Cyfoeth Naturiol Cymru
Natural Resources Wales

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Cardiff
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Public Law Team,
Law Commission of England & Wales,
1st Floor Tower,
52 Queen Anne's Gate,
London,
SW1H 9AG

27th March 2018

Dear Sir/ Madam,

Planning Law in Wales: Scoping Paper (Consultation Paper No. 228)

We welcome the opportunity to respond to the above consultation.

The statutory purpose of Natural Resources Wales (NRW) is set out under the Environment (Wales) Act 2016. In the exercise of its functions under the Environment (Wales) Act 2016, NRW must pursue sustainable management of natural resources in relation to all its work in Wales, and apply the principles of sustainable management of natural resources in so far as that is consistent with the proper exercise of its functions. NRW's duty (in common with the other public bodies covered by the Well-Being of Future Generation (Wales) Act 2015) is to carry out sustainable development.

Within the planning system, NRW undertakes a variety of roles including as a statutory consultee in the planning application process and in the local development plan process. Many of the proposals seem reasonable, should facilitate an effective planning system in Wales and are welcomed by NRW.

We have however, identified the following issues that require further clarification:

- Several proposals that are set out in Section 5 are seemingly aimed toward any public body exercising any function under the Code. However, it seems that the intended functions under consideration relate only to the functions for the determining body, and do not relate to the role of advisory bodies. We suggest this should be reviewed and amended as suggested in our detailed response.
- Whilst we are generally supportive of the proposal to abolish outline planning permission, we have concerns as to whether the proposed new provisions fully address existing problems associated with the outline planning permission process.
- Whilst we welcome provisions intended to facilitate timely decisions, this should not risk undermining the ability of determining bodies to make fully informed decisions. Opportunities to ensure how changes to validation requirements should be explored to help ensure adequate information is provided in support of a planning application.

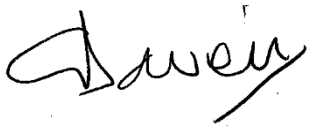
Furthermore, we would welcome the opportunity to discuss with you how the benefits associated with parallel tracking of planning and environmental permitting applications can be realised through the emerging Code.

Our detailed response to your consultation questions are included in the attached Annex 1.

We trust that our advice will be useful to you, and would welcome further opportunities to discuss the scope of your project and how we could engage with that process. We are currently undertaking a whole system improvement project with our colleagues within local planning authorities, initially focussed on North wales with an aim to replicate across Wales. We would welcome the opportunity to discuss this area of work with you and how it may be relevant to the project outlined in this consultation paper. We are also working with Public Health Wales and the Welsh Local Government Association to consider how bringing planning and environments permitting together can improve delivery of the requirements of the Well-being of Future Generations Act and the Environment Wales Act. We are happy to involve you in this work as it progresses.

If you have any queries in relation to our detailed response, please contact Keith Davies, Planning, Landscape, Energy and Climate Change Manager in the first instance at: keith.davies@cyfoethnaturiolcymru.gov.uk.

Yours faithfully,



Ceri Davies

Executive Director for Evidence, Policy and Permitting

Annex 1

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.

As a statutory consultee in the planning application process, we provide advice to the appropriate planning authority (decision-maker).

The proposed new provision seems to relate only to the various decision-making functions of planning authorities set out in paragraph 5.20 of the consultation document. It seemingly does not relate to the advisory function of consultees which are set out in various legislation including the Development Management Procedure (Wales) Order 2012. Whereas NRW may have regard to or refer to provisions of a development plan in providing its advice, it should not be under a duty to do so.

To avoid potential confusion on the role of statutory/ specialist consultees with the role of determining authorities, we suggest that the proposed new text set out in Question 5-1 is amended by deleting: ‘a public body’ and replace with ‘a determining authority’.

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?

As a statutory/ specialist consultee in the planning application process, we provide advice to the appropriate planning authority (decision-maker).

Paragraph 5.40 of the consultation document suggests that the proposed new provision seems to relate only to the various decision-making functions of planning authorities (as set out in paragraph 5.20 of the consultation document). It seemingly does not relate to the advisory function of consultees which are set out in various legislation including the Development Management Procedure (Wales) Order 2012.

To avoid potential confusion on the role of statutory/ specialist consultees with the role of determining authorities, we suggest that the proposed new text set out in Question 5-1 is amended by deleting: ‘a public body’ and replace with ‘a determining authority’.

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.

Our role as statutory/ specialist consultee in the planning system is set out in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended).

Whilst the proposed new provision may be applicable to the decision-making role of planning authorities, it is not applicable to all consultees who are consulted for advice on a specialist matter (e.g. as set out in the Development Management Procedure (Wales) Order 2012).

A similar duty already applies on NRW under Article 5D of The Natural Resources Body for Wales (Establishment) Order 2012, and duplication of this duty in planning legislation should be avoided as it could create ambiguity, particularly if there is a conflict or inconsistency between the two duties.

We therefore suggest that 'a public body' is replaced with 'a determining body'.

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.

Our role as statutory/ specialist consultee in the planning system is set out in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended). Our statutory role does not extend to providing expert advice on the use of the Welsh Language when responding to planning application consultations.

Whilst the proposed new provision may be applicable to the decision-making role of planning authorities, it may not be applicable to all consultees e.g. where they do not have a statutory duty to provide such advice.

To avoid confusing the role of statutory/ specialist consultees with the role of determining authorities We therefore suggest that ‘a public body’ is replaced with ‘a determining authority’.

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 polices 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?

Our role as statutory/ specialist consultee in the planning system is set out in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended). Our area of expertise and our statutory duties does not extend to providing expert advice on *all* matters to which Government policy may apply, and it would be confusing for new legislation to suggest otherwise.

The justification (paras 5.67 to 5.74) for the proposed new provision seems to relate only to the various functions of planning authorities, and does not seem to take account of advisory function of consultees who are consulted on specialist matters (as identified in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended).

To avoid potential confusion on the role of statutory/ specialist consultees with the role of determining authorities, we suggest that the proposed new text set out in Question 5-6 is amended by deleting: ‘a public body’ and replace with ‘a determining authority’.

We would also suggest that the Bill defines the term ‘policies of the Welsh Government’ by clarifying whether it extends to: Government strategies, plans, policies, Ministerial Written Statements and/ or Ministerial Oral Statements.

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?

We support the Law Commission's recommendation. Any attempt to replicate the provisions of the Wellbeing and Future Generations (Wales) Act 2015 into the Planning Code has risks of different parties having different interpretations unless such provisions are entirely consistent.

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?

Yes, we agree with the proposed approach to include sign-post provisions to help users navigate around relevant aspects of the Code.

Consultation question 5-13.
We consider that the term "planning authority" should be used in the Planning Code in place of the terms "local planning authority" and "minerals planning authority" in existing legislation.
Do consultees agree?

Yes, we agree.

Consultation question 6-1.
We provisionally consider that Part 6 of the PCPA 2004 (development plans), as amended by the PWA 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?

Yes, we agree.

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?

As explained in paragraph 6.31 of the consultation document, the requirement to undertake a Sustainability Appraisal, and a SEA emanate from different items of legislation which also set out, to varying degree, the nature of, and the procedures to follow, in undertaking the respective assessments/ appraisals. For this reason, and for the reasons set out in paragraph 6.34 (1) and (2) of the consultation document, it seems appropriate to retain the current existing provisions.

As part of a wider Planning Code, national planning policy and guidance can clarify *how* those assessments/ appraisals may be undertaken e.g. separately, or in association. Where the opportunity arises, the regulations and guidance could be aligned more closely with Sustainable Management of Natural Resources (SMNR) and Sustainable Development principles. SEA/SA is a tool that integrates such considerations into plan making and when done properly leads to better plans delivering multiple benefits for economic, social, environmental and cultural wellbeing. SEA/SA can be used to promote integration of SMNR and sustainable development and to test a plan's performance against these principles.

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?

We agree with the proposals.

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?

We welcome the proposal to simplify the process for applying for a planning application. We also welcome the proposed requirement that every application should be accompanied by sufficient information to describe the development. However, this should be accompanied with clear guidance that sets out what is 'sufficient information' for the purposes of validating an application.

Proposed provision (3): The degree of acceptable variation should be defined in guidance. Where there is uncertainty of effects, their assessment should be based on a worst-case scenario.

Proposed provision (4) Whilst we welcome the proposal to enable an applicant to invite the planning authority to grant permission subject to conditions, the range of matters where such conditions can be imposed would need to be clearly defined.

We have previously encountered outline planning applications which are not adequately supported by a level of information to allow us to understand the likelihood of significant environmental effects from a scheme. This can lead to delays in the decision-making process because of potential conflicting views on the level of detail required in support of an application. For example, regarding European Protected Species (EPS), we continually face difficulties with insufficient information being provided as part of outline applications.

The proposals for a Planning Code provide an opportunity to address this problem by, ensuring the relevant level of EPS information is provided with a planning application. The submission of this information should not be reserved for future approval. The level of information required by an applicant should be sufficient to enable the local authority to form a view about whether NRW would be likely to determine a licence application for EPS favourably (under the 2017 Habitats Regulations).

Proposed provision: (6) Whilst we support this proposal in principle, we recommend that for its effective implementation the Planning Code should also set out the validation requirements that every planning application is required to meet.

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?

We welcome measures that will support timely and informed decision-making. However, there are occasions where inadequate information has been provided in support of a planning application. The provision of additional information can incur delays to the decision-making process, especially if the request for additional information is contested by the applicant, or is delayed for other reasons. We would have concerns if the above proposed measure leads to a situation whereby planning permission is granted without the necessary information or evidence required to make an informed decision.

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?

We agree with the proposals.

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?

We welcome the clarity that this proposal brings.

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?

This is a complex area of planning law and by specifying these conditions in the Bill, it would provide clarity as to what type of condition could be imposed.

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?

We support this proposal in principle.

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?

We welcome this proposal in principle. As stated previously in answer to Question 8-11 this is a complex area of planning law. However, we advise that the reasoning and intent behind these conditions should be clearly explained in the Bill and what the implications of the proposal are so that they can be easily understood by all users of the planning system.

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?

We welcome these proposals.

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.
Do consultees agree?

(2) For the avoidance of doubt, the definition could be usefully expanded to include maisonettes, apartments and self-contained annexes.

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?

We welcome this proposal.

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?

We welcome this proposal.

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?

Subject to imposition of procedures that define which proposal has been implemented, we welcome this proposal.

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?

We do not have any comments on this proposal.

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?

There are potential resource implications associated with this proposal. Adequate consultation deadlines for statutory consultees should be maintained to enable consultees to respond within a reasonable timescale.

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?

We consider that for proposal (2) i.e. making Directions requiring particular applications to be notified, would involve including provision in the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (as amended) enabling the Welsh Ministers to make directions that it should be formally notified in respect of a particular application. It is unclear what mechanism would enable Welsh Ministers to become aware of a particular category of planning application in the first instance. We would recommend as an alternative that a similar provision as for 8.26(i) is made i.e. making provisions for Welsh Ministers to be notified for categories of applications would be more appropriate.

Consultation question 9-2.
We provisionally consider that the law relating to pre-application consultation and preapplication services in connection with developments of national significance should be reviewed and, where appropriate, clarified. Do consultees agree?

We would welcome opportunity for further engagement in any review of the pre-application stage for the consenting process for Developments of National Significance. If the review relates to the entire aspect of statutory pre-application consultation, we suggest that for reasons of consistency, this review should extend to the equivalent stage for the consenting process for Major Development.

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?

We would support the use of standard clauses in planning obligations to provide consistency and certainty. However, it would be difficult to prepare clauses which are reflect all possible scenarios. This should be highlighted in any guidance, and the standard clauses should be promoted as best practice.

We agree that these standards should be promoted in Welsh Government guidance. We would seek further guidance on how these provisions could be used to deliver environmental improvements.

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?

We would agree with the proposals.

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?

We would agree with the proposals.

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?

We would agree with the provision to secure a statement of truth as part of proceedings.