

Society of Antiquaries of London

Key Issues – Levelling Up and Regeneration Bill: Heritage

Whilst generally welcoming the heritage aspects of the Bill, the Society considers that more clarity is needed in the following Sections.

Section 92

The extension of the statutory duty to pay special regard to heritage significance in planning decisions to a wider range of 'relevant assets' designated under legislation is welcome. However, the protection established through current policy in the NPPF should not be prejudiced by more limited and category-specific provisions introduced in legislation. Heritage significance to which 'special regard' must be paid in planning decisions should not be restricted to those specific characteristics which justified, implicitly or explicitly, designation under existing legislation. A better approach would be to adopt an umbrella definition of significance in relation to all 'relevant assets' along the lines of the NPPF definition.

Similarly, the concept of 'relevant assets' should be extended to include 'non-designated heritage assets of archaeological interest which are demonstrably of equivalent significance to scheduled monuments'. In the event of disagreement about whether assets have such demonstrable significance, presumably decision-makers should take advice primarily from Historic England.

Sections 93-95

The changes to listed building provisions in these sections, although long overdue, are welcome, but resource issues in many local authorities may deter them from using the provisions.

Sections 116 -130

This replaces Environmental Impact Assessments with Environmental Outcomes Reports. These reports may include cultural considerations, although they are primarily directed towards the natural environment. The protection of cultural heritage should be a required element in these Reports; the current EIA regime has become an important means to identify and protect archaeology in large development projects.

Section 185

The Secretary of State's power to make regulations in relation to HERs is designed to ensure adoption of consistent data standards and public availability of data. In making such regulations, presumably the SofS would take advice primarily from Historic England. More detail on what constitutes an effective and comprehensive HER would be desirable.

There is no reference to resources for local authorities to support, manage and develop HERs, other than that the SofS may by regulation make provision for, and in connection with, the charging of fees. It would give more certainty if local authorities simply continue to exercise their right to charge fees. The provisions in Wales on access and charging in relation to HERs might serve as a better model.

We believe that a clear provision for authorities, where necessary, to combine to provide a HER should be included.

Annex A, attached, provides a fuller commentary on the heritage sections of the Bill.

ANNEX A

THE HERITAGE PROVISIONS OF THE LEVELLING UP AND REGENERATION BILL

1 *Context*

The specific heritage provisions of the bill are part of a much wider package of modifications to the planning system. National Development Management Policies adopted by the SoS are proposed to apply everywhere (in England), over-riding much of the policy content of current local plans. The introduction of the NPPF in 2012 was meant to achieve the same goal, but in practice local plans have continued to elaborate and 'domesticate' the NPPF policies.

2 *The statutory duty to preserve or enhance*

The bill under s92 in effect proposes the extension of the current statutory duties

- (1) to pay 'special regard to the desirability of preserving' a listed building or its setting (P (LB&CA) Act 1990 s16, 66), and
- (2) to pay 'special attention to the desirability of preserving or enhancing the character or appearance' of a conservation area (ibid, s72).

to other 'relevant [heritage] assets.' These are the other nationally designated categories of heritage assets (monuments, wrecks, parks and gardens), plus World Heritage Sites, inscribed by UNESCO on the nomination of the UK government.

The principle of giving statutory force to what is currently a matter of national policy for all 'designated heritage assets' under the NPPF is welcome in principle. The proposed s58B (1) to be inserted into the TCPA 1990 appears to do this elegantly, by imposing a duty on the decision-maker in relation to these categories of heritage asset 'to have special regard to the desirability of preserving or enhancing the asset or its setting'.

The proposed sub-section (2) introduces the concept of 'significance' to legislation:

'For the purposes of subsection (1), preserving or enhancing a relevant asset or its setting includes preserving or enhancing any feature, quality or characteristic of the asset or setting that contributes to the significance of the asset'.

That in turn brings the need to define 'significance', hitherto only defined in policy, namely the NPPF glossary:

'The value of a heritage asset to this and future generations because of its heritage interest. The interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting. For World Heritage Sites, the cultural value described within each site's Statement of Outstanding Universal Value forms part of its significance.'

That inclusive definition embraces all the strands of 'value' recognised across existing legislation and does not limit their applicability to any designated class of heritage asset. But under the proposed s58B (3), the definition of significance to which special regard must be paid would be limited to or qualified by the defining characteristics of each asset class set out in the relevant acts, just as present legislation defines the duty in relation to listed buildings and conservation areas to their 'special architectural or historic interest'. For Ancient Monuments significance would be defined as appearing 'to [the S of S] to be of national importance' (AMAAA 1979, s1(3)). For landscapes it would

be 'gardens and other land situated in England and appearing to [HE] to be of special historic interest' (HBAM Act 1953, s 8C). For wrecks it would be 'historical, archaeological or artistic importance' (Wrecks Act 1973, s1(b), and for WHS, their 'outstanding universal value', nowadays defined at the point of inscription.

None of these amount to a satisfactory working definition of significance, particularly that of scheduled monuments, and could be argued as limiting the scope of the 'features, qualities or characteristics' of designated assets to which 'special regard' must be paid as a statutory duty. Moreover, the definition of significance in subsequent policy (the revised NPPF) would have to align with that in the proposed legislation, which would take precedence.

All this highlights the potential unintended consequences which tend to flow from tinkering with already over-complicated and outdated heritage legislation. A clearer approach would be to adopt an umbrella definition of significance along the lines of the NPPF definition (which has now stood the test of time) and identify by reference to the legislation only the 'relevant asset' classes to which the definition and hence the duty to have special regard would apply. In the interests of consistency 'relevant assets' could also include 'non-designated heritage assets of archaeological interest, which are demonstrably of equivalent significance to scheduled monuments', as currently identified in NPPF footnote 68; but if so, 'demonstrably' would need to become something like 'demonstrated to the satisfaction of [Historic England?]'.

Finally, this section proposes changing the statutory duty in relation to listed buildings from 'to preserve' (which the courts have held means 'to do no harm') to 'to preserve or enhance', which has been in the conservation area legislation from its inception (1967). The change has been anticipated in the NPPF from its inception in 2012 and has now been generally accepted. Change in the legislation is a logical next step, at the point where the 'special regard' duty is extended to more 'relevant assets'. The opportunity should also be taken reciprocally to insert a reference to setting in s72 (1) of the P (LB&CA) Act 1990, as follows '*In the exercise, with respect to any buildings or other land in a conservation area or affecting its setting...*', in order to align it with the duty with regard to listed buildings in s66. This too is already established as a matter of policy in the NPPF.

While it is obviously possible to enhance many heritage assets by interventions that sustain and better reveal their significance, strictly it is arguable (and was argued by some in 2012) whether *significance* itself can be enhanced by intervention, or at least, whether a judgement can be made on the matter without the passing of time. Not a matter to revisit, I think.

It is also worth noting that although this change would bring statutory recognition of the status of entries on the Parks and Gardens Register, unlike buildings, monuments and wrecks there is no statutory procedure for regulating change to parks and gardens which is not 'development' for the purposes of the TCPA 1990. I expect the Gardens Trust will raise this matter, but management of change to a living, growing landscape is far more problematic than monuments (SMC) or buildings (LBC).

3 Listed building provisions

S93 would introduce Temporary Stop Notices which are intended to allow LPAs to take swift action to halt unauthorised works to listed buildings which affect their character and so require LBC. The right to compensation is limited (in terms, to cases where the works did not require, or had, LBC, or the LPA arbitrarily withdraws the notice without further action), hopefully sufficiently to give LPAs the confidence to proceed. Very much to be supported.

S94 would allow urgent works notices to be served on occupied buildings, addressing a long-standing anomaly, a barrier to safeguarding listed buildings at risk. Again, a very welcome proposal.

S95 removes the right of owners to claim compensation if an LPA serves a Building Preservation Notice, but HE/SoS do not subsequently list the building. The risk of having to pay compensation if a BPN fails has been a significant deterrent to LPAs serving BPNs; its removal is very welcome.

In summary, all three are changes long overdue; but will LPAs have the resources to use them?

4 Historic Environment Records

These provisions (s185) are welcome in principle, but some of the details seem to need further thought. Others will be better placed to comment in detail. However, the Welsh precedent/ comparison is relevant.¹ In terms of content, battlefields/ conflict sites are a notable omission from the English list under (2).

The inclusion of 2(vii) in the scope of the HER, and the SoS's power to make regulations requiring inclusion of classes of object, structure or site recognised under legislation seems odd – is there a hidden agenda here? Perhaps statues?

The SoS's power to make regulations (6a) is intended to ensure adoption of consistent data standards (7) and public availability of data. The SoS would presumably do so on the advice primarily of HE?

There is no reference to resources, other than that the SoS may by regulation make provision for and in connection with the charging of fees (6b). It would give more certainty if authorities simply had the right to charge fees (as they do now), rather than this being at the SoS's discretion as to both principle and level. The precedent of planning fees, consistently set by government below the cost of providing the service, is not encouraging.

The Welsh provisions on access and charging seem to cover the ground rather better:

36 Access to historic environment records

(1) The Welsh Ministers—

(a) must make each historic environment record available for public inspection in such manner as they consider appropriate;

(b) must, where a person requests a copy of part of a historic environment record or details accessed by means of such a record, and it appears to the Welsh Ministers that the request is reasonable, provide the person with a copy of that part of the record or those details;

(c) must make available to a person wishing to inspect a historic environment record advice on or assistance with retrieving and understanding information provided in the record or accessed by means of the record;

(d) must, where a person requests the retrieval of information provided in a historic environment record or accessed by means of such a record and it appears to the Welsh Ministers that the request is reasonable, compile for the person a document containing the information.

¹ <https://www.legislation.gov.uk/anaw/2016/4/part/4/crossheading/historic-environment-records>

(2) In assessing for the purposes of subsection (1)(b) or (d) whether a request is reasonable, the matters which the Welsh Ministers may take into account include any previous such requests made by or on behalf of the person concerned.

(3) The Welsh Ministers may charge a fee for—

(a) providing a copy or details under subsection (1)(b);

(b) providing advice or assistance under subsection (1)(c);

(c) compiling a document under subsection (1)(d).

(4) A fee charged under subsection (3) must be calculated by reference to the cost of providing the service to which the fee relates.

There is no overt provision for authorities to combine to maintain HERs – practically essential in some regions – unless this is covered elsewhere in legislation as a general power to provide services in combination with other authorities (?).

5 National Planning Policy Framework

The accompanying *Policy Paper*² (not to be confused with the *Explanatory Notes*) states that there will be consultation on *Our vision for the new National Planning Policy Framework (NPPF), detailing what a new Framework could look like, and indicating, in broad terms, the types of National Development Management Policy that could accompany it. The NPPF in whatever form should remain the critical document for managing the historic environment in planning decisions.*

[Drafted by Paul Drury, past-President of the Society of Antiquaries]

² <https://www.gov.uk/government/publications/levelling-up-and-regeneration-further-information/levelling-up-and-regeneration-further-information>