflects the correct position at law.

**Consultation question 5-13.**

**We consider that the term “planning authority” should be used in the Planning Code in place of the term “local planning authority” and “minerals planning authority” in existing legislation. Do consultees agree?**

52. The Bar Council supports this proposal, subject to careful identification of the separate status of the Welsh Ministers.

## **CHAPTER 6. FORMULATION OF THE DEVELOPMENT PLAN**

### **Consultation question 6-1.**

**We provisionally consider that Part 6 of the PCPA 2004 (development plans), as amended by the P(W)A 2015, should be restated in the Planning Code, subject to any necessary transitional arrangements relating to the Wales Spatial Plan and to the proposals in the remainder of the Chapter.**

**Do consultees agree?**

53. The Bar Council supports this proposal, which reflects the statutory support for the current plan-making arrangements.

### **Consultation question 6-2.**

**We provisionally propose that:**

- (1) the provisions currently in the Planning and Energy Act 2008 are not restated in the Bill;**
- (2) consideration is given in due course to:**
  - including equivalent provisions in guidance; and**
  - making appropriate amendments to the Building Regulations.**

**Do consultees agree?**

54. The Bar Council supports the aim of simplification within this proposal, but has no specialist position on the merits of the proposed drafting or how prominence can be given to these statutory aims.

### **Consultation question 6-3.**

**In light of the existence of duties to carry out sustainability appraisals of the NDF and strategic and local development plans, currently under Part 6 of the PCPA 2004:**

- (1) is there a continuing requirement for a separate appraisal to be carried out of their environmental impact, as currently required by the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004?**

**(2) are the 2004 Regulations still required in relation to plans and programmes other than the NDF and development plans? or**

**(3) do the 2004 Regulations need amendment or simplification in any way?**

55. The Bar Council confines its response to (1). This is an area where there has been considerable litigation in England, and there is merit in streamlining the statutory provisions to ensure that the requirement for SEA is clear on the face of the main primary legislation.

56. The Bar Council is aware of the controversy over development plan documents (DPDs) and supplementary planning documents (SPDs) and the continuing controversy in respect of the correct approach to “reasonable alternatives” and related provisions within the SEA Regulations. However those are matters best addressed by specialist consultees.

**Consultation question 6-4.**

**We provisionally propose that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill.**

**Do consultees agree?**

57. As set already above, the Bar Council is in general support of the omission of redundant statutory provisions.

**Consultation question 6-5.**

**We consider that Chapter 2 of Part 6 of the TCPA 1990 (blight notices) and Schedule 13 to the Act should be restated in the Planning Bill in broadly their present form.**

**Do consultees agree?**

58. The Bar Council has no formal position on this proposal, which is best addressed by specialist practitioners.

## **CHAPTER 7. THE NEED FOR A PLANNING APPLICATION**

59. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

### **Consultation question 7-1.**

**We provisionally propose that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, s 55(4)(g), should not be restated in the new Bill, but that the same result should be achieved by the use of the GPDO.**

**Do consultees agree?**

60. See above.

### **Consultation question 7-2.**

**We provisionally propose that the extent of minor building operations that are not excluded from the definition of development by TCPA 1990, s 55(2)(a), currently in the proviso to s 55(2)(a) and in s 55(2A) and (2B), should be clarified with a single provision to the effect that the carrying out of any works to increase the internal floorspace of a building, whether underground or otherwise, is development.**

**Do consultees agree?**

61. See above.

### **Consultation question 7-3.**

**It would be possible to incorporate in the Bill a definition of “engineering operations”, to the effect that they are operations normally supervised by a person carrying on business as an engineer, and include:**

**(1) the formation or laying out of means of access to a highway; and**

**(2) the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there. We invite the views of consultees.**

62. See above.

**Consultation question 7-4.**

**We provisionally propose that there should be an explicit provision as to the approval of use classes regulations by the negative resolution procedure.**

**Do consultees agree?**

63. See above.

**Consultation question 7-5.**

**We provisionally propose that section 55(3)(a) TCPA 1990 (intensification of dwellings as material change of use) should be clarified by providing that the use as one or more dwellings of any building previously used as a different number of dwellings shall be taken to involve a material change in the use of the building and of each part of it which is so used.**

**Do consultees agree?**

64. See above.

**Consultation question 7-6.**

**We provisionally propose that section 55(2)(d) to (f) of the TCPA 1990 (activities not falling under development) should be clarified by providing that the following changes of use should be taken for the purposes of this Act not to involve development of the land:**

- (1) the change of use of land within the curtilage of a dwelling to use for any purpose incidental to the enjoyment of the dwelling as such;**
- (2) the change of use of any land to use for the purposes of agriculture or forestry (including afforestation) and the change of use for any of those purposes of any building occupied together with land so used;**

**(3) in the case of buildings or other land which are used for a use within any class specified in an order made by the Welsh Ministers under this section, the change of use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, from that use to any other use within the same class. Do consultees agree?**

65. See above.

**Consultation question 7-7.**

**We provisionally propose that section 58 of the TCPA 1990 (ways in which planning permission may be granted) should not be restated in the new Planning Bill in its present form.**

**Do consultees agree?**

66. See above.

**Consultation question 7-8.**

**We provisionally propose that section 61 of the TCPA 1990 (largely relating to the applicability of pre-1947 legislation) should not be restated in the new Planning Bill.**

**Do consultees agree?**

67. See above.

**Consultation question 7-9.**

**We provisionally propose that sections 88 and 89 of the TCPA (planning permission granted by enterprise zone scheme) should not be restated in the new Planning Bill.**

**Do consultees agree?**

68. See above.

**Consultation question 7-10.**



**We provisionally propose that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill.**

**Do consultees agree?**

69. See above.

**Consultation question 7-11.**

**We provisionally propose that the provisions relating to time limits and certificates of lawfulness, currently included in TCPA 1990, ss 171B and 191 to 196, should be included in the new Planning Bill alongside the other provisions relating to the need for planning permission. They should be drafted along the lines of TCPA 1990, s 64(1) (including a reference to the need for a planning application to be submitted, in light of general and local development orders, but not to enterprise zone or simplified planning zone schemes).**

**Do consultees agree?**

70. See above.

**Consultation question 7-12.**

**We provisionally propose that a provision should be included to the effect that:**

**(1) an application for planning permission for an operation or change of use be assumed to include an application for a certificate of lawfulness of proposed use or development (CLOPUD) in relation to the operation or change of use; and**

**(2) an application for planning permission to retain an operation or change of use already carried out without permission is assumed to include an application for a certificate of lawfulness of existing use or development (CLEUD) in relation to the operation or change of use.**

**Do consultees agree?**

71. See above.

## **CHAPTER 8. APPLICATIONS TO THE PLANNING AUTHORITY**

72. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

### **Consultation question 8-1.**

We provisionally consider that the law as to planning applications could be simplified, by:

- (1) abolishing outline planning permission;**
- (2) requiring that every application for planning permission for development – whether that development is proposed, or is under way, or has been completed – being accompanied by plans, drawings and information sufficient to describe the proposed development;**
- (3) enabling the items to accompany applications to be prescribed in regulations, so as to include (so far as relevant) details of: - the approximate location of all proposed buildings, routes and open spaces, - the upper and lower limit for the height, width and length of each building proposed, and - the area or areas where access points will be situated;**
- (4) an applicant being able to invite the planning authority to grant permission subject to conditions reserving for subsequent approval one or more matters not sufficiently particularised in the application;**
- (5) an authority being able (whether or not invited to do so) to grant permission subject to such conditions; and**
- (6) an authority being able to notify the applicant that it is unable to determine an application without further specified details being supplied.**

**Do consultees agree?**

73. The Bar Council recognises that it would simplify the system by formally abolishing the 2 stage outline planning permission process whereby an outline permission is

followed by the reserved matters stage, however, in practice even full planning permissions are frequently subject lawfully to conditions which address matters of greater detail and which are made subject to a further approval process. That further approval process through condition does not require public consultation and approval whereas a reserved matters stage does require public consultation.

74. The question in the Bar Council's view is whether removing an outline and reserved matters process achieves greater clarity and fairness or not.

75. Central to any need for an outline permission option compared with a detailed permission would appear to the Bar Council to be the nature and indeed size of the development proposal itself.

76. There would appear to be benefit for the developer of a very large development to have an in principle permission as well as those who may be affected by it.

77. On balance therefore the Bar Council considers that the outline permission option should not be abolished.

**Consultation question 8-2.**

**We provisionally propose that section 327A of the TCPA 1990 – providing that planning authorities must not be entertain applications that do not comply with procedural requirements – should not be restated in the new Bill.**

**Do consultees agree?**

78. See above.

**Consultation question 8-3.**

**We provisionally propose that section 65(5) of the TCPA 1990 – providing that planning authorities must not entertain applications that are not accompanied by ownership certificates – should not be restated in the new Bill.**

**Do consultees agree?**

79. See above.

**Consultation question 8-4.**

**We provisionally propose that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to**

**(1) the notification of planning applications to agricultural tenants and**

**(2) the notification of minerals applications Should be clarified, to ensure that they are only drawn to the attention of applicants in relevant cases.**

**Do consultees agree?**

80. See above.

**Consultation question 8-5.**

**We provisionally propose that section 70A of the TCPA 1990 (power to decline similar applications) should be restated in the Planning Bill as its stands following amendment by PCPA 2004, the Planning Act 2008 and the P(W)A 2015.**

**Do consultees agree?**

81. See above.

**Consultation question 8-6.**

**We provisionally propose that section 70B of the TCPA (designed to discourage or prevent twin-tracking) should not be restated in the Planning Bill.**

**Do consultees agree?**

82. See above.

**Consultation question 8-7.**

**We provisionally consider that it would be helpful to include in the Bill a provision requiring each planning authority to prepare a statement specifying those within the community whom it will seek to involve in the determination of planning applications.**

**Do consultees agree?**

83. See above.

**Consultation question 8-8.**

**We provisionally propose that the DMP(W)O 2012 should be amended to make it clear that representations as to a planning application received after the end of the 21-day consultation but before the date of the decision should be taken into account if possible, but that there should be no requirement to delay the consideration of the application.**

**Do consultees agree?**

84. See above.

**Consultation question 8-9.**

**We provisionally consider that the distinction between conditions and limitations attached to planning permissions should be minimised, either:**

- 1) by defining the term “condition” so as to include “limitation”, or**
- 2) by making it clear that planning permission granted in response to an application or an appeal (as opposed to merely permission granted by a development order, as at present) may be granted subject to limitations or conditions.**

**Do consultees agree?**

85. See above.

**Consultation question 8-10.**

**We provisionally propose that the provisions in the TCPA 1990 as to the imposition of conditions should be replaced in the Bill with a general power for planning**

authorities to impose such conditions or limitations as they see fit, provide that they are:

- (1) necessary to make the development acceptable in planning terms;
- (2) relevant to the development and to planning considerations generally;
- (3) sufficiently precise to make it capable of being complied with and enforced; and
- (4) reasonable in all other respects.

Do consultees agree?

86. See above.

**Consultation question 8-11.**

In addition to the general power to impose conditions and limitations, it would be possible to make explicit in the Code powers to impose specific types of conditions and limitations, considered in Consultation questions 8-12, 8-16 and 8-18.

Do consultees consider that the powers to impose all or any of these types of conditions (or others) should be given a statutory basis – either in the Bill or in regulations – or should they be incorporated in Government guidance on the use of conditions?

87. See above.

**Consultation question 8-12**

We provisionally propose that the Code should include a provision enabling the imposition of conditions to the effect:

- (1) that the approved works are not to start until some specified event has occurred (a *Grampian* condition); or
- (2) that the approved works shall not be carried before:

- a contract for the carrying out of some further specified development has been made; and
- planning permission has been granted for the development that is the subject of the contract.

### **Do consultees agree?**

88. The Bar Council understands that Grampian conditions can sometimes lead to an absence of clarity and can be directed to the occurrence of a variety of events, including legal events, that quite rightly cannot be addressed through a planning application process. To that end point (1) is helpful in reflecting the law currently.

89. However, the Bar Council considers, that the analogy of Grampian conditions applied in the context of Listed Building works subject to a contract for the carrying out of works of redevelopment is not truly applicable as a general rule to 'contracts' per se. The further analogy might be works under s278 of the Highways Act 1980. These are both backed by statute and are in effect a hurdle required in any event not as a matter of common law contract.

90. In addition, the Bar Council is not clear what is meant by "*a contract for the carrying out of some further specified development*".

91. In short, the Bar Council considers that the power to impose conditions and the type of those conditions should not be overly constrained in statute. It may well be better for this to be a matter for Welsh Govt guidance.

### **Consultation question 8-13.**

We provisionally consider that it would be helpful:

(1) for a planning authority to be given a power (but not a duty) to identify from the outset the conditions attached to a particular planning permission that are "true conditions precedent", which go the heart of the permission, so that they must have been complied with before the permission can be said to have been lawfully implemented (the second category identified by Sullivan J in *Hart Aggregates v Hartlepool BC*), as distinct from other conditions precedent;

(2) for an applicant to have a right to request an authority to identify which of the conditions attached to a particular permission that has been granted are true conditions precedent; and

(3) for an applicant to have, in either case, a right to appeal against such identification, without putting in jeopardy the substance of the condition itself.

Do consultees agree? Is there any other way in which the status of pre-commencement conditions could be clarified?

92. The Bar Council understands the fact that the issue highlighted above has been the subject of debate before the Courts and also appreciate that this may not necessarily have achieved the sort of clarity that would be welcome.

93. The Bar Council considers that the addition of a process however whereby the planning authority or decision maker may be required to identify what it thinks amounts to a "*true condition precedent*" is not an answer to the questions that arise at law in any event. In other words, whilst it might provide some clarity or protection for a developer in its relations with the planning authority, the interpretation of a condition remains a matter of law and hence ultimately for the Courts.

94. In addition, it is not clear how a further appeal process on the specific issue would add fairness and clarity at our beyond the right to appeal against the imposition of a condition following the grant of appeal available in any event.

**Consultation question 8-14.**

**We provisionally propose that the Bill makes plain:**

**(1) that development must be commenced by the date specified in any relevant condition;**

**(2) that any phases must be commenced by the date specified in any condition relevant to that phase; and**

**(3) that in the absence of any such condition the development must be commenced within five years of the grant of permission.**

**Do consultees agree?**



95. See above.

**Consultation question 8-15.**

**We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions to the effect that the development or use of land under the control of the applicant (whether or not it is land in respect of which the application has been made) should be regulated to ensure that the approved development is and remains acceptable.**

**Do consultees agree?**

96. See above.

**Consultation question 8-16.**

**We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions where permission has been granted for a limited period, to the effect that the buildings or works authorised by the permission be removed, or the authorised use be discontinued at the end of the period, and that works be carried out at that time for the reinstatement of land.**

**Do consultees agree?**

97. See above.

**Consultation question 8-17.**

**We provisionally consider that a provision equivalent to section 72(3) of the TCPA 1990 (as to time-limited conditions) should be retained in the Code, but drafted so as to make clear that it applies only in the case of:**

- (1) time-limited permissions issued under what is now section 72(1)(a); and**
- (2) some time-limited permissions issued between 1960 and 1968.**

**Do consultees agree?**

98. See above.

**Consultation question 8-18.**

We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions to the effect:

- (1) that particular features of the building or land to which the permission relates be preserved, either as part of it or after severance from it;
- (2) that any damage caused to the building or land by the authorised works be made good after those works are completed; or
- (3) that all or part of the building or land be restored following the execution of the authorised works, with the use of original materials so far as practicable and with such alterations as may be specified.

Do consultees agree?

99. See above.

**Consultation question 8-19.**

We provisionally consider that the Bill should clarify the existing law and procedures as to the approval of details required by a condition of a planning permission, whether imposed at the request of an applicant (in relation to matters not sufficiently particularised in the application) or instigated by the authority itself.

Do consultees agree?

100. See above.

**Consultation question 8-20.**

We provisionally propose that a planning authority should be able in an appropriate case to decline to determine an application for the approval of one detailed matter without at the same time having details of another specified matter.

**Do consultees agree?**

101. The Bar Council considers that it is better for planning practitioners to provide their views as to the significance or otherwise of what appears to be at the heart of this proposal, the efficacy of approving matters on condition following the grant of permission (outline or otherwise) however we would raise one general matter.

102. It seems potentially unreasonable for an authority to be given the power to decline to determine an application for approval of a detailed matter which to all intents and purposes is valid and accords with the relevant condition. The Bar Council can see it may be desirable in some circumstances for a planning authority to have a greater range of details available but if that is desirable then surely that is a matter that could be reflected upon the face of the permission prior to grant or simply a matter of request.

**Consultation question 8-21.**

**We provisionally propose that the Bill should clarify the existing law and procedures as to the approval of details required by:**

**(4) a condition of a permission granted by a development order;**

**(5) a requirement imposed by a planning authority following a notification of proposed works in a relevant category of development permitted by a development order.**

**Do consultees agree?**

103. See above.

**Consultation question 8-22.**

**We consider that it might be helpful for there to be a time-limit within which the planning authority can respond to a notification of a proposal to carry out development in a relevant category (for example, buildings for agriculture and forestry), such that an applicant can proceed if no response has been received to the notification.**

**Do consultees agree?**

104. See above.

**Consultation question 8-23.**

**We provisionally consider that it might be helpful to bring together the procedures for seeking amendments to planning permissions, currently under section 73 and 96A of the TCPA 1990, into a single procedure for making an application for any variation of a permission – whether major or minor – which can be dealt with by the planning authority appropriately, in light of its assessment of the materiality of the proposed amendment.**

**We envisage that the authority would be able to choose to permit either:**

**(1) both the original proposal and a revised version, with the applicant able to implement either; or**

**(2) only the revised version, which would thus supersede the original.**

**Do consultees agree?**

105. The Bar Council agrees that there is merit in simplifying the current system whereby amendments to planning permissions are addressed under a single statutory provision.

106. With regard to alternatives (1) or (2) as to what the planning authority might be able to grant, the Bar Council considers that this might add unnecessary complexity. The Bar Council understand there is existing well established law which governs the impact of subsequent planning permissions upon implemented or unimplemented permissions which are still extant.

**Consultation question 8-24.**

**We provisionally propose that the Planning Code should extend the scope of section 96A (approval of minor amendments) to include approvals of details.**

**Do consultees agree?**

107. See above.

**Consultation question 8-25.**

**We provisionally propose that an expedited procedure should be available for the determination of an application to vary a permission where the implementation of the permitted development is under way.**

**Do consultees agree?**

108. See above.

**Consultation question 8-26.**

**We provisionally propose that the Welsh Ministers should have powers:**

**(1) to make regulations requiring applications in a particular category to be notified to them, and**

**(2) to make a direction requiring a particular application to be so notified, so that they may decide whether to call it in for their decision.**

**Do consultees agree?**

109. See above.

**Consultation question 8-27.**

**We provisionally propose that, where the Welsh Ministers decide to call in an application for planning permission, they (rather than, as at present, the planning authority) should be under a duty to notify the applicant.**

**Do consultees agree?**

110. See above.

**Consultation question 8-28.**

We provisionally consider that the following provisions currently in the TCPA 1990 should be not restated in the Planning Bill, but that equivalent provisions be included in the DMP(W)O 2012 if considered necessary:

(1) section 71(3) (consultation as to caravan sites); and

(1) section 71ZB (notification of development before starting, and display of permission whilst it is proceeding). Do consultees agree?

111. See above.

### Consultation question 8-29.

We provisionally propose that the following provisions currently in the TCPA 1990, which appear to be redundant (at least in relation to Wales), should not be restated in the Bill:

(1) section 56(1) (referring to the initiation of development);

(2) in section 70(3), the reference to the Health Services Act 1976 (applications for private hospitals);

(3) section 74(1)(b) of the TCPA 1990 (to make provision for the grant of permission for proposals not in accordance with the development plan);

(4) section 74(1A) (planning applications being handled by different types of planning authority);

(5) section 76 (duty to draw attention to certain provisions for the benefit of disabled people); and

(6) section 332 (power of Welsh Ministers to direct that planning applications

should also be treated as applications under other legislation).

Do consultees agree?

112. See above.

## CHAPTER 9. APPLICATIONS TO THE WELSH MINISTERS

113. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

**Consultation question 9-1.**

**We provisionally propose that sections 62M to 62O TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority, should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8.**

**Do consultees agree?**

114. See above.

**Consultation question 9-2.**

**We provisionally consider that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified.**

**Do consultees agree?**

115. See above.

**Consultation question 9-3.**

**We provisionally propose that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings should be extended to allow their appointment in connection with applications determined on the basis of written representations.**

**Do consultees agree?**

116. See above.

**Consultation question 9-4.**

**We provisionally propose that sections 62D to 62L of the TCPA 1990 (DNS procedure) should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8.**

**Do consultees agree?**

117. See above.

**Consultation question 9-5.**

**We provisionally propose that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Code.**

**Do consultees agree?**

118. See above.

**CHAPTER 10. THE PROVISION OF INFRASTRUCTURE AND OTHER IMPROVEMENTS**

119. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

**Consultation question 10-1.**

**We provisionally consider that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated broadly as they stand into the Planning Code, pending any more thoroughgoing review that may take place in due course.**

**Do consultees agree?**

120. See above.

**Consultation question 10-2.**



**We provisionally propose that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated broadly as they stand into the Planning Code, pending any review that may take place in due course.**

**Do consultees agree?**

121. See above.

**Consultation question 10-3.**

**We provisionally consider that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the new Planning Bill.**

**Do consultees agree?**

122. See above.

**Consultation question 10-4.**

**We provisionally consider that it might be helpful for a provision to be included in the Bill whereby a planning agreement under what is now section 106 of the TCPA 1990 – but not a unilateral undertaking – could include any provision that could be included in an agreement under section 278 of the Highways Act 1980 (execution of highway works), provided that the highway authority is a party to that agreement.**

**Do consultees agree?**

123. See above.

**Consultation question 10-5.**

**We provisionally consider that it would be helpful to make the enforcement of a planning obligation under section 106 of the TCPA 1990 more straightforward by including the breach of such an obligation within the definition of a breach of planning control.**

**We invite the views of consultees, including as to the practicalities of such a proposal.**

124. The Bar Council whilst appreciating the importance of the issues raised with regard to tightening up the response to failures to comply with s.106 planning obligations, considers that there are implicit difficulties of legal principle in putting the enforcement of breaches of planning control per se on the same footing as failures to comply with covenants within a s.106 agreement or a unilateral obligation. The first is in effect a breach of regulatory law which ultimately can end in prosecution for failure to comply with the enforcement notice and the second is in effect a breach of contract which is governed by civil law remedies (notwithstanding the example provided at 10.51 with regard to alleged fraudulent activity associated with such obligations) .

125. To that end, it is the Bar Council's view that the system of enforcement of each should remain separate.

**Consultation question 10-6.**

**Section 106(12) TCPA 1990 empowers the Welsh ministers to provide regulations for the breach of an obligation to pay a sum of money, to result in the imposition of a charge on the land, facilitating recovery from subsequent owners.**

**No such regulations have been made: does their absence cause a problem in practice?**

126. See above.

**Consultation question 10-7.**

**We provisionally propose that the use of standard clauses in planning obligations should be promoted in Welsh Government guidance.**

**Do consultees agree?**

127. The Bar Council supports the simplification and clarity such guidance would bring albeit that the specification should not impede freedom to agree provisions which differ from the standard conditions.

**Consultation question 10-8.**

**We provisionally consider that the introduction of a procedure to resolve disputes as to the terms of a section 106 agreement in Wales (along the lines of Schedule 9A to the TCPA 1990, to be introduced in England by the section 158 of the Housing and Planning Act 2016) might be useful.**

**Do consultees agree in principle, and what should be the features of such a procedure?**

128. See above.

**Consultation question 10-9.**

**We provisionally consider that the introduction of a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits to be provided (along the lines of section 106ZB of the TCPA 1990, introduced by section 159 of the 2016 Act with regard to obligations as they relate to the provision of affordable housing) might be useful.**

**Do consultees agree in principle, and what categories of benefits might most appropriately be subject to such a procedure?**

129. See above.

**Consultation question 10-10.**

**We provisionally propose that planning authorities should be able to enter into planning obligations to bind their own land in appropriate cases.**

**Do consultees agree?**

130. See above.

**Consultation question 10-11.**

**We provisionally propose that a person proposing to enter into a contract for the purchase of land should be able to enter into a planning obligation so as to bind that**

land, which would take effect if and when the relevant interest is actually acquired by that person.

**Do consultees agree?**

131. See above.

## **CHAPTER 11. APPEALS AND OTHER SUPPLEMENTARY PROVISIONS**

132. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

### **Consultation question 11-1.**

**We provisionally propose that the provision, currently in section 79(1) of the TCPA 1990, as to the powers of the Welsh Ministers on an appeal, should be amended so as to make it plain that they are required to consider the application afresh – as opposed to having a power to do so, as at present.**

**Do consultees agree?**

133. It is understood that an appeal under section 78 of the TCPA is an appeal de novo and not a review.

134. The wording in section 79 to which this proposal is directed is that the Secretary of State or Welsh Ministers “*may deal with the application as if it had been made to him in the first instance*”. The Bar Council considers that on balance this adequately describes the circumstances of an appeal given that the application in the first instance is always made to the authority.

### **Consultation question 11-2.**

**We provisionally propose that the Bill should make it clear that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors or examiners, save for:**

**(1) those in categories that have been prescribed for determination by Welsh Ministers; and**

**(2) those that have been specifically recovered by them (in case-specific directions) for their determination.**

**Do consultees agree?**

135. See above.

**Consultation question 11-3.**

**We provisionally propose that the power to appoint assessors to assist inspectors to determine appeals that are the subject of inquiries or hearings:**

**1) should be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and**

**(2) should be extended to allow the use of assessors in connection with applications determined on the basis of written representations.**

**Do consultees agree?**

136. See above.

**Consultation question 11-4.**

**We provisionally propose that the changes proposed in Consultation questions 11-1 to 11-3 should apply equally to:**

**(1) appeals against enforcement notices;**

**(2) appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and**

**(3) appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land.**

**Do consultees agree?**

137. See above.

**Consultation question 11-5.**

We provisionally propose that the legislation should state that, in a case where there has been an appeal to the Welsh Ministers, the start of the period within which a purchase notice can be served is the date of the decision of the Welsh Ministers on the appeal.

Do consultees agree?

138. See above.

**Consultation question 11-6.**

We provisionally propose that the Planning Bill should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice.

Do consultees agree?

139. See above.

**Consultation question 11-7.**

We provisionally consider that it would not be appropriate to bring together the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) and those in section 116, 118 and 119 of the Highways Act 1980.

Do consultees agree?

140. See above.

**Consultation question 11-8.**

We provisionally propose that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a

proposal for the improvement of the amenity of an area) be not restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984.

**Do consultees agree?**

141. See above.

**Consultation question 11-9.**

**We provisionally propose that decisions relating to orders under section 252 of the TCPA 1990 (extinguishing rights of way) be generally made by inspectors rather than by the Welsh Ministers, subject to a power for the Welsh Ministers to make a direction to recover a particular case for their decision.**

**Do consultees agree?**

142. See above.

## **CHAPTER 12. UNAUTHORISED DEVELOPMENT**

143. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

**Consultation question 12-1.**

**We provisionally consider that the provisions currently in sections 171C and 330 of the TCPA 1990 could be conflated into a single power for the Welsh Ministers or a planning authority to serve a “planning information notice” on the owner and occupier of land or any person who is carrying out operations or other activities on the land or is using it for any purpose, requiring the recipient to supply information as to:**

**(1) the interest in the land held by the recipient of the notice and by any other person of whom the recipient is aware;**

**(2) the use or uses of the land and when they began; and**

**(3) the operations and other activities now taking place of the land and when they began.**

Where it appears that there has been a breach of planning control, such a notice may also:

(4) require the recipient to supply information as to:

- whether any uses or operations specified in the notice are being or have been carried out on the land;
- any person known to be using or have used the land or carried out any operations on it;
- any planning permission that may have been granted, and any conditions or limitations attached to such a permission; or
- any reasons why permission is not required for any particular use or operation; and

(5) request a meeting at which the recipient can discuss the matters referred to in the notice.

Do consultees agree?

144. See above.

#### Consultation question 12-2.

We provisionally propose that the restriction on entering property for enforcement purposes only after giving 24 hours' notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to all property in use as a dwelling.

Do consultees agree?

145. See above.

#### Consultation question 12-3.

We provisionally consider that the law as to concealed breaches of planning control should remain as it is, subject to the common law principles developed *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304, and in



particular that the “planning enforcement order” procedure, introduced by the Localism Act 2011, should not be included in the Bill.

**Do consultees agree?**

146. See above.

**Consultation question 12-4.**

**We provisionally propose either:**

**(1) that an enforcement warning notice can be served during the period of 4 or 10 years after which enforcement action cannot be taken, but that the service of such a notice does not extend that period; or**

**(2) that where an enforcement warning notice has been served, the period for taking other enforcement action starts on the date on which the notice was served.**

**Do consultees agree and, if so, which option seems most appropriate?**

147. See above.

**Consultation question 12-5.**

**We provisionally propose that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, should be clarified to ensure that it applies in relation to any dwelling (defined so as to include a house and a flat).**

**Do consultees agree?**

148. See above.

**Consultation question 12-6.**

**We provisionally propose that:**

**(1) a temporary stop notice (TSN) should come into effect at the time and date stated in it, which will normally be when a notice is displayed on the land in question;**

**(2) it should then remain in effect for 28 days (starting at the beginning of the day after the day on which it is displayed);**

**(3) the notice displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, should: - state that a TSN has been issued; - summarise the effect of the TSN; and - state the address (and, if applicable, the website) at which a full copy of the TSN can be inspected;**

**(4) the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate.**

**Do consultees agree?**

149. See above.

**Consultation question 12-7.**

**We provisionally propose that:**

**(1) it should be an offence to contravene a temporary stop notice that has come into effect (rather than one that has been served on the accused or displayed on the site);**

**(2) it should be a defence to a charge of such an offence to prove that the accused - had not been served with a copy of the notice; and - did not know, and could not reasonably have been expected to know, of the existence of the notice.**

**Do consultees agree?**

150. See above.

**Consultation question 12-8.**

**We provisionally propose that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, should be amended so that a notice is to**

be “issued”, to come into force on the date stated in it, with copies being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service).

Do consultees agree?

151. See above.

**Consultation question 12-9.**

We provisionally propose that an enforcement notice should be required to specify:

(1) the steps that the authority requires to be taken, or the activities that are to cease, in order to achieve, wholly or partly, all or any of the purposes set out in section 173(4) of the TCPA 1990; and

(2) which one or more of those purposes it considers will be achieved by taking those steps.

Do consultees agree?

152. See above.

**Consultation question 12-10.**

We provisionally propose that there should be an explicit provision in the Bill, incorporating the principle in *Murfitt v Secretary of State* and subsequent cases, to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were integral to the making of the material change of use.

Do consultees agree?

153. See above.

**Consultation question 12-11.**

We provisionally propose that the relevant regulations should require that the explanatory note accompanying an enforcement notice should include a statement (in line with the principle in *Mansi v Elstree RDC*) to the effect that the notice does not restrict the rights of any person to carry out without a planning application any development that could have been so carried out immediately prior to the issue of the notice.

Do consultees agree?

154. See above.

**Consultation question 12-12.**

We provisionally propose that the Bill:

(1) should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2) (permission ought to be granted for any matter stated in the enforcement notice as constituting a breach of control); and

(2) should provide instead that the Welsh Ministers on determining an appeal including ground (a) may do all or any of the following:

- grant planning permission for any or all of the matters that are alleged to have constitutes a breach of control;
- discharge the condition that is alleged to have been breached; or
- issue a certificate of lawfulness, insofar as they determine that the matters alleged by the notice to constitute a breach of control were in fact lawful.

Do consultees agree?

155. See above.

**Consultation question 12-13.**

We provisionally consider that ground (e) on which an appeal can be made against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by section 172(2) (which refers to service

on owners and occupiers etc) rather than as required by section 172 (which also refers to time limits for service).

**Do consultees agree?**

156. See above.

**Consultation question 12-14.**

We provisionally consider that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so as not to duplicate the requirements of the relevant secondary legislation.

**Do consultees agree?**

157. See above.

**Consultation question 12-15.**

We provisionally propose that there be included in the part of the Code dealing with enforcement a provision equivalent to section 285(1) and (2), to the effect that an enforcement notice is not to be challenged, other than by way of an appeal to the Welsh Ministers, on any of the grounds on which such an appeal could have been brought.

**Do consultees agree?**

158. See above.

**Consultation question 12-16.**

We provisionally propose that the restriction on issuing a stop notice, currently in section 183(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to any building in use as a dwelling.

**Do consultees agree?**

159. See above.

Consultation question 12-17.

We provisionally propose that the provisions relating to stop notices, currently in section 184 of the TCPA 1990, should be amended so that a notice is to be “issued”, to come into force on the date stated in it, with copies being served on those apparently responsible for the breach of control (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service).

Do consultees agree?

160. See above.

Consultation question 12-18.

We provisionally propose:

(1) that it be an offence to contravene a stop notice that has come into effect;  
and

(2) that it be a defence to a charge of such an offence to prove that the accused - had not been served with a copy of the stop notice, and - did not know, and could not reasonably have been expected to know, of the existence of the notice.

Do consultees agree?

161. See above.

Consultation question 12-19.

We provisionally propose that:

(1) a stop notice should cease to have effect when the planning authority makes a decision to that effect; and

(2) that such a decision should be publicised as soon as possible after it has been made, by the display of a suitable site notice and the notification of all those who were notified of the original notice.

**Do consultees agree?**

162. See above.

**Consultation question 12-20.**

**We provisionally consider that where a stop notice is served by the Welsh Ministers under section 185, and subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority.**

**Do consultees agree?**

163. See above.

**Consultation question 12-21.**

**We provisionally propose that the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) to be framed so as to provide that a person commits an offence if:**

- (1) the person is in breach of an enforcement notice;**
- (2) the notice was at the time of the breach contained in the relevant register;  
and**
- (3) the person had been served with a copy of the notice; and**

**Do consultees agree?**

164. See above.

**Consultation question 12-22.**

**We provisionally propose that section 172A of the TCPA (assurances as to non-prosecution for breach of an enforcement notice) should be amended so as:**

- (3) to enable an authority to give such an assurance simply by “giving notice” to the relevant person, rather than necessarily doing so by a letter; and**

(4) to enable the authority to give in response to a request from to a person (B), who acquires an interest in land following the issue of an enforcement notice relating to the land, an assurance explaining that, once the enforcement notice had been issued, the authority was required to serve a copy of it on a person (A) from whom person B had acquired the interest in the land. Do consultees agree?

165. See above.

**Consultation question 12-23.**

We provisionally propose that section 180(1) of the TCPA 1990 (relating to the effect on an enforcement notice of a subsequent grant of planning permission) should be amended so as to refer

(1) to the grant of planning permission generally, rather than just to permission for development already carried out; and

(2) planning permission following the issue of an enforcement notice, rather than following the service of a copy of the notice.

Do consultees agree?

166. See above.

**Consultation question 12-24.**

We provisionally propose that offences of supplying false information in response to a request from a planning authority, currently under sections 65(6), 171D(5), 194(1) and 330(5) of the TCPA 1990, should all be triable either summarily (in the magistrates court) or on indictment (in the Crown Court), and the maximum penalty in each case should be in either case a fine of any amount.

Do consultees agree?

167. See above.

**Consultation question 12-25.**

We provisionally propose that the offences of: (1) reinstating or restoring buildings or works following compliance with an enforcement notice (under section 181(5) of the TCPA 1990); and (2) failing to comply with a breach of condition notice (under



**section 187A(9) of the TCPA 1990); should all be triable either summarily or on indictment, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990.**

**Do consultees agree?**

168. See above.

**Consultation question 12-26.**

**We provisionally propose that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to pre-1948 breaches of planning control, should not be restated in the Code.**

**Do consultees agree?**

169. See above.

## **CHAPTER 13. WORKS AFFECTING LISTED BUILDINGS AND CONSERVATION AREAS**

170. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

### **Consultation question 13-1.**

**We provisionally propose that the control of works to historic assets could be simplified by:**

**(1) amending the definition of “development”, for which planning permission is required, to include “heritage development”, that is: - the demolition of a listed building; or - the alteration or extension of a listed building in any manner that is likely to affect its character as a building of special architectural or historic interest; or - the demolition of a building in a conservation area;**

**(2) removing the requirement for listed building consent and conservation area consent to be obtained for such works; and**

**(3) implementing the additional measures outlined in Consultation questions 13-2 to 13-8 to ensure that the existing level of protection for historic assets would be maintained.**

**Do consultees agree?**

171. See above.

### **Consultation question 13-2.**

**We provisionally propose that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development.**

**Do consultees agree?**

172. See above.

**Consultation question 13-3.**

**We provisionally propose that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed.**

**Do consultees agree?**

173. See above.

**Consultation question 13-4.**

**We provisionally consider that the provisions (currently in sections 191 and 192 of the TCPA 1990) relating to certificates of lawfulness should be extended to include works that currently require only listed building consent or conservation area consent.**

**Do consultees agree?**

174. See above.

**Consultation question 13-5.**

**We provisionally consider that the Bill should include provisions to the effect that:**

**(1) any appeal relating to works to a listed building may contain as a ground of appeal that the building in question is not of special architectural or historic interest, and ought to be removed from the list of such buildings maintained by the Welsh Ministers;**

**(2) where a building is subject to a building preservation notice (provisional listing), the notice of appeal may contain a claim that the building should not be included in the list;**

**(3) the Welsh Ministers, in determining an appeal relating to a listed building, may exercise their powers to remove the building from the list; and**

**(4) in determining an appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.**

**Do consultees agree?**

175. See above.

**Consultation question 13-6.**

**We provisionally propose that the Bill should include provisions to the effect that:**

**(1) the carrying out without planning permission (or in breach of a condition or limitation attached to permission) of heritage development – defined along the lines indicated in Consultation question 13-1 – be a criminal offence, punishable - on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or - on summary conviction by imprisonment for a term not exceeding two years or a fine or both; and**

**(2) the defence to a charge of such an offence is the same as currently applies in relation to a charge of carrying out works without listed building consent.**

**Do consultees agree?**

176. See above.

**Consultation question 13-7.**

**We provisionally propose that the Bill should include provisions to the effect that heritage development be excluded from the categories of development that are subject to time limits as to the period within which enforcement action may be taken.**

**Do consultees agree?**

177. See above.

**Consultation question 13-8.**

**We provisionally propose that the Bill should include provisions to the effect that:**

**(1) where an enforcement notice is issued in relation to the carrying out of heritage development in breach of planning control, the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (i), (j) and**

**(k) as set out in Section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990;**

**(2) the Welsh Ministers, in determining an enforcement appeal relating to a listed building, may exercise their powers to remove the building from the list.**

**(3) in determining an enforcement appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.**

**Do consultees agree?**

178. See above.

**Consultation question 13-9.**

**We provisionally consider that planning permission should not be unified with scheduled monument consent.**

**Do consultees agree?**

179. See above.

**Consultation question 13-10.**

**We provisionally consider that the definition of “listed building” should be clarified by making it clear that the definition includes pre-1948 objects and structures if they were within the curtilage of the building in the list, as it was:**

**(1) in the case of a building listed prior to 1 January 1969, at that date; and**

**(2) in any other case, at the date on which the building was first included in the list.**

**Do consultees agree?**

180. See above.

**Consultation question 13-11.**

**We provisionally propose that the Ancient Monuments and Archaeological Areas Act 1979 should be amended so that Part 2 (areas of archaeological interest) does not apply in Wales.**

**Do consultees agree?**

181. See above.

#### **CHAPTER 14. OUTDOOR ADVERTISING**

182. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

##### **Consultation question 14-1.**

**We provisionally propose that the definition of “advertisement” in the TCPA 1990 should be clarified, and included in the Bill alongside other provisions relating to advertising.**

**Do consultees agree?**

183. See above.

##### **Consultation question 14-2.**

**We provisionally that the reference to the display of advertisements currently included in the statutory definition of “advertisement” in the TCPA 1990 could be omitted. Do consultees agree?**

184. See above.

##### **Consultation question 14-3.**

**We provisionally propose that the word “land” is used in place of “site” and “sites”, to be included: (1) in the provision of the Bill relating to the control of advertisements; and (2) in the Regulations when they are next updated.**

**Do consultees agree?**

185. See above.

**Consultation question 14-4.**

We provisionally propose that a definition of “person displaying an advertisement” in the TCPA 1990 be included in the Bill alongside other provisions relating to advertising, to include:

- (1) the owner and occupier of the land on which the advertisement is displayed;
- (2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and
- (3) the person who undertakes or maintains the display of the advertisement.

Do consultees agree?

186. See above.

**Consultation question 14-5.**

We provisionally propose that a discontinuance notice under the advertisements regulations:

- (1) should contain a notice as to the rights of any recipient to appeal against it;
- (2) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); and
- (3) should be “issued” (rather than “served” as at present), with a copy served on all those deemed to be displaying the advertisement in question.

Do consultees agree?

187. See above.

**Consultation question 14-6.**

We provisionally propose that section 220(2), (2A) and (3) should be replaced with a provision enabling regulations to be made providing for: (1) the dimensions,

appearance and position of advertisements that may be displayed, and the manner in which they are to be affixed to the law; (2) the prohibition of advertisements being displayed or land being used for the display of advertisements without either deemed or express consent; (3) the discontinuance of deemed consent; (4) the making and determination of applications for express consent, and the revocation or modification of consent; (5) appeals against discontinuance orders and decisions on applications for express consent; (6) areas of special control over advertising; and (7) consequential and supplementary provisions.

**Do consultees agree?**

188. See above.

**Consultation question 14-7.**

**We provisionally propose that deemed consent under the Advertisements Regulations should be granted for a display of advertisements that has the benefit of planning permission.**

**Do consultees agree?**

189. See above.

**Consultation question 14-8.**

**We provisionally propose that the display of advertisements on stationary vehicles and trailers be brought within control by the Regulations being amended so as to provide that: (1) no consent (express or deemed) be required for the display of an advertisement inside a vehicle, or on the outside of a vehicle on a public highway; (2) deemed consent be granted for the display of an advertisement on a vehicle not on a highway, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements.**

**Do consultees agree?**

190. See above.

**Consultation question 14-9.**

**We provisionally propose that: (1) a provision should be introduced in the Advertisements Regulations to enable a certificate of lawfulness to be issued in**



relation to a display of advertisements; and (2) an appropriate enabling provision should be included in the Bill, in line with the approach indicated in Consultation question 14-6.

Do consultees agree? And what might be the resources implications of this proposal?

191. See above.

**Consultation question 14-10.**

We provisionally propose that what is now Class 13 in Schedule 3 to the 1992 Regulations should be amended to provide that deemed consent is granted for the display of advertisements on a site that has been used for that purpose for ten years, rather than by reference to a fixed date (currently 1 April 1974).

Do consultees agree?

192. See above.

**Consultation question 14-11.**

We provisionally propose that the power (currently in section 224(1), (2) TCPA 1990) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill.

Do consultees agree?

193. See above.

**Consultation question 14-12.**

We provisionally propose that the powers currently in section 225 of the TCPA 1990 (removal of unauthorised posters and placards) and in section 43 of the Dyfed Act 1987 (removal of other unauthorised advertisements) should be replaced with a new single procedure allowing the removal of any unauthorised advertisements, subject to (1) no advertisement being removed without 21 days' notice having first been given to those responsible; (2) a right of appeal being available to recipients of such a notice and to owners and occupiers of the site of the offending advertisement, as under section 225B of the TCPA 1990 – on grounds relating to the lawfulness of the advertisement, the service of the notice, and the time for its removal; (3) compensation being payable by the planning authority for damage caused to land or

chattels by the removal of the advertisement (other than damage to the advertisement itself); and (4) protection for statutory undertakers to be afforded as under section 225K.

**Do consultees agree? What are the likely resource implications of this proposal?**

194. See above.

**Consultation question 14-13.**

**We provisionally propose that the maximum sentence on conviction for unauthorised advertising should be increased to an unlimited fine, in line with other offences under the TCPA 1990 and the Listed Buildings Act 1990.**

**Do consultees agree?**

195. See above.

**Consultation question 14-14.**

**We provisionally propose that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all functions under the Code relating to advertising should be exercised in the interests of amenity and public safety.**

**Do consultees agree?**

196. See above.

**Consultation question 14-15.**

**We provisionally propose that the provisions in section 220 of the TCPA 1990 relating to advisory committees and tribunals should not be included in the Bill.**

**Do consultees agree?**

197. See above.

**Consultation question 14-16.**

**We provisionally propose that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas be not included in the Bill.**

**Do consultees agree?**

198. See above.

**Consultation question 14-17.**

**It appears that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948 is no longer of any practical utility, and should be not included in the Bill.**

**Do consultees agree?**

199. See above.

**CHAPTER 15. WORKS TO PROTECTED TREES**

200. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

**Consultation question 15-1.**

**We provisionally consider 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.**

**Do consultees agree? If they do not, what definitions would be appropriate?**

201. See above.

**Consultation question 15-2.**

**We provisionally propose that the Bill should provide; (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.**

**Do consultees agree?**

202. See above.

**Consultation question 15-3.**

**We provisionally propose: (1) that the Bill makes 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.**

**Do consultees agree?**

203. See above.

**Consultation question 15-4.**

**We provisionally propose that it should be clarified that the making of 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.**

**Do consultees agree?**

204. See above.

**Consultation question 15-5.**

**We provisionally consider that there would be no benefit in bringing works to trees within the scope of development requiring planning permission.**

**Do consultees agree?**

205. See above.

**Consultation question 15-6.**

We provisionally consider 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 consider that the exemption 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). Do consultees agree?

206. See above.

**Consultation question 15-7.**

We provisionally consider 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.

Do consultees agree?

207. See above.

**Consultation question 15-8.**

We provisionally propose that a new exemption from consent under tree preservation regulations 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 (1) a requirement under section 206 of the TCPA 1990 or (2) a condition of a planning permission or a consent to fell another tree.

Do consultees agree?

208. See above.

**Consultation question 15-9.**

**We provisionally propose that a provision should 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.**

**Do consultees agree? And what might be the resource implications of this proposal?**

209. See above.

**Consultation question 15-10.**

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

**Do consultees agree?**

210. See above.

**Consultation question 15-11.**

**We provisionally propose 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).**

**Do consultees agree?**

211. See above.

**Consultation question 15-12.**

**We provisionally propose that there should be an explicit power enabling a planning authority to waive or relax a replacement notice. Do consultees agree?**

212. See above.

**Consultation question 15-13.**

**Section 209 of the TCPA 1990 provides for regulations be made enabling a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice; but no such regulations have yet been made.**

**Would such powers be helpful in ensuring that replacement trees are planted in appropriate cases?**

213. See above.

**Consultation question 15-14.**

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

**Do consultees agree?**

214. See above.

**Consultation question 15-15.**

**We provisionally propose 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.**

**Do consultees agree?**

215. See above.

**Consultation question 15-16.**

**We provisionally consider 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 (3) 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, did not know, and could not reasonably have been expected to know, of its existence.**

**Do consultees agree?**

216. See above.

**Consultation question 15-17.**

We provisionally consider 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 (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.

**Do consultees agree?**

217. See above.

**CHAPTER 16. IMPROVEMENT REGENERATION AND RENEWAL**

218. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

**Consultation question 16-1.**

We provisionally propose that the Bill should be drafted so as to make clear that a notice under what is now section 215 of the TCPA 1990, requiring land to be properly maintained, can be issued where the condition of the land: (1) is adversely affecting the amenity of part of the authority's area or the area of an adjoining authority; and (2) does not result in the ordinary course of events from, the lawful carrying on of continuing operations on that land or a continuing use of that land that is lawful.

**Do consultees agree?**

219. See above.

**Consultation question 16-2.**



**We provisionally propose that it should be possible to issue a notice (under what is now section 215 of the TCPA 1990) where the condition of the land in question results from the carrying on of operations or a use of the land that were once lawful, but are no longer lawful.**

**Do consultees agree?**

220. See above

**Consultation question 16-3.**

**We provisionally propose that a notice under the provision in the new Code replacing section 215 TCPA 1990 (time of notice taking effect): (1) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); (2) should be “issued” (rather than “served” as at present), with a copy served on all those deemed to be displaying the advertisement in question; and (3) should contain a notice as to the rights of any recipient to appeal against it.**

**Do consultees agree?**

221. See above.

**Consultation question 16-4.**

**We provisionally propose that the Bill should make it clear that all appeals against section 217 notices (appeals) are normally to be determined by inspectors, in line with consultation question 11-3.**

**Do consultees agree?**

222. See above.

**Consultation question 16-5.**

**We provisionally propose that the new Planning Code could include powers, replacing those currently available under section 89(2) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority, in relation to any land whose condition is affecting the amenity of its area or of any adjacent area (or is likely to affect it due to the collapse of the surface as the result of underground**

mining operations): (1) to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out remedial works; (2) to carry out itself the works specified in the notice, either - on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or - where no response is received to the notice; and (3) to recover the cost of such works from the owner, or to make them a charge on the land; and (4) to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement.

Do consultees agree?

223. See above.

Consultation question 16-6.

We provisionally propose that the new Planning Bill should include powers, equivalent to those currently available under section 89(1) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority: (1) to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out landscaping works for the purpose of improving the land; (2) to carry out itself the works specified in the notice, either - on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or - where no response is received to the notice; and (3) to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement.

Do consultees agree?

224. See above.

Consultation question 16-7.

We provisionally propose that the Bill should contain powers for the Welsh Ministers to make regulations to facilitate the removal of graffiti and fly-posting, by enabling planning authorities: (1) to deal with graffiti or fly-posting that is detrimental to amenity or offensive, by requiring the users or occupiers of the land affected to remove it; (2) to deal with persistent unauthorised advertising, by serving a notice on those responsible for surfaces persistently covered with fly-posting, requiring them to take preventive measures to minimise recurrence; and (3) in either

case, to take direct action where necessary, and recharge those responsible where appropriate.

**Do consultees agree?**

225. See above.

**Consultation question 16-8.** We provisionally propose the amendment of: (1) Part 18 of and Schedules 32 to the Local Government, Planning and Land Act 1980 (enterprise zones), and (2) the provisions relating to enterprise zones in the TCPA 1990 and related legislation, so that they apply in future only in relation to England. Do consultees agree?

226. See above.

**Consultation question 16-9.**

**We provisionally propose the amendment of: (1) the New Towns Act 1981, and (2) the provisions relating to new towns in the New Towns and Urban Corporations Act 1985, the TCPA 1990, the Housing and Regeneration Act 2008, and related legislation, so that they apply in future only in relation to England.**

**Do consultees agree?**

227. See above.

**Consultation question 16-10.**

**We provisionally propose the amendment of: (1) Part 16 of and Schedules 26 to 31 to the Local Government, Planning and Land Act 1980 (urban development areas and urban development corporations); and (2) the provisions relating to urban development corporations in the New Towns and Urban Development Corporations Act 1985, the TCPA 1990, the Leasehold Reform, Housing and Urban Development Act 1993, and related legislation, so that they apply in future only in relation to England.**

**Do consultees agree?**

228. See above.

**Consultation question 16-11.**

**We provisionally propose the amendment of: (1) Part 3 of the Housing Act 1988 (housing action trust areas), and (2) the provisions relating to housing action trusts in the TCPA 1990 and related legislation, so that they apply in future only in relation to England. Do consultees agree?**

229. See above.

**Consultation question 16-12.**

**We provisionally propose the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they apply in future only in relation to England and Scotland.**

**Do consultees agree?**

230. See above.

**CHAPTER 17. HIGH COURT CHALLENGES**

231. The Bar Council supports a number of the proposals as set out below. It is however the Bar Council's view that many aspects are best addressed by specialist practitioners.

**Consultation question 17-1.**

**We provisionally propose that the provisions currently in Part 12 of the TCPA 1990 (challenges in the High Court to the validity of actions and decisions under the Act) should be replaced in the Planning Code by new provisions to the effect that a court may entertain proceedings for questioning any decision of a public body under the Code (other than one against which there is a right of appeal to the Welsh Ministers) – and any failure to make any such decision – but only if:**

**(1) the proceedings are brought by a claim for judicial review; and**

**(2) the claim form is filed:**

- before the end of the period of four weeks in the case of a challenge to the decision of the Welsh Ministers on an appeal against an enforcement notice (other than a decision granting planning permission), a tree replacement notice, an unsightly land notice or a decision refusing a certificate of lawfulness of existing use or development; or

- before the end of the period of six weeks in any other case,

(3) beginning with the day after the day on which the relevant decision was made.

**Do consultees agree?**

232. The Bar Council agrees that the proposed provisions would simplify and make matters clearer in respect of challenges to such actions and decisions by relevant authorities.

233. It is noted however that these provisions would not appear to apply to challenges to a 'relevant document' ie local development plan which is currently addressed by s.113 of the PCPA 2004. If it is the intention that such challenges should be also covered by this single provision then that would of course need to be added.

234. In addition, we note that the CPR would need to be amended to reflect these changes.

**Consultation question 17-2.**

**We provisionally consider that the provisions of Part 5 of the PCPA 2004 (relating to the correction of minor errors in decisions) should be included within the Bill, but amended so as to allow a 14-day period within which the Welsh Ministers or an inspector can respond to a request to make a correction to their decision, and an applicant can respond to a notification by them that they propose to make such a correction. Do consultees agree?**

235. We agree.

**CHAPTER 18. MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS**

236. The Bar Council has no formal position on any of these provisions, which are best addressed by specialist practitioners.

**Consultation question 18-1.**

**We provisionally propose that the Bill should: (1) rationalise as far as possible the bodies or categories of bodies that are to be treated as statutory undertakers for the purpose of some or all of the Code (and for which provisions); and (2) provide for each undertaker or category of undertaker what is to be regarded as “operational land” and who is “the appropriate Minister”.**

**Do consultees agree?**

237. See above.

**Consultation question 18-2.**

**We provisionally propose that, when the GPDO is next updated, consideration should be given to separating those provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies, from those relating to development generally.**

**Do consultees agree?**

238. See above.

**Consultation question 18-3.**

**We provisionally propose that sections 283 and 316A of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers and local authorities that are statutory undertakers) should not be restated in the Code.**

**Do consultees agree?**

239. See above.

**Consultation question 18-4.**

We provisionally propose that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local authorities that are statutory undertakers) should not be restated in the Bill.

Do consultees agree?

240. See above.

**Consultation question 18-5.**

We provisionally propose that the new Bill should generally use – in place of the term “winning and working of minerals” – the term “mining operations” defined so as to include: (1) the winning and working of minerals in, on or under land, whether by surface or underground working; (2) the removal of material of any description from: - a mineral-working deposit; - a deposit of pulverised fuel ash or other furnace ash or clinker; or - a deposit of iron, steel or metallic slag; and (3) the extraction of minerals from a disused railway embankment.

Do consultees agree?

241. See above.

**Consultation question 18-6.**

We provisionally consider that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) no longer serve any useful purpose, and should not be restated in the Planning Code.

Do consultees agree?

242. See above.

**Consultation question 18-7.**

We provisionally propose that the Bill should include: (1) the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and (2) those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions).

Do consultees agree?

243. See above.

**Consultation question 18-8.**

We provisionally propose that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (so as to apply to minerals development) should be included in the Bill itself rather than in secondary legislation.

Do consultees agree?

244. See above.

**Consultation question 18-9.**

We provisionally propose that the Bill should include a power for the Welsh Ministers to provide for a scale of fees for the performance by them or by planning authorities of any of their functions under the Code, by publication rather than prescription, provided that it also includes a restriction equivalent to section 303(10) of the TCPA 1990, ensuring that the income from the fees so charged does not exceed the cost of performing the relevant function.

Do consultees agree?

245. See above.

**Consultation question 18-10.**

We provisionally propose that there should be single provision in the Bill providing for the determination by the Upper Tribunal of disputes as to compensation under provisions in the Bill relating to revocation, modification and discontinuance of planning permission, temporary stop notices, stop notices, damage caused by entry for enforcement purposes, tree preservation, highways, and statutory undertakers, under the provisions in the Land Compensation Act 1961.



Do consultees agree?

246. See above.

**Consultation question 18-11.**

**We provisionally propose that the Code should include a power to require that expert evidence at inquiries and other proceedings (including appeals decided on the basis of written representations) to be accompanied by a statement of truth in accordance with the requirements of the Civil Procedure Rules in force for the time being.**

Do consultees agree?

247. We agree.

**Consultation question 18-12.**

**We provisionally propose that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be amplified to make explicit that such an order is only to be made where: (1) one party to an appeal has behaved unreasonably; and (2) that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.**

Do consultees agree?

248. See above.

**Consultation question 18-13.**

**We provisionally propose that the Planning Code should incorporate provisions equivalent to those currently in: (1) section 276 of the Public Health Act 1936 (the powers of a planning authority to sell materials removed in executing works); (2) section 289 of that Act (power to require the occupier of any premises not to prevent works being carried out); and (3) section 294 of that Act (limit on the liability of landlords and agents in respect of expenses recoverable), to be applicable to the carrying out by the authority of works required by discontinuance notices, enforcement notices, tree replacement notices, and unsightly land notices. Do consultees agree?**

249. See above.

**Consultation question 18-14.**

**Are there any terms used in the TCPA 1990 that need to be defined (or defined more clearly), other than those explicitly referred to in other consultation questions?**

250. See above.

**Consultation question 18-15.**

**We provisionally propose that: (1) the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a “dwelling”, rather than a “dwellinghouse”, and (2) the interpretation section of the Bill should include a definition of the term “dwelling” to the effect that it includes a house and a flat, and a definition of the term “flat”.**

**Do consultees agree?**

251. See above.

**Consultation question 18-16.**

**We provisionally consider that it would be helpful for the Bill to include a provision to the effect that the curtilage of a building is the land closely associated with it, and that the question of whether one structure is within the “curtilage” of a building is to be determined with regard to: (1) the physical ‘layout’ of the building and the structure; (2) their ownership, past and present; and (3) their use and function, past and present.**

**Do consultees agree?**

252. See above.

**Consultation question 18-17.**

**We provisionally propose that the interpretation section of the Bill contain definitions of the following terms: (1) “agriculture” and “agricultural”, along the**

lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and (2) “agricultural land” and “agricultural unit”, broadly in line with the definition in Part 6 of Schedule 2 to the GPDO; and we provisionally propose that no further definitions of those terms be provided in relation to purchase notices and blight notices.

**Do consultees agree?**

253. See above.

**Consultation question 18-18.**

We provisionally propose that the following provisions, which appear to be obsolete or redundant, should not be included in the Planning Code: (1) section 314 of the TCPA 1990 (apportionment of expenses by county councils); (2) section 335 of the TCPA 1990 (relationship between planning legislation and other legislation in force in 1947); and (3) Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act). Do consultees agree?

254. See above.

**Bar Council  
Monday 5 March**

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