Cymdeithas y Cyfreithwyr
The Law Society

General principles of the Planning (Wales) Bill
The Law Society submission
November 2014

Introduction

1. The Law Society is the representative body of over 141,000 registered legal practitioners in England and Wales. The Law Society negotiates on behalf of the profession and lobbies regulators, governments and others.

2. This submission has been prepared by the Law Society's Planning & Environmental Law Committee ('the PEL Committee'). The PEL Committee comprises 19 practitioners specialising in planning and environmental law, drawn from a cross-section of the profession, public and private sectors and covering both England and Wales.

3. The PEL Committee was pleased to have the opportunity to contribute to the development of the evidence base for the Planning (Wales) Bill ('the Bill') and to be represented on the Independent Advisory Group ('IAG'), whose recommendations have in large measure been adopted by the Welsh Government.

4. In February 2014, the Law Society responded to the consultation on the Welsh Government's White Paper, *Positive Planning: Proposals to Reform the Planning System in Wales and the draft Planning (Wales) Bill* and the Environment and Sustainability Committee ('the Committee') is referred to that response in the report on consultation.[1] The Law Society also gave evidence to the Committee's pre-legislative scrutiny inquiry.

5. The Law Society welcomes this further opportunity to contribute to the debate by responding to the Committee's inquiry on the general principles of the Bill.

6. The Law Society notes that the Welsh Government has issued, in parallel with the introduction of the Bill, a series of consultations on proposals to exercise the powers proposed in the Bill and the Law Society will be responding to those consultations in due course. As a result, this submission has sought to confine itself to the provisions of the Bill and the underlying principles, but on occasion some discussion of future secondary legislation has proved unavoidable.

Part 2 - Development planning

National Development Framework ('NDF')

7. Consideration of the NDF by the National Assembly for Wales ('the National Assembly) is a vital element of giving legitimacy and standing to the NDF. The National Assembly will presumably wish to conduct its own scrutiny of the NDF which may involve the taking of evidence from the Welsh Government and interested parties prior to recommendations being formulated, as well as taking its own expert advice on the soundness of the plan laid before them. The Law Society considers that 60 days is likely to be the minimum period for such an exercise to be conducted in a way that would usefully contribute to the making of the NDF. The Law Society would wish to be assured that the Committee is satisfied that proper scrutiny and formulation of recommendations can be conducted within this period.

[1] A copy of that submission accompanies this submission for ease of reference.

Strategic Planning

8. The Law Society notes that the Committee's pre-legislative scrutiny recommendations expressed concern about the "democratic deficit" in the proposals for Strategic Development Plans ('SDP') in designated areas, referring to uncertainty as to how the planning competence framework would apply and the need to ensure that the local voice was heard.

9. The Law Society considers that there are governance concerns about the strategic development plan panels ('SDP panels'). The argument for the introduction of a significant nominated element at this level of the development plan hierarchy does not appear to be fully developed. The Explanatory Memorandum at paragraph 3.31 refers to one third of an SDP panel comprising "representation from social, economic and environmental organisations". The Bill[2] provides for nominated members of an SDP Panel to be appointed by the SDP Panel after they have been nominated by a "nominating body". It is not clear whether the nominating bodies are to be other public bodies (for example, Health Boards) or non-governmental bodies. In the latter case, what assurance will the ministers be seeking with regard to their internal governance before adding them to the list of nominating bodies?

10. Paragraph 3.29 of the Explanatory Memorandum envisages that SDPs will enable "larger than local" issues which cut across several local planning authorities (such as housing demand) to be considered in an integrated and comprehensive way. SDP Panels will therefore be of great importance in addressing those "larger than local" issues that have, to date, proved to be intractable under the current arrangements (as shown by the evidence base). The Law Society questions whether the nomination arrangements as currently proposed are sufficiently robust and transparent to contribute to the standing of SDP Panels in the eyes of the public.

11. The only comparable situation within the current planning system is the appointment of independent members to National Park Authorities by the Welsh Ministers. These appointments are made under well-established arrangements for public appointments. Those arrangements ensure that the independent members bring a range of backgrounds, skills and local knowledge, which complement the knowledge and skills of the elected members. Given that three SDP Panels are envisaged, the number of nominated members will not be large. The Law Society would invite the Committee to consider whether adopting the model of ministerial appointment using the public appointments process would be more transparent and thereby command greater confidence.

12. The Law Society considers that the Committee's concern about the application of the competence framework to the nominated members is well made. However, this is another aspect of a problem identified by the IAG[3], which pointed out that the member training has hitherto been focussed on the training of members to sit on development control committees and that, under the local authority cabinet system of government, the LDP is the responsibility of the cabinet. The development of a training and competence framework for members of the SDP Panels - whether elected or nominated - should be an early priority for the Planning Advisory and Improvement Service.

[2] See Schedule 1, paragraph 4 and the new schedule 2A, paragraph 4 to the Planning and Compulsory Purchase Act 2004.
[3] See IAG recommendation 64 and the preceding discussion.

Community and Local Councils

13. The Law Society notes the Welsh Government's support for the idea of town and community place plans. Such plans can be important to the credibility of the planning system when local councils prove they have the capacity to produce a credible, good quality plan. However, while the Law Society supports the Committee's pre-legislative view that a panoply of neighbourhood plans should not be introduced in Wales, it is unclear as to how the Welsh Government envisages place plans acquiring status in the plan hierarchy. The Committee may wish to explore this question further with the Government.

Part 3 - pre-application procedures

14. While welcoming the proposed statutory framework for pre-application consultations, the Law Society would make two points:

    i. The Law Society recognises the designation of the types of development that will be subject to pre-application consultation, but questions whether basing the requirement on the existing definition of "major development"[4] alone is sufficient. There are categories of development which, while not constituting "major development", can nevertheless bring about significant change to their surroundings. Proposals for wind turbines are a case in point; the present publicity requirements for notifying neighbours of applications bear no relationship to the wide areas over which such vertical structures can be viewed. A more appropriate trigger might be the need for a screening under the Environmental Impact Assessment Regulations.

    ii. Bearing in mind the emphasis that has been placed by the Welsh Government on creating a planning system that operates consistently across the local planning authorities, the Committee may wish to enquire further into the reasons why the Bill does not address the question of charging for pre-application advice. Paragraph 3.64 of the Explanatory Memorandum mentions that some local authorities make a charge under powers to charge for discretionary services, although this power will no longer be available if pre-application advice becomes as mandatory service.

Part 4 - applications to Welsh Ministers and developments of national significance

15. The Law Society is generally supportive of the principles of the proposed system for determining applications for developments of national significance ('DNS') similar to that created by the Planning Act 2008 for Nationally Significant Infrastructure Projects (NSIPs), (albeit with some significant difference referred to further below). The projects covered by Part 4 of the Bill are of a size that would be considered 'nationally

[4] Town and Country Planning (Development Management Procedure) (Wales) Order 2012, Part 1, paragraph 2 defines "major development" as: a) the winning and working of minerals or the use of land for mineral-working deposits(**4**); (b) waste development; (c) the provision of dwelling houses where— (i) the number of dwelling houses to be provided is 10 or more; or (ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i); (d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more; or (e) development carried out on a site having an area of 1 hectare or more;

significant' (in the UK sense) and ought to benefit from a similar streamlined regime; although as the Law Society noted in its submission on the White Paper, the provisional list of schemes does not include significant highway schemes.

16. However, care must be taken that, when introducing a lower threshold for projects that already come under the Planning Act 2008 regime in Wales (principally electricity generation), this does not result in small projects having to go through an unduly onerous process for their size. Paragraph 3.71 of the Explanatory Memorandum states that energy generation projects in the range of 25-50 MW are proposed to be categorised as DNS in Wales. The Law Society is unclear as to the basis for this range; it is not explained in the Explanatory Memorandum or the White Paper for the Bill. The Law Society would suggest that this is a matter the Committee could usefully explore further.

17. Where DNS applications are made directly to the Welsh Government, there will need to be appropriate resources in place to handle them. The Bill makes provision for the Welsh Ministers to appoint persons to exercise functions in relation to DNS, including processing and deciding planning applications for DNS. The Explanatory Notes state that it is anticipated that such persons would be appointed from the Planning Inspectorate Wales. The Law Society welcomes the Welsh Government's intention to maintain the Planning Inspectorate as a joint Wales and England agency. The Inspectorate now has experience of running over 50 applications in both Wales and England under the Planning Act 2008, supported by the extensive use of IT systems capable of handling large documents. This experience is of direct relevance to the proposed Welsh DNS system.

18. The Law Society welcomes the inclusion of machinery for dealing with "secondary consents", but it is noteworthy that the Bill does not seek to replicate the Planning Act 2008 system through the creation of a separate category of "development consent orders" granting planning permission and other consents. The Law Society suggests that there should be powers for the Welsh Ministers to adopt a single permission or consent covering both planning permission and the secondary consents, and for this to be a "live" document like the proposed new form of planning permission.

19. The Law Society would remind the Committee that the IAG recommended that non-devolved ancillary consents for nationally significant infrastructure schemes in Wales under the Planning Act 2008 (mainly large electricity generation schemes) should be determined by the Welsh Ministers rather than by local planning authorities (IAG Recommendation 25). As the Law Society understands the position, the clauses in the Bill relating to secondary consents do not extend to ancillary consents for schemes under the Planning Act 2008. The Law Society believes that three questions merit further examination by the Committee:

    a. Would determining ancillary consent issues at national level within Wales facilitate greater co-ordination of decision-making?

    b. If separate statutory provision is not made, would the Welsh Ministers consider calling-in ancillary consent applications under existing powers and, if so, is policy guidance on calling-in in such circumstances required or envisaged?

    c. If call-in powers are to be used what might be the parameters? A potential example of a "greater than local" ancillary scheme meriting call-in could be the very large sub-station schemes connected with the export of wind energy from the TAN 8 strategic search areas. On the other hand, should applications for

workers' housing required for a scheme remain with the local planning authority as a matter best determined locally?

20. The Law Society notes that the consideration of DNS can be by a combination of methods and the Explanatory Memorandum states that written representations and hearings are envisaged for these applications. This should enable the examination system used under the Planning Act 2008 to be largely replicated. However, there is no indication that there is an intention to replicate the use of a panel of "examiners" covering various disciplines, as under the Planning Act 2008, as opposed to a single inspector. The Law Society would suggest that the Committee could usefully seek further explanation of the Government's thinking on this. It may be that the use of assistant planning inspectors is envisaged, but the Law Society thinks there is merit in providing for the appointment of a panel in appropriate cases.

21. Clause 24 of the Bill would allow both DNS and applications made directly to the Welsh Ministers to be determined by an appointed person. However, the Law Society considers that decisions on nationally significant developments should always be reserved to the Welsh Ministers and not delegated to planning inspectors. This would be in line with the changes to the Planning Act 2008 system made by the Localism Act 2011, which requires decisions on development consent orders to be taken by the Secretary of State.

22. The Planning Act 2008 process is currently being amended to deal with issues around the amendment of development consent orders to take account of the changes that are inevitable in any complex project. The Law Society would suggest that further consideration should be given to this in relation to the Bill's proposals - for example, is it envisaged that the Welsh Ministers will handle variation applications?

Part 5 - Development Management

23. The Law Society generally welcomes the provisions on development management in Part 5 of the Bill.

24. However, the Law Society is disappointed that the package of reforms to section 106 of the Town and County Planning Act recommended by the IAG, and supported by the Committee in its pre-legislative comments, have not been adopted. We will not repeat what is said in our response to the White Paper save to mention recent evidence of the need for reform. Members of our Committee have seen a number of cases in recent months where Welsh local authorities, as landowners, have been hampered in trying to dispose of surplus land by the inability to sell the land with planning permission and subject to obligations secured under section 106. These issues seem to have arisen as local authorities have been accelerating their programmes of asset realisation.

25. There is also some concern that there may be unintended consequences from the prohibition on amendments to planning applications once an appeal against refusal has been made. This prohibition may mean that some applications which have been refused but subsequently rendered acceptable to the local planning authority by the negotiation of amendments with the applicant, would have to start again afresh if they had already entered the appeal system after being refused. This could be avoided by allowing the Inspectorate, with the agreement of the parties, to return an application that has been refused for amendment, re-consultation and re-determination by the local planning authority.

Part 6 - Enforcement and appeals

26. The Law Society welcomes the proposed changes to enforcement legislation set out in Part 6 of the Bill. These changes bring greater clarity and certainty to areas where there were some anomalies and omissions, and overcome some of the emerging differences between Welsh and English legislation where circumstances and objectives are similar.

27. Section 38 (inserting a new section 173ZA into the Town and Country Planning Act 1990) is welcomed. This provision should help to avoid unnecessary enforcement action where development is acceptable provided it has necessary controls imposed on it by way of conditions or limitations applied to a planning permission for development already carried out. It benefits those who have carried out development without permission, local planning authorities ('LPAs') and interested persons who could be affected by it in bringing forward an open and fair consideration of the acceptability of the development.

28. Sections 39 to 41 are supported as they prevent the anomaly whereby a deemed planning application was held to be made even where no appeal under ground (a) was made or argued. Moreover, they (together with section 30) provide a single avenue for seeking a planning permission and avoid the present duplication of process which leads to delay and uncertainty.

29. Section 42 has benefits for the decision-maker, LPA and interested persons in that it avoids legal pitfalls and simplifies the evidence gathering and presentation at appeal. However, it could delay what may, in the end, be an acceptable proposal by having it go through the process afresh.

30. Section 43 is welcomed and supported as it places appeals under section 215 of the Town and Country Planning Act 1990 in the most appropriate place for determination by those familiar with the issues that they involve.

31. Section 44 is welcomed in respect of the inclusion of the written representation format of appeal in the costs regime. This will undoubtedly assist in ensuring that the most appropriate format for determination of appeals is chosen. The Law Society also supports the ability of the Planning Inspectorate/Welsh Ministers to initiate and recover costs in appropriate circumstances, subject to the acceptability of the particular circumstances to be set out in secondary legislation. However, the Law Society would suggest that the Welsh Ministers should only be able to initiate an award of costs if there is unreasonable behaviour by one of the parties: they should not be able charge their costs to the parties on every appeal, whether or not there is unreasonable behaviour. As currently drafted, section 44 does not limit the Welsh Ministers' ability to initiate costs to cases of unreasonable behaviour.

Part 7 - Town and Village Greens

32. As stated in the Law Society's response to the *Positive Planning* consultation in February, applications for registration of a town or village green are frequently pursued in order to frustrate development that has been found acceptable in planning terms. Applications can be made at virtually no cost to the applicants and the non-statutory procedures for determining applications do not carry any costs sanctions against unreasonable behaviour. However, the costs to a landowner of challenging such an

application can be very considerable and frequently have to be borne in order to protect an already significant investment in obtaining planning permission.

33. The Law Society welcomes the provisions made in the Bill to restrict the right to make an application where land has already entered the planning system and the inclusion of a provision that will enable landowners to submit declarations that their land is not being used "as of right". The Law Society supported similar proposals in England and maintaining consistency between England and Wales is helpful to practitioners and their clients.

The Welsh Language

34. The Law Society notes that there has been comment on the role that the Bill should play in promoting the use of Welsh and it has been suggested that the impact of a development on the Welsh language should be made a material consideration that would be sufficient, alone, to justify refusing planning permission. The Law Society is broadly content that the current policy guidance on the Welsh Language and LDP preparation, and the revised TAN 20, sit comfortably within the overarching purpose of the planning system suggested by the IAG and supported by the Committee in its pre-legislative scrutiny report. The Law Society does not have a settled view on the desirability of further provision in the Bill but should the National Assembly be minded to go beyond the present position, the Law Society would pose a number of questions that it considers ought to be answered as part of the debate:

    i. Should a fundamental tenet of the existing system - that decisions are reached by correctly identifying the material considerations and then conducting a balancing exercise in which decisions are to be taken in accordance with the development plan unless the material considerations indicate otherwise - be overridden?

    ii. If the Welsh language is to become an overriding material consideration, has the discipline of land use planning developed sufficiently robust and objective methods to assess the effect of development on use of Welsh, so that developers can be confident that planning decisions based on Welsh language considerations are robust and evidence-based?

    iii. Is the degree of primacy to be afforded to Welsh in planning decisions compatible with other rights entrenching respect for family life and freedom of movement of individuals under human rights and European law?

Compulsory Purchase

35. The Law Society welcomes the Committee's support for the IAG's proposals in relation to bringing together compulsory purchase order ('CPO') powers applying in Wales.

36. There is also an aspect of the relationship between CPO powers and the proposed Welsh DNS system as it now appears in the Bill that merits further comment from the Law Society. Under the Planning Act 2008, a development consent order ('DCO') can contain CPO powers. The Welsh Government's approach of keeping the Welsh DNS process squarely within the planning system precludes a similar approach to associated CPOs. In several of the categories of development proposed to be designated as nationally significant, there are existing CPO powers under other legislation. The normal approach to CPO is to satisfy Ministers that there are no

obvious planning impediments to implementing CPO powers if granted. The result of this is a sequential approach where planning permission is in place before the examination of a CPO begins. The DCO approach of bringing CPO powers within the DCO examination process resolves this issue for schemes subject to the Planning Act 2008 system. The requirement to resolve potential planning impediments for other CPOs derives from circular guidance rather than being a statutory rule. The Law Society would suggest that the Welsh Government should examine how to enable NSP applications for planning permission and secondary consents to be considered in parallel with the granting of CPO powers where the applicant has such powers available and believes they are required for the scheme in question.