



Bar Council response to the Law Commission Consultation Paper No. 228 Planning Law in Wales-Scoping Paper

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 No. 228 Planning Law in Wales-Scoping Paper¹.
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.

Overview

4. The Bar Council supports the Law Commission's objectives in proposing reforms to planning legislation in Wales through the consolidation and simplification of the current legislation. The proposed reforms would also seek to incorporate some of the legal principles established through case law that 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. We also consider that these changes would help to avoid inconsistent decisions being made and could bring about greater fairness overall.

¹ Law Commission's consultation paper no.228 http://www.lawcom.gov.uk/wp-content/uploads/2016/06/cp228_Planning_Wales_version-for-printer.pdf

5. 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 our disagreements are minor. Our response reflects the Bar's overall position but may not reflect the views of the Planning & Environmental Bar Association, which may respond in its own right. In addition, it has not been possible to respond to those questions that invite us to provide specific examples of statistical evidence since we have not undertaken research on this subject.

6. We do not wish to keep this consultation response confidential. We intend to publish this response on the 'Consultations' section of the Bar Council website.

INTRODUCTORY COMMENTS:

7. The Project coincides with 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 present paper.

8. In that report the Law Commission recommends a new approach to legislation by the Welsh National Assembly, whose hallmarks are:

- a. that the existing fragmented bodies of legislation applying in relation to Wales in respect of particular subject-matter be restated in one piece of Assembly legislation (a process often called "consolidation" of legislation);
- b. that, in tandem with the process of consolidation, the opportunity is taken to introduce reforms with a view to improving the functioning of the legislation; and
- c. that the resulting text should stand as a code, its integrity protected by a discipline that further legislation in its subject area should be incorporated into it.

9. It is clearly relevant that there has been a considerable number of very recent legislative reforms relating to the planning system in Wales and, in particular, to the Planning (Wales) Act 2015 ('the PWA'). The stated aims of this Act are to ensure that the development and use of land contribute to improving the economic, social, environmental and cultural well-being of Wales, in accordance with the Well-being of Future Generations (Wales) Act 2015.

10. The PWA followed the publication, in December 2013, by the Welsh Government of a consultation paper entitled 'Positive Planning', which contained a series of proposals for reforms to the planning system in Wales. This was published together with a consultation paper entitled 'Planning and Regulated Decisions of the Welsh Ministers' that was more specifically related to making changes to the way planning appeals and references to the Welsh Ministers are dealt with.

11. As noted in the Law Commission's Scoping Paper, the reforms set out in the PWA are, for the most part, policy driven. The Law Commission's Scoping Paper, by contrast, envisages "technical reform" or "simplification" which would provisionally include:

- a. the restatement of existing law so that as far as reasonably practicable it is contained within a single piece of legislation in a modern, consistent and well-ordered manner so as to be easily accessible to its readers;
- b. adjustments to produce a satisfactory consolidated text of the sort traditionally made in the course of consolidation – correcting errors, removing ambiguities and obsolete material, modernising language and resolving a variety of minor inconsistencies;
- c. the simplification of the law by way of streamlining and rationalising unnecessary process and procedure, but not introducing any substantial change of policy; and
- d. the writing into statute of propositions of law developed in case law where they might contribute towards more accessible and coherent legislation; we describe this as “codification of case law”, to distinguish it from codification in the wider sense described above.

12. The Scoping Paper considers this to be the first stage in the eventual production of a comprehensive Planning Code for Wales.

13. As well as the PWA the Historic Environment (Wales) Act 2016 (“HEWA 2016”) inserts further Wales only provisions into the Planning (Listed Buildings and Conservation Areas) Act 1990.

14. It is further noted that, since the publication of the Law Commission’s Scoping Paper, the Welsh Government has also commenced consultation on the detailed content of the subordinate legislation required to support the PWA provisions. This relates to improving how appeals and references to Welsh Ministers are dealt with and changes to standard daily amounts charged by the Planning Inspectorate on behalf of the Welsh Ministers. It also includes draft updated guidance on awards of costs for certain proceedings. This most recent consultation is entitled “Appeals, costs and standard daily amounts” (issued 10 August 2016 which will run until 4 November 2016).

15. We are aware that, in general terms, town and country planning in Wales and England is an area of public law (given its breadth and different interrelated systems addressing development control and decision making) that has been described as “one of the most litigated of all”.

16. Attempts have been made in the past to simplify or clarify parts of the town and country planning system both in England and in Wales in areas such as Compulsory Purchase and Enforcement. In addition, it is a notable feature of successive governments over the past 20 years or so first to suggest that the planning system is too complex and is a brake on desired development and/or fails to protect the environment allows for unwelcome development; and secondly to propose reforms to the system.

17. In light of the above, we consider that it is self-evident that the aims behind a wholesale re-configuration of planning related legislation in Wales will require significant political will and support accompanied by a recognition that the process is most likely to take a considerable period of time. The envisaged benefits from this proposal therefore will not be realised for some time. The alternative of more piecemeal reform may necessarily be more attractive.

18. We will seek to assist as best we can in this process in the event that this is taken forward.

CONSULTATION QUESTIONS:

Q 1-1: We ask stakeholders to provide us with any available figures, estimates or experience of both monetised and non- monetised costs caused by over-complicated or otherwise defective planning legislation.

Q 1-2: We ask stakeholders to provide us with examples of benefits that could be gained from consolidation and simplification of planning legislation.

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

20. Benefits would also be conferred on by those who may have inadvertently committed a breach of planning law. This may be out of ignorance or because they have been poorly advised by professionals such as planning consultants or architects (who may not have a full understanding of the legal ramifications) who themselves can end up committing breaches of planning law. This can lead to both enforcement and eventually to the commission of a criminal offence.

21. Clearly, if the public is able to understand more easily where such potential pitfalls lie and the consequences thereof justice is more effectively served.

22. We also recognise that there is only so much that can be achieved with a code as we go on to explain further below. There cannot be a set of rules that can displace one of the most essential facets of planning decision-making, namely, the decision maker's discretion as to the planning merits of a case.

Q 3-1: We consider that there is a strong case for creating a new Planning Code. Do stakeholders agree?

23. We agree that there is a strong case for simplification of the planning system and that it ought to be made more accessible, whether this is through the creation of a new Planning Code as envisaged in the Scoping Paper, or by other means.

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

Q 3-2: We ask stakeholders’ views on the distribution of provisions between the Planning Code – either in the main body of the legislation or in a Schedule – and secondary legislation made under it

25. With regard to the distribution of provisions between the Planning Code, the Bar Council notes and agrees with the Law Commission’s comments at para of the Scoping Report that *“[b]roadly speaking... the balance between primary and secondary legislation in the planning context has been struck correctly.”*

26.

Q 4-1: We welcome stakeholders’ comments on the proposed scope of an initial piece of codified planning law focusing on planning and development management.

Q 4-2: We welcome stakeholders’ views on the subject- matter of later phases of codification and the suggested wider scheme of codification.

27. As noted above, we agree with the Law Commission’s assessment that the larger the codification exercise the longer it will take, and the more resources will be required. We accept, therefore, that there is a case for dividing up the work to consolidate and simplify the planning system into discrete topics.

28. The identification of the core parts of the planning system: planning and development management as forming part of the scope of the initial piece of codification, on the one hand, given that it covers the range of core areas of the planning system makes sense.

29. We agree with the Law Commission that this would represent quite an exceptional and extensive piece of work, with all the accompanying costs and in terms of both time and resource. In light of this, we have considered whether it is workable to further divide up the proposed initial phase. We have concluded that, on balance, the Law Commission is correct in its identification of the issues to be included in the first phase and this should address development management. We particularly agree with the Commission’s suggestion that Compulsory Purchase provisions should not form part of the initial code.

30. We consider that, in terms of the subject matter of subsequent phases covering the final phase or phase(s) and in the event that the order of matters to be considered (if divided up) that this should begin with Compulsory Purchase.

31. We note that, whilst there is reference to the Highways Act 1980, there is no suggestion that the consent regime thereunder should be integrated as part of the code. We suggest that the Law Commission should consider this for the subsequent phases.

Q 5-1: We invite stakeholders’ views on whether technical reform as discussed in this chapter

should be pursued in the substantive phase of the project.

Q 5-2: We invite suggestions from stakeholders as to desirable areas for technical reform which fall within our classification system.

32. The technical reform, as proposed and defined within the Scoping Paper, addresses important but quite specific aspects of the existing planning law and practice. These suggestions are also reflected in section 7 of the Scoping Paper, which raises the issue of how to reflect the more established aspects of case law within the Code or whether to give them statutory form and definition.

33. As set out earlier, we consider that it is not within our remit to give a considered view on all of the issues raised by the consultation. In general terms, however, we think that the Law Commission's analysis and identification of the current aspects of the existing legislation and law which present issue, but which have not been sufficiently problematic to necessitate self-standing reform, is important. We agree that they detract from the accessibility and clarity of the law as it currently stands and that these issues warrant the attention of this paper and the proposals.

Q 6-1: We consider that drawing together consents as set out in this chapter is likely to deliver a system that is more open, accessible and consistent. We seek stakeholders' views on the practical benefits which might be derived from the exercise.

34. Please see the comments in the Introduction and to the answer to Q1.26 above.

Q 6-2: We seek stakeholders' comments on whether we should be looking at the merging of consent regimes into one statutory process, or instead retaining the separation between the processes but presenting these together in the proposed Planning Code.

Q 6-3: Do stakeholders consider that any (and if so, which) of the statutory consents identified in this chapter are appropriate for unification?

35. With regard to the question of whether the Law Commission should be looking at merging consent regimes or retain the separation of the regimes (albeit under the single code) and on the subject of the listed building consent regime with the wider development consent regime in particular, we consider that these issues are best addressed by other stakeholders in their consultation responses. Such matters are clearly more appropriately addressed by planning practitioners and others with more direct knowledge and involvement in the planning regime.

36. Nevertheless, we are cognisant of the changes brought about by the Planning Act 2008 generally, in respect of Nationally Significant Infrastructure Projects and the "one stop shop" approach to be adopted as part of the DCO process which enables the Examining Authority to make decisions in respect of relevant separate statutory consent regimes as part of the same decision process.

37. We consider that the unification or the principle of making a single relevant decision making

process where it will not lead to the loss of any right to make representations, and indeed avoid confusing and costly duplication of the consideration of the same project under separate regimes, is to be supported.

Q 6-4: We seek any evidence which stakeholders are able to provide on the number of applications for planning permission which are currently accompanied by applications for listed building, conservation area or advertisement consent.

38. The Bar Council is not in a position to provide such evidence.

Q 7-1: We welcome stakeholders' views on the rules being brought into the Planning Code, in particular as regards interpreting undefined statutory terms, the principles of planning law and filling gaps where the scope of statutory provisions is unclear.

Q 7-2: We welcome any suggestions of case law which stakeholders consider particularly appropriate for codification.

**Bar Council²
29.09.16**

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² Prepared for the Bar Council by the Law Reform Committee