

Chapter 15: Works to protected trees

INTRODUCTION

- 15.1 Conditions are frequently imposed on planning permissions to protect existing trees and to ensure the planting of new ones; and there is a duty on planning authorities when granting planning permission to ensure that new trees are planted in appropriate cases.¹
- 15.2 The carrying out of works to trees is not development, requiring planning permission; nor is there any other universal requirement under the planning Acts for consent to be obtained for such works.² However, all planning Acts since 1932 have made some provision for the protection of trees of special value. The relevant primary legislation is currently in Chapter 1 of Part 8 of the TCPA 1990. The secondary legislation is in the TCP (Trees) Regulations 1999 (“the 1999 Regulations”), which when first made applied in England and Wales, but since 2012 apply only in Wales.³

Tree preservation orders

- 15.3 Section 198 of the TCPA 1990 provides that a tree preservation order (“TPO”) may be made by a planning authority to protect particular trees and woodlands where it is expedient in the interests of amenity.
- 15.4 Under the Act as it now applies in Wales, the wording of an order will follow that of the model order in force at the time the order is made. The current model order is in the Schedule to the 1999 Regulations. Details as to the making and confirmation of orders are also contained in the Regulations. An order may be made so as to take effect at some date in the future.⁴ More usually, it will be made on a provisional basis, so as to take effect immediately and remaining in force for six months, but needing to be confirmed if it is not to lapse.⁵
- 15.5 Where an order has been made, the consent of the planning authority must be obtained for the carrying out of any works to any of the trees protected by it.⁶ Carrying out works without such consent is an offence, under section 210.⁷ The details of the consent system – including the numerous exemptions from the need for consent, the

¹ TCPA 1990, s 197.

² See **para 15.16** as to felling licences.

³ 1999 SI 1892, revoked so far as they apply to England by SI 2012 No 605, reg 26(1).

⁴ TCPA 1990, s 199.

⁵ TCPA 1990, s 201.

⁶ The precise extent of the works for which such consent must be obtained depends, at least under the present law, on the wording of the order in question, which will in turn depend on the date when it was made.

⁷ This is a criminal offence presumably because the unauthorised works are not capable of being reversed.

procedure by which consent can be obtained, and the consequences of such consent not being forthcoming – are currently as set out in the order itself.

- 15.6 All existing orders will have been made in accordance with the model order in existence at the time they were made. And it may be noted that there are still some orders in force that were made as long ago as the 1940s. Model orders used to be contained in Government circulars⁸, and more recently they have been in regulations (which in turn have been amended on various occasions).⁹ That has meant that any changes to the model order, to accord with changing policy over the years, would not be reflected in orders already made. The procedural and other requirements in the order – for example, as to the exemptions from the need for consent, and the availability of compensation – accordingly vary, depending on when the order in question was made.
- 15.7 This means that every order is necessarily lengthy, and difficult for non-planning lawyers to understand – and even more so for property owners, tree contractors and local authority tree officers.
- 15.8 The system has for many years been regarded as unsatisfactory, and was finally changed by the Planning Act 2008. Section 192 of that Act made extensive changes to Chapter 1 of Part 8 of TCPA 1990, which introduced a new system under which the Secretary of State and the Welsh Ministers are able to make regulations providing for a freestanding code of control – somewhat similar in concept to the Advertisements Regulations.¹⁰
- 15.9 Section 193 of the 2008 Act made a transitional provision, to the effect that any order made under the old system will continue in force but omitting all of its provisions other than those necessary to identify the tree being protected.
- 15.10 Sections 192 and 193 of the 2008 Act (and thus the new provisions in the TCPA 1990) was brought into force (along with new regulations) in England in 2012, but the new system has not yet been implemented in Wales.
- 15.11 Once the relevant legislative changes have been brought into force in Wales, and assuming that regulations are made that are broadly similar to those now applying in England, it is likely that the system will operate as follows:
- (1) regulations under section 202A of the TCPA 1990 will provide that any new order will in future contain merely the details of the trees or woodlands it protects (specified by a schedule and a map), and not the requirements as to consent etc;
 - (2) the regulations will provide that every new order takes effect immediately, but will cease to have effect after six months unless it has been confirmed;

⁸ Appendix A to *The Memorandum on the Preservation of Trees and Woodlands*, 1949; Appendix A to Circular 27/53; Appendix A to the second edition of the *Memorandum*, 1966.

⁹ TCP (Tree Preservation Order) Regulations 1969 (SI 17), Sched (amended by 1975 SI 148, 1988 SI 963); and TCP (Trees) Regulations 1999 (SI 1892).

¹⁰ See **Chapter 14**.

- (3) they will govern applications for consent for works to any tree protected by the order, and appeals; and
 - (4) they will provide other procedural details, such as the availability of compensation.
- 15.12 Failures to obtain consent under the regulations will still be an offence, under section 210 of the TCPA 1990 – subject to various exceptions, considered below.¹¹
- 15.13 Section 193 of the 2008 Act was a transitional provision, to the effect that any order made under the old system will continue in force but omitting all of its provisions other than those necessary to identify the tree being protected.
- 15.14 This will provide a much simpler system, which will be easier to use both by tree owners and planning authorities. In the remainder of this Chapter, we assume that it will indeed be introduced in Wales in due course, subject to any changes that may be made as a result of the present exercise.

Trees in conservation areas

- 15.15 In recognition of the fact that many trees of amenity value are to be found within conservation areas, section 211 of the TCPA 1990 provides that the planning authority must be given six weeks' notice of almost any works to a tree in such an area (other than one that is not protected by a TPO), so that it has an opportunity to impose a TPO if it wishes. Failure to give such notice is also an offence.

Felling licences

- 15.16 Alongside the controls in the planning Acts, the Forestry Act 1967 (which currently applies throughout Great Britain¹²) requires a felling licence to be obtained where any tree is to be felled – again, subject to numerous exceptions. In England and Scotland, licences are issued by the Forestry Commission; but in Wales, since 2013, they have been issued by Natural Resources Wales. Failure to obtain a licence is an offence.¹³

Other provisions

- 15.17 The three statutory codes (TPOs, trees in conservation areas, and felling licences) are linked to each other, in such a way as to avoid overlapping control.¹⁴ Further, since works to trees are often (although by no means always) linked to development proposals, each code is also linked to mainstream planning legislation, in that no consent needs to be obtained for tree works that are required in order to carry out development that has been permitted in response to a planning application.

¹¹ See **paras 15.59 to 15.85**.

¹² The law in Scotland is likely to be significantly changed by the Forestry and Land Management (Scotland) Bill, currently before the Scottish Parliament. If enacted, this will replace the 1967 Act in Scotland.

¹³ Forestry Act 1967, s 17.

¹⁴ Forestry Act 1967, s 15.

Possible reforms

- 15.18 In this Chapter, we consider first the making of tree preservation orders, and the need for consent to be obtained for works to trees protected by them, and then the need to notify the authority of works to trees in conservation areas.
- 15.19 In this Consultation Paper, we focus particularly on the relevant primary legislation. However, as with the control of advertisements, much of the detail as to the management of works to trees is contained in secondary legislation, and we therefore also raise some points that could be considered for reform when regulations are being drafted to underpin the introduction of the new system. We understand that any such regulations will be the subject of a further consultation exercise before they are introduced.
- 15.20 We note in particular a number of legislative reforms that were proposed by the UK Government in 1994, in respect of England and Wales.¹⁵ Those proposals received wide support at the time, but were not implemented, presumably due to legislative priority. We consider that many of those reforms are still worthy of consideration.
- 15.21 As noted in Part One of this Consultation Paper, we have not made any proposals as to the reform of the law on felling licences, or forestry in general. However, we are mindful of the proposals made by the Welsh Government in its recent consultation document *Taking Forward Wales's Sustainable Management of Natural Resources*, particularly in relation to ancient, veteran and heritage trees, which are relevant to our proposals with respect to preservation orders.¹⁶

TREE PRESERVATION ORDERS

What may be protected

- 15.22 The first obvious question is what may be protected by a tree preservation order – what is a tree? Most Acts not directly related to planning that refer to “trees” also refer to hedges, bushes and shrubs, making no distinction between them.¹⁷ That is because, in all the situations being referred to (for example, the removal of a tree overhanging a highway), it makes no difference whether the plant in question is best classified as a tree or shrub. The Forestry Act 1967 refers to all “trees”, but excludes from the need for a licence the felling of a tree with a diameter of under 150 mm, implying that a tree can have a trunk of a diameter of less than that – as is recognised by the definition of a sapling as “a young tree”.
- 15.23 The question was considered, in the context of references to “trees” in planning legislation, by Cranston J in *Palm Developments Secretary of State*.¹⁸ He noted that

¹⁵ *Tree Preservation Orders: Review*, Department of the Environment, 1994.

¹⁶ *Taking Forward Wales's Sustainable Management of Natural Resources*, Welsh Government, June 2017.

¹⁷ For example, Highways Act 1980, ss 96, 141, 142; Plant Health Act 1967, s 1; Theft Act 1968, s 4; Criminal Damage Act 1971, s 10; Electricity Act 1989, Sched 4.

¹⁸ [2009] EWHC 220 (Admin), 2 P&CR 16, at [1].

the relevant dictionary definitions were of limited assistance. He adopted the approach of Phillips J in *Bullock v Secretary of State*:

Bushes and scrub nobody, I suppose, would call “trees”, nor, indeed, shrubs, but it seems to me that anything that ordinarily one would call a tree is a “tree” within this group of sections in the 1971 Act [the predecessor of Chapter 1 of Part 3 of the TCPA 1990].¹⁹

And he concluded that a “sapling” (of any size) is a tree, and are capable of being protected by a woodland order.

- 15.24 The dictum in *Bullock*, although commonly cited and helpful in a general sense, is clearly not capable of being transformed into a watertight definition.²⁰ No more helpful is the observation by Collins J in *R (Fowler) v Ealing LBC* that obviously there can be arguments as to whether something is a shrub or a tree, and that it would not be irrational for a council to use a tree preservation order to protect a rhododendron or an arbutus.²¹ However, these statements do suggest that there is a distinction between a shrub and a bush, on the one hand, and a tree. One dictionary defines a “shrub” as “a woody plant which is smaller than a tree and has several main stems arising at or near the ground”; and a “bush” as “a shrub or clump of shrubs with stems of moderate length”.²²
- 15.25 We do not consider that there is likely to be any exclusive definition of “tree” that will be entirely satisfactory for present purposes. We have considered whether it would be helpful to provide a partial definition, in the context of the provisions currently in Part 8 of the TCPA 1990, by stating that it does not include a bush or a shrub. That would help to distinguish it from the provisions in other Acts mentioned above.²³ It would also suggest that where, for example, a particular rhododendron is properly classified as a “tree” it can be protected by a tree preservation order; but where it is (as will usually, but not always, be the case) a “shrub”, it cannot.
- 15.26 On balance, however, we suspect that such a definition – if in the form of a statutory provision – would create as much uncertainty as it would avoid; and we therefore provisionally consider that the term “tree” should not be defined in primary or secondary legislation. That would still leave open the possibility of non-statutory guidance as to what types of may be appropriately be protected – we note, for example, the statement in TAN 10 that “A TPO cannot apply to bushes, shrubs or hedges. However a TPO may be made to protect trees in hedges or an old hedge which has become a line of trees”. We consider that approach to be more appropriate.

¹⁹ (1980) 40 P&CR 246 at 251. See also TAN 10, para 5.

²⁰ See our comments in the previous Chapter on the definition of “advertisement”.

²¹ *R (Fowler) v Ealing LBC* [2004] EWHC 2860 (Admin), at [13] to [16].

²² *New Oxford Dictionary of English*, 1st Edn, 1988.

²³ See **footnote 17**.

- 15.27 We also consider below the possibility of exempting from the need for consent works to smaller trees.²⁴
- 15.28 A TPO may also protect a “woodland” – and the law relating to woodland orders is slightly different from that applying to orders protecting individual trees and groups; the Court of Appeal has noted that a woodland order is “a different animal” from an area order.²⁵ It is sometimes argued that a particular group of trees does not constitute a “woodland”. However, as noted by Sullivan J in *R (Plimsole Shaw Brewer) v Three Rivers DC*, that is pre-eminently a question of fact and degree for the planning authority to decide.²⁶ We do not consider that a statutory definition would assist.

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?

Policy basis for protection

- 15.29 A planning authority may only make a TPO where it appears to the authority that it is expedient to protect a tree or woodland “in the interests of amenity”.²⁷ Unfortunately, the meaning of the term “amenity” is not entirely clear, and its usage in everyday speech has gradually changed over the last 70 years.
- 15.30 Traditionally it has been assumed that “amenity” in this context refers solely to visual amenity – whether a tree provides public benefit is a matter of what it looks like, and how readily visible it is to how many people. One definition of “amenity” referred to in a decision of the High Court from 1968 is “visual appearance and the pleasure of its enjoyment”.²⁸ And we note that the recent Welsh Government Consultation Paper on *Natural Resources* suggests that:

The “amenity” test does not, for example, take into account the wider value of ancient, veteran and heritage trees, particularly their often significant biodiversity value.²⁹

²⁴ See **paras 15.81 to 15.85**.

²⁵ *Evans v Waverley BC* [1995] 3 PLR 81, CA, per Hutchinson LJ at p 93D. As to area orders, see **paras 15.41 to 15.45**.

²⁶ [2007] EWHC 1290 (Admin) at [12].

²⁷ TCPA 1990, s 198(1). This will not be not affected by the changes to be made by the Planning Act 2008 (see **para 15.8**).

²⁸ *Cartwright v Post Office* [1968] All ER 646 at p 648.

²⁹ *Taking Forward Wales’s Sustainable Management of Natural Resources*, Welsh Government, June 2017, p. 26 – paragraph (a).

- 15.31 The corresponding provision applying in Scotland explicitly refers to the possibility of a TPO being made either in the interests of amenity or because the trees or woodlands in question are of cultural or historical significance or both.³⁰ That suggests that “amenity” does not extend to include the wider significance of a tree.
- 15.32 However, a wider meaning of the term may be implied by a decision the Court of Appeal in 1981, to the effect that “amenity” means “pleasant circumstances or features, advantages”.³¹ And one dictionary definition suggests that it means “the pleasantness or attractiveness of a place”.³²
- 15.33 The general perception as to the value of trees, both by relevant professionals and more generally by the public, is now based on a significantly wider range of factors than would be encompassed by the concept of visual amenity alone. This is particularly so in relation to ancient, veteran and heritage trees, as indicated by the quotations above. Further, section 6(1) of the Environment (Wales) Act 2016 requires public authorities to seek to maintain and enhance biodiversity in the exercise of their functions.
- 15.34 We therefore consider that it would be desirable to make it plain that a tree preservation order may be made on the basis of factors other than appearance (visual amenity). To do so would both clarify the law and bring it into line with current thinking as to the basis on which an order ought to be made.
- 15.35 We note that regulation 4 of the TCP (Control of Advertisements) Regulations 1992, considered in the previous Chapter, provides that, in exercising powers under those Regulations, an authority is to do so in the interests of amenity and public safety; and it then goes on to list (on a non-exclusive basis) some factors that are relevant to amenity and some to public safety.³³ We provisionally consider that a similar approach could be adopted in relation to the exercise of functions of the Code relating to trees. The Bill could thus state
- (1) that those functions are to be exercised in the interests of amenity;
 - (2) that “amenity” for these purposes includes appearance, rarity, biodiversity, and historic, scientific and recreational value; and
 - (3) that the Welsh Ministers may provide in regulations a list of factors relevant to amenity.
- 15.36 The Regulations could then include, if it were considered desirable, a more detailed list of factors to be taken into account in the interests of amenity. That would enable the legislation to be changed more readily to reflect changing policy imperatives,

³⁰ TCP (Scotland) Act 1997, s 160(1), (1A), substituted by Planning etc (Scotland) Act 2006, s 28.

³¹ *FFF Estates v Hackney LBC* [1981] QB 503, CA, per Stephenson LJ at p 517, citing with approval the dictum of Scrutton LJ in *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at p 370.

³² Oxford Dictionary.

³³ See **para 14.2**.

15.37 In addition, the inclusion – as we proposed earlier – of a general duty to have regard to the development plan and to national policy will mean that those will automatically be relevant to the exercise of functions in relation to trees. Many development plans already contain policies and supporting text relating to the use of TPOs to protect trees. National policy is in TAN 10, of which an updated version will no doubt be issued at the same time as the new system introduced by the Planning Act 2008 comes into effect in Wales.

15.38 Such policies and guidance are invariably framed to be in the interests of amenity – in the wider sense of that term, outlined above – so that the reference to the development plan in this context will help to create a joined-up system.

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?

The making of tree preservation orders

15.39 The TCPA 1990 states that a planning authority may make an order to preserve “trees, groups of trees or woodlands”.³⁴ The 1999 Regulations require that an order “shall specify the trees, groups of trees or woodlands to which it relates”.³⁵ And the current model order (in the Schedule to those Regulations³⁶) prohibits the cutting down [etc] of “any tree specified in Schedule 1 to this Order or comprised within a group of trees or in a woodland so specified”. And all orders require to be confirmed if they are to have effect for more than six months after they are made.

15.40 An order protecting a single tree or a group of individually specified trees is straightforward – the trees to be protected are specified in a schedule, and shown on a map attached to the order.

15.41 However, the Schedule to the model order envisages that it may protect “trees specified individually” or “trees specified by reference to an area”, “groups of trees”

³⁴ TCPA 1990, s 198(1).

³⁵ TCP (Trees) Regulations 1999, reg 2(1)(a).

³⁶ See **para 15.6**.

and “woodlands”.³⁷ This introduces the concept of an “area order”, not referred to anywhere else in the legislation. An “area” order is designed to protect all trees, of whatever age or species, growing anywhere within an area shown on an Ordnance Survey plan accompanying the order.

- 15.42 This raises several problems. First, it is commonly assumed that an area order only protects those trees that were in existence at the time the order was made. As time goes on this becomes increasingly problematic.
- 15.43 Secondly, the Court of Appeal in *Evans v Waverley BC* has held that woodland orders protect all trees, of whatever species or age, that are within the relevant block of land.³⁸ However, the prohibition in the model order (noted above) relates to “any tree specified in Schedule 1 ... or comprised within a group of trees or in a woodland so specified”. It is not clear why the approach in *Evans*, if correct, would not also apply to the interpretation of an area order, so that it would protect all trees in the area, whether or not they were in existence at the time the order was made. If there is to be a distinction between area orders and woodland orders, it should be made explicit on the face of the Bill.
- 15.44 Thirdly, area orders are in a number of cases used on a precautionary basis to protect all trees on a large site on which development seems likely. The hope is that, once the development has been approved and completed, the remaining trees (including any new ones planted in pursuance of landscaping conditions) can then be protected by individual or group orders as appropriate. But in many cases the old area order remains in place indefinitely, even though the position on the ground will be completely different from when the order was made.
- 15.45 The use of area orders has for many years been discouraged by the UK Government. TAN 10 thus states that “the area classification should only be used exceptionally, and only until the trees can be given individual or group classification”.³⁹ The courts too have urged authorities to exercise care in not making “blanket TPOs”.⁴⁰ The UK Government proposed in 1994 to introduce a new provision requiring that area orders, after they had been confirmed, should be converted to orders specifying the trees being protected individually or by reference to groups; and that existing area orders would cease to have effect after a five-year transitional period.⁴¹ We provisionally consider that that is still a sensible approach.
- 15.46 As to woodland orders, if the approach of the courts in *Evans* (noted above) were not correct, it would be administratively burdensome to have to renew orders at regular intervals to ensure the protection of trees coming into existence (either planted or self-seeded) after an order had first been made. We therefore consider that it would

³⁷ Sch 1 to the sample order (in the Schedule to the TCP (Trees) Regulations 1999,

³⁸ *Evans v Waverley BC* [1995] 3 PLR 81, CA, at p 87B, 93C; *R (Plimsoil Shaw Brewer) v Three Rivers DC* [2007] EWHC 1290 (Admin) at [22]; *Palm Developments Secretary of State* [2009] EWHC 220 (Admin), 2 P&CR 16, at [42].

³⁹ TAN 10, Annex A, para A.5; see also Welsh Office Circular 64/78, *Memorandum*, para 43.

⁴⁰ *Robinson v East Riding of Yorkshire Council* [2002] EWCA Civ 1660 at para 24.

⁴¹ *Tree Preservation Orders: Review*, Department of the Environment, 1994, paras 2.16-2.19.

be helpful to confirm that they do indeed protect all trees – of whatever age – within the specified area.

- 15.47 We therefore provisionally propose that the powers in the Bill enabling the Welsh Ministers to make regulations as to tree preservation orders provide
- (1) for orders to be made to protect trees, specified individually or by reference to an area; groups of trees; and woodlands;
 - (2) that orders relating to trees specified by reference to an area or groups of trees protect only those trees that were in existence at the time the orders were made;
 - (3) that all orders cease to have effect unless they have been confirmed within six months;
 - (4) 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;
 - (5) that existing area orders, already confirmed as such, cease to have effect after five years; and
 - (6) that woodland orders protect all trees, of whatever age and species, within the specified area, whether or not they were in existence at the date of the order.

Consultation question 15-3.

We provisionally propose that the Bill and the Regulations made under it should provide:

- (1) 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?

Notification of new orders

15.48 Any breach of a tree preservation order is a strict liability offence. In order to minimise the chance of anyone inadvertently committing an offence, therefore, it is therefore important that:

- (1) the making (and subsequent confirmation) of an order is promptly and properly notified to all those likely to be affected, who may be about to carry out works to the tree in question;⁴²
- (2) the existence of the order is made a local land charge, so as to bring it to the attention of future owners of the property; and
- (3) a copy of the order is kept available for public inspection, to inform those intending to carrying out works in the future.

15.49 This is achieved by procedural requirements in the relevant regulations.

15.50 As to the first point, the 1999 Regulations require an order to be notified to the owners and occupiers of any land affected by an order and any neighbouring land.⁴³ In some cases, this can be a major administrative exercise. The 2012 Regulations in England

⁴² See for example *Knowles v Chorley BC* [1998] JPL 593.

⁴³ TCP (Trees) Regulations 1999, reg 1(2).

sought to simplify this, by limiting the notification to the owners and occupiers of “the land on which the trees [etc] are situated”. This leaves unclear precisely what is required in the common situation of a tree growing close to the boundary of a plot, overhanging a neighbouring plot.

- 15.51 We provisionally consider that the regulations should make it clear that an 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.
- 15.52 We consider the significance of the third point in the context of prosecutions for unauthorised works.⁴⁴

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?

WORKS TO PROTECTED TREES

Overlap with planning permission

- 15.53 In our Scoping Paper, we noted that there was some overlap between planning permission and consent for works to protected trees.
- 15.54 This arises partly because the carrying out of works to trees could be said to be development, requiring planning permission – as such works have something in common with landscaping works, which are sometimes considered to be engineering operations. It is true that a tree is part of the land itself, but so are minerals before they are extracted. However, we note that “mining operations” are specifically highlighted as a separate category of development; and that there appears to be no reported case in which anyone has even suggested, far less successfully argued, that tree works are development requiring planning permission.
- 15.55 We therefore do not see any need for any clarification of the law to include works to trees within the scope of development requiring planning permission.
- 15.56 Secondly, tree works are sometimes carried out in association with development proposals. However, in each case, the relevant regulations ensure that the grant of permission overrides the need for consent under any tree preservation order, or notice in relation to any conservation area, or felling licence, as the case may be. It

⁴⁴ See paras 15.114 to 15.119.

is therefore desirable if those considering applications for such consents are aware of the general planning position, and if those considering the grant of planning permission are aware of the implications of the proposed development on any trees. But there is no question of two consents being required.

- 15.57 However, more often tree works are carried out as an entirely freestanding operation, and there is no overlap with mainstream planning control.
- 15.58 We therefore do not see any benefit in bringing works to trees within the general planning system.

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?

Need for consent

- 15.59 As would be expected, there are many exceptions to the general rule that consent is required for all works to a tree protected by a tree preservation order.
- 15.60 Under the current law (prior to amendment by the Planning Act 2008), the principal exceptions are contained within the TCPA 1990:
- (1) works to trees that are dying, dead or dangerous;
 - (2) works necessary as a result of a statutory requirement;
 - (3) works necessary to prevent or abate a nuisance; and
 - (4) forestry works approved by Natural Resources Wales.⁴⁵

Other exceptions are provided within the order itself – the precise wording of which will depend on the model order in force at the time it was made.

- 15.61 Under the new system, introduced by the Planning Act 2008, all of the exceptions to the need for consent – regardless of the date of the order – will be in the regulations made under the Act, which will no doubt be slightly amended from time to time. This will be much simpler. However, there are some difficulties with the present exceptions, which could usefully be resolved when consideration is being given to the exceptions to be included in the new regulations.

⁴⁵ TCPA 1990, ss 198(6), 200.

Works to dead, dying or dangerous trees

- 15.62 Under the current law, section 198(6)(a) of the TCPA 1990 provides that a tree preservation order may not prevent the cutting down, uprooting, topping or lopping of “trees which are dying or dead or have become dangerous”.
- 15.63 It has long been recognised that determining whether a tree is “dying” is fraught with uncertainty. And it is often claimed, after a tree has been felled, that it was dangerous. When the new system was introduced in England, therefore, the Regulations excepted from the need for consent only the following categories of works:
- “14(1)(a) the cutting down, topping, lopping or uprooting of a tree
- (i) which is dead...
 - (b) the removal of dead branches from a living tree;
 - (c) the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken;
...⁴⁶
- 15.64 This effectively removes the “dying” element of the exception in section 198(6)(a), and tightens up the “dangerous” element.
- 15.65 The new exception relating to dead branches is clearly designed to allow householders and others to remove deadwood regularly without consent, thus rendering lawful activity that has no doubt occurred on very many occasions. It is to that extent sensible. But it may have unfortunate consequences where, as commonly occurs with veteran trees, a substantial proportion (but not the whole) of a tree is dead – since it would be possible to remove, perfectly lawfully, one branch after another until there is no point in keeping what is left.
- 15.66 In Scotland, by contrast, the corresponding exception in the TCP (Scotland) Act 1997 provides that an order is not to prohibit “the uprooting, felling or lopping of trees if it is urgently necessary in the interests of safety”.⁴⁷ That makes no provision for the felling without consent of trees that are “dying” or “dead”. Nor is there any such exception in the current model order.⁴⁸ That means that if a tree is dead (or dying) **and** dangerous, consent will not be required to make it safe. And if the removal of a branch is necessary for safety reasons – for example because of a weak fork – that too would not need consent. But the need for consent cannot be avoided merely because a tree is dead or dying, so long as it is not dangerous.
- 15.67 We are aware that a tree that is dead or dying may in some cases be a significant habitat for wildlife; and that its removal may for that reason be undesirable. In other

⁴⁷ TCP (Scotland) Act 1997, s 160(6)(a).

⁴⁸ Scottish Government Circular 1 of 2011, *Tree Preservation Orders*, Annex A.

cases, the removal of a dead or dying tree may be appropriate where it has become unsightly, possibly followed by the planting of a suitable replacement. Distinguishing between these two situations is a matter best left to the discretion of the planning authority. But there is no reason why such works should be exempt from the need for consent – unless the tree in question is dangerous.

- 15.68 We provisionally suggest, therefore, that the approach taken in Scotland is preferable, so that exceptions equivalent to those in regulation 14(1)(a)(i) and (b) of the new English Regulations need not be included when corresponding regulations are introduced in Wales.⁴⁹
- 15.69 As to works said to be necessary for safety, we consider that the approach taken in regulation 14(1)(c) of the new English Regulations is preferable to that envisaged by the current wording of section 198(6)(a) of the TCPA 1990, in that the former focusses on the necessity of the particular works proposed, rather than on the state of the tree. The new English provision is also more tightly drafted than the corresponding exemption in Scotland. It also accords with the decision of the Court of Appeal in *R v Brightman*, which established that a duty lies on the accused to establish that a tree was dangerous at the time of the works, not on the authority to prove that it was not.⁵⁰ And it follows the approach that has been taken since 1986 in relation to works to listed buildings that are said to have been necessary for health or safety.

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?

Works to prevent or abate a nuisance

- 15.70 Under the current law, section 198(6)(b) of the TCPA 1990 (prior to amendment by the Planning Act 2008) provides that a tree preservation order may not prevent “the cutting down, uprooting, topping or lopping of any trees ...so far as may be necessary for the prevention or abatement of a nuisance”. The corresponding provision in Scotland is in identical terms.⁵¹

⁴⁹ *Taking Forward Wales’s Sustainable Management of Natural Resources*, Welsh Government, June 2017., p 26 – paragraph (b).

⁵⁰ [1990] 1 WLR 1255.

⁵¹ TCP (Scotland) Act 1997, s 160(6)(b).

- 15.71 This provision has given rise to considerable uncertainty.⁵² Many trees overhang property boundaries. On one interpretation of s 198(6)(b), the branches or roots of a protected tree that cross a boundary can only be removed without consent where they can be shown to cause “actionable damage” – notably by roots extracting moisture from soil beneath the foundations of a neighbouring building. On the other interpretation, they can be removed wherever they encroach into neighbouring airspace or soil, without there being any need to show that they have caused any damage (the latter is sometimes referred to as “pure encroachment”).
- 15.72 A provision in the same terms has been in existence in each planning Act in England and Wales since 1947. The position at common law at that date was as had been stated by the Court of Appeal in *Lemmon v Webb* half a century earlier, as follows:
- The encroachment of the boughs and roots [of a tree] over and within the land of an adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this, an action on the case would lie. Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so.⁵³
- 15.73 That decision, which was followed in other pre-1947 decisions,⁵⁴ strictly related only to encroaching branches; but it was more recently adopted by the House of Lords in *Delaware Mansions Ltd v Westminster CC* in relation to encroaching roots.⁵⁵ And it has also been followed in very many other cases over the years. It was also held in *Delaware Mansions* that “damage consisting of the impairment of the load-bearing qualities of residential land is ... itself a nuisance”.⁵⁶
- 15.74 The phrase “the abatement of a nuisance” thus had a clear and well-established meaning well before its first appearance in the context of tree preservation orders in the TCPA 1947 (and earlier private legislation⁵⁷). It referred then, and still refers, to the self-help remedy available to anyone who owns or occupies land over or in which there is a branch of a tree that is growing on neighbouring land. There was no need to prove damage. Lord Parker CJ in *Edgeborough Building Co v Woking UDC* thus

⁵² TAN 10, para 26 notes that “the legality of such action is uncertain”.

⁵³ *Lemmon v Webb* [1894] 3 Ch 1, CA, per Kay LJ at p 24. That decision also reviewed all the authorities going back to the eighteenth century; and was not doubted when the case went on to the House of Lords ([1895] AC 1).

⁵⁴ *Smith v Giddy* [1904] 2 KB 448, *Mills v Brooker* [191] 1 KB 555 (branches); *Butler v Standard Telephones and Cables* [1940] 1 All ER 121 (roots).

⁵⁵ *Delaware Mansions Ltd v Westminster CC* [2002] AC 321, HL at [12], per Lord Cooke of Thorndon; and see the decision of the Court of Appeal in *Davey v Harrow Corpn* [1958] 1 QB 60.

⁵⁶ (1998) 88 BLR 99 at [33]. It is not clear why this principle should be limited to residential land.

⁵⁷ See, for example, Essex County Council Act 1933, s 144: “no person shall cut down ... any tree ... except ... (c) to such an extent as may be necessary to prevent its constituting a nuisance to the owner or occupier of neighbouring lands; or (d) to such an extent as may be necessary in pursuance of a right to abate a nuisance.”

considered (obiter) that there was much to be said for the view that there was no reason for departing from the ordinary meaning of “nuisance” in the legal sense.⁵⁸

- 15.75 More recently, in *Perrin v Northampton BC*, it was argued that the nuisance identified in section 198(6)(b) did not have to be an “actionable nuisance”, but merely a nuisance in the broader sense of the common law. At first instance, Judge Peter Coulson QC, sitting in the Technology and Construction Court, considered that argument to be incorrect.⁵⁹ However, when the case went on to the Court of Appeal, both Sir John Chadwick and Blackburne J had some doubt as to whether it was possible to distinguish between “actionable nuisance” and “pure encroachment”. The latter noted that “it is, to say the least, surprising, that if Parliament intended the expression involved some ingredient over and above “pure encroachment” it did not say so.” However, the Court allowed the appeal on other grounds, and did not have to decide the point.⁶⁰
- 15.76 The precise meaning of the phrase “abatement of a nuisance” thus remains uncertain; it is indeed probably one of the most significant of the legal issues raised in this Chapter, particularly in the light of the number of protected trees growing on or close to property boundaries. We provisionally consider that it would be helpful for that uncertainty to be resolved.
- 15.77 Thus, it commonly occurs that a tree in A’s garden overhangs the boundary with B’s garden, and affects both A’s property and B’s property – either by, for example, shedding leaves and blocking drains, or by causing foundations to subside. If the tree is protected by a TPO, under the present law, A requires consent to carry out the works to the parts of the tree in or above his garden; but B probably does not require consent to carry out works to the roots or branches in or above her garden (even if they amount to almost half the tree). This seems illogical.
- 15.78 The Government has, in the past, suggested introducing a new requirement whereby works to prevent or abate an actionable nuisance could be carried out without consent, but subject to a requirement to give prior notice to the planning authority. That seems very cumbersome, and begs the question of what, precisely, constitutes an actionable nuisance.
- 15.79 We provisionally consider that it would be more straightforward to abolish altogether the “nuisance” exemption, so that landowners would still have a common law right (as per *Lemmon v Webb*) to remove an encroaching root or branch, but would have to apply to the planning authority for consent under any TPO protecting the tree. Such an application could presumably be dealt with on precisely the same basis as where a tree is causing similar problems on the land on which it is growing – no doubt the authority (or, on appeal, the Welsh Ministers) would give those problems appropriate weight, and balance them against any effect on amenity that would arise as a result of the proposed remedial works.

⁵⁸ (1966) 198 EG 581.

⁵⁹ [2007] 1 All ER 929, 1 P&CR 481, JPL 723 at [34], [35].

⁶⁰ [2008] 1 WLR 1307, CA at [27], [29], [66], [67]. Wall LJ agreed with both judgments.

15.80 This proposal, if implemented, would potentially lead to more applications for consent than at present. However, because of the considerable uncertainty as to the law that currently exists, we suspect that very few people proposing to carry out works to protected boundary trees actually rely on the exemption at present. We therefore consider that the resources implications arising from a slight rise in the number of applications would be counterbalanced by a decrease in uncertainty. But we would welcome the views of consultees on this point.

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?

Works to saplings

15.81 Tree preservation orders are generally made to protect trees of reasonable size. But they may in some situations protect saplings from the moment they are planted – notably when they are introduced to replace a mature tree whose felling has been permitted, or are required by a landscaping condition attached to a planning permission for new development, or (under section 206 of the TCPA 1990⁶¹) following the removal of a tree because it is dead or dangerous or has been removed unlawfully. In such a case it would be illogical for the owner of the sapling to be able to remove it without consent.

15.82 However, an order will also apply to self-seeded saplings within a protected woodland – since, as noted above, a woodland order protects all trees, even those first appearing many years after it was made. In that case, it would be unhelpful to require consent to be obtained for the removal of undergrowth and scrub (which is likely to contain such saplings).

15.83 There is an exemption from the need to notify the planning authority of works to a tree in a conservation area where the tree in question is less than a specified size.⁶² But there is no equivalent exemption from the need to obtain consent where the tree is protected by a TPO. However, the most recent model order in Scotland contains just such a provision, whereby consent under the order is not required for the cutting down, uprooting, topping or lopping of a tree having a diameter not exceeding 75mm (or 100mm in a woodland where the work is to improve the growth of other trees).⁶³

⁶¹ See **para 15.92**.

⁶² TCP (Trees) Regulations 1999, reg 10(1)(e), (f).

⁶³ Art 4(c), (d) of the model order at Scottish Govt Circular 1 of 2011, *Tree Preservation Orders*, Annex A.

This allows for the thinning of woodlands, although it does not protect newly planted saplings in other cases.

- 15.84 We provisionally consider that there should be a limited exemption from the need for consent in relation to small saplings, but not where they were planted as a result of
- (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.
- 15.85 That would protect saplings that had been deliberately planted and merited preservation, but would enable undergrowth and scrub to be removed in woodlands on a regular basis without fear of prosecution.

Consultation question 15-8.

We provisionally propose that a new exemption from consent under tree preservation regulations should be introduced, to allow the carrying out without consent of works to trees having a diameter not exceeding a specified size, save in the case of trees that were planted as a result of

- (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?

Certificate as to need for consent

- 15.86 As with the display of advertisements, there can be considerable uncertainty as to whether consent is required for proposed works to a tree or woodland, and particularly as to whether it falls within one or more of the exemptions in the Act or the order (or, under the new system, in the regulations). And here too, this is particularly unfortunate given that the carrying out of works to protected trees without consent is a criminal offence.
- 15.87 It is possible to seek an informal opinion from an authority; but such an opinion will not necessarily bind it in the event of subsequent enforcement proceedings.⁶⁴ And it would in theory be possible to obtain from the High Court a declaration as to the need for consent.⁶⁵ But it is not possible to obtain from the planning authority a binding certificate of lawfulness, as there is no link with planning permission (as there is in relation to at least some displays of advertisements).
- 15.88 Again, therefore, we provisionally consider that it would be more straightforward for there to be a mechanism, not dissimilar to that governing applications for certificates

⁶⁴ *Postermobile v Brent LBC*, the Times, 8 December 1997; *R v Westminster CC) v National Car Parks* [2002] 21 February, unreported; see **para 14.67**.

⁶⁵ Although this may be difficult in practice; see *Chambers v Guildford BC* [2008] JPL 1459, QB.

of lawfulness of proposed development (CLOPUDs), whereby anyone could seek a binding decision as to the lawfulness of proposed works to protected trees – that is, as to whether they would amount to an offence under section 210 of the TCPA 1990 if they were to be carried out. Such a certificate, if issued, would then prevent the authority from instituting a prosecution.

- 15.89 As with our similar proposal relating to certificates as to the need for consent for the display of advertisements⁶⁶, we would welcome the views of consultees as to how many such applications there might in fact be for certificates as to the need for consent for tree works, and as to whether the burden of processing them would be greater or less than the benefit that would arise from having an easy means of achieving certainty.
- 15.90 The procedure as to such applications would probably best be included in the new Regulations when the new system is brought into effect; but the enabling provisions in the Bill would need to be adjusted accordingly.

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?

Applications for consent

- 15.91 There is at present no requirement for a planning authority to acknowledge receipt of an application for consent under a tree preservation order, as there is with other types of application under the TCPA 1990. Government guidance in England suggested that to do so would be good practice.⁶⁷ We suggest that this omission could be rectified when new regulations are made.

⁶⁶ See **para 14.70**.

⁶⁷ *Tree Preservation Orders: A Guide to the Law and Good Practice*, Department of the Environment, 2000, para 6.42.

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?

REQUIREMENT TO PLANT REPLACEMENT TREES

Location of the replacement tree

- 15.92 Section 206 of the TCPA 1990 imposes a duty to plant a replacement tree where
- (1) a tree protected by a tree preservation order is removed, uprooted or destroyed unlawfully, or
 - (2) a tree protected by an order (other than a woodland order) is removed without consent because it is dead, dying or dangerous.
- 15.93 The replacement tree is to be planted “at the same place”, unless the planning authority agree to vary the requirement. In practice, planting at precisely the same place is often not practical – or it is unnecessarily expensive due to the need to remove the remains of the previous tree. We provisionally consider that it would be sensible to relax the requirement slightly, to allow the replacement tree to be planted “at or near” the location of the original tree.⁶⁸
- 15.94 This would reflect the replanting requirement as it applies to protected woodlands, which requires the replacement of trees that have been removed etc by the planting of the same number of trees “on or near” the land on which those trees stood.

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?

Variation of tree replacement notice

- 15.95 If a landowner fails to comply with a requirement to plant a tree either under section 206 of the TCPA 1990 or under a condition of a consent to fell a protected tree, the

⁶⁸ And see *Tree Preservation Orders: Review*, Department of the Environment, 1994, paras 2.44, 2.45.

authority may enforce the requirement by the service of a replacement notice under section 207. There is a right to appeal against such a notice under section 208.

- 15.96 It appears that there is at present no power for a planning authority to waive or relax a replacement notice. However, the Courts have held that an authority may enforce only some of the requirements of a planning enforcement notice⁶⁹; and there is no reason why it should not also be able to vary a tree replacement notice, albeit not in such a way as to extend its scope.
- 15.97 We provisionally consider that the present exercise provides a good opportunity to introduce an explicit power to vary a replacement notice.⁷⁰

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?

Costs incurred by the planning authority

- 15.98 Section 209 of the TCPA 1990 provides that, where a replacement notice is not complied with, a planning authority may take action itself to carry out the required work, and recover the cost from the owner of the land. Section 209(5) provides that regulations may provide for any expenses incurred by an authority to be registered as a charge on the land, to enable recovery from subsequent purchasers. However, no such regulations have been made.⁷¹
- 15.99 It could be that the absence of a power for an authority to recover the costs it incurs in planting replacement trees could act as a deterrent to it taking such action; and the production of regulations to introduce the new system of tree preservation orders would be an opportunity to rectify this omission. On the other hand, the costs involved in planting replacement trees are not likely to be great, and the cost of recovering them are likely to be almost as great, which might make recovery not worthwhile.

⁶⁹ *Arcam Demolition & Construction Co. Ltd. v Worcestershire CC* [1964] 1 WLR 661.

⁷⁰ *Tree Preservation Orders: Review*, Dept of the Environment, 1994, para 2.47.

⁷¹ Compare TCP General Regulations 1992 (SI No 1492), reg 14(2) (enforcement notices) and reg 14(3) (waste land notices).

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?

UNAUTHORISED WORKS TO TREES

15.100 Section 210(1) of the TCPA 1990 provides that it is an offence

- (1) to cut down, uproot, or wilfully destroy a protected tree;
- (2) wilfully to damage, top or lop the tree in such a manner as to be likely to destroy it; or
- (3) to cause or permit any of those activities.

A person guilty of an offence under section 210(1) is liable on summary conviction, or on conviction on indictment, to a fine (of any amount).⁷²

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

Reckless or indirect damage

15.102 The wording of section 210(1) indicates that the offence under that subsection is only committed where destruction or damage is “wilful”. It might at first sight appear that this would not extend to damage etc caused as a result of acts that are carried out recklessly as to whether or not they will have that effect. A notable example is where a statutory undertaker, or a contractor on its behalf, is carrying out a programme of cable or pipe renovation over a large area including a number of protected trees.

15.103 Other examples of activities that might lead to trees being damaged include interfering with the water table, the use of harmful chemicals, the raising or lowering of soil levels (particularly during development) and the grazing of animals in woodlands. All of those might well have the effect of killing trees, even if only gradually, but it might be difficult or impossible to prove that the result was consciously intended.

15.104 The Courts have held that the word “wilful” in a criminal statute includes recklessness.⁷³ We consider that the phrase “intentional or reckless” is clearer than

⁷² TCPA 1990, s 210(2), amended by 2015 SI 664, Sched 4, para 18.

⁷³ *R v Sheppard* [1981] AC 394, per Lord Diplock at p 398.

“wilful” – and arguably has the same meaning.⁷⁴ We provisionally consider that the present exercise provides a good opportunity to make such a change.⁷⁵

Consultation question 15-14.

We provisionally propose that the scope of the matters prohibited by a tree preservation order be extended to include the causing of harm to a 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?

One offence or two

- 15.105 In the TCPA 1947, the relevant offence was simply the contravention of a tree preservation order; the maximum penalty was a fine of fifty pounds. This presumably included both the felling of a magnificent specimen tree and the removal of a branch of a tree in a woodland.
- 15.106 Problems can arise where works (other than cutting down, uprooting or destruction) have been carried out in circumstances such that, at the time of mounting a prosecution, it is not clear whether or not they will lead to the destruction of the tree. If a contractor is charged under section 210(1), the evidence adduced may be sufficient to prove that the contractor carried out works to a tree, and thus to justify conviction under section 210(4), but not to prove beyond reasonable doubt that those works were likely to destroy the tree.
- 15.107 The distinction between the two offences was introduced in the Civic Amenities Act 1967. The original Bill (a private members’ Bill) simply proposed increasing the maximum penalty for any contravention of an order, from £50 to £250. In response, the Government proposed an amendment that was subsequently enacted, differentiating between the two categories.⁷⁶ The fines have since been substantially increased.⁷⁷
- 15.108 If the trial is in the Magistrates’ Court, the bench can simply find the accused guilty of the lesser offence, but only if there is a separate charge on the summons referring to subsection (4).⁷⁸ However, if the accused has opted for jury trial, that course is not

⁷⁴ Blackstone, *Criminal Practice*, 2017, para A2.13.

⁷⁵ See also *Tree Preservation Orders: Review*, Dept of the Environment, 1994, paras 2.40, 2.41, which suggested proscribing damage caused “negligently or indirectly”

⁷⁶ Standing Committee C, 8 February 1967, col 123.

⁷⁷ See paras 15.100, 15.101.

⁷⁸ *Lawrence v Same* [1968] 2 QB 93.

open, since the offence under subsection (4) is only triable summarily. Whilst a jury may find an accused person guilty of a lesser offence, it may only do so if the lesser offence is triable either way.⁷⁹ It follows that an accused person who has been charged with the more serious offence, whether or not in conjunction with a charge on the lesser offence, if he or she considers that the evidence may only support conviction on the latter, should opt for jury trial and then submit that there is no case to answer on the former.

- 15.109 It is also possible for an unscrupulous developer to destroy a tree that is inconveniently located by carrying out a series of relatively minor operations, each of which would only be punishable under subsection (4), but which together would render the tree not worth saving.
- 15.110 The simple solution to this problem would be to revert to the formula used in the TCPA 1947, referring to “any breach of a tree preservation order” – or, under the new system introduced by the Planning Act 2008, “any contravention of tree preservation regulations”. Such a change was proposed by Alun Michael MP when the 2008 Act was proceeding through the House of Commons, but did not attract Government support.⁸⁰
- 15.111 It would also bring the law relating to unauthorised works to trees in line with the position as to unauthorised works to listed buildings, in relation to which section 9 of the Listed Buildings Act 1990 simply provides that contravention of section 7 is an offence – triable either way, with an unlimited fine on conviction.⁸¹ Section 7 in turn simply states that “no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration in any manner which affects its character as a building of special architectural or historic interest unless the works are authorised”.
- 15.112 That clearly envisages a range of circumstances from the demolition of a Grade I building through to the removal of a chimney-pot from a Grade II building. In practice, the level of harm is reflected in the sentence imposed.⁸²
- 15.113 We provisionally consider that it would be more straightforward to replace section 210(1) and 210(4) of the TCPA 1990 with a single offence, consisting of any contravention of tree preservation regulations.

⁷⁹ Criminal Law Act 1967, s 6(3).

⁸⁰ Proposed amendment no 439 to clause 157. Hansard, 25 January 2008, col 407.

⁸¹ Listed Buildings Act 1990, s 9, amended by 2015 SI 664, Sched 4, para 19.

⁸² In line with the guideline cases *R v Duckworth* (1995) 16 Cr App R (S) 529 at p 531 and *R v Palmer* (1989) 121 Cr App R (S) 407 at 408, and guidance from the Sentencing Advisory Panel.

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?

The need to prove an order is available for inspection

15.114 It has already been noted that it is important that a copy of a tree preservation order is kept available for public inspection, to inform those who may wish to carry out works to the tree in question many months or even years after it was made.⁸³ It was partly the existence of this requirement that enabled the Divisional Court in *Maidstone BC v Mortimer* to conclude that the offence under section 210 of the TCPA 1990 was an offence of strict liability, not requiring proof by the prosecution of knowledge on the part of the accused. It noted that

“it is not a difficult task for any member of the public ... to obtain from the local authority reliable information on the question whether the tree is subject to a preservation order.”⁸⁴

15.115 The consequence of an authority failing to comply with the requirement as to keeping a copy of the order available for inspection were considered by the Divisional Court in *Vale of Glamorgan v Palmer*, in which the accused had tried to discover whether a tree was protected, but had failed to discover the existence of the order.⁸⁵ The Court observed that the quoted passage in *Maidstone* presupposed that a copy the relevant order was in fact available to be inspected at the time of the works. It went on to hold that where an authority could not establish that the order had been deposited for inspection, it could not be relied upon to found a prosecution.

15.116 Unfortunately, the Court in *Vale of Glamorgan* went on to hold that a failure to make the order available for inspection rendered it “invalid”. That seems to be incorrect, since the validity of an order could only be challenged by an application to the High Court made within six weeks of it being confirmed; it is not open to the accused in a criminal trial to argue that an order is invalid. But the Divisional Court was clearly seeking to emphasise that such procedural requirements are important; so the accused in such a situation might have to rely on applying to have the prosecution stayed as an abuse of process. However, that seems to place too high a burden on someone who has in good faith tried to comply with the requirements of the law.

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

⁸³ See **para 15.48** above.

⁸⁴ [1980] 3 All ER 552, per Park J at p 554f.

⁸⁵ [1984] JPL 334.

been served on the person carrying out the works – rather than for those who are accused to have to show that the order has neither been served on them nor made available for inspection.

15.118 The offence in section 210 (as it will be following amendment by the Planning Act 2008) relates to the carrying out of various categories of works to a prohibited tree in contravention of tree preservation regulations; and the regulations (in England) prohibit to works to “a tree to which an order relates”.⁸⁶ We provisionally consider that the equivalent regulations in Wales should refer to the carrying out of works to a tree that is the subject of an order of which a copy had been served on the person carrying out the works, or of which a copy had been made available for inspection at the time of the works.

15.119 It would also be appropriate for there to be a defence to a charge if the accused is 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. That would enable the authority to prosecute contractors who had been personally served with a copy of the order, but would avoid liability attaching to, for example, an absentee owner to whom a copy of the order had not yet been sent.

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**

that a defence should be available to a person charged with such an offence if able to show that he or she had not been served with a copy of the order and did not know, and could not reasonably have been expected to know, of its existence.

Do consultees agree?

⁸⁶ TCP (Tree Preservation) (England) Regulations 2012.

TREES IN CONSERVATION AREAS

Notification procedure: the existing law

- 15.120 The existing legislation providing protection for trees in conservation areas is somewhat unsatisfactory, in that it involves a two-stage approval process – notice has to be given of proposed works, under section 211 of the TCPA 1990, and the planning authority can then decide whether it wishes to make a tree preservation order to protect the tree in question.
- 15.121 If the authority does make an order, and if the applicant is determined to carry out the works, the applicant then has to make an application for consent under the order (or, in future, under the regulations). If such consent is applied for, and is refused or granted subject to onerous conditions, it is then possible to appeal in the usual way. If the authority does not make an order, or if it makes no decision within six weeks of being notified, the works may go ahead with impunity at any time in the following two years.
- 15.122 In some cases, an authority may be content to see the proposed works go ahead, but only if they are carried out in a particular manner; and if the tree is to be felled, the authority may wish to secure the planting of a replacement. But there is no power for an authority to attach any conditions to a notice to the applicant allowing the works to proceed.
- 15.123 In practice, it is likely that the relevant officer of the planning authority, on receipt of a notice under section 211, will inspect the site and the tree in question – unless they are already well known – and will make a decision on the spot as to whether the proposed works are desirable (possibly subject to conditions). It would therefore involve no extra burden on the authority to issue a “decision” promptly, if necessary subject to conditions, rather than make an order, then await a further application for consent under that order, and then have to determine it formally.

Possible reform

- 15.124 We therefore provisionally consider that it would be more straightforward if an authority, on being notified of proposed works to a tree in a conservation area, were to have four possible responses open to it:
- (1) to allow the works (either felling of the tree or other works to it) to proceed, with no conditions (other than as to the two-year time limit);
 - (2) to allow the tree to be felled, subject to a condition as to a replacement tree being planted;
 - (3) to impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or
 - (4) to impose a tree preservation order, and to refuse consent for the works.
- 15.125 This would not introduce a new procedure, so much as condense the rather convoluted procedure that already exists. That would save time and effort for the

planning authority in cases where it wishes to do anything other than simply allow the works to proceed without further ado.

- 15.126 But it would allow applicants to know where they stand, and would avoid the need for any second application if the authority wishes to choose options (2), (3) or (4). If no response were received within the six-week period, and no TPO had been imposed, it could be assumed that the answer was as per the first option; if the answer were (2) or (3), there would be a right of appeal against the conditions; and if (4), against the refusal. If a tree preservation order were to be made, it would be on the usual provisional basis, needing to be confirmed within six months.
- 15.127 The notification procedure would operate just as at present. The procedure for option (1) would be as currently exists under section 211. The procedure would under option (2) would require a new power enabling an authority to impose conditions on a consent granted under section 211(3)(b)(i). And the procedure for options (3) and (4) could be simply a slight variation for the procedures that would otherwise relate to the determination of an application for consent to a TPO tree – the only difference would be that the notification that had been submitted under section 211 would automatically be deemed to an application for consent under the new TPO.

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?

Other points

- 15.128 A number of the points raised earlier in this Chapter in connection with the protection of trees by tree preservation orders also apply in relation to trees in a conservation area.
- 15.129 In particular, the definition of a “tree” as suggested above would apply equally to the provisions in the Bill as to trees in conservation areas.

15.130 And the points made earlier as to the exemptions relating to dead, dying and dangerous trees and works necessary to abate a nuisance would apply equally to the need to notify a planning authority where the tree in question is in a conservation area.