



## **Consultation on the Draft Heritage Protection Bill**

### **A response by the English National Park Authorities Association June 2008**

#### **Summary**

1. The English National Park Authorities Association (ENPAA) exists to provide a collective voice for the nine English National Park Authorities. It is governed by the Chairs of the nine Authorities, and our response represents the collective view of the Authorities. It has been prepared by officers, working within the policies established by the National Park Authorities (NPAs). Individual NPAs may submit separate comments, which will draw on the specific issues for their particular region.

2. ENPAA very much welcomes the publication of the draft Heritage Protection Bill for legislative scrutiny. We consider this represents a long overdue reform of the heritage protection system and one which will achieve the aim of making a clearer, simpler and more effective system. We look forward to a revised draft Bill receiving Parliamentary time at the earliest opportunity and hope that it will have a speedy passage through to enactment.

3. The Association commented on *Heritage Protection for the 21<sup>st</sup> Century*, the White Paper proposals which preceded the draft Bill. We provided additional comments to supplement our response to the three questions posed by the White Paper in the hope they would be of assistance in drafting legislation and guidance. We are pleased to see the draft Bill addresses many of the issues we raised in our White Paper response. We now offer the following comments and suggestions in the hope that they will be of assistance in improving the Bill. We also raise a number of questions which we consider need to be addressed, possibly by the yet unpublished Statutory Guidance.

4. This response is based upon detailed discussion of the draft Bill at the recent annual meeting of the professional historic environment officers (archaeologists and building conservation officers). This discussion also benefited from input from colleagues in the devolved administrations and from representatives of the partner organisations who attend the meeting. These comments are made in the absence of most Statutory Guidance which we recognise will be a very important component of the legislation.

5. A critical aspect of the Draft Heritage Bill's implementation will be the resourcing of it. An agreement has been reached between Central Government and the Local Government Association whereby government funding will be made available where additional statutory duties are introduced. We believe this applies in this case, and look for this agreement to be extended to National Park Authorities given their significant role in assisting in the protection of the historic environment.

6. Our detailed points relate to the following:

- the need for the Bill to be far clearer and consistent in the role of the National Park Authorities (NPAs). In particular, NPAs should be included in sections 82; 147 (9); 163 94); 171 (2); 173 (4); 174 (3); 177 (2); 182-184; and 185 (7);
- amending the definition of terms to refer to landscape; and to ensure consistency between England Wales;
- our desire to be consulted on the criteria for determining 'special interest';
- the need to address problems caused for the registration of sites and provision of information where the owners are not known;
- ensuring open spaces are sufficiently protected as much as structures;
- our concern that the proposed wording in S. 86(2)(b) on the definition of damage is weaker than that in existing legislation;
- our objection to the ability to use 'ignorance' as a defence for unauthorised works to a heritage structure;
- there should be a new duty under S. 89(4) to ensure that minimal works also seek to avoid damaging the asset;
- the views of local planning authorities should be sought by the national authority before determining consent under S. 95;
- the need for guidance on whether a local planning authority is responsible for deciding Heritage Asset Consent under S. 95(3);
- the need for clarity over how the notification system under S.100 will operate;
- strengthening S. 110(1)(e) which, as drafted, does not conform to best practice and could infact lead to a weakening of existing levels of protection;
- concerns over damage to archaeological sites caused by time delays created by the requirement for consultation on enforcement notices;
- the need for strong guidance, monitoring and enforcement by the national heritage authority of the proposal in S.152(2)(c) which would mean Heritage Asset Consent was not required if planning permission was granted, given the differences that exist between the two consent regimes;
- the critical importance of new working arrangements, sharing of information and consultation between planning and historic environment staff;
- the need to improve the protection afforded to ecclesiastical sites;
- the importance of enabling NPAs to enter into Heritage Protection Agreements with English Heritage for registered assets;
- LPAs should be the consenting body for metal detectors, with consents being conditional on reports of any findings being supplied to the Historic Environment Record (HER);
- the need to retain the provision of minimum compensation on compulsory purchase where a registered structure is being deliberately neglected;
- the need to consult English Heritage in advance of carrying out necessary works to registered historic structures is potentially onerous;
- charging recovery costs under S.175 should include the ability to charge for administrative charges incurred by the local planning authority;
- NPAs should retain the ability to enter into Guardianship Agreements;
- the Bill should confirm that a HER Authority can make arrangements with another authority or service provider regarding the maintenance of its HER;
- the need to re-draft S.213 regarding HER documentation given the significant problems that could be encountered by its current wording;
- we look to be consulted on the provisions relating to Conservation Area designation on the grounds of special archaeological and artistic interest; and
- the need to avoid weakening the level of protection and seriousness of unauthorised demolition within a Conservation Area.

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1. We welcome the opportunity to comment on the Draft Heritage Protection Bill. Our response provides detailed comments on it and is organised in the order of the sections of the Bill.

#### Role of National Park Authorities

2. The area of most concern to us in the draft Bill concerns the role of National Park Authorities. NPAs are unique local government bodies in England. Their statutory duties under the 1995 Environment Act are to:

- (i) To conserve and enhance the natural beauty, wildlife and **cultural heritage** of the National Park; and
- (ii) To promote opportunities for the understanding and enjoyment of the special qualities (of the National Park) by the public.

In pursuing these purposes the authority shall...seek to foster the economic and social well being of local communities within the National Park.

3. The protection of the historic environment is therefore one of their statutory functions. The National Park Authorities are also local planning authorities. There are various places in the draft bill, however, where it is unclear whether National Park Authorities are included, particularly where there is also specific mention of the Broads Authority which operates under slightly different legislation. The draft Bill provides for a definition of local authority which excludes the National Parks but where the phrase local authority is used there is frequently an additional section which specifically includes the Broads Authority and joint planning boards. Two National Park Authorities, the Lake District and the Peak District, were initially also joint planning boards but this distinction was removed by the 1995 Environment Act and since April 1, 1997 no longer applies. We wonder whether the omission of specific reference to National Park Authorities is an accidental omission? We believe that this inconsistency needs to be addressed and draw attention in our section by section comments below to some specific instances where we believe the powers given to local authorities should also include all National Park Authorities. These include sections 82; 147 (9); 163 (94); 171 (2); 173 (4); 174 (3); 177 (2); and 185 (7).

#### **Part 1 - Heritage Registration**

4. We welcome the definitions of heritage structures [2.2] but, while recognising the difficulties of finding suitable terminology, note that the definitions then go on to list sites and wonder whether site would be a better all encompassing term. Similarly we would consider 'landscape' to be a better, more easily understood term than 'open space'. Paleo-environmental sites would not be covered by the definition of registrable open space in England [3.2] or that of registered heritage structures and we question why the definition [3.2] is more restrictive than that for Wales [3.3].

5. We recognise the need for additional protection for parks and gardens and battlefields but wonder whether the definitions in 2.2 are sufficient to include all areas which are currently scheduled monuments. In some instances the land between individual components is scheduled (an example of this would be the Extensive

prehistoric and medieval remains on Levisham Moor – Scheduled Monument 35461). The land between the historic components or assets contributes to the setting of these assets but may not in itself be proven to contain physical evidence although it does need to be managed in the same way as the assets.

6. The definition of local planning authority in 9 (3) (c) includes all the National Park Authorities.

7. We welcome the requirement on the heritage authority to publish criteria for determining special interest and hope that there will be consultation on these criteria and that the National Park Authorities will be involved in this [4.4; 4.5]. We have some concerns about how “special archaeological interest” will differ from the current criteria of “national importance” with regard to archaeological sites and note that national importance derived from non-statutory criteria which had an objective base.

8. We welcome the provisions for consultation on inclusion on the register [5 - 10] and the provision of a procedure for providing interim protection through provisional registration [11 - 13].

9. We note that an application for certificate of no intention to register a structure [39] or open space [40] can be made without an application for planning permission being made, as is currently the case. However we also note an inconsistency with regard to consultation on a proposed certificate of no intention to register – this requires representation from each owner of or any part of the land concerned [42.(3) (a)] although 42.(6) provides that 42.(3)(a) does not apply where the number of owners concerned makes it impracticable for the heritage authority to invite written representations from each of them. There appears to be no such provision with regard to consultation on proposed designation where all owners need to be consulted. This is of concern because there are areas of land which have no known owner. An example would be the multi period lead mines and processing works and 20<sup>th</sup> century barytes mill on Grassington Moor - Scheduled Monument 31331. Here the bulk of the site is on land for which a Common Land Tribunal found that there was no registered owner. As the bill stands such an important monument could not become registered. ENPAA considers these inconsistencies need to be addressed.

10. Section 82 provides that the heritage authority has to provide a copy of the register for a local authority area to the “relevant authority”. The definition of relevant authority includes in relation to a district the district planning authority and county planning authority. However, there is no definition of these in the Bill to clearly confirm that National park Authorities (which are both district and county planning authorities under other planning legislation) are the “relevant authority”. We assume that the phrase relevant authority in 82.(1) is meant to include the National Park Authorities as local planning authorities - the definition of local authority in 228 does not - and question the omission of National Parks from the list in 82.(4) or from the descriptions of relevant authority in 82 (5).

11. If the local planning authority (which by definition includes National Park Authorities) is being given a duty to notify owners [83.(1)] the heritage authority must also be given a duty to provide ownership information, which it will have acquired and used during the consultation process, to the local planning authority [82.(2)]. What procedures are to be put in place for when there is no known ownership – cf comments made above in relation to certificates of no intention to register?

## **Part 2 - Control of works and prevention of damage to registered heritage structures**

12. We note that Heritage Asset Consent is only required for works to structures [86.(2)], not open spaces - are open spaces to be provided with any additional protection from tipping operations or removal of objects etc? We have concerns that if they are not afforded the same level of protection as structures on the register they are in danger of being seen as a less important category of asset more akin to features of special local interest [210 (2) (b)], previously known as local lists.

13. ENPAA notes that 86.(2)(b) slightly weakens the definition of damage: “any damage” in the 1979 Ancient Monuments and Archaeological Areas Act to “damage or disturbance affects the special interest of the registered heritage structure” and are concerned that this could be seen as a slight weakening of the protection given to ancient monuments. Nevertheless, we recognise that it may be easier to prove disturbance. We welcome the inclusion of “repairs” [86 (2) (c)] to the list of works requiring consent.

14. We are concerned that the defence of ignorance in respect of unauthorised works to a heritage structure [89 (2); 152 (5)] is a retrograde step. Although the defence currently applies to scheduled ancient monuments it does not apply to listed buildings. There are considerably more cases of damage to listed buildings than to ancient monuments, and English Heritage has been reticent to initiate prosecutions in cases of damage to ancient monuments. Offenders invariably claim ignorance of listing as it is exceedingly difficult to prove that this is not the case. The onus must remain on the owner. Without this the ability of a local planning authority to take action in cases of damage will be severely handicapped and the level of protection for buildings will be reduced. The lengths the local planning authority will have to go to counteract claims of ignorance – sending notification/ listing reminders by registered post etc – do not appear to have been accounted for in the Impact Assessment.

15. We consider there should be an additional clause to ensure that the minimal works permitted under 89 (4) (b) should seek to avoid damaging the asset.

16. ENPAA considers there should be measures included in the Bill to ensure that the views and advice of the local planning authority who are likely to be better acquainted with the heritage asset, are taken into account by the “national authority” in determining consent under 95.(2).

17. Will the local planning authority be responsible for deciding whether Heritage Asset Consent is required [95.(3)]? Many applications currently made by National Park Authorities for Scheduled Monument Consent are for works which do not affect the special interest of a monument, e.g. provision of on-site interpretation, or for works which are designed to maintain the special interest. Clear guidance will be necessary.

18. [100] How the requirement to notify the national authority will work in practice needs clarifying. There is no requirement at present for such notification for the bulk of listed building consents and the exemptions possible under S101 will need to be made clear.

19. [103.(2)(a)] We note that this proposal essentially mirrors the existing requirement to advertise applications for listed building consent. We welcome the potential extension to other registered assets/schedule monuments but note that this

may entail additional expenditure for National Park Authorities and other local planning authorities.

20. The power not to entertain an application [104] is welcomed.

21. [110.(1)(e)] This section appears to provide for little more than a watching brief and does not conform to existing best practice with regard to planning applications which use variants of the standard Grampian condition published in Planning Policy Guidance Note 16. This states, "No development shall take place within the area indicated until the applicant has secured the implementation of a programme of archaeological work in accordance with a written scheme of investigation which has been submitted by the applicant and approved by the Planning Authority". As this condition is not mentioned in the bill, although additional conditions are provided for under 106.(3)(b), its absence might be perceived to weaken existing practice and thus be contrary to the intentions espoused by previous ministers that the new Act will not weaken existing levels of protection.

22. The need for consultation before issuing an enforcement notice [130.(1)] is a weaker provision which may entail unnecessary time delay and seems to risk continuing damage, especially to archaeological sites where damage is irreversible. It is potentially a very onerous task if universally applied, which doesn't exist at present for listed buildings, no matter the grade.

23. We note that National Park Authorities are specifically referred to in sections 144.(6) (b) and 146.(5) but excluded from the definitions in 147 (9). This anomaly should be rectified.

24. [152] We consider there should be a similar provision for offences with regard to acts causing or likely to cause damage to registered open spaces as well as registered heritage structures as such assets are equally vulnerable.

25. [152.(2)(c)] We read this as meaning that if planning consent is applied for and granted, Heritage Asset Consent is not required. If so there will need to be very strong guidance, backed up by monitoring and enforcement by the national heritage authority to ensure that the process of determining applications for planning permission require the heritage status of an asset and the impact of the proposed development on the special interest of the heritage status of a structure to be fully considered throughout the application process by the planning authority. The level of detail needed for a listed building consent or a scheduled monument consent application exceeds that of a planning application at present – eg planning permission for an extension will not normally relate to drawings that show glazing bar profiles or internal door details. Works which currently impact on the character of a listed building or which may cause any damage to a scheduled monument are not permitted development under the General Permitted Development Order and currently require either listed building consent or scheduled monument consent.

26. We recognise that this section (and 155) will require the adoption of new working practices in all local planning authorities, particularly with regard to ensuring that all planning consents affecting registered assets benefit from the submission of adequate documentation and input from historic environment staff with adequate professional knowledge, expertise and experience into the decision making process. How will procedures and guidance for this be developed and enforced by the heritage authority? These changes will also require the adoption of new working practices by architects, architectural technologists etc.

27. [153] We note that ecclesiastical exemption is retained and extended. The draft Guidance On The Operation Of Ecclesiastical Exemption suggests that “organisations internal procedures must provide equally stringent procedures for the authorisation of works as the secular heritage protection system does” (6). It goes on to say that “processes should provide similar levels of consultation and engagement with local communities, planning authorities and with the national amenity societies as operate under the provisions of the rest of the Heritage Protection Act” (7). In our experience current practice does not provide the level of protection envisaged by existing legislation and strengthening of the process is necessary, backed up by adequate monitoring and enforcement. Historic Environment Records are not specifically referred to in the Code of Practice (Annex A) except as depositories of information (ix): not as pre-application consultees. The Guidance suggests that the exempt denominations build up links with HERs but this is only Guidance and should be given statutory weight.

### **Part 3 - Other effects of registration**

28. [155 (4)] We note that National Park Authorities are local planning authorities under Section 336(1) and Part 1 of the Town and Country Planning Act 1990.

29. [157] As this section is currently drafted it appears to preclude National Park Authorities making Heritage Partnership Agreements with regard to monuments/assets they maintain. In our response to the Heritage Protection White Paper we noted that many scheduled monument consent applications by National Park Authorities, were to enable the beneficial management of monuments and form part of programmes of conservation management of monuments under their control. These are often as a result of management agreements. We suggested that such conservation projects would frequently be candidates for Heritage Protection Agreements. We consider that unless National Park Authority and other local planning authority staff are to acquire class consents, similar to those currently held by English Heritage staff there should be a provision for National Park Authorities and other local planning authorities to enter into Heritage Protection Agreements, with the heritage authority (English Heritage) in order for the efficient management of registered assets. As the bill stands it would seem to preclude the example of one of the very successful pilot schemes – the Cornwall bridges. We believe that this omission needs to be addressed.

30. [161] We note that consents for use of metal detectors, unlike other consents, are reserved to the heritage authority. The retention of this type of consent by the heritage authority is however inconsistent and potentially confusing to the public who would expect the local planning authority to issue consent, since they issue heritage asset consent for all other purposes. If this is not altered we consider that there should be a procedure for formal consultation between the heritage authority and the local planning authority and the Historic Environment Record and that 161.11 should be reworded so that the heritage authority is required to inform the local planning authority and the relevant Historic Environment Record of the granting of any consent. Consents should normally be conditional on reports of any findings being supplied to the Historic Environment Record.

31. [163] We note that this section only applies to registered structures and not registered open spaces and that 163.4 would appear to preclude the majority of National Park Authorities except the Broads Authority with regard to sections 163-170. This anomaly should be rectified.

32. The omission of the provision for minimum compensation on compulsory purchase [169] in cases where the registered structure is being deliberately neglected is regrettable. It is a small extra weapon in the local planning authority's armoury that presently deters problem owners from being completely irresponsible. We consider it should be reinstated.

33. [171] This section [171.(2)] also precludes the majority of National Park Authorities and the anomaly should also be rectified. We note that 171 also only applies to heritage structures, not heritage spaces, and consider there should also be scope for acquisition of registered heritage open spaces by agreement. National Park Authorities should also be referred to in 173 (4).

34. [174] We are pleased to see the power of a local authority to carry out necessary works to registered historic structures included in the bill as this partly follows existing practice with respect to listed buildings. The need to consult English Heritage beforehand is potentially onerous and does not apply at present to listed buildings (cf comments on [130] above). As drafted, however, this clause does not apply to National Park Authorities and we believe this anomaly should be rectified, perhaps by altering local authority to local planning authority (cf [176] the power to make dangerous structure orders). National Park Authorities currently do have the power to serve urgent works notices on listed buildings.

35. [175] This section, relating to recovery of costs of works carried out by a local planning authority should include specific reference to the ability of the local planning authority under the Local Government Act 1974 to add an administration charge where they have had to arrange for the work to be done. This is referred to in English Heritage's 'Stopping the Rot' document. It is essential that this provision is included as the extra charge for establishment costs and staff time is what helps to persuade the problem owner to do the work themselves and thus save local planning authority time and effort.

36. Section 177.(2)(a) specifically excludes National Park Authorities from entering into guardianship agreements. If this remains as written what is the status of existing agreements such as that which the Peak District National Park Authority has at present (with Staffordshire County Council) for Throwley Old Hall – a grade II\* stabilised ruin? We consider that that National Park Authorities should retain the power to enter into guardianship agreements.

37. The definition of relevant public authority in 182 -184 specifically excludes National Park Authorities which seems perverse in view of the National Park Authorities' statutory purposes under the Environment Act.

38. The definition of local authority in 185 and 186 [185.7] also excludes National Park Authorities.

## **Part 5 - Historic Environment Records**

39. [210.(1)] We strongly support the proposal to provide a statutory basis for Historic Environment Records and note that this section places a duty on National Park Authorities to create and maintain Historic Environment Records. We are reassured by the draft statutory guidance which recognises that "as with other functions an HER authority is free to make arrangements with another local authority or service provider) for the maintenance of an HER for its area". We look to this to be assume that this will be formalised in the legislation.

40. [213.(1)(b)] Many Historic Environment Records contain material which is not the copyright of the Historic Environment Record – photographs, reports, books etc. There is a potential conflict between this clause and the rights of copyright holders. We also note a conflict with Environmental Regulations which provide for the non-disclosure of environmental information when disclosure is likely to be detrimental to the survival of the asset. In practice it would be a huge administrative task to copy all of a Historic Environment Record as it includes planning files for sites, often running into several volumes. We would also point out that Historic Environment Records are updated on a daily basis. We consider that this clause requires redrafting.

41. [214] We welcome the provision for registrable structures and open spaces of special local interest. As noted above however there are instances where structures and open spaces have no known owner and we believe that there should be provision for dealing with such situations (cf 42.(6)).

### **Sections to be Included**

42. Conservation Areas are an important mechanism which National Park Authorities use to carry out their statutory function to 'to conserve and enhance the natural beauty, wildlife and cultural heritage' of the National Parks. We welcome the comments in paragraphs 278-279 of the Explanatory Notes that the bill will provide for Conservation Area designation as currently although including designation on the grounds of special archaeological and artistic interest. We hope that National Park Authorities will be consulted on the provisions of this section of the Bill at the earliest opportunity.

43. ENPAA welcomes the proposed amendment to the TCP GDO 1995 to require planning permission for the demolition or partial demolition of buildings in Conservation Areas referred to in paragraph 278; and the provisions in paragraph 279 that change that does not benefit a Conservation Area will not be considered to be appropriate. We are, however, concerned that one implication of amendment to the GDO to require planning permission to be obtained for demolition is that unauthorised demolition of a building in a conservation area is a criminal offence rather than a planning offence and this may be seen as a weakening of the level of protection.

ENPAA  
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