Passage of the

Historic Environment (Amendment) (Scotland) Bill 2010

SPPB 156
Passage of the

Historic Environment (Amendment) (Scotland) Bill 2010

SP Bill 43 (Session 3), subsequently 2011 asp 3

SPPB 156
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

Annexes D and E of the Stage 1 Report (the oral and written evidence received by the Education, Lifelong Learning and Culture Committee) were originally published on the web only. This material is included in this volume after the Stage 1 Report.

At Stage 1, and after Stage 2, the Subordinate Legislation Committee agreed the contents of its reports on the Bill without debate. Extracts of the minutes and Official Reports of the relevant meetings are not, therefore, included in this volume.

No amendments were lodged at Stage 3, and therefore no Marshalled List or Groupings were produced. Consequently there was no As Passed version of the Bill. The Bill was passed in its As Amended at Stage 2 form.
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Historic Environment (Amendment) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision amending certain aspects of the law relating to ancient monuments and listed buildings, including provision in relation to unauthorised works, powers of enforcement in connection with such works, offences and fines, powers of entry to ancient monuments, the control and management of certain ancient monuments, and liability for the expenses of urgent works on listed buildings; to make provision for the creation of inventories of gardens and designed landscapes and of battlefields; to provide for grants and loans in respect of the development and understanding of matters of historic and other interest; and for connected purposes.

PART 1

AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

1 Recovery of grants for repair, maintenance and upkeep of certain property

(1) Section 4A of the 1953 Act (recovery of grants under section 4) is amended in accordance with this section.

(2) In subsection (3), at the beginning, insert “Subject to subsection (3A) below,”.

(3) After subsection (3) insert—

“(3A) Where a condition referred to in subsection (3) above specifies, or makes provision for calculating, the amount recoverable in the event of a condition being contravened or not complied with, that amount is the amount recoverable under subsection (3) in respect of the contravention or failure to comply with the condition.”.

(4) In subsection (4), at the beginning, insert “Subject to subsection (4A) below,”.

(5) After subsection (4) insert—

“(4A) Where a condition referred to in subsection (3) above specifies, or makes provision for calculating, the amount recoverable in the event of a disposal by the grantee of the relevant interest, that amount is the amount recoverable under subsection (4) above in respect of the disposal.”.
PART 2

MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Control of works affecting scheduled monuments

In section 2 of the 1979 Act (control of works affecting scheduled monuments)—

(a) in paragraph (a) of subsection (3), the word “written” is repealed,
(b) after that subsection insert—

“(3A) If—

(a) works to which this section applies have been executed without being authorised under this Part; and
(b) the Scottish Ministers grant consent for the retention of the works,

the works are authorised under this Part of this Act from the grant of the consent.

(3B) References in this Act to scheduled monument consent include consent under subsection (3A) above.”.

Defences

Offences under sections 2, 28 and 42: modification of defences

(1) The 1979 Act is amended in accordance with this section.
(2) In section 2(8), for the words “prove that” substitute “show that, before executing, causing the execution of or, as the case may be, permitting the execution of the works—

(a) he had taken all reasonable steps to find out whether there was a scheduled monument within the area affected by the works, and

(3) In section 28(1) (offence of damaging certain ancient monuments)—

(a) for the word “lawful” substitute “reasonable”,
(b) after “monument”, where it first occurs, insert “shall be guilty of an offence if the person”,
(c) in paragraph (a), for the words “knowing that it is” substitute “knew or ought to have known that it was”,
(d) in paragraph (b)—

(i) for the word “intending” substitute “intended”,
(ii) for the word “being” substitute “was”,
(e) the words “shall be guilty of an offence” are repealed.
(4) In section 42 (restrictions on use of metal detectors)—

(a) in subsection (6) for the word “prove” substitute “show”,
(b) in subsection (7)—

(i) for the words “prove that he had taken all reasonable precautions” substitute “show that—
Historic Environment (Amendment) (Scotland) Bill  
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(a) he had taken all reasonable steps”,
(ii) for the words “and did not believe that it was” substitute “; and
(b) he did not know and had no reason to believe that that place was a protected place”.

Fines

4 Fines: increases and duty of court in determining amount

(1) The 1979 Act is amended in accordance with this section.

(2) In section 2 (control of works affecting scheduled monuments)—

(a) in subsection (10) for “the statutory maximum” substitute “£50,000”,
(b) after that subsection insert—

“(10A) In determining the amount of any fine to be imposed on a person under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.”.

(3) In section 28 (offence of damaging certain ancient monuments)—

(a) in subsection (4) for “the statutory maximum” substitute “£50,000”,
(b) after that subsection, add—

“(5) In determining the amount of any fine to be imposed on a person under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.”.

Powers of entry

5 Powers of entry to inspect condition of scheduled monument

In section 6(1) of the 1979 Act (powers of entry for inspection of scheduled monument with a view to ascertaining its condition), for “and” substitute “; and such power may, in particular, be exercised with a view to ascertaining—”.

Works affecting scheduled monuments: enforcement

6 Works affecting scheduled monuments: enforcement

(1) After section 9 of the 1979 Act insert—

“Scheduled monument enforcement notices

9A Power to issue scheduled monument enforcement notice

(1) Where it appears to the Scottish Ministers that—

(a) any works have been, or are being, executed to a scheduled monument or to land in, on or under which there is a scheduled monument, and
(b) the works are such as to involve a contravention of section 2(1) or 6(1),
they may, if they consider it expedient having regard to the effect of the works on the character of the monument as one of national importance, serve a notice under this section (in this Act referred to as a “scheduled monument enforcement notice”).

(2) A scheduled monument enforcement notice must specify the alleged contravention and must (either or both)—

(a) specify any works falling within subsection (1) which the Scottish Ministers require to cease,

(b) require steps falling within subsection (3) and specified in the notice to be taken.

(3) Those steps are—

(a) for restoring the monument or land to its former state,

(b) if the Scottish Ministers consider that restoration to its former state would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider are required to alleviate in a manner acceptable to them the effect of the works which were carried out without scheduled monument consent, or

(c) for bringing the monument or land to the state it would have been in if the conditions of any scheduled monument consent for the works had been complied with.

(4) In considering whether restoration is undesirable under subsection (3)(b), the Scottish Ministers are to have regard to the desirability of preserving—

(a) the national importance of the monument,

(b) its features of historical, architectural, traditional, artistic or archaeological interest.

(5) Where further works of a kind mentioned in subsection (3)(b) have been carried out on a monument or land, scheduled monument consent is treated as having been granted in respect of the works carried out on that monument or land.

9B Scheduled monument enforcement notices: further provisions

(1) A scheduled monument enforcement notice—

(a) must specify the date on which it is to take effect and, subject to section 9C(3), takes effect on that date, and

(b) must specify the period (the “period for compliance”) within which—

(i) any works required to cease must cease,

(ii) any steps required to be taken must be taken,

and may specify different periods for different works or steps.

(2) Where different periods apply to different works or steps, references in this Act to the period for compliance with a scheduled monument enforcement notice, in relation to any works or step, are to the period within which the works are required to cease or the step is required to be taken.
(3) The date specified in the notice under subsection (1)(a) must be at least 28 days after the date on which the notice is served.

(4) A copy of a scheduled monument enforcement notice must be served—
(a) on the owner, the lessee and the occupier of the monument to which it relates and of the land in, on or under which the monument is situated,
(b) on any other person having an interest in the monument or land, being an interest which in the opinion of the Scottish Ministers is materially affected by the notice.

(5) The Scottish Ministers may, at any time—
(a) withdraw a scheduled monument enforcement notice (without prejudice to their power to issue another), or
(b) waive or relax any requirement of such a notice and, in particular, extend the period for compliance.

(6) The Scottish Ministers must, immediately after exercising the powers conferred by subsection (5), give notice of the exercise to every person who has been served with a copy of the scheduled monument enforcement notice or would, if the notice were reissued, be served with a copy of it.

(7) The Scottish Ministers must—
(a) publish by electronic means (as for example by means of the internet) a list containing particulars of any monument in respect of which a scheduled monument enforcement notice has been served, and
(b) on request, provide a copy of a scheduled monument enforcement notice.

9C Appeal against scheduled monument enforcement notice

(1) A person on whom a scheduled monument enforcement notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated may, at any time before the date specified in the notice as the date on which it is to take effect, by summary application appeal to the sheriff on any of the grounds in subsection (2).

(2) Those grounds are—
(a) that the matters alleged to constitute a contravention of section 2(1) or (6) have not occurred,
(b) that those matters (if they occurred) do not constitute such a contravention,
(c) that—
(i) works to the monument or land were urgently necessary in the interests of safety or health,
(ii) it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter, and
(iii) the works carried out were limited to the minimum measures immediately necessary,
(d) that copies of the notice were not served as required by section 9B(4),
(e) that the period for compliance for any works or step falls short of what should reasonably be allowed.

(3) Where an appeal is brought under this section the notice is of no effect until the appeal is withdrawn or finally determined.

(4) In determining an appeal under this section the sheriff may uphold or quash the notice.

(5) The sheriff may uphold a notice despite copies of it not having been served as required by section 9B(4) if satisfied that any person on whom a copy should have been, but was not, served has not been substantially prejudiced by the failure.

9D Execution of works required by scheduled monument enforcement notice

(1) If any steps specified in the scheduled monument enforcement notice have not been taken within the period for compliance with the notice, the Scottish Ministers may—

(a) enter on the land in, on or under which the scheduled monument is situated and take those steps, and

(b) recover from the person who is then the owner or lessee of the monument or land any expenses reasonably incurred by them in doing so.

(2) Where a scheduled monument enforcement notice has been served in respect of a monument—

(a) any expenses incurred by the owner, lessee or occupier of a monument or the land in, on or under which it is situated for the purpose of complying with it, and

(b) any sums paid by the owner or lessee of a monument or land under subsection (1) in respect of expenses incurred by the Scottish Ministers in taking steps required by it,

are to be treated as incurred or paid for the use and at the request of the person who carried out the works to which the notice relates.

(3) If on a complaint by the owner of any scheduled monument or land it appears to the sheriff that the occupier of the monument or land is preventing the owner from carrying out work required to be carried out by a scheduled monument enforcement notice, the sheriff may by warrant authorise the owner to enter the land and carry out the work.

(4) If the Scottish Ministers take steps under subsection (1) they may sell any materials removed by them from the monument or land unless those materials are claimed by the owner within 3 days of their removal.

(5) After selling the materials the Scottish Ministers must pay the proceeds to the owner less the expenses recoverable by them from the owner.

(6) Where the Scottish Ministers seek, under subsection (1), to recover any expenses from a person on the basis that the person is the owner of the scheduled monument or land, and the person proves that—
(a) the person is receiving the rent in respect of the monument or land merely as trustee, tutor, curator, factor or agent of some other person, and

(b) the person has not, and since the date of the service of the demand for payment has not had, in the person’s hands on behalf of that other person sufficient money to discharge the whole demand of the Scottish Ministers,

the person’s liability is limited to the total amount of the money which the person has or has had in the person’s hands on behalf of that other person.

(7) If by reason of subsection (6) the Scottish Ministers have not recovered the whole of any such expenses from a trustee, tutor, curator, factor or agent they may recover any unpaid balance from the person on whose behalf the rent is received.

(8) Any person who wilfully obstructs a person acting in the exercise of powers under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

### 9E Offence where scheduled monument enforcement notice not complied with

(1) Where, after the end of the period for compliance with a scheduled monument enforcement notice, any works required by the notice to cease have not ceased or any step required by the notice has not been taken, the person who is for the time being owner of the scheduled monument or of the land in, on or under which it is situated is in breach of the notice.

(2) If at any time the owner of the monument or land is in breach of a scheduled monument enforcement notice the owner is guilty of an offence.

(3) An offence under this section may be charged by reference to any day or longer period of time.

(4) A person may, in relation to the same scheduled monument enforcement notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) In proceedings against any person for an offence under this section, it is a defence for the person to show that—

(a) the person did everything the person could be expected to do to secure that all works required by the notice to cease were ceased or that all the steps required by the notice were taken, or

(b) the person was not served with a copy of the notice and was not aware of its existence.

(6) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding £20,000, and

(b) on conviction on indictment, to a fine.

(7) In determining the amount of any fine to be imposed, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.
Historic Environment (Amendment) (Scotland) Bill

Part 2—Modifications of the Ancient Monuments and Archaeological Areas Act 1979

9F Effect of scheduled monument consent on scheduled monument enforcement notice

(1) If, after the issue of a scheduled monument enforcement notice, consent is granted under section 2(3A)—

(a) for the retention of any work to which the notice relates, or

(b) permitting the retention of works without complying with some condition subject to which a previous scheduled monument consent was granted,

the notice ceases to have effect in so far as such work is or such works are required by the notice to cease, or in so far as it requires steps to be taken involving the works not being retained or, as the case may be, for complying with that condition.

(2) The fact that a scheduled monument enforcement notice has wholly or partly ceased to have effect under subsection (1) does not affect the liability of any person for an offence in respect of a previous failure to comply with it.

Stop notices

9G Stop notices

(1) Subsection (2) applies where the Scottish Ministers consider it expedient that any relevant works should cease before the expiry of the period for compliance with a scheduled monument enforcement notice.

(2) The Scottish Ministers may, when they serve the copy of the scheduled monument enforcement notice or afterwards, serve a notice (in this Act referred to as a “stop notice”) prohibiting the execution of the relevant works to the scheduled monument to which the enforcement notice relates, or to land in, on or under which the monument is situated, or to any part of the monument or land specified in the stop notice.

(3) In this section and sections 9H and 9I, “relevant works” means any works specified in the scheduled monument enforcement notice as works which the Scottish Ministers require to cease and any works carried out as part of, or associated with, such works.

(4) A stop notice may not be served if the scheduled monument enforcement notice has taken effect.

(5) A stop notice must specify the date when it is to come into effect, and that date—

(a) must not be earlier than 3 days after the date when the notice is served, unless the Scottish Ministers consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice, and

(b) must not be later than 28 days from the date when the notice is first served on any person.

(6) A stop notice may be served by the Scottish Ministers on any person who appears to them to have an interest in the monument or the land in, on or under which it is situated or who is executing, or causing to be executed, the relevant works specified in the scheduled monument enforcement notice.
(7) The Scottish Ministers may at any time withdraw a stop notice (without prejudice to their power to serve another) by notice which must be—

(a) served on all persons who were served with the stop notice, and

(b) publicised by displaying it for 7 days in place of all or any site notices (within the meaning of section 9H(3)).

9H Stop notices: supplementary provisions

(1) A stop notice ceases to have effect when—

(a) the scheduled monument enforcement notice to which it relates is withdrawn or quashed,

(b) the period for compliance expires, or

(c) notice of the withdrawal of the stop notice is served under section 9G(7), whichever occurs first.

(2) Where a requirement of the scheduled monument enforcement notice to which a stop notice relates is waived or relaxed by virtue of section 9B(5) so that the scheduled monument enforcement notice no longer relates to any relevant works, the stop notice ceases to have effect in relation to those works.

(3) Where a stop notice has been served in respect of a scheduled monument the Scottish Ministers may publicise it by displaying on the land in, on or under which the monument is situated or on the monument (except where doing so might damage it) a notice (in this section and section 9J referred to as a “site notice”)—

(a) stating that a stop notice has been served on a particular person or persons,

(b) indicating its requirements, and

(c) stating that any person contravening it may be prosecuted for an offence under section 9J.

(4) A stop notice is not invalid by reason that a copy of the scheduled monument enforcement notice to which it relates was not served as required by section 9B if it is shown that the Scottish Ministers took all such steps as were reasonably practicable to effect proper service.

9J Compensation for loss due to stop notice

(1) Where a stop notice ceases to have effect a person who, when the notice is first served, has an interest (whether as owner or occupier or otherwise) in the scheduled monument to which the notice relates or the land in, on or under which the monument is situated is entitled to be compensated by the Scottish Ministers in respect of any loss or damage falling within subsection (2).

(2) That is loss or damage directly attributable to—

(a) the prohibition contained in the stop notice, or

(b) in a case within subsection (3)(b), the prohibition of such of the works prohibited by the stop notice as cease to be relevant works.

(3) For the purposes of this section, a stop notice ceases to have effect when—
(a) the scheduled monument enforcement notice is quashed,
(b) a requirement of the scheduled monument enforcement notice is waived or relaxed by virtue of section 9B(5) so that any works the execution of which are prohibited by the stop notice cease to be relevant works,
(c) the scheduled monument enforcement notice is withdrawn by the Scottish Ministers otherwise than in consequence of the grant by them of scheduled monument consent for the works to which the notice relates, or
(d) the stop notice is withdrawn.

(4) The loss or damage in respect of which compensation is payable under this section in respect of a prohibition includes any sum payable in respect of a breach of contract caused by the taking of action necessary to comply with the prohibition.

(5) No compensation is payable under this section—

(a) in respect of the prohibition in a stop notice of any works which, at any time when the notice is in force, are such as to involve a contravention of section 2(1) or (6), or

(b) in the case of a claimant who was required to provide information under section 57 (power to require information as to interests in land) in respect of any loss or damage suffered by the claimant which could have been avoided if the claimant had provided the information or had otherwise co-operated with the Scottish Ministers when responding to the notice.

9J Penalties for contravention of stop notice

(1) A person who contravenes a stop notice after a site notice has been displayed, or after the stop notice has been served on the person, is guilty of an offence.

(2) Contravention of a stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to any day or longer period of time.

(4) A person may, in relation to the same stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—

(a) the stop notice was not served on the accused, and

(b) the accused had no reasonable cause to believe that the works were prohibited by the stop notice.

(6) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding £20,000, and

(b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.
9K Temporary stop notices

(1) Where it appears to the Scottish Ministers that—

(a) any works have been, or are being, executed to a scheduled monument or to land in, on or under which there is a scheduled monument,

(b) the works are such as to involve a contravention of section 2(1) or (6), and

(c) it is expedient that the works are (or any part of the works is) stopped immediately,

they may, if they consider it expedient to do so having regard to the effect of the works on the character of the monument as one of national importance, issue a temporary stop notice.

(2) The notice must be given in writing and must—

(a) specify the works in question,

(b) prohibit execution of the works (or so much of the works as is specified in the notice), and

(c) set out the Scottish Ministers’ reasons for issuing the notice.

(3) A temporary stop notice may be served on any of the following—

(a) a person who appears to the Scottish Ministers to be executing, or causing to be executed, the works,

(b) a person who appears to the Scottish Ministers to have an interest in the scheduled monument or the land in, on or under which the monument is situated (whether as owner or occupier or otherwise).

(4) The Scottish Ministers must display on the land in, on or under which the monument is situated or on the monument (except where doing so might damage it)—

(a) a copy of the notice, and

(b) a statement as to the effect of section 9M.

(5) A temporary stop notice has effect from the time a copy of it is first displayed in pursuance of subsection (4).

(6) A temporary stop notice ceases to have effect at the end of the period of 28 days starting on the day the copy notice is so displayed.

(7) But if a shorter period starting on that day is specified in the notice, the notice instead ceases to have effect at the end of that shorter period.

(8) And if the notice is withdrawn by the Scottish Ministers before that period of 28 days (or, as the case may be, that shorter period) expires, the notice ceases to have effect on being so withdrawn.
9L **Temporary stop notices: restrictions**

(1) A second or subsequent temporary stop notice must not be issued in respect of the same works unless the Scottish Ministers have in the meantime taken some other enforcement action in relation to the contravention of section 2(1) or (6) which is constituted by the works.

(2) In subsection (1), “enforcement action” includes obtaining the grant of an interdict under section 9O.

9M **Temporary stop notices: offences**

(1) A person who contravenes a temporary stop notice—

   (a) which has been served on the person, or

   (b) a copy of which has been displayed in pursuance of section 9K(4),

   is guilty of an offence.

(2) Contravention of a temporary stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to a day or to a longer period of time.

(4) A person may, in relation to the same temporary stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—

   (a) the temporary stop notice was not served on the accused, and

   (b) the accused did not know, and could not reasonably have been expected to know, of its existence.

(6) A person guilty of an offence under this section is liable—

   (a) on summary conviction, to a fine not exceeding £20,000,

   (b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the execution of the works which constituted the offence.

9N **Temporary stop notices: compensation**

(1) A person who, at the date on which a temporary stop notice is first displayed in pursuance of section 9K(4), has an interest (whether as owner or occupier or otherwise) in the scheduled monument to which the notice relates or the land in, on or under which the monument is situated is entitled to be compensated by the Scottish Ministers in respect of any loss or damage directly attributable to the prohibition effected by that notice.

(2) But subsection (1) applies only if the circumstances are as set out in one or both of the following paragraphs—
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(a) the works specified in the notice are authorised by scheduled monument consent granted on or before the date mentioned in that subsection,

(b) the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent as is mentioned in paragraph (a).

(3) Subsections (4) and (5) of section 9I apply to compensation payable under this section as they apply to compensation payable under that section; and for the purpose of that application references in subsection (5) of that section to a stop notice are to be taken to be references to a temporary stop notice.

Interdicts

9O Interdicts restraining unauthorised works on scheduled monuments

(1) Whether or not they have exercised or propose to exercise any of their other powers under this Act, the Scottish Ministers may seek to restrain or prevent any actual or apprehended breach of any of the controls provided by or under this Act on the execution of works affecting scheduled monuments by means of an application for interdict.

(2) On an application under subsection (1) the court may grant such interdict as it thinks appropriate for the purpose of restraining or preventing the breach.

(3) In this section “the court” means the Court of Session or the sheriff.”.

(2) In section 6 of that Act (powers of entry), after subsection (3) insert—

“(3A) Any person duly authorised in writing by the Scottish Ministers may at any reasonable time enter any land—

(a) to ascertain whether a scheduled monument enforcement notice, a stop notice or a temporary stop notice should be served in relation to a scheduled monument in, on or under that or any other land,

(b) to ascertain whether a scheduled monument enforcement notice, a stop notice or a temporary stop notice has been complied with,

(c) for the purposes of section 9G(7), 9H(3) or 9K(4), or

(d) to ascertain whether any offence has been, or is being, committed with respect to any scheduled monument in, on or under that or any other land under section 2(1) or (6), 9E, 9J or 9M.”.

(3) In subsection (1) of section 61 of that Act (interpretation), in the appropriate places in alphabetical order insert—

““period for compliance” is to be construed in accordance with section 9B(1) and (2);”,

““scheduled monument enforcement notice” has the meaning given by section 9A(1) of this Act;”,

““stop notice” has the meaning given in section 9G(2) of this Act;”,

““temporary stop notice” means a notice issued under section 9K(1) of this Act;”.
Control and management of monuments and land under guardianship

(1) The 1979 Act is amended in accordance with this section.

(2) In section 13 (effect of guardianship of ancient monuments)—

(a) after subsection (2) insert—

“(2A) The power conferred by subsection (2) above includes power—

(a) to control the holding of events in or on the monument;
(b) to control and manage such events;
(c) to require payment of a charge in respect of the holding of such events;
(d) to exclude, restrict or otherwise control public access to the monument in connection with such events.”;

(b) after subsection (7) add—

“(8) In subsection (2A) above—

(a) “events” includes functions and any other organised activities;
(b) references to the holding of events, in relation to organised activities, are to be construed as references to the carrying out of such activities.”.

(3) In section 15 (acquisition and guardianship of land in vicinity of an ancient monument)—

(a) in subsection (3), after “and” where it fourth occurs, insert “without prejudice to that generality”,

(b) after that subsection insert—

“(3A) The power of full control and management of land under guardianship conferred by subsection (3) above includes power—

(a) to control the holding of events on associated land;
(b) to control and manage such events;
(c) to require payment of a charge in respect of the holding of such events;
(d) to exclude, restrict or otherwise control public access to associated land in connection with such events.”;

(c) after subsection (4) insert—

“(4A) Subsections (3), (3A) and (4) are subject to any provision to the contrary in the guardianship deed.”;

(d) after subsection (6) add—

“(7) In subsection (3A) above—

(a) “events” includes functions and any other organised activities;
(b) references to the holding of events, in relation to organised activities, are to be construed as references to the carrying out of such activities.”.

(4) In subsection (1) of section 19 (public access to monuments under public control), after “to” where it first occurs, insert “sections 13(2A) and 15(3A) of this Act and to”.

(5) Paragraph 6(1) of Schedule 3 (transitional provisions) is repealed.
Provision of facilities, etc. at ancient monuments

8 Provision of facilities, etc. at ancient monuments

In section 20 of the 1979 Act (provision of facilities for the public in connection with ancient monuments)—

(a) in subsection (1)—

(i) the words “for or in connection with affording public access” are repealed,

(ii) in paragraph (a) for “to” substitute “in or on”,

(iii) in paragraph (b) for “to” substitute “in or on”,

(b) for subsection (2) substitute—

“(2) In subsection (1), references to a monument include references to any land associated with the monument.

(2A) The facilities and services which may be provided for the public under this section include—

(a) facilities and information or other services for or in connection with affording public access to the monument, and

(b) facilities for the sale of goods and the provision of other services.”.

Financial support in relation to ancient monuments

9 Financial support for preservation etc. of monuments

In section 24 of the 1979 Act (expenditure by the Scottish Ministers or local authority on acquisition and preservation of ancient monuments etc.)—

(a) in subsection (2), for the words from “at” to the end of the subsection substitute—

“(a) at the request of the owner undertake, or assist in, or

(b) defray or contribute towards the cost of,

the preservation, maintenance and management of any ancient monument.”,

and

(b) in subsection (4), for the words from “at” to the end of the subsection substitute—

“(a) at the request of the owner undertake, or assist in, or

(b) defray or contribute towards the cost of,

the preservation, maintenance and management of any ancient monument situated in or in the vicinity of their area.”.

Power of entry where monument at risk

10 Power of entry on land where monument at risk

In section 26 of the 1979 Act (power of entry on land believed to contain ancient monument)—

(a) in subsection (3), at the beginning, insert “Subject to subsection (4) below,”,

(b) after subsection (3) add—

“(4) Subsection (3) does not apply where—
(a) land is, or is to be, excavated in exercise of the power conferred by subsection (2); and

(b) the Scottish Ministers know or have reason to believe that any ancient monument they know or believe to be in, on or under that land is or may be at risk of imminent damage or destruction.”.

Inventories of gardens, designed landscapes and battlefields

11 Inventories of gardens and designed landscapes and of battlefields

After section 32 of the 1979 Act, insert—

“PART 1A

INVENTORIES OF GARDENS AND DESIGNED LANDSCAPES AND OF BATTLEFIELDS

32A Inventory of gardens and designed landscapes

(1) The Scottish Ministers must compile and maintain (in such form as they think fit) an inventory of such gardens and designed landscapes as appear to them to be of national importance.

(2) In subsection (1), references to gardens and designed landscapes are to grounds which have been laid out for artistic effect and, in appropriate cases, include references to any buildings, land, or water on, adjacent, or contiguous to such grounds.

(3) The Scottish Ministers may, from time to time, modify the inventory so as to—

(a) add an entry relating to grounds mentioned in subsection (2);

(b) remove an entry relating to such grounds;

(c) amend an entry relating to such grounds (whether by excluding anything previously included as part of the grounds or adding anything not previously so included, or otherwise).

(4) As soon as reasonably practicable after including any grounds in the inventory in exercise of their duty under subsection (1), or modifying the inventory under subsection (3), the Scottish Ministers must—

(a) inform—

(i) the owner of the grounds;

(ii) (if the owner is not the occupier) the occupier of the grounds; and

(iii) any local authority in whose area the grounds are situated, of the inclusion or modification; and

(b) where the grounds are so included, or the inventory is modified as mentioned in paragraph (a) or (c) of subsection (3), send to any person or any local authority informed under paragraph (a) of this subsection a copy of the entry or, as the case may be, of the amended entry in the inventory relating to the grounds.

(5) The Scottish Ministers must from time to time publish, in such manner as they think fit, a list of all the gardens and designed landscapes which are for the time being included in the inventory.
32B Inventory of battlefields

(1) The Scottish Ministers must compile and maintain (in such form as they think fit) an inventory of such battlefields as appear to them to be of national importance.

(2) In this section, “battlefield” means—

(a) an area of land over which a battle was fought; or

(b) an area of land on which any significant activities relating to a battle occurred (whether or not the battle was fought over that area).

(3) Subsections (3) to (5) of section 32A apply to an inventory compiled and maintained under subsection (1) of this section as they apply to an inventory compiled and maintained under subsection (1) of that section; and, for the purposes of that application, references to gardens and designed landscapes, and to grounds referred to by those expressions, are to be construed as references to a battlefield.

Grants and loans

12 Development and understanding of matters of historic, etc. interest: grants and loans

After section 45 of the 1979 Act insert—

“45A Development and understanding of matters of historic, etc. interest: grants and loans

(1) The Scottish Ministers may make grants or loans for the purpose of defraying in whole or in part any expenditure incurred, or to be incurred—

(a) in or in connection with;

(b) with a view to the promotion of,

the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest.

(2) A grant or loan under this section may be made subject to such conditions (including conditions as to repayment) as the Scottish Ministers consider appropriate.

(3) Without prejudice to any powers of the Scottish Ministers under any enactment (including this Act), the total amount of grants and loans which may be made under this section must not exceed £100,000 in any one year period.”.

Regulations and orders

13 Regulations and orders under the 1979 Act

Before subsection (1) of section 60 of the 1979 Act (regulations and orders) insert—

“(A1) Any power conferred by this Act to make regulations or orders includes power to make such incidental, supplemental, consequential, transitory, transitional or saving provision as the Scottish Ministers consider necessary or expedient.”.
Meaning of “monument”

14 **Meaning of “monument” in the 1979 Act**

In section 61 (interpretation) of the 1979 Act—

(a) in subsection (7)—

(i) the word “and” immediately following paragraph (b) is repealed,

(ii) after paragraph (c) insert “and

(d) any site (other than one falling within paragraph (b) or (c) above) comprising any thing, or group of things, that evidences previous human activity;”,

(b) in subsection (8), paragraph (b) is repealed.

Scheduled monument consent applications: regulations and refusal to entertain

15 **Scheduled monument consent: regulations as respects applications, etc.**

(1) Schedule 1 to the 1979 Act (control of works affecting scheduled monuments) is amended in accordance with subsections (2) and (3).

(2) After paragraph 1(1), insert—

“(1A) The Scottish Ministers may by regulations make provision as to—

(a) the manner in which scheduled monument consent is to be granted;

(b) the form and content of scheduled monument consent.”.

(3) In paragraph 2—

(a) for sub-paragraphs (1) and (2) substitute—

“(1) The Scottish Ministers may by regulations provide that an application for scheduled monument consent is not to be entertained unless it is accompanied by a certificate as to the interests in the monument to which the application relates.

(2) Such regulations may—

(a) make provision as to the notice of any application for scheduled monument consent to be given to any person (other than the applicant) who, at the beginning of the period of 21 days ending with the date of the application, was the owner of the monument;

(b) make provision for publicising applications for scheduled monument consent;

(c) make provision as to—

(i) the form and content of certificates such as are mentioned in sub-paragraph (1) and notices such as are mentioned in paragraph (a);

(ii) service of such notices;

(d) make provision as to such further particulars of the matters to which such certificates relate as may be prescribed;
(e) require an applicant for scheduled monument consent to certify, in such form as may be prescribed, or to provide evidence, that any requirements of the regulations have been satisfied;

(f) make different provision for different classes of case.”,

(b) in sub-paragraph (4), after “of” where it first occurs, insert “regulations made under”.

(4) In subsection (11) of section 2 of that Act (control of works affecting scheduled monuments), after “for,” insert “the manner of granting, and the form, content”.

16 Refusal to entertain certain applications for scheduled monument consent

After paragraph 2A of Schedule 1 to the 1979 Act insert—

“2B(1) Where sub-paragraph (2) or (3) applies, the Scottish Ministers may refuse to entertain an application for scheduled monument consent.

(2) This sub-paragraph applies where—

(a) within the period of 2 years ending with the date the application is received, the Scottish Ministers have refused a similar application; and

(b) in their opinion there has been no significant change in any material considerations since the similar application was refused.

(3) This sub-paragraph applies where the application is made at a time when a similar application is under consideration.

(4) For the purposes of this paragraph, an application for scheduled monument consent is to be taken to be similar to another such application only if the scheduled monument and the works to which the applications relate are, in the opinion of the Scottish Ministers, the same or substantially the same.”.

Inquiries and hearings

17 Application for scheduled monument consent: inquiries and hearings

In paragraph 3(2) of Schedule 1 to the 1979 Act (control of works affecting scheduled monuments), for “shall” substitute “may”.

PART 3

MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Certificate that building not intended to be listed

18 Certificate that building not intended to be listed

(1) After section 5 of the 1997 Act insert—

“5A Certificate that building not intended to be listed

(1) The Scottish Ministers may, on the application of any person, issue a certificate stating that they do not intend to include a building in a list compiled or approved under section 1.
(2) Where the Scottish Ministers issue a certificate under subsection (1) in respect of a building—

(a) they may not for a period of 5 years from the date of issue exercise in relation to the building any of the powers conferred on them by section 1, and

(b) a planning authority may not for that period—

(i) serve a building preservation notice in relation to the building, or
(ii) affix such a notice under section 4(1).

(3) A person submitting an application to the Scottish Ministers under subsection (1) must, at the same time as submitting it, give notice of the application to the planning authority within whose district the building is situated.”.

(2) In section 76 of that Act (rights of entry), in subsection (1), at the end add “or in connection with an application under section 5A(1)”.

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**Offences under section 8: fines**

19 **Offences in relation to unauthorised works and listed building consent: increase in fines**

In subsection (4)(a) of section 8 of the 1997 Act (offences), for “£20,000” substitute “£50,000”.

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**Declining to determine applications for listed building consent**

20 **Declining to determine an application for listed building consent**

(1) After section 10 of the 1997 Act, insert—

“10A Declining to determine an application

(1) A planning authority may decline to determine an application (in this subsection referred to as the “current application”) for listed building consent—

(a) if—

(i) in the period of two years ending with the date on which the current application is received, the Scottish Ministers have refused a similar application referred to them under section 11 or have dismissed an appeal against the refusal of, or an appeal under section 18(2) in respect of, a similar application, and

(ii) in the opinion of the authority there has not, since the Scottish Ministers refused the similar application or dismissed the appeal, been any significant change in any material considerations,

(b) if—

(i) in that period of two years the planning authority have refused more than one similar application,

(ii) there has been no appeal to the Scottish Ministers against either (or as the case may be any) of those refusals, and
(iii) in the opinion of the authority there has not, since the more (or as the case may be most) recent of the refusals, been any significant change in any material considerations,

(c) if—

(i) in that period of two years the planning authority have refused more than one similar application,

(ii) there has been an appeal to the Scottish Ministers against either (or as the case may be any) of those refusals but as at the time the current application is received no such appeal has yet been determined, and

(iii) in the opinion of the authority there has not, since the more (or as the case may be most) recent of the refusals, been any significant change in any material considerations,

(d) if—

(i) in that period of two years there have been appeals under section 18(2) in respect of more than one similar application but as at the time the current application is received no such appeal has yet been determined, and

(ii) in the opinion of the authority there has not, since the more (or as the case may be most) recent of the appeals was made, been any significant change in any material considerations, or

(e) if—

(i) in that period of two years two similar applications have been made to the planning authority,

(ii) the planning authority have refused one of those applications and there has been an appeal under section 18(2) in respect of the other but as at the time the current application is received the appeal under that section has yet to be determined as has the appeal (if any) against the refusal, and

(iii) in the opinion of the authority there has not, since the refusal or since the appeal was made (whichever was the more recent), been any significant change in any material considerations.

(2) For the purposes of this section an application for listed building consent is to be taken to be similar to another such application only if the listed building and the works to which the applications relate are in the opinion of the planning authority the same or substantially the same.”.

(2) In section 18(2) of that Act (right to appeal against decision or failure to take decision)—

(a) for the word “neither” substitute “not”,

(b) the word “nor” after paragraph (a) is repealed,

(c) after that paragraph, insert—

“(aa) given notice to the applicant that they have exercised their power under section 10A to decline to determine the application, or”.
Applications and appeals: hearings

21 Hearings in connection with applications for listed building consent and appeals

In the 1997 Act—

(a) subsection (4) of section 11 (reference of certain applications to the Scottish Ministers) is repealed,

(b) in Schedule 3 (determination of certain appeals by person appointed by the Scottish Ministers), the following are repealed—

(i) in paragraph 2, sub-paragraphs (2) to (4),

(ii) in paragraph 3, sub-paragraphs (4) and (5),

(iii) in paragraph 6(2)(a), the words “by virtue of paragraph 2(4)”.

Enforcement notices, stop notices and temporary stop notices

22 Enforcement notice: requirement to cease works

(1) The 1997 Act is amended in accordance with this section.

(2) In section 34 (power to issue listed building enforcement notice)—

(a) after subsection (1) insert—

“(1A) A listed building enforcement notice shall specify the alleged contravention and shall (either or both)—

(a) specify any works falling within subsection (1) which the authority requires to cease,

(b) require steps falling within subsection (2) and specified in the notice to be taken.”,

(b) in subsection (2), for the words from the beginning to “taken”, substitute “Those steps are”,

(c) in subsection (5), for the words from “any”, where it first occurs, to the end of that subsection, substitute “—

(i) any works required to cease must cease,

(ii) any steps required to be taken must be taken,

and may specify different periods for different works or steps.”,

(d) after that subsection insert—

“(5A) Where different periods apply to different works or steps, references in this Act to the period for compliance with a listed building enforcement notice, in relation to any works or step, are to the period within which the works are required to cease or the step is required to be taken.

(5B) The date specified in the notice under subsection (5)(a) must be at least 28 days after the date on which the notice is served.”.

(3) In section 35 (appeal against listed building enforcement notice), after subsection (1)(i) insert—
“(ia) that the cessation of any works required by the notice exceeds what is necessary to remedy the contravention of section 8(1) or (2),”.

(4) In section 39 (offence where listed building enforcement notice not complied with)—
(a) in subsection (1), after “taken” where it second occurs, insert “or any works required by the notice to cease have not ceased”,
(b) at the end of paragraph (a) of subsection (4), insert “or that all works required by the notice to cease were ceased,”.

(5) In section 40(1) (effect of listed building consent on listed building enforcement notice), after “as” where it first occurs, insert “such work is or such works are required by the notice to cease, or in so far as”.

23 Stop notices and temporary stop notices
(1) After section 41 of the 1997 Act insert—

“Stop notices

41A Stop notices

(1) Subsection (2) applies where the planning authority consider it expedient that any relevant works should cease before the expiry of the period for compliance with a listed building enforcement notice.

(2) The authority may, when they serve the copy of the listed building enforcement notice or afterwards, serve a notice (in this Act referred to as a “stop notice”) prohibiting the execution of the relevant works to the listed building to which the enforcement notice relates, or to any part of that building specified in the stop notice.

(3) In this section and sections 41B and 41D, “relevant works” means any works specified in the listed building enforcement notice as works which the planning authority require to cease and any works carried out as part of, or associated with, such works.

(4) A stop notice may not be served if the listed building enforcement notice has taken effect.

(5) A stop notice must specify the date when it is to come into effect, and that date—
(a) must not be earlier than 3 days after the date when the notice is served, unless the planning authority consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice, and
(b) must not be later than 28 days from the date when the notice is first served on any person.

(6) A stop notice may be served by the planning authority on any person who appears to them to have an interest in the building or who is executing, or causing to be executed, the relevant works specified in the listed building enforcement notice.

(7) The planning authority may at any time withdraw a stop notice (without prejudice to their power to serve another) by notice which must be—
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(a) served on all persons who were served with the stop notice, and
(b) publicised by displaying it for 7 days in place of all or any site notices (within the meaning of section 41B(4)).

41B Stop notices: supplementary provisions

(1) A stop notice ceases to have effect when—
(a) the listed building enforcement notice to which it relates is withdrawn or quashed,
(b) the period for compliance expires, or
(c) notice of the withdrawal of the stop notice is served under section 41A(7),

whichever occurs first.

(2) Where the listed building enforcement notice to which a stop notice relates is varied so that it no longer relates to any relevant works, the stop notice ceases to have effect in relation to those works.

(3) The reference in subsection (2) to a listed building enforcement notice being varied includes a reference to—
(a) a requirement of such a notice being waived or relaxed by virtue of section 34(7),
(b) the terms of such a notice being varied on appeal by virtue of section 37(2)(a).

(4) Where a stop notice has been served in respect of any listed building the planning authority may publicise it by displaying on the building a notice (in this section and section 41E referred to as a “site notice”)—
(a) stating that a stop notice has been served on a particular person or persons,
(b) indicating its requirements, and
(c) stating that any person contravening it may be prosecuted for an offence under section 41E.

(5) A stop notice is not invalid by reason that a copy of the listed building enforcement notice to which it relates was not served as required by section 34 if it is shown that the planning authority took all such steps as were reasonably practicable to effect proper service.

41C Power of the Scottish Ministers to serve stop notice

(1) If it appears to the Scottish Ministers that it is expedient that a stop notice should be served in respect of any building they may themselves serve such a notice under section 41A.

(2) A stop notice served by the Scottish Ministers has the same effect as if it had been served by the planning authority.

(3) The Scottish Ministers must not serve such a notice without consulting the planning authority.
(4) The provisions of this Act relating to stop notices apply, so far as relevant, to a stop notice served by the Scottish Ministers as they apply to a stop notice served by a planning authority, but with the substitution for any reference to the planning authority of a reference to the Scottish Ministers, and any other necessary modifications.

41D Compensation for loss due to stop notice

(1) Where a stop notice ceases to have effect a person who, when the notice is first served, has an interest (whether as owner or occupier or otherwise) in the building to which the notice relates is entitled to be compensated by the planning authority in respect of any loss or damage falling within subsection (2).

(2) That is loss or damage directly attributable to—

(a) the prohibition contained in the stop notice or,

(b) in a case within subsection (3)(b), the prohibition of such of the works prohibited by the stop notice as cease to be relevant works.

(3) For the purposes of this section, a stop notice ceases to have effect when—

(a) the listed building enforcement notice is quashed on grounds other than those mentioned in paragraph (e) of section 35(1),

(b) the listed building enforcement notice is varied (otherwise than on the grounds mentioned in that paragraph) so that any works the execution of which are prohibited by the stop notice cease to be relevant works,

(c) the listed building enforcement notice is withdrawn by the planning authority otherwise than in consequence of the grant by them of listed building consent for the works to which the notice relates, or

(d) the stop notice is withdrawn.

(4) The reference in subsection (3)(b) to a listed building enforcement notice being varied includes a reference to—

(a) a requirement of such a notice being waived or relaxed by virtue of section 34(7),

(b) the terms of such a notice being varied on appeal by virtue of section 37(2)(a).

(5) A claim for compensation under this section must be made to the planning authority within the prescribed time and in the prescribed manner.

(6) The loss or damage in respect of which compensation is payable under this section in respect of a prohibition includes any sum payable in respect of a breach of contract caused by the taking of action necessary to comply with the prohibition.

(7) No compensation is payable under this section—

(a) in respect of the prohibition in a stop notice of any works which, at any time when the notice is in force, are such as to involve a contravention of section 8(1) or (2), or
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(b) in the case of a claimant who was required to provide information under section 272 of the principal Act (power to require information as to interests in land) in respect of any loss or damage suffered by the claimant which could have been avoided if the claimant had provided the information or had otherwise co-operated with the planning authority when responding to the notice.

(8) Except in so far as may be otherwise provided by any regulations made under this Act, any question of disputed compensation under this section is to be referred to and determined by the Lands Tribunal for Scotland.

(9) In relation to the determination of any such question, the provisions of sections 9 (procedure on references under section 8) and 11 (expenses) of the Land Compensation (Scotland) Act 1963 (c.51) apply subject to any necessary modifications and to the provisions of any regulations made under this Act.

41E Penalties for contravention of stop notice

(1) A person who contravenes a stop notice after a site notice has been displayed, or after the stop notice has been served on the person, is guilty of an offence.

(2) Contravention of a stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to any day or longer period of time.

(4) A person may, in relation to the same stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—
(a) the stop notice was not served on the accused, and
(b) the accused had no reasonable cause to believe that the works were prohibited by the stop notice.

(6) A person guilty of an offence under this section is liable—
(a) on summary conviction, to a fine not exceeding £20,000, and
(b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.

Temporary stop notices

41F Temporary stop notices

(1) Where it appears to the planning authority that—
(a) any works have been, or are being, executed to a listed building in their district,
(b) the works are such as to involve a contravention of section 8(1) or (2), and
(c) it is expedient that the works are (or any part of the works is) stopped immediately,

they may, if they consider it expedient to do so having regard to the effect of the works on the character of the building as one of special architectural or historic interest, issue a temporary stop notice.

(2) The notice must be given in writing and must—

(a) specify the works in question,

(b) prohibit execution of the works (or so much of the works as is specified in the notice), and

(c) set out the authority’s reasons for issuing the notice.

(3) A temporary stop notice may be served on any of the following—

(a) a person who appears to the authority to be executing, or causing to be executed, the works,

(b) a person who appears to the authority to have an interest in the building (whether as owner or occupier or otherwise).

(4) The authority must display on the building—

(a) a copy of the notice, and

(b) a statement as to the effect of section 41H.

(5) A temporary stop notice has effect from the time a copy of it is first displayed in pursuance of subsection (4).

(6) A temporary stop notice ceases to have effect at the end of the period of 28 days starting on the day the copy notice is so displayed.

(7) But if a shorter period starting on that day is specified in the notice, the notice instead ceases to have effect at the end of that shorter period.

(8) And if the notice is withdrawn by the authority before that period of 28 days (or, as the case may be, that shorter period) expires, the notice ceases to have effect on being so withdrawn.

41G Temporary stop notices: restrictions

(1) A temporary stop notice does not prohibit the execution of works (either or both)—

(a) of such description,

(b) in such circumstances,

as may be prescribed.

(2) A second or subsequent temporary stop notice must not be issued in respect of the same works unless the planning authority have in the meantime taken some other enforcement action in relation to the contravention of section 8(1) or (2) which is constituted by the works.

(3) In subsection (2), “enforcement action” includes obtaining the grant of an interdict under section 146(2) of the principal Act (interdicts restraining breaches of planning control).
41H  Temporary stop notices: offences

(1) A person who contravenes a temporary stop notice—
(a) which has been served on the person, or
(b) a copy of which has been displayed in pursuance of section 41F(4),
is guilty of an offence.

(2) Contravention of a temporary stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to a day or to a longer period of time.

(4) A person may, in relation to the same temporary stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—
(a) the temporary stop notice was not served on the accused, and
(b) the accused did not know, and could not reasonably have been expected to know, of its existence.

(6) A person convicted of an offence under this section is liable—
(a) on summary conviction, to a fine not exceeding £20,000,
(b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the execution of the works which constituted the offence.

41I  Temporary stop notices: compensation

(1) A person who, at the date on which a temporary stop notice is first displayed in pursuance of section 41F(4), has an interest (whether as owner or occupier or otherwise) in the building to which the notice relates is entitled to be compensated by the planning authority in respect of any loss or damage directly attributable to the prohibition effected by that notice.

(2) But subsection (1) applies only if the circumstances are as set out in one or both of the following paragraphs—
(a) the works specified in the notice are authorised by listed building consent granted on or before the date mentioned in that subsection,
(b) the authority withdraws the notice other than following such grant of listed building consent as is mentioned in paragraph (a).

(3) Subsections (5) to (9) of section 41D apply to compensation payable under this section as they apply to compensation payable under that section; and for the purpose of that application the reference in section 41D(7) to a stop notice is to be taken to be a reference to a temporary stop notice.”.

(2) In section 76 of that Act (rights of entry)—
(a) after subsection (1) insert—

“(1A) Any person duly authorised in writing by the planning authority may, at any
reasonable time, enter upon land—

(a) to ascertain whether a listed building enforcement notice, a stop notice or
a temporary stop notice has been complied with,

(b) for the purposes of section 41A(7), 41B(4) or 41F(4).”

(b) in subsection (2)(b), after the number “39” insert “, 41E, 41H”.

(3) In subsection (1) of section 81 of that Act (interpretation), after the definition of “prescribed” insert—

“‘stop notice’ has the meaning given in section 41A(2),

“temporary stop notice” means a notice issued under section 41F(1),”.

Fixed penalty notices

24 Non-compliance with listed building enforcement notice: fixed penalty notice

After section 39 of the 1997 Act insert—

“39A Fixed penalty notice where listed building enforcement notice not
complied with

(1) Where a planning authority have reason to believe that, by virtue of subsection
(1) of section 39, a person is in breach of a listed building enforcement notice
they may, if the conditions in subsection (9) are satisfied, serve on the person a
fixed penalty notice as respects that breach.

(2) The fixed penalty notice is to specify (either or both)—

(a) the works specified, under subsection (1A) of section 34, in the listed
building enforcement notice which have not ceased,

(b) the step specified, under that subsection, in the listed building
enforcement notice which has not been taken.

(3) No more than one fixed penalty notice may be served on a person as respects a
breach by the person of a listed building enforcement notice.

(4) For the purposes of this section, a “fixed penalty notice” is a notice offering the
person the opportunity of discharging any liability to conviction for an offence
under section 39 as respects the breach of the listed building enforcement
notice.

(5) The person discharges any such liability by paying to the planning authority,
within the relevant period, a penalty of a prescribed amount specified in the
fixed penalty notice.

(6) The relevant period mentioned in subsection (5) is the period of 30 days
immediately following the day on which the fixed penalty notice is served.

(7) But if payment is made within the first 15 days of the period mentioned in
subsection (6) the amount payable is reduced by 25%.
(8) The fixed penalty notice is to identify the period mentioned in subsection (6) and is also to state that if payment is made within the first 15 days of that period the amount payable is reduced by 25%.

(9) The conditions are that the fixed penalty notice—

(a) is served within the period of 6 months which immediately follows the period for compliance with the listed building enforcement notice,

(b) is not served after the person has been charged with an offence under section 39 as respects the breach of the listed building enforcement notice.

(10) During the period mentioned in subsection (6) it is not competent to commence proceedings against the person for an offence under section 39 as respects that breach.

(11) If the amount (or as the case may be the reduced amount) is timeously paid it is not competent to commence proceedings against the person for an offence under section 39 as respects that breach.

(12) A penalty received by a planning authority by virtue of subsection (5) is to accrue to that authority.

(13) In prescribing an amount for the purposes of subsection (5), the Scottish Ministers may make different provision for different cases or different classes of case, including provision for different amounts by reference to previous breaches of listed building enforcement notices relating to the same steps or works.”.

Liability of owner and successors for expenses of urgent works

(1) The 1997 Act is amended in accordance with subsections (2) and (3) of this section.

(2) In section 50 (recovery of expenses of works under section 49), after subsection (5) add—

“(6) Where a person to whom notice has been given under subsection (2) ceases, during the 28 day period mentioned in subsection (4), to be the owner of the building, a person may within 28 days of becoming the new owner of the building, a matter mentioned in any of paragraphs (a) to (c) of subsection (4); and the Scottish Ministers shall determine to what extent the representations are justified.

(7) Subsection (5) applies to a determination under subsection (6) as it applies to a determination under subsection (4).”.

(3) After that section insert—

“Liability of owner and successors for expenses of works executed under section 49

Liability of owner and successors for expenses of works executed under section 49

(1) An owner of a listed building who is liable for expenses under section 50(2) does not, by virtue only of ceasing to be such an owner, cease to be liable for those expenses.
(2) Subject to subsection (3), where a person becomes an owner of a listed building (any such person being referred to in this section as a “new owner”) that person is severally liable with any former owner of the building for any expenses for which the former owner is liable under section 50(2).

(3) A new owner is liable as mentioned in subsection (2) only if the condition mentioned in subsection (4) or subsection (5) is met.

(4) The condition is that—
   (a) a notice (a “notice of liability for expenses”) in the form prescribed under section 50G is registered in relation to the building,
   (b) the notice was registered at least 14 days before the acquisition date, and
   (c) the notice has not expired before the acquisition date.

(5) The condition is that—
   (a) a notice of renewal (within the meaning of section 50C) in relation to the building is registered, and
   (b) that notice has not expired before the acquisition date.

(6) A notice of liability for expenses is to specify—
   (a) the expenses mentioned in subsection (2), and
   (b) the works to which the expenses relate.

(7) In this section, “acquisition date” means the date on which the new owner acquired right to the listed building.

(8) Where a new owner of a listed building pays any expenses for which a former owner of the building is liable, the new owner may recover the amount so paid from the former owner.

(9) A person who is entitled to recover an amount under subsection (8) does not, by virtue only of ceasing to be the owner of the listed building, cease to be entitled to recover that amount.

(10) This section applies as respects any expenses for which an owner of a listed building becomes liable on or after the day on which this section comes into force.

50B Notice of liability for expenses: further provision

(1) A notice of liability for expenses—
   (a) may be registered only on the application of the Scottish Ministers or a planning authority,
   (b) may be registered in respect of expenses of different works executed on a listed building,
   (c) expires at the end of the period of 5 years beginning with the date of its registration.

(2) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of liability for expenses submitted for registration is accurate.
50C Notices of renewal

(1) Subsection (2) applies where—
   
   (a) a notice of liability for expenses in relation to a listed building is registered, and

   (b) that notice has not expired.

(2) A notice (a “notice of renewal”) in the form prescribed by section 50G specifying the same expenses and works as those specified in the notice of liability for expenses may be registered.

(3) A second or subsequent notice of renewal in respect of the same expenses and works specified in the notice of liability for expenses mentioned in subsection (1) may be registered.

(4) A second or subsequent notice of renewal may not be registered if an earlier notice of renewal has expired.

(5) Where the notice of liability for expenses mentioned in subsection (1) was registered on the application of—
   
   (a) the Scottish Ministers, a notice of renewal may be registered only on the application of the Scottish Ministers,

   (b) a planning authority, a notice of renewal may be registered only on the application of that authority.

(6) A notice of renewal expires at the end of the period of 5 years beginning with the date of its registration.

(7) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of renewal submitted for registration is accurate.

50D Notice of determination following representations under section 50

(1) Subsections (2) and (3) apply where—
   
   (a) a notice of liability for expenses (in this section, the “original notice”) in relation to a listed building, or a notice of renewal in relation to the original notice, is registered, and

   (b) the owner of the listed building has made representations to the Scottish Ministers under section 50(4) or (6).

(2) Where the original notice was registered on the application of a planning authority, the authority must, as soon as reasonably practicable after the Scottish Ministers give notice of their determination under section 50(5), apply to register a notice (a “notice of determination”) in the form prescribed under section 50G.

(3) Where the original notice was registered on the application of the Scottish Ministers, the Scottish Ministers must, as soon as reasonably practicable after making their determination under section 50(4) or (6), apply to register a notice of determination.
(4) A notice of determination must specify the amount given by the Scottish Ministers as the amount recoverable in connection with a notice of determination under section 50(5).

(5) Where the amount recoverable (“amount A”) is less than the amount specified as the expenses of the works in the original notice (“amount B”), amount B is, on registration of the notice of determination, to be treated as amount A.

(6) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of determination submitted for registration is accurate.

50E Discharge of notice of liability for expenses and notice of renewal

(1) Subsections (2) and (3) apply where—

(a) a notice of liability for expenses (in this section, the “original notice”) in relation to a listed building, or a notice of renewal in relation to the original notice, is registered, and

(b) any liability for expenses under section 50(2) to which the original notice relates has been fully discharged.

(2) Where the original notice was registered on the application of a planning authority, the authority must apply to register a notice (a “notice of discharge”) in the form prescribed under section 50G stating that liability has been fully discharged.

(3) Where the original notice was registered on the application of the Scottish Ministers, the Scottish Ministers must apply to register a notice of discharge.

(4) On being registered, a notice of discharge—

(a) discharges the notice of liability for expenses, or

(b) where a notice of renewal in relation to the original notice is registered, discharges the notice of renewal.

(5) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of discharge submitted for registration is accurate.

50F Meaning of “register” in relation to notices

In relation to—

(a) a notice of liability for expenses,

(b) a notice of renewal,

(c) a notice of determination,

(d) a notice of discharge,

“register” means register the information contained in the notice in question in the Land Register of Scotland or, as appropriate, record the notice in question in the Register of Sasines; and “registered” and other related expressions are to be construed accordingly.
50G  Power to prescribe forms

(1) The Scottish Ministers may prescribe—
(a) the form of the notices mentioned in subsection (2), and
(b) the information to be contained in such notices (in addition to any required to be contained in them by virtue of any other provision of this Act).

(2) The notices are—
(a) a notice of liability for expenses,
(b) a notice of renewal,
(c) a notice of determination,
(d) a notice of discharge.”.

(4) In section 12 of the Land Registration (Scotland) Act 1979 (c.33), in subsection (3) (which specifies losses for which there is no entitlement to be indemnified by the Keeper under that section), after paragraph (s) add—

“(t) the loss arises in consequence of an inaccuracy in any information contained in—
(i) a notice of liability for expenses registered in pursuance of section 50A of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9);
(ii) a notice of renewal registered in pursuance of section 50C of that Act;
(iii) a notice of determination registered in pursuance of section 50D of that Act; or
(iv) a notice of discharge registered in pursuance of section 50E of that Act.”.

26  Recovery of grants for preservation etc. of listed buildings and conservation areas

(1) The 1997 Act is amended in accordance with this section.

(2) In section 51 (power of local authority to contribute to the preservation of listed buildings etc.)—

(a) after subsection (5) insert—

“(5A) A contribution under this section by way of grant may be made subject to such conditions as the local authority may determine.”,

(b) in subsection (6), at the beginning insert “Without prejudice to the generality of subsection (5A),”.

(3) In section 52 (recovery of grants under section 51)—

(a) in subsection (1), at the beginning insert “Subject to subsection (1A),”,

(b) after that subsection insert—
“(1A) Where a condition imposed on the making of a grant to which this section applies specifies, or makes provision for calculating, the amount recoverable in the event of a disposal by the grantee of that interest, that amount is the amount recoverable under subsection (1) in respect of the disposal.”,

(c) in subsection (4), at the beginning insert “Subject to subsection (4A),”;

(d) after that subsection insert—

“(4A) Where a condition referred to in subsection (4) specifies, or makes provision for calculating, the amount recoverable in the event of a condition being contravened or not complied with, that amount is the amount recoverable under subsection (4) in respect of the contravention or failure to comply with the condition.”.

(4) In section 70 (recovery of grants under section 69)—

(a) in subsection (4), at the beginning insert “Subject to subsection (4A),”;

(b) after that subsection insert—

“(4A) Where a condition imposed on the making of a grant to which this section applies specifies, or makes provision for calculating, the amount recoverable in the event of a disposal by the grantee of that interest, that amount is the amount recoverable under subsection (4) in respect of the disposal.”,

(c) in subsection (7), at the beginning insert “Subject to subsection (7A),”;

(d) after that subsection insert—

“(7A) Where a condition referred to in subsection (7) specifies, or makes provision for calculating, the amount recoverable in the event of a condition being contravened or not complied with, that amount is the amount recoverable under subsection (7) in respect of the contravention or failure to comply with the condition.”.

Crown application

27 Provisions that do not bind the Crown

In section 73A(2) of the 1997 Act (application to the Crown)—

(a) after paragraph (e) insert—

“(ea) section 41E;

(eb) section 41H;”;

(b) after paragraph (g) insert—

“(ga) section 50A(2);”.

Regulations in connection with inquiries

28 Regulations in connection with inquiries, etc.

(1) In section 79(1) of the 1997 Act (application of certain general provisions of the Town and Country Planning (Scotland) Act 1997), after the reference to section 273 (offences by corporations) insert—

“section 275A (further provision as regards regulations: inquiries, etc.),”.

39
(2) In subsection (5) of section 9 of the Tribunals and Inquiries Act 1992 (c.53) (procedure in connection with statutory inquiries)—

(a) the words from “an” to the end become paragraph (a) of that subsection,

(b) after that paragraph insert “; or

(b) an inquiry held under paragraph 6 of Schedule 3 to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9).”.

**Regulations and orders**

**29 Regulations and orders under the 1997 Act**

(1) Section 82 of the 1997 Act (regulations and orders) is amended in accordance with this section.

(2) In subsection (2)—

(a) the words “shall be exercisable by statutory instrument” become paragraph (a) of that subsection,

(b) after that paragraph insert—

“(b) may be exercised so as to make different provision for different purposes.”.

(3) In subsection (3), at the beginning insert “Subject to subsection (3A),”.

(4) After subsection (3) insert—

“(3A) A statutory instrument containing regulations made under section 39A(5) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.

(5) In subsection (4)—

(a) the words “shall be exercisable by statutory instrument” become paragraph (a) of that subsection,

(b) after that paragraph insert—

“(b) may be exercised so as to make different provision for different purposes.”.

(6) For subsection (6) substitute—

“(6) Any power conferred by this Act to make regulations or orders includes power to make such incidental, supplemental, consequential, transitory, transitional or saving provision as the Scottish Ministers consider necessary or expedient.”.

**PART 4**

**GENERAL**

**30 Interpretation**

In this Act—

“the 1953 Act” means the Historic Buildings and Ancient Monuments Act 1953 (c.49),
“the 1979 Act” means the Ancient Monuments and Archaeological Areas Act 1979 (c.46),
“the 1997 Act” means the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9).

31 Ancillary provision

(1) The Scottish Ministers may by order made by statutory instrument make such supplementary, incidental, consequential, transitory, transitional or saving provision as they consider necessary or expedient for the purposes of, in consequence of or for giving full effect to any provision of this Act.

(2) The provision which can be made under subsection (1) includes provision amending or repealing any enactment (including any enactment comprised in this Act) or any other instrument.

(3) An order under this section may make different provision for different purposes.

(4) Subject to subsection (5), a statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(5) A statutory instrument containing an order under this section which adds to, replaces or omits any part of the text of an Act is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Parliament.

32 Short title and commencement

(1) This Act may be cited as the Historic Environment (Amendment) (Scotland) Act 2010.

(2) The provisions of this Act, except sections 30, 31 and this section, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.

(3) Different days may be appointed under subsection (2) for different purposes.
Historic Environment (Amendment) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision amending certain aspects of the law relating to ancient monuments and listed buildings, including provision in relation to unauthorised works, powers of enforcement in connection with such works, offences and fines, powers of entry to ancient monuments, the control and management of certain ancient monuments, and liability for the expenses of urgent works on listed buildings; to make provision for the creation of inventories of gardens and designed landscapes and of battlefields; to provide for grants and loans in respect of the development and understanding of matters of historic and other interest; and for connected purposes.

Introduced by: Fiona Hyslop
On: 4 May 2010
Supported by: Bruce Crawford
Bill type: Executive Bill
HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

EXPLANATORY NOTES

AND OTHER ACCOMPANYING DOCUMENTS

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Historic Environment (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 4 May 2010:

   • Explanatory Notes;
   • a Financial Memorandum;
   • a Scottish Government Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 43–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is an amending piece of legislation and its extent and content are formed by a series of amending provisions identified by Historic Scotland and local government, and during the course of discussions with stakeholders during 2007, which followed the publication of a report by the Historic Environment Advisory Council for Scotland on the need for a review of heritage legislation in Scotland.¹

5. The Bill harmonises aspects of the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and aligns aspects of the historic environment legislation with the planning regime.

COMMENTARY ON SECTIONS

The main provisions of the Bill

6. The Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill and a fourth Part which includes provisions on “Interpretation”, “Ancillary provision” and “Short title and commencement”. The principal Acts are:

- the Historic Buildings and Ancient Monuments Act 1953 ("the 1953 Act");
- the Ancient Monuments and Archaeological Areas Act 1979 ("the 1979 Act"); and
- the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 ("the 1997 Act").

THE BILL – SECTION BY SECTION

PART 1 – AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

Section 1 – Recovery of grants for repair, maintenance and upkeep of certain property

7. Section 1 amends section 4A of the 1953 Act which enables the Scottish Ministers to recover grants made under section 4 of that Act. This provision will allow Scottish Ministers to specify, or to set out the terms for calculating, in a grant award letter the amount that would be recoverable when a condition of grant is either contravened or not complied with or in the event that the property is disposed of.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 2 – Control of works affecting scheduled monuments

8. Section 2 amends section 2 of the 1979 Act to provide Scottish Ministers with a specific power to grant consent for the retention of unauthorised works.

Section 3 – Offences under sections 2, 28 and 42: modification of defences

9. Section 3 modifies two defences and one offence in the 1979 Act. The defence in section 2(8) is adjusted so that, in addition to the existing “defence of ignorance”, an accused is also required to establish that he took all reasonable steps to discover whether the area affected by the unauthorised works which he is accused of executing or causing or permitting to be executed, contained a scheduled monument.

10. Section 42(7), which contains a defence in respect of unauthorised use of a metal detector in a protected place (as defined in section 42(2)), is amended to provide for a similar dual element defence to that in section 2(8).

11. Section 3 of the Bill also modifies the offence in section 28(1) of the 1979 Act of damaging or destroying a protected monument without reasonable excuse. The effect of the change is that for the offence to be committed, it must be established that the accused knew, or ought to have known, that the monument in question was protected (within the meaning of section 28(3)). This is in addition to the element of the offence specified in paragraph (b) of section 28(1) that the damage or destruction was done intentionally or recklessly.

Section 4 – Fines: increases and duty of court in determining amount

12. Section 4 raises the level of fines on summary conviction under section 2 and section 28 of the 1979 Act to £50,000 for offences tried summarily.

13. Subsections (2)(b) and (3)(b) make it a requirement that the court, in determining the amount of the fine to be imposed on a person convicted of an offence under section 2 or 28 of
the 1979 Act takes into account the extent of any financial gain that has accrued or is likely to accrue to the offender.

Section 5 – Powers of entry to inspect condition of scheduled monument

14. Section 5 clarifies that paragraphs (a) and (b) of section 6(1) of the 1979 Act merely provide particular instances of how the general power to enter land (as provided under section 6 of the 1979 Act) may be used.

Section 6 – Works affecting scheduled monuments: enforcement

15. Section 6(1) inserts new sections 9A to 9O into the 1979 Act. This establishes enforcement powers for Scottish Ministers to protect scheduled monuments. New sections 9A to 9F allow scheduled monument enforcement notices to be served, new sections 9G to 9N allow stop notices and temporary stop notices to be served and new section 9O makes provision for interdict proceedings to be raised.

New section 9A – Power to issue scheduled monument enforcement notice

16. Subsection (1) allows Scottish Ministers to serve a scheduled monument enforcement notice in respect of unauthorised works carried out to a scheduled monument or to land in, on or under which there is a scheduled monument or a breach of conditions in scheduled monument consent. This section also makes it clear that it is a matter of discretion for the Scottish Ministers to issue such an enforcement notice and that Scottish Ministers are required to have regard to the effects of the works on the character of the monument as one of national importance.

17. Subsections (2) and (3) require a scheduled monument enforcement notice to specify the works that are to cease and/or the steps that must be taken to either restore the monument or land to its former state, alleviate the effects of the unauthorised works or to bring the monument or land into a state fully compatible with the terms of the scheduled moment consent.

18. Subsection (4) sets out that in considering whether restoration would be undesirable, the Scottish Ministers must have regard to the desirability of preserving the national importance of the monument or its features of historical, architectural, traditional, artistic or archaeological interest.

19. Subsection (5) sets out that where further works are carried out under the terms of subsection (3)(b) scheduled monument consent is deemed to have been granted for such works.

New section 9B – Scheduled monument enforcement notices: further provisions

20. Subsections (1) to (7) set out detailed procedures (e.g. on content and service) relating to scheduled monument enforcement notices. Subsections (1) to (3) require that the notice must specify the effective date and the time period within which works must cease or steps must be taken (“the period for compliance”) and provide for a minimum 28 day period between service of the notice and the date on which it is to take effect. Subsection (4) sets out the persons on whom a copy of the notice must be served. Subsection (5) provides Scottish Ministers with the power to withdraw an enforcement notice or waive or relax any requirement of such a notice,
including extending the period for compliance. Where that power is exercised, subsection (6) requires notification to be given and specifies on whom such notification must be served. Subsection (7) sets out that the Scottish Ministers must keep a list of monuments in respect of which enforcement notices have been served which must be published electronically. Copies of the notices must also be provided on request.

**New section 9C – Appeal against scheduled monument enforcement notice**

21. This section sets out the process and grounds for an appeal against an enforcement notice. In particular, subsection (1) provides for a right of appeal to the sheriff for the person on whom the notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated. An appeal must be made before the date it takes effect under section 9B(1). Subsection (2) sets out the grounds of appeal. Subsection (3) states that the notice is of no effect until the appeal is withdrawn or finally determined. Subsection (4) sets out that a sheriff has the power to determine an appeal against a scheduled monument enforcement notice by upholding or quashing the notice.

**New section 9D – Execution of works required by scheduled monument enforcement notice**

22. Section 9D gives Scottish Ministers power to enter the land in, on or under which the scheduled monument is situated to undertake any works which have not been carried out within the period for compliance with the notice and provides for the recovery of expenses incurred in carrying out such works from the owner or lessee of the monument or land.

23. Subsection (3) provides a power for the sheriff to authorise by warrant an owner of the scheduled monument or land to go on the land and carry out the works where prevented to do so by the occupier.

24. Subsections (4) and (5) allow the removal from the monument or land of materials by the Scottish Ministers and their subsequent sale after a period of 3 days during which they are unclaimed by the owner, requiring any proceeds from such a sale, less expenses, to be paid to the owner. Subsections (6) and (7) limits liability for recovery of expenses from owners receiving rent in respect of the monument or land merely as a trustee, tutor, curator, factor or agent of some other person. If the owner does not have, and had not since the demand for payment from the Scottish Ministers had, sufficient money to discharge the whole demand, his liability for expenses is limited to the amount which he has, or has had, in his hands on behalf of that other person. Where Scottish Ministers have not recovered the whole of any such expenses from an owner recovery of any unpaid balance from the person on whose behalf the rent is received is allowed.

25. Subsection (8) makes it a criminal offence to wilfully obstruct the Scottish Ministers from carrying out works required by the enforcement notice under the powers available under subsection (1).

**New section 9E – Offence where scheduled monument enforcement notice not complied with**

26. Section 9E sets out that where an enforcement notice has not been complied with within the period for compliance, the owner for the time being of the monument or of the land in, on or under which it is situated is in breach of the notice and is guilty of an offence and sets out the
penalties. It is a defence to show that a person did everything they could be expected to do to ensure compliance with the notice or that they were not served with a copy of the notice and did not know of its existence.

New section 9F – Effect of scheduled monument consent on scheduled monument enforcement notice

27. Section 9F applies where a scheduled monument enforcement notice has been issued, and scheduled monument consent is then granted under new section 2(3A) of the 1979 Act (inserted by section 2 of the Bill) for the retention of works or of works which do not comply with a condition in the original scheduled monument consent. In such cases, the notice ceases to have effect in so far as it requires the works to cease, steps to be taken involving the works not being retained or compliance with that condition.

New section 9G – Stop notices

28. Inserted section 9G gives the Scottish Ministers power to issue a stop notice in relation to unauthorised works to a scheduled monument or to land in, on or under which the monument is situated, or to any part of the monument or land specified in the stop notice.

29. Subsections (1) and (2) set out the circumstances in which Scottish Ministers may issue a stop notice. Subsection (1) requires that the Scottish Ministers must consider it expedient for the works to cease before the expiry of the period for compliance with a scheduled monument enforcement notice. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the scheduled monument enforcement notice has been served but may not be served after the enforcement notice has taken effect.

30. Subsection (3) clarifies that “relevant works” means any works specified in the enforcement notice as works that the Scottish Ministers require to cease and associated works.

31. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the Scottish Ministers consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days after the date, when the notice is served.

32. Subsection (6) sets out that Scottish Ministers may serve the notice on any person who appears to them to have an interest in the monument or the land in, on or under which it is situated or who is executing, or causing to be executed, the relevant works specified in the enforcement notice.

33. Subsection (7) allows Scottish Ministers to withdraw a stop notice at any time by notice which must be served on all persons who were served with the original stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.
These documents relate to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

New section 9H – Stop notices: supplementary provisions
34. Subsection (1) sets out the circumstances in which a stop notice ceases to have effect. Subsection (3) sets out how Scottish Ministers may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

New section 9I – Compensation for loss due to stop notice
35. Subsection (1) sets out that where a stop notice ceases to have effect a person with an interest in the scheduled monument or the land in, on or under which the monument is situated is entitled to compensation in respect of any loss or damage that can be attributed to the matters in subsection (2). Those matters are the prohibition in the stop notice or the prohibition of works which cease to be relevant works due to the waiving or relaxing of a requirement in the scheduled monument enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are where the stop notice is withdrawn or the associated enforcement notice is quashed or withdrawn. Subsection (4) clarifies that any compensation payable includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (5). The compensation provisions in section 9I are caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 9J – Penalties for contravention of stop notice
36. New section 9J sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offence including allowing for conviction for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement on the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

New section 9K – Temporary stop notices
37. New sections 9K to 9N cover the operation of the new system of temporary stop notices. While a stop notice is always issued in relation to a scheduled monument enforcement notice, a temporary stop notice may be issued even if no enforcement notice is in place. In new section 9K (temporary stop notices) subsection (1) sets out the circumstances in which Scottish Ministers may issue temporary stop notices. The Scottish Ministers have to consider that the works are unauthorised or fail to comply with a condition attached to consent and to consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the monument as one of national importance.

38. Subsection (2) requires that the notice must be in writing and specify the works which are to stop, prohibit execution of the works and set out Scottish Ministers’ reasons for issuing the notice.

39. Subsection (3) states that notice may be served on a person who either appears to be executing or causing to be executed works and/or a person who has an interest in the scheduled monument or the land in, on or under which the monument is situated.
40. Subsection (4) states that the Scottish Ministers must display a copy of the notice and a statement on the effect of section 9M (relating to offences) on the land in, on or under which the monument is situated or on the monument (except where doing so damages it).

41. Subsections (5) to (7) set out when the notice starts and ceases to have effect. It may have effect for a maximum of 28 days. Subsection (8) provides that if the notice is withdrawn before 28 days the notice ceases to have effect at that point.

New section 9L – Temporary stop notices: restrictions

42. In new section 9L subsections (1) and (2) prohibit the issue of further temporary stop notice unless another enforcement action has been taken e.g. the service of an enforcement notice.

New section 9M – Temporary stop notices: offences

43. In new section 9M, subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.

44. Subsection (5) sets out the statutory defence under this section, which is that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.

45. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

New section 9N – Temporary stop notices: compensation

46. Subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the notice being served. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by scheduled monument consent granted on or before the date the temporary stop notice is first displayed, and/or the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent. Subsection (3) applies subsections (4) and (5) of new section 9I to compensation under this section which provide details of what the compensation may cover and sets out the circumstances when no compensation is payable under this section. New section 9N will be caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 9O – Interdicts restraining unauthorised works on scheduled monuments

47. New section 9O sets out that whether or not Scottish Ministers have exercised any of their powers under this Act they may restrain or prevent any actual or apprehended breaches of the controls provided by the Act by applying for an interdict.
48. Subsection (2) of section 6 of the Bill gives persons duly authorised by Scottish Ministers rights of entry in relation to the service of and enforcement of scheduled monument enforcement notices, stop notices, and temporary stop notices.

Section 7 – Control and management of monuments and land under guardianship

49. Subsection (2)(a) of section 7 inserts a new subsection (2A) into section 13 of the 1979 Act. This new subsection clarifies that the power conferred by section 13(2) of the 1979 Act includes power to control the holding of events; power to control and manage events; power to charge for events and the power to control public access to the monument in connection with such events. Section 7(2)(b) inserts a new subsection (8) in section 13 of the 1979 Act which clarifies that reference to “events” in the new inserted section 2A includes functions and any other organised activity.

50. Subsection (3)(a) amends section 15 of the 1979 Act (acquisition and guardianship of land adjoining or in the vicinity of an ancient monument). This will ensure that the powers in paragraphs (a) and (b) of section 15(3) are exercisable without prejudice to the general power in that section to control and manage land associated with ancient monuments which is under guardianship.

51. Subsection (3)(b) inserts a new subsection (3A) into section 15 of the 1979 Act. This new subsection clarifies that the power conferred by section 15(3) of the 1979 Act includes power to control the holding of events; power to control and manage those events; power to charge for events and the power to control public access to the monument in connection with such events. Section 7(3)(d) inserts a new subsection (7) in section 15 of the 1979 Act which clarifies that reference to “events” in the new inserted subsection (3A) includes functions and any other organised activity.

52. Subsection (3)(c) inserts a new subsection (4A) in section 15 of the 1979 Act. This provides that the powers conferred by subsections (3), (3A) and (4) could not be used in relation to an event or type of event that was contrary to any express provision in the guardianship deed.

53. Subsection (4) of section 7 amends subsection (1) of section 19 of the 1979 Act to ensure that the right of public access to monuments under public control is subject to inserted sections 13(2A) and 15(3A) of the Bill. This gives Scottish Ministers and local authorities the power to control public access to the monument in connection with the holding of the event or function.

54. Section 7(5) repeals paragraph 6(1) of Schedule 3 (transitional provisions) to the 1979 Act. This amendment makes clear that Scottish Ministers may manage properties taken into guardianship before 1979 and those taken into guardianship after the enactment of the 1979 Act in exactly the same way.

Section 8 – Provision of facilities, etc. at ancient monuments

55. Section 8(a) amends section 20 of the 1979 Act to remove the requirement that facilities and information or other services may be provided for the public only in connection with affording public access. Section 8(b) substitutes a new subsection (2) and new subsection (2A)
These documents relate to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

in section 20 of the 1979 Act. These new provisions clarify that any reference to a monument includes references to any land associated with the monument and set out the specific facilities and services that may be provided for the public under section 20 of the 1979 Act. The section applies to monuments owned or under the guardianship of the Scottish Ministers or a local authority and monuments otherwise under the control or management of the Scottish Ministers.

Section 9 – Financial support for preservation etc. of monuments

56. Section 9 amends section 24 of the 1979 Act so as to make clear that the power of the Scottish Ministers and local authorities to defray or contribute towards the cost of preserving, maintaining or managing an ancient monument is exercisable without the owner’s having requested such action.

Section 10 – Power of entry on land where monument at risk

57. Section 10 modifies the power in section 26(1) which enables a person authorised by the Scottish Ministers to enter land where an ancient monument is known or believed to be to record matters of archaeological or historical interest. This includes a power to carry out excavations with the consent of anyone who requires to give consent for such excavations. The effect of the amendment is that such consent is not required where the Scottish Ministers know or have reason to believe that any ancient monument is at risk of imminent damage or destruction.

Section 11 – Inventories of gardens and designed landscapes and of battlefields

58. Section 11 inserts new sections 32A and 32B in the 1979 Act which create a new statutory duty for Scottish ministers to compile and maintain an inventory of gardens and designed landscapes and an inventory of battlefields.

New section 32A – Inventory of gardens and designed landscapes

59. Subsection (1) places a new statutory duty on Scottish Ministers to compile and maintain an inventory of gardens and designed landscapes which, in their view, are of national importance.

60. Subsection (2) defines gardens and designed landscapes for the purposes of the new section.

61. Subsection (3) provides Scottish Ministers with the power to add, remove or amend entries in the inventory from time to time.

62. Subsection (4) states that when adding a garden and designed landscape to the inventory or modifying the inventory Scottish Ministers must inform the owner and (when the owner is not the occupier) the occupier of the grounds in question and the local authority in whose area the grounds are situated.
63. Subsection (5) states that Scottish Ministers must from time to time and in a manner they think fit publish a list of the gardens and designed landscapes included in the inventory at the time of publication.

New section 32B – Inventory of battlefields

64. Subsection (1) places a statutory duty on Scottish Ministers to compile and maintain an inventory of battlefields.

65. Subsection (2) defines battlefield for the purposes of the new section.

66. Subsection (3) applies subsections (3) to (5) of new section 32A to an inventory of battlefields compiled under section 32B(1). The effect of this is that the functions of the Scottish Ministers set out in those subsections are also exercisable in respect of the inventory or battlefields.

Section 12 – Development and understanding of matters of historic, etc. interest: grants and loans

67. Section 12 inserts a new section 45A into the 1979 Act to provide a new power of financial assistance to the Scottish Ministers. Subsection (1) states that Scottish Ministers may make grants or loans in connection with or with a view to the promotion of the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest. Subsection (2) of the new section 45A sets out that such grants or loans may be subject to such conditions as the Scottish Ministers think appropriate. Subsection (3) provides that, without prejudice to any powers of the Scottish Ministers under any enactment (including this Act), the total amount of grants and loans which may be made under this section must not exceed £100,000 in any one year period.

Section 13 – Regulations and orders under the 1979 Act

68. Section 13 amends section 60 of the 1979 Act and confirms that any regulation or order making powers conferred by the 1979 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provisions that Scottish Ministers consider necessary or expedient.

Section 14 – Meaning of “monument” in the 1979 Act

69. Section 14 amends the meaning of “monument” in section 61(7) of the 1979 Act (interpretation) and extends the range of historic environment assets that can be designated under the 1979 Act to include “any site comprising any thing, or group of things, that evidences previous human activity”.

Section 15 – Scheduled monument consent: regulations as respects applications, etc.

70. Section 15(2) inserts a new sub-paragraph (1A) after paragraph 1(1) of Schedule 1 to the 1979 Act. This enables Scottish Ministers to make regulations as to the form, manner and content of the granting of scheduled monument consent. Section 15(3) amends paragraph 2 of
Schedule 1 to the 1979 Act. This enables regulations to be made by the Scottish Ministers to make provision as to what certificates must accompany an application to enable it to be considered, the notification and publication of applications for scheduled monument consent, the form and content of certificates and notices and such further particulars of the matters to which such certificates relate.

Section 16 – Refusal to entertain certain applications for scheduled monument consent

71. Section 16 inserts a new paragraph 2B after paragraph 2A of Schedule 1 to the 1979 Act enabling Scottish Ministers to decline to consider a scheduled monument consent application in two situations. The first is where the application is similar to an application that had been made within the previous two years and Ministers consider there has been no significant change in any material considerations since the similar application was refused. The second is where the application is made while a similar application is under consideration by Ministers. Sub-paragraph (4) clarifies that an application for scheduled monument consent is taken to be similar if the scheduled monument and the works are in the opinion of Scottish Ministers the same or substantially the same.

Section 17 – Application for scheduled monument consent: inquiries and hearings

72. Section 17 amends paragraph 3(2) of Schedule 1 to the 1979 Act to replace the requirement to hold a public local inquiry or a hearing before determining whether or not to grant scheduled monument consent with a power to do so.

PART 3 – MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 18 – Certificate that building not intended to be listed

73. Section 18 inserts a new section 5A into the 1997 Act enabling Scottish Ministers to issue a certificate that they do not intend to list a building during the five years from the date of the certificate. Any person can apply for such a certificate.

74. Subsection (2)(b) of section 5A states that for that 5 year period a local planning authority may not serve a building preservation notice in relation to the building or affix such a notice under the terms of section 4(1) of the 1979 Act.

75. Subsection (3) requires that a person applying for a certificate must, at the same time, inform the local planning authority within whose district the building is situated of the application.

Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines

76. Section 19 raises the level of fines on summary conviction under section 8 of the 1997 Act (offences) to £50,000. This relates to a conviction for an offence described in section 6 or 8(2) of the 1997 Act – the carrying out of unauthorised works on a listed building or non-compliance with a condition of listed building consent.
Section 20 – Declining to determine an application for listed building consent

77. Section 20 inserts a new section 10A after section 10 of the 1997 Act enabling planning authorities to decline to determine an application for listed building consent in certain situations. Subsections (1)(a) to (1)(e) set out the specific circumstances where a planning authority may decline to determine an application for listed building consent.

78. Section 10A(2) clarifies that an application for listed building consent is taken to be similar to another such application if the listed building and works to which the applications relate are in the opinion of the planning authority the same or substantially the same.

79. Subsection (2) of section 20 allows for an appeal to be made to the Scottish Ministers where the planning authority have failed to give notice to a person applying for listed building consent that they have declined to determine the application under the power in section 10A.

Section 21 – Hearings in connection with applications for listed building consent and appeals

80. Section 21 removes the requirement to hold a hearing before determining applications and appeals under the 1997 Act. This provision amends the 1997 Act to bring the equivalent processes into line with those in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006. Paragraph (a) repeals subsection (4) of section 11 (reference of certain applications to the Scottish Ministers) of the 1997 Act. Paragraph (b) repeals certain provisions of Schedule 3 to the 1997 Act relating to the determination of certain appeals by persons appointed by the Scottish Ministers and certain appeals by the Scottish Ministers which, but for a direction under paragraph 3(1), would fall to be determined by an appointed person.

Section 22 – Enforcement notice: requirement to cease works

81. Section 22 amends section 34 (power to issue enforcement notice), section 35 (appeal against listed building enforcement notice), section 39 (offence where listed building enforcement notice not complied with) and section 40 (effect of listed building consent on listed building enforcement notice). The amendments allow a listed building enforcement notice to specify any works which the planning authority or the Scottish Ministers require to cease and/or to specify steps which must be taken, and makes the necessary amendments following on from this to the enforcement process.

Section 23 – Stop notices and temporary stop notices

82. Section 23 inserts new sections 41A to 41I into the 1997 Act giving local authorities the power to serve stop notices and temporary stop notices in relation to unauthorised works on a listed building.

New section 41A – Stop notices

83. Subsections (1) and (2) set out the circumstances in which local planning authorities may issue a stop notice. In so doing local planning authorities must consider it expedient for the
works to cease before the expiry of the period for compliance with a listed building enforcement notice.

84. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the listed building enforcement notice has been served but may not be served after the listed building enforcement notice has taken effect.

85. Subsection (3) of new section 41A clarifies that “relevant works” refers to the “works” that the local planning authority require to cease under the terms of the enforcement notice together with any associated works.

86. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the planning authority consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days from the date, when the notice is served.

87. Subsection (6) sets out that the local planning authority may serve the notice on any person who appears to them to have an interest in the building or is executing or causing to be executed the relevant works specified in the listed building enforcement notice.

88. Subsection (7) allows local planning authorities to withdraw a stop notice at any time by notice which must be served on all persons who were served with the stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

New section 41B – Stop notices: supplementary provisions

89. New section 41B sets out supplementary provisions relating to stop notices. Subsections (1) and (2) set out the circumstances in which a stop notice ceases to have effect. Subsection (4) sets out how the planning authority may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

New section 41C – Power of the Scottish Ministers to serve stop notice

90. New section 41C allows Scottish Ministers to serve a stop notice under section 41A. It clarifies that notices so served have the same effect as those served by a local planning authority and that provisions of the Act relating to stop notices apply to those served by Scottish Ministers as they apply to those served by the planning authority. Scottish Ministers may serve a stop notice either where a planning authority have issued an enforcement notice or where Scottish Ministers themselves have issued the enforcement notice.

91. Subsection (3) makes it clear that Scottish Ministers must consult the planning authority before issuing a stop notice.
New section 41D – Compensation for loss due to stop notice

92. Subsection (1) sets out that a person with an interest in the building is entitled to compensation in respect of any loss or damage that can be attributed to the prohibition in the stop notice. Compensation is also payable where works prohibited by the stop notice cease to be “relevant works” (within the meaning of section 41A(3)) as a result of a variation of the listed building enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are when the stop notice is withdrawn or the associated enforcement notice is quashed, withdrawn, or varied. Subsection (6) provides that the compensation that may be payable under this section includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (7). Subsection (8) provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 41E – Penalties for contravention of stop notice

93. New section 41E sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offences including allowing for conviction to be made for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

94. New sections 41F to 41I cover the operation of the new system of temporary stop notices.

New section 41F – Temporary stop notices

95. In new section 41F subsection (1) sets out the circumstances in which planning authorities may issue temporary stop notices. The planning authority has to consider that the works to a listed building are unauthorised or fail to comply with a condition attached to consent and consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the building as one of special architectural or historic interest.

96. Subsection (2) requires a notice to be in writing and to specify the works in question, prohibit execution of the works and set out the planning authority’s reasons for issuing the notice.

97. Subsection (3) states that notice may be served on a person who either appears to be executing, or causing to be executed the works and/or a person who has an interest in the building.

98. Subsection (4) states that the planning authority must display a copy of the notice and a statement on the effect of section 41H (relating to offences) on the building in question.

99. Subsections (5) to (7) sets out when the notice starts and ceases to have effect. It may have effect for a maximum of 28 days.
100. Subsection (8) provides that if the notice is withdrawn before the end of the 28 day period (or specified shorter period), it ceases to have effect at that point.

New section 41G – Temporary stop notices: restrictions

101. In new section 41G, subsection (1) enables regulations to be made prescribing types of work the execution of which is not prohibited by a stop notice; and subsection (2) prohibits the issue of further temporary stop notice unless another form of enforcement action has been taken e.g. the service of an enforcement notice.

New section 41H – Temporary stop notices: offences

102. In new section 41H subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.

103. Subsection (5) sets out the statutory defences under this section, which are that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.

104. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the activity which constituted the offence.

New section 41I – Temporary stop notices: compensation

105. In new section 41I subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the notice being served. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by listed building consent granted on or before the date the temporary stop notice is first displayed and/or the planning authority withholds the notice other than following such grant of listed building consent. Subsection (3) applies subsections (5) to (9) of new section 41D to compensation under this section. Any question of disputed compensation will be referred to and determined by the Lands Tribunal.

106. Subsection (2) of section 23 gives persons duly authorised by a planning authority rights of entry in relation to the enforcement of listed building enforcement notices, stop notices, and temporary stop notices.

Section 24 – Non-compliance with listed building enforcement notice: fixed penalty notice

New section 39A – Fixed penalty notice where listed building enforcement notice not complied with

107. Section 24 inserts new section 39A into the 1997 Act. This establishes powers for planning authorities to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice provided the conditions set out in subsection (9) are met. The conditions in subsection (9) are that the fixed penalty notice must be issued within 6 months of the failure to comply with the listed building enforcement notice, and
that a fixed penalty notice cannot be issued where a person has already been charged with an
toffence in respect of the breach of the listed building enforcement notice.

108. Subsections (6) and (7) set out that a person who receives a fixed penalty notice has 30
days to pay the penalty, and that the penalty is reduced by 25% if payment is made within 15
days.

109. Subsection (12) provides that any payment received by a planning authority in respect of
a fixed penalty notice is retained by the authority.

110. Subsection (13) allows Scottish Ministers to prescribe in secondary legislation different
levels of fine for different cases. This will also allow Ministers to set out in regulations an
incremental scale of fines related to previous breaches of listed building enforcement notices
relating to the same steps or works.

Section 25 – Liability of owner and successors for expenses of urgent works

111. Section 25 inserts new sections 50A to 50G into the 1997 Act. These new sections will
enable a notice of liability for expenses to be registered in the appropriate property register
against a listed building.

New section 50A – Liability of owner and successors for expenses of works executed under
section 49

112. New section 50A deals with the apportionment of liability for the expenses of urgently
necessary works for the preservation of a listed building when a property is sold. It makes it
clear that an owner does not cease to be liable when he or she ceases to own a property.
Subsection (1) provides that an owner will remain liable for relevant costs after the property has
been sold.

113. Subsection (2) deals with the liability of an incoming or “new” owner of a property. A
new owner is severally liable with the outgoing owner. If there are further new owners, both or
all are bound. This is, however, subject to the provisions of subsection (3) which provides that
an incoming owner will be liable for the cost of any urgent works which have been carried out
prior to the date on which the new owner becomes the owner of the property only if a notice of
liability for expenses has been registered in the property registers (on or before a date 14 days
prior to the new owner becoming the owner) and the notice has not expired before that date or
that a notice of renewal has been registered and has not expired. Liability for the cost of
completed urgent works where no notice has been registered is thus excluded. In other words, if
no notice is registered, the purchaser is not liable. Where a notice is registered, then a new
owner would be liable for the full amount of the cost of the urgent works as described in the
notice.

114. Where the new owner pays any relevant costs, under subsection (8) they may recover the
amount paid from a former owner, if the former owner is liable.
New section 50B – Notice of liability for expenses: further provision

115. Subsection (1) of new section 50B sets out who may register a notice of liability for expenses and provides that a notice may be registered in relation to different works executed on a listed building. A notice will expire after 5 years, though it may be renewed.

116. Subsection (2) provides that the Keeper of the Registers of Scotland will not be required to determine whether or not the information contained in a notice of potential liability for expenses is accurate.

New section 50C – Notices of renewal

117. Subsection (1) sets out that a notice of renewal may be registered only when a notice of liability for expenses has been registered and has not expired.

118. Subsection (2) provides Scottish Ministers and planning authorities with the power to register a notice of renewal in a form prescribed under inserted section 50G.

119. Subsection (3) allows for a second or subsequent notice of renewal to be registered in respect of the same expenses and works as specified in the original notice of liability.

120. Subsection 4 sets out that a second or subsequent notice of renewal cannot be registered if a notice of renewal for expenses has expired.

121. Subsection (5) makes it clear that where a notice of liability for expenses has been registered by Scottish Ministers a notice of renewal may be registered only on application of Scottish Ministers. Subsection (5) also makes it clear that where a notice of liability for expenses has been registered by a planning authority a notice of renewal may be registered only on application of that authority.

122. Subsection (6) states that a notice of renewal expires after a period of 5 years.

123. Subsection (7) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of renewal is accurate.

New section 50D – Notice of determination following representations under section 50

124. Subsection (1) makes it clear that subsections (2) and (3) apply only where a notice of liability of expenses or a notice of renewal has been registered and the owner has made representations to the Scottish Ministers under the terms of section 50(4) of the 1997 Act or section 50(6) of the 1997 Act as inserted by section 25(2) of this Bill.

125. Subsection (2) sets out that when a notice of liability has been registered by a planning authority the authority must apply to register a notice of determination in a form prescribed under new section 50G as soon as practicable after the Scottish Ministers have given notice of their determination under the terms of section 50(5).
126. Subsection (3) sets out that when the original notice of liability has been registered by Scottish Ministers they must apply to register a notice of determination as soon as practicable after they have made their determination.

127. Subsection (4) sets out that a notice of determination must specify the amount recoverable in connection with a notice of liability for expenses.

128. Subsection (5) makes it clear that when the amount recoverable as set out in a notice of determination is less than the amount specified as the expenses of the works set out in the original notice of liability the amount specified in the notice of determination is to be treated as the amount recoverable.

129. Subsection (6) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of determination is accurate.

New section 50E – Discharge of notice of liability for expenses and notice of renewal

130. Subsections (1)(a) and (b) clarify that subsections (2) and (3) apply only when a notice of liability for expenses or a notice of renewal have been registered and any liability for expenses under section 50(2) has been fully discharged.

131. Subsection (2) states that when a planning authority has registered the original notice of liability for expenses the authority must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.

132. Subsection (3) states that when Scottish Ministers have registered the original notice of liability for expenses they must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.

133. Subsection (4) confirms that when registered a notice of discharge discharges a notice of liability for expenses or, where applicable, a notice of renewal.

134. Subsection (5) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of discharge is accurate.

New section 50F – Meaning of “register” in relation to notices

135. Section 50F defines “register” in relation to a notice of liability for expenses; a notice of renewal; a notice of determination and a notice of discharge as either the Land Register of Scotland or the Register of Sasines.

New section 50G – Power to prescribe forms

136. Section 50G gives the Scottish Ministers power to prescribe the forms of notices for liability for expenses, notices of renewal, notices of determination and notices of discharge.
Section 26 – Recovery of grants for preservation etc. of listed buildings and conservation areas

137. Section 26 amends sections 52 and 70 of the 1997 Act which enables the Scottish Ministers and planning authorities to recover grants made under sections 51 and 69 of that Act.

138. These new provisions mean that Scottish Ministers and planning authorities can specify in a grant award letter the amount that would be recoverable (or set out the terms for calculating the amount that would be recoverable) when a condition of grant is either contravened or not complied with, or in the event the property is disposed of.

Section 27 – Provisions that do not bind the Crown

139. Section 27 amends section 73A of the 1997 Act to ensure that new sections 41E, 41H and 50A(2) do not bind the Crown.

Section 28 – Regulations in connection with inquiries, etc

140. Section 79(1) of the 1997 Act applies various provisions of the Town and Country Planning (Scotland) Act 1997 (“the TCPS Act”) for the purposes of the 1997 Act including the power to hold inquiries under section 265 of the TCPS Act. Section 52 of the Planning etc. (Scotland) Act 2006 introduced a new section 275A into the TCPS Act which enables the procedure to be followed in such inquiries to be set by regulations made by the Scottish Ministers.

141. Section 28(1) of the Bill inserts a reference to the new section 275A into section 79(1) and so will enable such regulations to be made in relation to inquiries held under the 1997 Act.

142. Section 28(2) of the Bill removes the power to make rules under the Tribunals and Inquiries Act 1992 for inquiries held under Schedule 3 to the 1997 Act.

Section 29 – Regulations and orders under the 1997 Act

143. Subsections (2) and (5) amend subsections (2) and (4) of section 82 of the 1997 Act and confirm that the power to make regulations and orders under the 1997 Act may be exercised to make different provisions for different purposes.

144. Subsection (4) inserts a new section 3A into section 82 of the 1979 Act to provide that a statutory instrument containing regulations prescribing the fixed penalty amounts made by virtue of section 39A(5) is subject to affirmative procedure in the Scottish Parliament.

145. Subsection (6) confirms that any regulation making powers conferred by the 1997 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provision that Scottish Ministers consider necessary or expedient.
PART 4 – GENERAL

Section 31 – Ancillary provision

146. Subsection (1) confers powers on the Scottish Ministers enabling them to make supplementary, incidental, consequential, transitory, transitional or saving provision in connection with the Bill where such provision is considered necessary or expedient.

147. Subsection (2) states that the provision which can be made under section 31(1) includes provision to amend or repeal any enactment, including any contained in the Bill, or any other instrument.

148. Subsection (5) provides that any order which adds to, replaces or omits any part of an Act shall be subject to an affirmative resolution procedure in Parliament. Other than this, orders will be subject to negative resolution procedure.

Section 32 – Short title and commencement

149. Subsections (2) and (3) set out the arrangements for commencement of the provisions of the Bill. Sections 30 and 31 commence on Royal Assent. Section 32 comes into force on Royal Assent, and all other provisions are to be commenced by order.

FINANCIAL MEMORANDUM

INTRODUCTION

150. This memorandum sets out the financial implications of the Historic Environment (Amendment) (Scotland) Bill. This Financial Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Background

151. The Historic Environment (Amendment) (Scotland) Bill is an amending piece of legislation. The Bill will remove barriers to the use of existing powers, and enhance the ability of the regulatory and planning authorities to manager our historic environment in a sustainable way for the enjoyment and benefit of future generations.

152. The draft Bill is made up of four Parts. The first three parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill and a fourth Part which includes provisions on “Interpretation” and “Short Title and commencement”. The Principal Acts are:

- the Historic Buildings and Ancient Monuments Act 1953 (“the 1953 Act”);
- the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”); and
General comment on the financial implications of the Bill provisions

153. The Bill builds on and modifies well-developed and established structures and legislation. For example, a system for scheduling monuments in Scotland was first put in place in 1882, and one for listing buildings in 1947. The provisions are designed to carry no or absolutely minimal ongoing costs and also no significant one-off costs. The Bill is intended to place no new significant burdens or duties on central or local government or owners of assets, businesses or individuals.

154. The primary effect of the Bill is to enhance the ability of Historic Scotland and local authorities to achieve existing objectives. The use of the new powers that the Bill will introduce will largely be a discretionary matter for the regulatory authorities (Historic Scotland and local authorities), not a duty, and one important intended effect of the Bill is to allow these bodies greater flexibility and discretion about how to achieve best value and produce improved results for the same input of resources. In most cases it is not possible to estimate readily the number of occasions on which individual new powers may be used, which will depend on what cases arise and what judgements are made in the future about what action offers best value, in terms of potential costs and outcomes. For most of these powers, the principal cost incurred will be in terms of staff time, which will be found through the re-prioritisation of work as appropriate. In many instances, there is unlikely to be a predictable annual pattern of use, and Ministers expect many of these powers to be used only occasionally. Historic Scotland, local authorities and other public bodies are content that no additional resources are required.

155. Where information below is presented as a range of possible costs, unless specifically indicated otherwise, it is regarded as very unlikely that figures will fall outwith this range, based on the most relevant evidence and experience to date.

Consultation

156. The content of the Bill is based on a series of provisions identified by Historic Scotland and local government, and developed further in discussion with other stakeholders during 2007. The Bill was subject to a full public consultation between 20 May and 14 August 2009. The outcome of the consultation has informed the Scottish Government’s assessment of the cost implications of the Bill.

157. The Scottish Government consultation specifically invited consultees’ comments on an initial financial assessment of the costs associated with the Bill provisions that were included in the consultation document and any potential financial implications of the Bill that they could identify. COSLA agreed that the proposed amendments would not carry any direct financial implications for its members and were unlikely to have a significant overall impact on their day-to-day costs. Individual local authorities who commented on the financial implications of the Bill provisions generally agreed. Historic Scotland, as an Executive Agency, has led the work within the Scottish Government on the Bill and is satisfied that it will not require additional resources as a result of the Bill.
COSTS ASSOCIATED WITH THE BILL PROVISIONS

158. Sections 1 to 18 and section 26(4) are concerned with activities which fall within the remit of Historic Scotland, principally the designation of scheduled monuments and listed buildings and the granting and enforcement of scheduled monument consent (SMC). The best assessment of the cost for Historic Scotland of each section is provided, wherever possible. There are no costs for local authorities in any of these sections. There are no potential costs for other bodies or individuals unless mentioned.

159. Sections 19 to 25 and section 26(2) and(3) are concerned with activities which fall within the remit of local authorities, principally the granting and enforcement of listed building consent (LBC). There are no costs for Historic Scotland in these sections. There are no potential costs for other bodies or individuals unless mentioned.

SECTIONS WITH RELEVANCE TO COSTS ON THE SCOTTISH ADMINISTRATION

160. No additional funding will be required from the core Scottish Government to enable Historic Scotland to implement the new powers that will be introduced by the Bill.

Legal proceedings

161. As a general issue, a number of the provisions create additional circumstances in which prosecutions could be brought under the 1979 Act. This potential already exists under current legislation. In practice, cases are rarely taken to that point. For example, at present, of the thirty damage cases reported and investigated each year on average, only about two per year have potential to progress to prosecution, as the majority of others are either minor and/or the perpetrator is unknown. However, fewer cases than that proceed to court in practice: whether prosecution is in the public interest will always be taken into account, as will whether prosecution is in the best interests of the monument’s future management and protection.

162. As general background, only seventeen prosecutions under the 1979 Act have been sought by Historic Scotland, and its predecessors: the last case Historic Scotland led to court (this was successfully prosecuted) was in 1998. It is not considered that this Bill will significantly change that position and, therefore, rather than attempt to estimate the number of possible new cases under each relevant provision, which is extremely difficult, it is assumed that the legislation taken as a whole would increase the number of cases reaching the courts by between 0 and 2 cases every 5 years, with the likely position being at the low end of that range. This would give rise to overall costs as below.

Costs on the Scottish Administration

163. Historic Scotland has no recent costings to use as a baseline for its involvement in court cases. For these purposes, we estimate that such costs would be between £5,000 to £10,000 per case: comprising £3,555 for Historic Scotland costs, £810 for legal representation and a general allowance for non-estimable costs for, e.g., expert witnesses and commissioned reports. This implies a range of costs on any five years of between £0 and £20,000.
164. In relation to the Scottish Courts Administration and the Crown Office the average cost of bringing a case in the sheriff courts under summary proceedings, which it is assumed would be the usual approach, although other proceedings are not ruled out, is £260 (£95 for judicial salaries plus £165 for SCS running costs) to the SCS and £244 for the Crown Office. This suggests a total cost over a period of 5 years of between £0 and £520 for SCS and between £0 and £488 for the Crown Office. Both organisations believe the costs associated with the Bill will not be significant for them and are readily absorbable.

Sections 1 and 26(4) – Recovery of grants for repair, maintenance and upkeep of certain property and recovery of grants for preservation etc. of listed buildings and conservation areas

165. No costs are expected to arise from these provisions. These provisions deal with grant schemes for outstanding buildings and conservation areas which Historic Scotland already operates. Under both the relevant schemes, Ministers are entitled to recover a proportion of their grant in certain circumstances, including the sale of the building, within a ten-year period. As a general rule, grant is reclaimed at a rate of 100% in the first year, 90% in the second year and so on: but it is not possible to specify a particular approach at the start of the project. The provision will in future allow Ministers, where they wish, to specify in the grant award for a project the amount recoverable or the means of calculating the amount in the event of a sale or breach of conditions. This is intended to facilitate those cases where the anticipated proceeds from the onward sale of the building, including certainty about the basis on which any grant will be recovered, will make an important contribution to the viability of the project.

Section 2 – Control of works affecting scheduled monuments (section 2(a))

166. This provision clarifies that the use of electronic communication for the issuing of SMCs will be possible. This will allow a very modest saving in terms of the stationary and postal costs of preparing and issuing hard copy SMCs. In 2008-09, 239 SMC cases were handled by Historic Scotland. This suggests an annual saving of around £220. There may be some savings for the recipients of consents, in terms of enabling earlier response, but this cannot be estimated with any reliability.

Section 2 – Control of works affecting scheduled monuments (section 2(b))

167. This provision recognises that in certain circumstances it would be expedient for Ministers to be able to grant consent retrospectively for works coming to their attention for which SMC should have been sought. This facility currently exists in respect of listed buildings, but not scheduled monuments. Up to 10 such cases typically come to attention each year. Historic Scotland believes the administrative costs of dealing with such cases will be unchanged by this provision: however, there will now be the option of drawing a clearer line under each one.

Section 3 – Offences under sections 2, 28 and 42: modification of defences

168. This will replace the existing defences based on lack of knowledge or belief under the 1979 Act, to make these more comparable with what exists in other legislation, in terms of expectation that a person will take reasonable steps to establish whether a site is protected. It is hoped this provision will encourage greater use of the current sources of information on the location of scheduled monuments and reduce the number of incidents of unauthorised works,
although it is not possible to put any reliable estimate on how many such cases, with the potential enforcement and remediation costs, may be avoided.

169. Potential prosecution-related costs are covered at paragraph 163 above. Information about the location of scheduled monuments is already readily available, for example on the Historic Scotland website and on PASTMAP, and the scope for developing such sources of information is already being considered.

Costs on other bodies and individuals

170. Some consultees were concerned that these provisions, as consulted on\(^2\), would increase costs on those undertaking works, particularly in rural settings, by placing them under an obligation to check exhaustively on the location of scheduled monuments. In finalising the Bill, Ministers have recognised this concern and modified the original proposal so that a person will still have a defence if they can demonstrate that they took all reasonable steps to establish if a site was protected. Given the existence of information on the Historic Scotland website and elsewhere, the further consideration being given to how this is presented and Historic Scotland’s commitment to work with owners and their representative bodies to raise awareness of sources of information, Ministers do not believe that this section will create any significant new costs for those contemplating works.

Section 5 – Powers of entry to inspect condition of scheduled monument

171. This section clarifies the drafting of the legislation. No additional costs are expected for Historic Scotland or any other organisation or individual. There is a possibility of minor savings in staff time for Historic Scotland, in terms of reducing time spent in occasional disputes with owners over the scope of the existing powers (which Historic Scotland draws on extensively) but these cannot be sensibly quantified and will be small.

Section 6 – Works affecting scheduled monuments: enforcement

172. This section introduces into the 1979 Act enforcement powers already available in the context of listed buildings; and stop notice and temporary stop notice powers already available in the planning system. At present the only mechanism for intervening in a situation where unauthorised works on scheduled monuments come to attention is for Ministers to seek an interdict. Section 6 (inserted sections 9A to 9F) will introduce new powers to enable Scottish Ministers to serve a scheduled monument enforcement notice (SMEN) that will allow for the reversal or amelioration of unauthorised works to scheduled monuments or works in breach of any condition attached to scheduled monument consent, in cases where such remedial works are desirable or reasonably practicable. Section 6 (inserted sections 9G to 9N) will introduce new powers to enable Scottish Ministers to issue stop notices and temporary stop notices for unauthorised works on a scheduled monument. These will effect a halt – immediate in the case of temporary stop notices – to unauthorised works to a scheduled monument and will provide additional powers to prevent irremediable damage to such nationally important monuments though illegal and unauthorised works.

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\(^2\) The original proposal was to repeal the defences based on lack of knowledge without any replacement.
173. Historic Scotland estimates that it may issue up to 10 notices a year under this provision. The cost of such a notice is estimated as £188 in staff time (further breakdown available) and £100 in travel costs, recognising that in some cases the notice will need to be fixed to the land, giving a cost of £288 per notice. In addition there are potential costs in checking that a notice has been complied with. These are estimated as £71 in staff time (further breakdown available) and £100 in travel, giving an additional cost of £171 per notice. This provides an overall upper estimate of costs of £4,590 a year. Historic Scotland is content that this is readily absorbable. These provisions will in theory reduce the need to seek interdicts: however, in recent years Historic Scotland has not used this mechanism at all, so it does not seem sensible to identify a specific saving.

174. Section 6 (inserted section 9I) provides for compensation to be paid for loss due to a stop notice in certain specified circumstances when a stop notice ceases to have effect. A stop notice ceases to have effect when the SMEN is quashed or the SMEN or the stop notice is withdrawn by Scottish Ministers. The loss or damage in respect of which compensation is payable under this section includes any sum payable in respect of a breach of contract caused by the taking of the action necessary to comply with the prohibition. There is clearly potential for compensation costs to arise in certain circumstances in relation to stop notices, but Scottish Ministers would simply need to factor the risk of a successful compensation claim into any decision to serve a notice. The Scottish Government is satisfied that cases would only be pursued when Historic Scotland is sure of its ground and the risk of a successful claim for compensation is very low. It is not possible to provide reliable estimates for potential compensation sums, which would be highly specific to individual cases. Given that these powers are unlikely to be used where it was assessed likely that compensation could be successfully pursued, and that the circumstances around any such claim are unpredictable, it is not considered that any reliable estimate can be provided for potential costs. Historic Scotland is content that this provision does not raise any significant financial issues for Historic Scotland.

175. In relation to the Scottish Courts Service the new provisions relating to SMENs provide for an appeal to the sheriff against the notice and on the grounds of procedural error. This may have marginal cost implications for the Scottish courts. However, it is impossible to say how many cases will reach appeal. It is not believed that a significant number of SMENs will be issued and it is the Scottish Government’s view that not many will be appealed: it is estimated between 0 and 2 a year. Where an appeal to the sheriff does take place, the cost is expected to be £260 per case, as above, giving an estimate of between £0 and £520 a year. This section of the consultation document attracted no comment from consultees and it remains the Government’s view that there will be very few appeals under the new regime. Any reduction in interdicts as above would represent a small saving to the courts, but as noted above this is expected to have minimal impact.

Section 7 – Control and management of monuments and land under guardianship

176. This provision removes differences in the provisions for monuments taken into guardianship pre- and post-1979 in recognition that over the past 30 years the legal distinction has not proved to have any practical effect: its removal therefore simplifies the legal framework. The section also clarifies that Ministers’ powers in respect of monuments under guardianship include the power to hold events and charge for these, putting beyond doubt Historic Scotland’s ability to respond to the twenty-first century expectations of communities and individuals. It will
also put beyond doubt Historic Scotland’s responsibilities towards visitors in relation to health and safety and other legislation relevant to the holding of events. Historic Scotland does not expect any significant new costs to arise from this. The provision enabling charging for events at these sites does not have capacity to generate new income at a level which would be significant for Historic Scotland. Although Historic Scotland has significantly developed its programme of events in recent years, particularly at the key sites of Edinburgh Castle and Stirling Castle (both Crown owned) events still contribute a relatively small proportion of income: admissions, retail and catering continue to provide almost 95% of income. The nature of guardianship properties means that events at these properties will overwhelmingly be small scale community events, and other small events, for which only modest charges focused on cost recovery could be set, and which would not be expected to make any significant contribution to Historic Scotland’s overall income. Events are already held at these sites and the total income from them in the last 3 years has been: £104,364 in 2007-08; £108,032 in 2008-09; and, £78,608 in 2009-10. Historic Scotland does not expect the sums raised in this way to increase significantly in the future.

**Section 8 – Provision of facilities, etc. at ancient monuments**

177. This provision puts beyond doubt that Ministers may provide facilities for the public at properties in care and clarifies what such facilities may include. Historic Scotland has provided such facilities for many years and therefore has no specific programme of works contingent on the Bill and expects this provision to carry no specific costs.

**Section 9 – Financial support for preservation etc. of monuments**

178. The provision removes a barrier to providing grants from within the existing archaeology programme to tenants and other third parties. At present grants can only be provided to such persons at the request of the owner. The provision is particularly intended to deal with occasions where a third party – such as a trust – wishes to seek grant aid, but the owner, though content with a project going ahead, would prefer not to be drawn directly into the grant process. The new provision will allow greater flexibility within current budgets and it is not possible to provide any reliable estimate of the value of grants within that budget which may be payable in future specifically as a result of the change.

**Section 10 – Power of entry on land where monument at risk**

179. The amendment removes the requirement for the owner to consent to an excavation when a site is at risk or believed to be at risk of imminent damage or destruction. It is most likely to be called on in circumstances where an owner or their representative cannot be quickly contacted, despite best efforts, and the threat appears to be particularly acute. For more major investments, Historic Scotland would always by preference choose sites where an excavation is undertaken with the owner’s consent. The nature of excavations under this new power is therefore expected to be short-term and small-scale – e.g. the rescue of suddenly exposed vulnerable organic materials or limited exploratory investigation, to establish the potential significance of a newly-exposed site. We would expect between 3 and 6 cases every 5 to 10 years where the new power would be invoked to enable an excavation. The cost of excavations, which Historic Scotland contracts in, varies considerably but the typical cost of a small-scale emergency excavation is about £4,000. This suggests a cost from such activity over 5 to 10 years of between £12,000-

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3 Historic Scotland’s income from its properties in care in 2008-09 was £17.462m. This income is used for the upkeep and repair of properties in care.
These documents relate to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

£24,000. Costs would be found from within existing programmes and the decision would be at the discretion of Ministers (in practice Historic Scotland).

180. Compensation may be claimed: similar arguments as at paragraph 174 above apply, in terms of the provision of an estimate and the reason why Ministers do not believe that these potential costs should be estimated here.

Section 11 – Inventories of gardens and designed landscapes and of battlefields

181. Historic Scotland already maintains an inventory of gardens and designed landscapes and Ministers announced their intention to introduce a register of battlefields on 27 July 2009: no change in legislation is required to implement this. This provision does not affect that position. The new provision makes a technical change in the way these sites will be brought within scope of the planning system, through which they are protected. Rather than requiring, as now, periodic revision to the General Development Regulations, the inventories maintained by Historic Scotland will themselves have statutory standing. There will be a new duty to publish these documents in such form and at such time as Ministers think fit: Historic Scotland already publishes the gardens and designed landscapes inventory on its website and would expect to do the same for the battlefields inventory in due course, and so this duty is not expected to incur any additional cost. There will be an efficiency and effectiveness gain for local authorities, which will no longer be required to consult a list which over time may become out of date. There should also be benefits to applicants. However, it is not possible to cost these in any reliable way.

Section 12 – Development and understanding of matters of historic, etc. interest: grants and loans

182. The provision introduces an express power for Ministers to use grants and loans to fund a wider range of bodies than is currently recognised explicitly in legislation for a broad range of work in support of the historic environment, such as publications, feasibility studies of buildings and conferences. The total amount payable under this new power in any given year is limited to £100,000, to put beyond doubt that this provision is intended only to create some marginal flexibility and there is no wish here to open the way either to significant new expenditure or to any substantial change in the pattern of grant spending by Historic Scotland. It is not possible to estimate what additional sums may be payable as a result of this new power, as this will depend in part on what approaches Historic Scotland receives in future and how it chooses to respond. However, Historic Scotland is content that this provision does not require any increase in its budget, and that it simply provides it with greater flexibility and capacity for responsiveness in terms of the use of its overall grants budgets.

Section 14 – Meaning of “monument” in the 1979 Act

183. Section 14 of the Bill will extend the range of historic environment assets that can be designated under the 1979 Act by expressly allowing Ministers to designate as a scheduled monument “any site comprising any thing, or group of things, that evidences previous human activity”. This will lead to the scheduling of a very small number of sites that do not currently fall within the statutory definition of monument. Historic Scotland estimates the number of such sites to be around 10 (as against a total number of around 8,000 scheduled monuments). Whether individual sites should be scheduled under this new power will generally be considered
within Historic Scotland’s routine scheduling programme, which undertakes a rolling programme of area visits, reviewing existing sites and considering potential new ones. It is not practicable to identify additional new costs for scheduling individual sites within this programme. Historic Scotland is not aware of immediate threats to any of the potential new sites under this provision, which would require such a site to be considered urgently outwith that programme. If however an urgent separate consideration was required, the cost of an ad hoc scheduling is estimated at £1,129, comprising £1,029 in staff costs (further breakdown available) and £100 in travel. It is anticipated that this will be a rare occurrence, possibly once every 5 to 10 years. Historic Scotland is content that any costs will be easily absorbed.

Costs on other bodies and individuals

184. One respondent to the Bill consultation felt that this proposal would have financial implications for those that managed land on which “new” monuments were situated. The Scottish Government does not accept the view that the revised definition will have financial implications for land managers, although it does recognise that scheduling does have some impact. For instance, it brings owners within the consents regime, which is not charged but could involve additional process, depending on whether the owner wishes to undertake any works on the site. Scheduling in itself places very few burdens on the owners of monuments. The effects of scheduling may be summarised as follows:

- a scheduled monument remains the property of its owner. Once a monument is scheduled, the prior written consent of Scottish Ministers is required for most works that affect the monument, including repairs.
- a legal process known as “class consents” allows certain works to take place without the need for SMC. For example, if ploughing was taking place on the monument in a ten-year period up to the date it was scheduled, similar ploughing may continue without SMC.
- moreover a change from ploughing to grazing will not require SMC.

185. While the Scottish Government recognises the key role that owners, occupiers and managers can play in helping to ensure the survival of scheduled monuments and actively encourages positive management of sites, owners are not obliged to maintain or repair monuments. Indeed Historic Scotland is frequently asked by owners if they are required to fence a scheduled monument – the answer is no. The type of monument that the revised definition will capture, notably sites evidencing the earliest human activity in Scotland, some prehistoric and medieval industrial sites and parts of battlefields, will be extremely rare. The nature and quality of the presently available evidence for artefact scatters in general means that only a small number of new scheduling proposals are likely. Historic Scotland is not aware of any sites likely to be affected by this new provision where the nature of the site would bring into prospect the possibility of a significant impact on the operation of an existing business. Scottish Ministers, through Historic Scotland, would in any case expect to work closely with site owners, occupiers and managers to positively manage any such impacts.

Section 15 – Scheduled monument consent: regulations as respects applications, etc.

186. This provision will move some of the detail of the SMC application regime from primary to secondary legislation, enabling it to be kept more readily up to date and responsive to wider
developments in public administration and customer needs. No costs, other than the costs of producing a new regulation picking up some of the provisions of an existing schedule, are envisaged. No significant changes are planned to the regime, although the opportunity will be taken to modernise and simplify forms, which may generate some efficiency savings for users of the system and in Historic Scotland: however, these cannot be reliably estimated.

Section 16 – Refusal to entertain certain applications for scheduled monument

187. Section 16 makes provision which will provide Ministers with limited discretion to refuse to entertain repeat applications for SMC, in line with existing provisions in the planning regime. It will carry no cost and when used will create a saving, being the cost which would otherwise have been incurred in reconsidering the case. This power is expected to be used extremely rarely. The cost of considering a SMC case is estimated as £109 (further breakdown available) in staff costs and £100 in travel costs, giving a total saving of £209 per such case, expected once every 5 to 10 years.

Section 17 – Application for scheduled monument consent: inquiries and hearings

188. Section 17 brings SMC into line with planning, by passing the decision on whether to conduct an oral hearing or inquiry on applications for SMC to the body responsible for consideration of the decision rather than, as now, providing the appellant with the right to require one. This provision is principally intended to simplify the law by harmonising provisions and while there is a theoretical possibility of savings, it is expected in practice that the overall number of cases going to public local inquiry will be unaffected and there is no recent history of the cheaper hearings procedure being used.

Section 18 – Certificate that building not intended to be listed

189. This provision will enable Ministers to issue a certificate declaring that they have no intention to list a building for a period of 5 years. This is intended to provide certainty to those considering the development of an unlisted building, who wish to deal early on with any potential for listing. An application may result in listing, if appropriate, rather than the issue of a certificate. Drawing on the experience of a similar regime in England, Historic Scotland estimates that there are likely to be between 20 and 30 cases a year under this new provision. These will be dealt with within the existing ad hoc listing programme, under which the average cost of listing a building is £605, comprising £505 staff costs (further breakdown available) plus £100 in travel costs. This provides an estimated cost of between £12,100 and £18,150 per annum. As there is no experience of operating a provision of this type in Scotland and experience in England is only a partial guide, the degree of uncertainty around the range of possible costs here is potentially somewhat higher than for others provided. However, against this can be set a potential saving which is not quantifiable, from avoiding more time consuming and costly interventions at a later stage when owners, developers and local authority officers have invested in plans which must be relegated pending a listing consideration or redrafted in response to a listing.

Costs and savings on other bodies and individuals

190. It is expected that this provision will create savings for local authorities and developers, which have potential to be significant, by enabling greater certainty about whether a building
These documents relate to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

will fall within the LBC regime while plans for development are still at an early stage. A change in the status of a building may affect the validity of work done at an earlier stage and introduce delays and additional cost if earlier preparations or decisions have to be revisited. The potential for such savings cannot however be reliably estimated. One organisation felt that as regulation does not constrain who can apply for a certificate, a high volume of solicitors might do so when handling property transactions, and therefore there would be a widespread increase in conveyancing costs. However, it is the Scottish Government’s view that this is unlikely and that solicitors will not apply for a certificate where there is no obvious reason to do so and users of conveyancing services will not be willing to pay for this work when it is not required for any specific purpose.

SECTIONS WITH RELEVANCE TO COSTS ON LOCAL AUTHORITIES

Section 20 – Declining to determine an application for listed building consent

191. Following section 16 (see paragraph 187 above), section 20 makes a similar provision for local authorities in relation to listed building consent, providing local authorities with limited discretion to refuse to entertain repeat applications for LBC, in line with existing provisions in the planning regime. This will carry no costs and has some potential for savings, but is only expected to be used rarely in practice.

Section 21 – Hearings in connection with applications for listed building consent and appeals

192. Following section 17 (see paragraph 188 above), section 21 brings LBC into line with planning, by passing the decision on whether to conduct an oral hearing or inquiry on appeals for LBC to the body responsible for consideration of the decision rather than, as now, providing the appellant with the right to require one. As with section 17, this provision is principally intended to simplify the law by harmonising provisions and while there is a theoretical possibility of savings, it is expected in practice that the overall number of cases going to public local inquiry will be unaffected and there is no recent history of the cheaper hearings procedure being used.

Sections 22 to 24 – Enforcement notices: requirement to cease works and non-compliance with listed building enforcement notice: fixed penalty notice

193. These provisions bring the LBC regime into line with that for planning. Enforcement notices are already in place for LBC, and the provision in relation to those simply harmonises further detail with the planning regime. Stop notices and temporary stop notices offer local authorities an alternative to interdicts where they wish to obtain the urgent cessation of works: stop notices may only be issued alongside enforcement notices, though temporary stop notices are not restricted in that way and take immediate effect. Assuming the cost of issuing a stop or temporary stop notice is similar to the cost of issuing an enforcement notice, this would suggest a cost of around £150 per case (further breakdown available). In those cases where it is decided that further action is needed to ensure compliance, additional costs may be incurred, which are likely to be between £300 and £500 per case.4 However, it is not possible to estimate the frequency with which local authorities will choose to use these new powers. No data is gathered centrally on the use of enforcement notices at present. Without a reliable estimate of potential frequency, it is not possible to put a reliable figure on the potential costs an authority may incur.

4 These costs will not be incurred in every case and will not be additional where they simply substitute, or reduce the need, for enforcement action which would be taken at a later stage under existing arrangements.
which will also tend to vary, depending on the number of listed buildings in its area. However, given that councils will be able to decide when the use of these powers offers best value, as opposed to other approaches they may take, such as use of interdict, it seems reasonable to assume that the net costs, if any, will not be significant in relation to any individual council’s budget and local authorities have confirmed they expect this to be the case. Similar arguments as at paragraph 174 above apply in relation to the cost of compensation provisions.

194. Section 24 provides for a new regime of fixed penalty notices, again in line with the planning regime. The relevant provision (section 25 of the Planning etc. (Scotland) Act 2006) has only been in force for a relatively short time and local authorities have therefore not been able to provide an estimate of the cost of issuing a fixed penalty notice under the current planning regime for comparison. Again it is not possible to estimate how frequently an individual council may choose to use these powers. Overall, however, local authorities do not expect these costs to be significant.

**Section 25 – Liability of owner and successors for expenses of urgent works**

195. This provision will enable local authorities to register a liability for the cost of any urgent works against the title of a property. The purpose of the provision is to make it easier for local authorities to recover the costs of urgent works and so to encourage the more frequent use by councils of these powers, particularly at an early stage when lower-cost interventions may prevent the need for more expensive works later. The cost of preparing an urgent works notice is estimated at around £300 and the estimated cost of a registration with the Keeper of Registers will be £30 per title. Costs to local authorities will depend on the frequency of use. Data is not held centrally on the frequency of use of urgent repairs powers. However, all local authority expenses are recoverable from owners and so any costs are expected to be fully off-set, while an improved ability to recover these costs should generate overall savings. It is not, however, possible to provide a reliable figure for the savings that may arise.

**Costs on other bodies and individuals**

196. Existing legislation empowers the Keeper of the Registers of Scotland to charge fees in line with existing Registers of Scotland policy, in order to recover operational costs.

197. Costs of urgent works may already be recovered from owners. However, under the Bill, owners will no longer be able to avoid reimbursing the cost of urgent works simply by giving up title, by whatever means. Owners who keep their property in good order will not be affected. Any new owners will be properly informed about any outstanding liabilities at a point where they can take that into account in their transaction with the seller.

**Section 26(2) and (3) – Recovery of grants for preservation etc. of listed buildings and conservation areas**

198. Section 26(3) is intended to have similar effect as section 26(4) (see paragraph 165) and no costs are expected to arise from these provisions. Section 26(2) ensures that this applies both to grant and loan-making powers.
OTHER COSTS

Other costs on the Scottish Administration

One-off Bill implementation costs

199. There will be one-off costs of activities which, though not strictly required by the proposed legislation, would support its implementation. These are the production of updated policy guidance; training, particularly for Historic Scotland and local authority officers; and awareness-raising with key groups, including through paper and web publication. Historic Scotland intends to discuss further with stakeholders how these activities would be most effectively delivered and what sums will be required, but is confident that any costs can be absorbed within its current budget lines. Historic Scotland provisionally estimates that the total cost of these activities will fall in the range £65,000 to £90,000\(^5\), over the period 2010-11 to 2011-12. More precise estimates will be made available as discussions with stakeholders progress. Historic Scotland has a well-established programme of continuing professional development for the staff involved in its regulatory work, into which training on new provisions in the Bill can be readily integrated. In terms of the new local authority powers, the close modelling of these on existing planning provisions should be helpful in containing training costs. Historic Scotland is already working closely with the Improvement Service\(^6\), as part of its modernisation programme, to develop independent learning materials for relevant local authority staff, into which training on the Bill can be easily fitted.

200. The Bill also includes certain regulation making powers, which are individually difficult to cost but which collectively might be expected to cost between £5,000 and £10,000 to take forward, mainly in staff time, which can be managed within existing budgets.

Other costs on other bodies and individuals

Sections 4 and 19 – Fines: increases and duty of court in determining amount and Offences in relation to unauthorised works and listed building consent: increase in fines

201. These sections simply increase the maximum fines for offences under the 1979 Act and the 1997 Act to £50,000 (maxima are currently £10,000 and £20,000 respectively). This is the figure in the Marine (Scotland) Act 2010 and also more closely in line with maximum fines under nature conservation legislation.\(^7\) In the case of the 1979 Act, the courts are also instructed to take into account any likely financial benefit accruing to the person being fined from the unauthorised works, to bring that Act into line with other comparable areas of legislation. No costs are expected to arise for any organisation or individual, other than to those who have been found to contravene the law.

\(^5\) Based on estimates ahead of stakeholder discussion of minimum costs of £5,000 for policy preparation, £15,000 for direct communications with owners of monuments, £5,000 for internal Historic Scotland training and £40,000 for events and materials for stakeholders, including local authorities. The upper estimate makes an allowance for additional costs of just over one-third of the minimum.

\(^6\) The Improvement Service was set up in 2005 help improve the efficiency, quality and accountability of local public services in Scotland by providing advice, consultancy and programme support to councils and their partners. see http://www.improvementservice.org.uk/the-improvement-service/

\(^7\) Parallels with nature conservation legislation are regarded as particularly relevant here, given the commitment in National Outcome 12 to protecting and enhancing both the built and natural environment. The provisions in the Marine (Scotland) Act 2010 include fines for offences in relation to Historic Marine Protected Areas.
Provisions not referred to above

202. Where provisions are not referred to above, Scottish Ministers are content that no issues requiring further comment in the Financial Memorandum arise.

SUMMARY

203. The table annexed summarises the expected financial impact of the Bill, in terms of best estimates of costs and savings to the Scottish Administration, local authorities and other bodies, for those provisions against which a specific figure can be provided. Any ongoing costs and savings have potential to take effect from 2011-12 onwards.
<table>
<thead>
<tr>
<th>Section</th>
<th>Scottish Administration</th>
<th>Local authorities</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cost</td>
<td>Saving</td>
<td>Cost</td>
</tr>
<tr>
<td><strong>Annually</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Removal of requirement for scheduled monument consent to be written</td>
<td>-</td>
<td>£220 (HS)</td>
</tr>
<tr>
<td>6</td>
<td>Works affecting scheduled monuments: enforcement</td>
<td>Up to £4590 (HS) Up to £520 (SCS)</td>
<td>-</td>
</tr>
<tr>
<td>18</td>
<td>Certificate that building not intended to be listed</td>
<td>£12,100-£18,150 (HS)</td>
<td>-</td>
</tr>
<tr>
<td>22-24</td>
<td>Listed buildings: enforcement – notices</td>
<td>-</td>
<td>-</td>
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<tr>
<td>25</td>
<td>Liability of owners and successor for expenses of urgent works</td>
<td>-</td>
<td>-</td>
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<tr>
<td><strong>Every 5 – 10 years</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-</td>
<td>Legal proceedings</td>
<td>£0-£20,000 (HS) £0 - £520 (SCS) £0 - £488 (COPFS)</td>
<td>-</td>
</tr>
<tr>
<td>10</td>
<td>Power of entry where monument at risk</td>
<td>£12,000-£24,000 (HS)</td>
<td>-</td>
</tr>
<tr>
<td>14</td>
<td>Meaning of &quot;monument&quot; in the 1979 Act</td>
<td>£1129 (HS)</td>
<td>-</td>
</tr>
<tr>
<td>16</td>
<td>Refusal to entertain repeat applications</td>
<td>-</td>
<td>-</td>
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<tr>
<td><strong>One-off costs</strong></td>
<td></td>
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<tr>
<td>-</td>
<td>Policy guidance, education and awareness raising</td>
<td>£65,000-£90,000 (HS)</td>
<td>-</td>
</tr>
<tr>
<td>-</td>
<td>Preparation of regulations</td>
<td>£5,000-10,000 (HS)</td>
<td>-</td>
</tr>
</tbody>
</table>

¹ Potential small savings, not possible to estimate  
² Potential larger savings, not possible to estimate  
³ Frequency of use not possible to estimate  
⁴ Excludes any further costs associated with enforcement in certain cases  
⁵ Assumes one title per case: some cases may involve further £30 per additional title  
⁶ Local authorities entitled to seek full recovery of costs from owners
These documents relate to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

204. On 4 May 2010, the Minister for Culture and External Affairs (Fiona Hyslop MSP) made the following statement:

“In my view, the provisions of the Historic Environment (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

205. On 28 April 2010, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Historic Environment (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Historic Environment (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 4 May 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 43–EN.

POLICY OBJECTIVES OF THE BILL

Overview

2. Scotland’s historic environment is intrinsic to our sense of place and our strong cultural identity and plays a large role in helping to attract visitors to Scotland. It makes a significant contribution to the economy, for example through tourism and the support of indigenous craft skills1, and provides the people of Scotland with a rich environment in which to live and work. Our historic environment is both inspiring and irreplaceable and has a significant role to play in developing a sustainable economic future for Scotland. Scottish Ministers’ full policies for the historic environment are set out in the Scottish Historic Environment Policy (SHEP)2. This Bill provides the opportunity to address specific gaps and weaknesses in the current heritage legislation framework that have been identified during discussions with stakeholders and will improve the ability of the regulatory authorities to work with partners to manage Scotland’s unique historic legacy for the benefit of future generations.

3. The Bill is an amending piece of legislation which consists of a series of provisions identified by central and local government, and during the course of discussion with other stakeholders during 2007, which followed the publication of a report by the Historic

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2 The SHEP can be found at the following web address: [http://www.historic-scotland.gov.uk/shep-july-2009.pdf](http://www.historic-scotland.gov.uk/shep-july-2009.pdf)
Environment Advisory Council for Scotland (HEACS) on the need for a review of heritage legislation in Scotland.

4. The Bill is designed as a tightly focused technical amending Bill to improve the management and protection of Scotland’s historic environment. It has been drafted with the intention of avoiding placing significant new burdens or duties on public or private bodies or individuals and implementation costs are expected to be minimal.

5. The Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill and a fourth Part which includes provisions on “Interpretation” and “Short title and commencement”. The principal Acts are:
   - the Historic Buildings and Ancient Monuments Act 1953 (“the 1953 Act”);
   - the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”); and

The 1953 Act
6. The Bill amends a provision in the 1953 Act: this Act provides certain grant making powers.

The 1979 Act
7. The Bill amends the 1979 Act in relation to aspects of “scheduling”, under which monuments of national importance can be designated as “scheduled monuments” and afforded certain safeguards under the law. There are currently around 8,000 scheduled monuments in Scotland. It also amends sections of the 1979 Act related to properties held in the guardianship or ownership of Scottish Ministers.

The 1997 Act
8. The Bill amends the 1997 Act in relation to certain grant making powers and aspects of “listing”, under which buildings of special architectural or historic interest are listed and again afforded certain legal safeguards, though of a different nature of those for scheduled monuments (see paragraph 17 below). There are currently around 47,000 listed buildings in Scotland.

Historic Scotland
9. Historic Scotland is an executive agency of the Scottish Government which exercises functions on behalf of Scottish Ministers under these Acts and provides advice to Scottish Ministers on all matters relating to the historic environment. Further information about Historic

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4 There are currently 346 properties in the care of Scottish Ministers.
Scotland is available on its website. Further information on scheduling, listing, grants and properties in the care of Scottish Ministers is available on the website of Historic Scotland.

**Strategic policy objectives**

10. The Bill is part of the Scottish Government’s programme to streamline, simplify and clarify the system for protecting and managing the historic environment and should be seen as complementing work which is already being taken forward by Historic Scotland in partnership with local authorities, for example, the establishment of Joint Working Agreements between local government and Historic Scotland, and the managed removal of a duty on local authorities to notify Scottish Ministers of certain casework. The Bill also needs to be read in the context of Scottish Ministers’ broader ambitions for how Historic Scotland should develop to become more flexible, more open, more easily accessed and more outward looking.

11. The Bill will contribute to the Scottish Government’s Purpose by introducing a series of provisions that will enhance the ability of Scottish Ministers and planning authorities to manage sustainably Scotland’s unique historic environment. By doing so without creating significant new regulatory or financial burdens, it will support the Government’s simplification agenda, and will introduce greater harmonisation of the law in this area. The amending Bill will support, in particular, the Scottish Government’s Greener Strategic Objective and will contribute directly to National Outcome 12 (“We value and enjoy our built and natural environment and protect and enhance it for future generations”) by providing a much improved legislative toolkit to help protect and enhance our historic environment for future generations.

12. The Bill will also help the Scottish Government meet its international commitments under the European Convention on the Protection of the Archaeological Heritage (the “Valletta Convention”).

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5 See the “About Us” section of the Historic Scotland website which can be found at: [http://www.historic-scotland.gov.uk/index/about.htm](http://www.historic-scotland.gov.uk/index/about.htm)

6 The Historic Scotland website can be accessed at: [http://www.historic-scotland.gov.uk](http://www.historic-scotland.gov.uk)

7 Between 25 June and 25 September Historic Scotland ran a public consultation which sought views on whether and how the Agency might take forward the removal of the duty to notify Scottish Ministers of the more straightforward types of listed building consent applications, as tested by a pilot. Thirty-two responses were received to the consultation. The majority of respondents supported a scheme which would lead to planning authorities issuing listed building consent decisions more quickly while maintaining the quality of the decisions taken. The consultation document and the analysis of the responses to the consultation can be found at: [http://www.historic-scotland.gov.uk/index/about/consultations/closedconsultations.htm](http://www.historic-scotland.gov.uk/index/about/consultations/closedconsultations.htm)

8 “To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth”: see [http://www.scotland.gov.uk/About/scotPerforms/purposes](http://www.scotland.gov.uk/About/scotPerforms/purposes)

9 More information on National Outcome 12 may be found at [http://www.scotland.gov.uk/About/scotPerforms/outcomes/environment](http://www.scotland.gov.uk/About/scotPerforms/outcomes/environment). More information on the Greener Strategic Objective may be found at [http://www.scotland.gov.uk/About/scotPerforms/objectives/greener](http://www.scotland.gov.uk/About/scotPerforms/objectives/greener).

10 The United Kingdom is party to the European Convention on the Protection of the Archaeological Heritage (the “Valletta Convention”) which places an obligation on States, under Article 2, to institute a legal system for the protection of the archaeological heritage, on land and under water. The Convention can be found at: [http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm](http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm)
Background to the Bill

13. The process leading to the Bill was started under the previous administration, following a report from HEACS in 2006 recommending a major review.

14. In 2004 the then Minister for Tourism, Culture and Sport asked HEACS to consider whether there was a need to review heritage legislation in Scotland. HEACS reported in August 2006, recommending a review of heritage protection legislation. The Minister for Tourism, Culture and Sport gave an interim response in December 2006. This noted the practical implications of undertaking a major legislative review; that HEACS had acknowledged that the current legislation “had considerable strengths”; and that an alternative to a major review would be pursuing more specific legislative improvements as part of a continuing programme of administrative and legislative change. The Minister therefore wished to allow a period for further discussion on the HEACS report with stakeholders to enable the briefing of incoming Ministers, and final decisions on the report, after the 2007 election. The practical implications of a review, as identified by the Minister at that stage, are considered in more detail at paragraph 24 below.

15. Officials then engaged in extensive analysis and discussion with stakeholders. This involved written papers, a series of meetings with stakeholders and substantial discussion including meetings involving the wider historic environment sector, local authorities and government which examined in detail the issues raised by the HEACS report. This process identified that there were gaps and weaknesses in the existing heritage protection legislative framework, but that there was not compelling evidence of a need for a more protracted, fundamental review.

16. In December 2007, the then Minister for Europe, External Affairs and Culture concluded that “after careful consideration, I have come to the view that the present system does not have sufficient problems to warrant major legislative reform. Of course there are various legislative changes that might merit consideration; and I may well choose to address these as policy develops and legislative opportunities arise. However, I will not be promoting major legislative reform on the English model. It strikes me that it would be more efficient and effective to invest our resources in improving the workings of the current system.”

17. Scottish Ministers concluded that what was required was legislation which could be produced within the life of the current Parliament to make tightly-focused amendments to the three pieces of primary legislation listed above while retaining the core of the current system, with its separate regimes for the scheduling of monuments of national importance and the listing of buildings of special architectural or historic interest; and separate consent processes for each

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11 Ministers were aware throughout of plans for major reform in England and Wales, work on which began in 2001. A draft Bill was not included in the Westminster legislative programme for 2009-10; Ministers there have now committed to a programme of non-legislative change.
of these. The Scottish Government is content that there is a sound rationale for having different legal frameworks for scheduled monuments and listed buildings. For scheduled monuments (which are mainly sites of archaeological importance), the default position is that they should, as far as possible, remain in the state to which they came down to us. For listed buildings, the default position is that they should remain in active use. Not all things needing protecting are the same, and it is widely considered in Scotland that the different approaches of the legislation governing each group are rational and useful.

18. Nevertheless, the opportunity is being taken to contribute to the Scottish Government’s wider streamlining and simplification agenda by harmonising provisions within the 1979 and 1997 Acts wherever that can sensibly be done (for example, in levels of fines under the 1979 Act), and also, where practicable, by harmonising elements of historic environment legislation with the planning regime (for example, by introducing a system of stop and temporary stop notices for unauthorised works to scheduled monuments and listed buildings). The Bill will also complement the Scottish Government’s policies for planning and the historic environment as set out in the Scottish Planning Policy, published in February 2010. The Scottish Government is satisfied that the Bill will deliver practical benefit.

19. As part of this process, once the Bill is enacted, the Government will revise the SHEP to reflect the changes that will be introduced by this Bill. The SHEP is an important part of the formal system, which establishes, among other things, how Historic Scotland will deal with individual cases: the wording of the SHEP is taken into account, for example, in public local inquiries. The revisions to the SHEP will be subject to consultation before being finalised and published. Some matters in the Bill will also be supported by more detailed operational policies issued on Ministers’ behalf by Historic Scotland. Where Ministers plan to use updated policy statements in the SHEP or new Historic Scotland operational policies to support specific provisions mentioned below, they intend that drafts of these will be made available in time for Stage 2 of the Bill.

Overarching policy aims

20. As already noted, the overarching aims of the Bill are: to improve the management and protection of our historic environment by addressing the specific gaps and weaknesses in the current historic environment legislative framework that were identified during the stakeholder engagement process; to avoid introducing significant new burdens or duties on central or local government, owners of assets, businesses or members of the public; and in a challenging economic climate to keep the implementation costs low. It reflects the Government’s view that it should not impose new statutory controls and duties when better and more proportionate means to bring about improvements to the heritage legislative framework in Scotland are available – in this case through targeted legislative amendment and the non-statutory improvements in the management of the historic environment that are already being progressed by Historic Scotland and the local authorities.

15 http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/newSPP
16 The SHEP can be found at: http://www.historic-scotland.gov.uk/shep-july-2009.pdf. Please see also paragraph 2 above.
21. The principal ways in which the Bill will contribute to Ministers’ aims are by:

- aligning aspects of the listing and scheduling systems wherever possible, for example by enabling Scottish Ministers to issue a scheduled monument enforcement notice which will parallel similar provisions in the 1997 Act; by making provision for retrospective scheduled monument consent; and by harmonising the level of fine on summary conviction under sections 2 and 28 of the 1979 Act and section 8 of the 1997 Act.

- aligning with the modernisation of planning, for example, by introducing a comparable system of stop notices for all designated assets and by removing the right to be heard in connection with applications and appeals under the 1979 and the 1997 Act in line with similar procedures in planning legislation.

- enhancing the ability of the regulatory authorities to work with developers by making it clear that Scottish Ministers can specify in a grant award letter the amount of grant that would be recoverable in certain circumstances; and by introducing a new power that will enable Scottish Ministers to offer a certificate that will guarantee that a building will not be listed for a period of five years.

- enabling government to work more creatively with partners; for example, by introducing explicit powers to enable Scottish Ministers to offer ancient monuments grants to a third party to undertake works of preservation, maintenance and management of an ancient monument without the owners having requested such action.

- improving capacity to deal with urgent threats by introducing stop notices as above and also enhancing the powers available to enable a person authorised by the Scottish Ministers when they know or have reason to believe that any ancient monument is at risk of imminent damage or destruction.

- increasing the efficiency and effectiveness of deterrents by raising the level of fines on summary conviction; by empowering Scottish Ministers to serve a scheduled monument enforcement notice that will allow for the reversal or amelioration of unauthorised works, or works to scheduled monuments in breach of any conditions attached to a scheduled monument consent; and, by enabling planning authorities to issue fixed penalty notices as an alternative in cases when a person is in breach of a listed building enforcement notice.

- clarifying the powers of Ministers to provide facilities and events at all properties in their care, to promote understanding and enjoyment and in line with the expectations of visitors in the 21st century.

22. These proposals and the other provisions will enhance the ability of the Scottish Ministers and planning authorities to manage sustainably our irreplaceable historic environment and will help ensure that we pass on a legacy of which future generations of Scots can be proud.

ALTERNATIVE APPROACHES

23. In her response to the HEACS report on Whether there is a need to review heritage legislation in Scotland of 20 December 2006 the then Minister for Tourism, Culture and Sport set out what the then government identified as being the arguments against a review. By way of
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

context the then Minister set out that there had been some significant developments since HEACS was first set the task of considering the case for a review. Chief among these was the development of an overarching policy statement on the historic environment which was consulted on in 2006 and first published in 2007 as Scottish Historic Environment Policy (SHEP). This addressed one of HEACS’ arguments in favour of a review, which was that Scotland had a system with many component parts but no single stated rationale. The SHEP provided that overarching vision for the first time and so promoted a shared understanding among the different individuals and organisations who had a part to play in protecting Scotland’s heritage and managing change in our historic environment.

24. The then Minister’s response also noted that HEACS had suggested a single overarching review predicated on a commitment to introducing major new legislation. The then Government took the view that this would require extensive public consultation and discussion and advised that the resource implications of such a process should not be underestimated, both for the Government and for outside bodies. There would be both direct costs and opportunity costs for all involved. Even more important in the long term would be the resource implications of pursuing some of the changes which HEACS had argued would justify a review which the report had not attempted to cost. The then Minister also noted that any major review always risks giving rise to a period of uncertainty and “planning blight”. Ministers were particularly aware of the time taken in England and Wales to progress the Heritage Protection Review17.

25. The Bill provisions have been strongly influenced by stakeholder discussion in 2007 and subject to full public consultation in 2009 and Scottish Ministers are satisfied that there are long-standing practical issues that can only be dealt with through primary legislation, but which can be readily addressed in a tightly-focused Bill. Having rejected the case for a wider review, the Scottish Government had only two options: to take forward such a Bill or do nothing and retain the status quo.

26. It would be possible to retain the status quo. However, this would mean that the regulatory authorities would continue to apply legislation which contained the technical gaps and weaknesses identified. This approach would also be at odds with the Scottish Government’s aim of streamlining, harmonising and modernising the legal framework. Although this is largely a technical, amending Bill, it will introduce new provisions and remove barriers to the use of existing powers that will enhance the ability of the Scottish Ministers and planning authorities to manage our irreplaceable historic environment in a sustainable way for the enjoyment and benefit of future generations. The Scottish Government therefore believes that if it did not take this opportunity to improve heritage protection legislation, the people and heritage of Scotland would ultimately be disadvantaged. As the alternative approach for each individual provision in the Bill would have been keeping the status quo, this point is not repeated separately under each section below.

17 The UK Government’s Heritage Protection Review began at the start of the decade. In April 2008, a draft Heritage Bill was published: [http://www.culture.gov.uk/reference_library/media_releases/5063.aspx](http://www.culture.gov.uk/reference_library/media_releases/5063.aspx). It has been considered by the UK Parliament’s Culture, Media and Sport Committee (which reported in July 2008 [http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/cmcumeds.htm](http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/cmcumeds.htm)), but has not yet been included in a legislative programme.
CONSULTATION

27. A public consultation on a draft of the Bill under its previous name (The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill) ran from 20 May to 14 August 2009. The responses to the consultation on the draft Bill indicated generally strong support for the provisions and the underlying aims of the Bill. In particular, respondents welcomed the twin aims of harmonising, where practicable, the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and aligning historic environment legislation with the planning regime when appropriate. The large majority of the respondents also agreed that the Bill would be helpful to the regulatory authorities. Positive comments received in response to the consultation include the following:

> In order to be effective, we consider it essential to have in place a regulatory system that is clear consistent and pragmatic. With this in mind, we welcome all of the proposed amendments in the draft Bill. (Heritage Lottery Fund)

> The changes proposed in the Bill assist with aligning and modernising heritage legislation with powers available in other legislation. The changes proposed will further aid the protection of the historic built environment and heritage. (Angus Council)

> Generally the Bill will improve the efficiency and effectiveness of the protection of Scotland’s Historic Environment, without impacting significantly on Local Planning Authorities. (East Dunbartonshire Council).

> In general the Society strongly supports this vitally important Bill, which will enable better sustainable management of our priceless and nationally important heritage assets. (The Society of Antiquaries of Scotland).

> The Built Environment Forum Scotland welcomes this draft Bill which will strengthen the ability to effectively and sustainably manage our heritage. It will simplify processes without weakening controls, and close some loopholes that presently allow unacceptable threats to the historic environment. (Built Environment Forum Scotland).

28. The majority of respondents, including planning authorities, supported the provisions of the draft Bill, subject to raising certain technical issues. However, there remained some disappointment, particularly among historic environment professional and voluntary sector bodies, that the Government was not pursuing a more comprehensive review of heritage legislation in Scotland. Some, for example, argued that the protection and management of undesignated historic environment resources (i.e. those not listed or scheduled) deserved more attention; others sought full statutory protection for gardens and designed landscapes and battlefields; and others noted their disappointment that the Bill did not impose new duties on

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19 The Analysis Report on the consultation can be found on Historic Scotland’s web site at the following address: [http://www.historic-scotland.gov.uk/index/about/consultations/closedconsultations.htm](http://www.historic-scotland.gov.uk/index/about/consultations/closedconsultations.htm).
local authorities. Only one respondent expressed general concern about the legislation in principle. Comments from consultees on specific provisions are covered in more detail below.

**Stakeholder engagement**

29. During the public consultation in 2009, Historic Scotland officials met with a wide range of organisations and individuals to discuss in detail the implications of the Bill provisions as part of the wider programme of consultation. 

30. Discussion with COSLA, which described the Agency’s approach as “a model of stakeholder engagement”, confirmed their support for the Bill provisions. COSLA also expressed strong resistance to the introduction (as suggested by some of the respondents) of statutory duties for the care of the historic environment and for historic environment records.

31. Officials in Historic Scotland followed up many of the written consultation responses to seek more information or clarification.

32. The Scottish Government understands that this approach to consultation was widely welcomed.

**DETAILED POLICY OBJECTIVES**

**PART 1 – AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953**

**Section 1 – Recovery of grants for repair, maintenance and upkeep of certain property**

*Intention of provision*

33. Under the terms of the 1953 Act Scottish Ministers are empowered to provide grants and loans for the repair or maintenance of historic buildings – the 1953 Act authorises grants for the following: buildings of outstanding historic or architectural interest and the upkeep of land comprising or contiguous to any such building and also includes the repair or maintenance of any objects ordinarily kept in such a building. In 2008/09 around £4.3m was allocated to projects funded under the 1953 Act. The grant funding is managed by Historic Scotland on behalf of Scottish Ministers and provides funding to owners to meet the cost of repairs using traditional materials to conserve original features in buildings of outstanding architectural or historic interest. The 1953 Act also provides that such grants may be subject to conditions imposed by Ministers for the purpose of securing public access to the whole or part of the property to which the grant relates or for other purposes as the Scottish Ministers think fit. Under section 4A of the Act, Ministers are also empowered to recover the amount of the grant or such part of it as they think fit from the grantee if any condition subject to which a grant was made is contravened or not complied with. In addition, under the same section, Scottish Ministers are entitled to

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20 For example, some respondents argued for the introduction of a general duty of care for the historic environment.

21 Details of this stakeholder engagement process can be found at: [http://www.historic-scotland.gov.uk/index/heritage/environmentbill/stakeholder-engagement.htm](http://www.historic-scotland.gov.uk/index/heritage/environmentbill/stakeholder-engagement.htm)

22 Details of access to grant-funded properties may be found at: [http://www.historic-scotland.gov.uk/index/places/grantaidedproperties.htm](http://www.historic-scotland.gov.uk/index/places/grantaidedproperties.htm)
recover the grant, or a proportion thereof, if the property is sold within a period not exceeding 10 years. However, the current legislative arrangements do not allow Ministers (in practice, Historic Scotland) to fix at the outset the amount they will wish to recover. In some cases, this can cause practical difficulties, in particular, where the grant is given in relation to a commercial development or to a trust dependent on using the proceeds of one project to fund the next (a “revolving fund trust”). In such cases, a clear agreement on future grant recovery could be a substantial aid to project planning.

34. The policy intention is therefore to improve the government’s ability to work with partners interested in providing listed buildings with a more secure long-term future, and to provide owners with a definitive amount that will be recoverable in the event of sale, say in 7 years time, by amending section 4A of the 1953 Act, which enables Scottish Ministers to recover grants made under section 4 of that Act, to make it clear that the grant offer can specify the amount recoverable or can make provision for calculating the amount recoverable in the event of a disposal such as sale of the building or where a condition has been contravened or not complied with. Section 26 of the Bill has a similar effect in relation to grant-making powers under the 1997 Act.

Stakeholder response

35. While there was wide support for the proposal there was some concern that the provision might have implications for financing listed building projects on the grounds that setting out the terms of grant recovery in a grant award letter might not be seen by banks as a “clear grant” and that that might affect development appraisals. However the Scottish Government is satisfied that this will not be the case since the general power to recover grant is not new and major project funding partners such as the Heritage Lottery Fund have made it clear that they would wish to be able to factor this information into their financial assessments as early as possible in the application process.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 2 – Control of works affecting scheduled monuments

36. The draft Bill as presented for consultation included proposals for a new offence of “disturbance” of a scheduled monument. This was intended to deal with a small number of cases which have from time to time arisen. These are where unauthorized works affecting a scheduled monument have taken place which Historic Scotland has regarded as having a significant negative impact but where it has been difficult to make a successful case under the existing test of “damage”, for example because the area affected is below ground and it is not possible to demonstrate conclusively what archaeological evidence has been lost. While consultees generally agreed that in principle any weaknesses in the law in terms of dealing with archaeological damage should be addressed, a number raised significant questions about how “disturbance” would be defined in a clear and consistent way. Scottish Ministers have considered these comments. While they considered that there was an issue here which deserved further attention, they were persuaded that the approach proposed in consultation was not sufficiently robust. Having considered the issue further, Scottish Ministers are satisfied that the issues identified in relation to the small number of cases referred to above can be most effectively and proportionately addressed by promoting closer liaison between Historic Scotland.
and the Crown Office, to ensure that on the rare occasions\(^{23}\) when a case does reach the stage of potential prosecution both parties have a stronger shared understanding of the evidence required to demonstrate archaeological damage.

**Intention of provision**

37. Section 2(a) removes the word “written” from section 2(3)(a) of the 1979 Act: this change taken with the changes made to Schedule 1 by section 15 will allow the Scottish Ministers to make provision in regulations as to the manner, form and content of scheduled monument consent – to include electronic means, taking account of the new ways of delivering public services which have become available since 1979. Section 2(b) introduces new subsections (3A) and (3B) to section 2 of the 1979 Act, enabling retrospective scheduled monument consent (SMC). Currently there is no legal mechanism to allow Scottish Ministers to issue SMC for work already carried out on a scheduled monument. However, in certain limited circumstances it may be appropriate and in the best interests of the scheduled monument to retain certain unauthorised works for example where reversal of an intervention would be likely to lead to further damage of the monument. The policy intention is to amend the 1979 Act to allow Scottish Ministers to grant consent for the retention of unauthorised works. This will bring the treatment of scheduled monuments into line with that of listed buildings, paralleling similar provision in section 7(3) of the 1997 Act.

**Stakeholder response**

38. All consultees who commented on this proposal welcomed the provision. However, of those who provided comment, one suggested that the provision should be accompanied by clear guidance and another advised that such approval must be provided following the same strict assessment and considerations as that for scheduled monument consent. Another respondent suggested that guidance on the circumstances in which this power might be used should be provided in subsequent amendments of SHEP. The Scottish Government concurs with the views expressed and can confirm that detailed policy advice on how this new provision will work in practice will be set out in the revised SHEP and through operational policy. One respondent also suggested that the Bill should clearly set out that this new provision should only be applied “in certain limited circumstances”. The Government is not persuaded that amending the wording of the Bill is required but does intend to ensure that the specific circumstances in which this provision might be applied are set out in detailed operational policy.

**Section 3 – Offences under sections 2, 28 and 42: modification of defences**

**Intention of provision**

39. It is currently a defence under section 2(8) of the 1979 Act to prove that unauthorised works to a scheduled monument were carried out in ignorance that it was scheduled or that the scheduled monument was in an area affected by the works. The “defence of ignorance” is not paralleled in the 1997 Act, nor is it found in comparative nature conservation legislation and it does not appear in the Marine (Scotland) Act 2010 in relation to historic marine protected

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\(^{23}\) The Scottish courts were last asked to consider a case under section 2 of the 1979 Act in 1998.
areas. The historic environment sector in Scotland has made it clear that they consider that the defence is a weakness in the existing heritage protection legislative framework and that they would welcome its removal. The draft Bill included for comment a proposal to repeal this defence and also to delete other references in the 1979 Act to a person’s state of knowledge or belief.

40. In the light of the comments made in the consultation, summarised below, these proposals have been amended, so that the defence in 2(8) now allows lack of knowledge only to be used in defence where a person can show they took all reasonable steps to find out whether there was a scheduled monument in the area affected by the works. This approach builds on an existing defence in section 42(7) related to metal detecting, which will now be retained, subject to minor changes to modernise the drafting. Reference to a person’s state of knowledge will also be retained in section 28, which deals with intentional and reckless damage, subject to the addition that an offence is committed where a person knows or ought to know that their action affects a protected monument.

Stakeholder response

41. A majority of those respondents who commented on this proposal during the consultation on the draft Bill welcomed the provision without comment. However, concerns were expressed by some that the complete removal of this defence was too great a step and that some continuing recognition was needed that, for example, the precise extent of a monument on the ground may be difficult to discern and some limit needed to be placed on what was expected of those undertaking works by way of prior research. Also a significant number of respondents, while accepting that information on the location and extent of protected monuments and buildings had become much more easily accessible since 1979, suggested that it would be important to educate the public and land managers about what and where heritage assets are in Scotland. The Scottish Government agrees and is already committed to ensuring that there is continued improvement in the quality of information and advice that is available to the public and land owners and managers of historic environment assets, in line with developments under wider planning reform, which encourage and support individuals and organisations undertaking works of any kind to check for any form of relevant constraint. It also plans a programme of information dissemination and awareness-raising following enactment, working closely with relevant stakeholders. This will include guidance on what actions a person might take to check for the existence and location of a scheduled monument.

Section 4 – Fines: increases and duty of court in determining amount

Intention of provision

42. The Scottish Government’s main policy aim here is to bring historic environment legislation into line with other “environmental crimes”, for example, those regulated by the Scottish Environment Protection Agency (SEPA) and Scottish Natural Heritage (SNH). For

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24 Parallels with nature conservation legislation are regarded as particularly relevant here, given the commitment in National Outcome 12 to protecting and enhancing both the built and natural environment. The provisions in the Marine (Scotland) Act include fines for offences in relation to Historic Marine Protected Areas.

25 SEPA is a non-departmental public body (NDPB) accountable through Scottish Ministers to the Scottish Parliament. SEPA is a regulatory body and its main role is to protect and improve the environment. SEPA also advises Scottish Ministers, regulated businesses, industry and the public on environmental best practice.
example, unauthorised works which damage Sites of Special Scientific Interest can attract fines of up to £40,000 on summary conviction and an unlimited fine on conviction on indictment under the terms of the Nature Conservation (Scotland) Act 2004; fines under SEPA’s legislation also have similar penalties. Section 66 of the Antisocial Behaviour etc. (Scotland) Act 2004 doubled the fine levels under summary proceedings for most of the main environmental offences regulated by SEPA from £20,000 to £40,000. As a result, the main waste offences specified in section 33 of the Environmental Protection Act 1990 (namely contravention of section 33(1) and breach of a waste management licence condition); the major offences under the Pollution Prevention and Control (Scotland) Regulations 2000 (namely contravention of regulation 6(1), breach of a Pollution Prevention and Control permit condition, breach of an enforcement or suspension notice, and breach of a court order under regulation 33); along with all offences under the Landfill (Scotland) Regulations 2003, now have a maximum fine of £40,000 on summary proceedings. Moreover, regulation 40(2) of the Water Environment (Controlled Activities) (Scotland) Regulations 2005 also provides for a maximum fine of £40,000 on summary proceedings under those regulations. This provision will introduce an appropriate fiscal deterrent for those who would seek to destroy or damage designated monuments and remove a misleading signal in law about the relative importance of different types of asset. The most recent comparable legislation, the Marine (Scotland) Act 2010, which deals in part with marine historic assets, introduces maximum fine levels of £50,000.

43. The Scottish Government is of the view that the current statutory maximum fine of £10,000 is too low in current times in proportion to the financial benefit (often arising from development or development potential) which may accrue from destroying or damaging a protected monument. As with nature conservation legislation these levels of penalty should recognise the fact that in many cases, damage to a scheduled monument will be motivated by financial gain. The Bill will therefore raise the level of fines on summary conviction under section 2 and section 28 of the 1979 Act. Maximum penalties relating to sections 2 and 28 will be increased to £50,000 for offences tried summarily.

44. The Bill will also make it a requirement that the court, in determining the amount of the fine to be imposed on a person convicted of an offence under section 2 or 28 takes into account the extent of any financial gain that has or is likely to accrue to the offender. This parallels provisions already in the 1997 Act.

Stakeholder response

45. This provision was welcomed during the consultation with a majority of those who commented on the proposal offering unequivocal support for the provision, noting that the increased fine would act as an appropriate deterrent to unauthorised works to scheduled monuments and that the level of fine suggested was in keeping with the level of fines in other areas e.g. in relation to wildlife and planning breaches. One respondent opposed the figure as being too high. One suggested that the level of fine proposed was too low to deter offences under the 1979 and 1997 Acts. However, it should be stressed that the new £50,000 limit relates only to summary proceedings – that is proceedings in front of a sheriff sitting without a jury or in the justice of peace court. On indictment in either the sheriff court or the High Court of Justiciary, trial is before a jury (an option which is retained in the 1979 Act and the 1997 Act).

26 SNH is an NDPB responsible to Scottish Ministers and through them to the Scottish Parliament. The role of SNH is to look after the natural heritage, help people to enjoy and value it, and encourage people to use it.
and the fine remains unlimited: an offence under section 28 of the 1979 Act can also attract a custodial sentence for a term not exceeding 2 years.

Section 5 – Powers of entry to inspect condition of scheduled monument

Intention of provision

46. Section 6(1) of the 1979 Act confers on Scottish Ministers a general power to enter land to inspect a monument with a view to ascertaining its condition, with paragraphs (a) and (b) merely providing particular instances of how the power may be used. However, Scottish Ministers are aware that paragraphs (a) and (b) have sometimes been taken to limit the types of case where the power can be used. The Bill will therefore amend and clarify section 6(1) of the 1979 Act regarding powers of the Scottish Ministers to enter land to inspect the condition of a scheduled monument to remove any uncertainty.

Stakeholder response

47. All of the respondents who commented on this proposal during the consultation on the Bill welcomed the provision.

Section 6 – Works affecting scheduled monuments: enforcement [Enforcement notices]

Intention of provision

48. There are no provisions in the 1979 Act for enforcement and remedy where works have been executed on a scheduled monument without the requisite scheduled monument consent. There are such provisions for listed buildings in the 1997 Act and the Scottish Government believes that it is desirable to harmonise the arrangements for scheduled monuments with those for listed buildings and that doing so will help safeguard these nationally important monuments for the benefit of future generations. These powers are separate from those being introduced to deal with situations where works have been executed without the requisite scheduled monument consent but where it is deemed appropriate to grant consent retrospectively (see paragraph 37 above).

49. The Bill will introduce new powers to enable Scottish Ministers to serve a scheduled monument enforcement notice that will allow for the reversal or amelioration of unauthorised works to a scheduled monument or works in breach of any condition attached to scheduled monument consent, in cases where such remedial works are desirable or reasonably practicable. The proposed new powers follow the model for listed buildings in the 1997 Act. Where a scheduled monument enforcement notice is issued, Scottish Ministers may specify works that are to cease or any specified steps that are to be taken. The enforcement notice cannot take effect until at least 28 days after the date on which the notice is served. A person on whom a scheduled monument enforcement notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated may by summary application appeal to the sheriff on a number of specific grounds. It will be an offence to fail to comply with a notice.
Stakeholder response

50. Those who commented on this proposal during the consultation on the draft Bill offered their support for the provision as drafted.

Section 6 – Works affecting scheduled monuments: enforcement [Stop and temporary stop notices]

Intention of provision

51. Together with enforcement notices, new powers for stop notices and temporary stop notices are intended to introduce a strengthened package of protection for scheduled monuments and bring the regime into line with that for listed buildings and the planning system more generally.

52. Currently, if unauthorised works causing damage to a scheduled monument, or works in breach of any condition attached to scheduled monument consent, are found to be underway there is no legal mechanism, other than by way of an interim interdict, to stop them quickly. An enforcement notice will not take effect for at least 28 days. In addition, if an appeal is brought against such a notice, it will not take effect until the appeal has been fully determined or withdrawn. In view of the possible delays to the aim of achieving a stop and remediation of unauthorised works, the Bill therefore also introduces stop notices to achieve a more immediate ban on works specified in the enforcement notice. These will effect a halt – immediate in the case of temporary stop notices – to unauthorised works to a scheduled monument and will provide additional powers to prevent irremediable damage to such nationally important monuments through illegal and unauthorised works. The provisions are modelled on those in the Town and Country Planning (Scotland) Act 1997.

53. The provisions will allow a stop notice to be issued where the Scottish Ministers consider it expedient that the unauthorised works should stop before the end of the period in which the enforcement notice requires to be complied with. A stop notice is to be served before the scheduled monument enforcement notice comes into effect.

54. The effect of the stop notice will be to prohibit the carrying out of the alleged unauthorised works until such time as the enforcement notice to which it relates is withdrawn or quashed, the period of compliance of the enforcement notice expires, or the notice is withdrawn. A stop notice must not come into effect earlier than 3 days after the date when the stop notice is served, unless the Scottish Ministers consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice. Failure to comply with a stop notice will be an offence.

55. Temporary stop notices again parallel similar powers in the planning regime. The Scottish Ministers will be able to issue such a notice where unauthorised works, or works in breach of any condition attached to scheduled monument consent, have been or are being carried out to a scheduled monument and they consider it is expedient that the works are stopped immediately. This will allow for a notice to be served requiring works to come to an immediate stop, without the need to set out the special reasons for it to come into immediate effect, which would be required for a stop notice. In addition, unlike a stop notice, a temporary stop notice can be issued even if no scheduled monument enforcement notice has been issued. Unlike a stop
notice, which may remain in force for as long as any period of compliance under an associated enforcement notice, a temporary stop notice can only have effect for a maximum of 28 days. Failure to comply with a temporary stop notice will be an offence.

56. New powers of entry are also provided to complement the new scheduled monument enforcement provisions.

Stakeholder response

57. A majority of those who commented on this proposal during the consultation on the draft Bill offered their full support for the provision as drafted commenting in particular that the introduction of temporary stop notices was an especially worthwhile addition as it would enable quicker and more efficient action against unauthorised works and noting that the enforcement provisions were fully in keeping with the way the planning legislation operates.

58. Some respondents questioned that any appeal would be to a sheriff. The Scottish Ministers are satisfied that referral to a sheriff is a reasonable and appropriate appeal mechanism as the issues that the sheriff will be asked to consider (as set out in new section 9C of the 1979 Act, inserted by section 6 of the Bill) relate to due legal process. Sheriffs will not require detailed specialist knowledge of historic environment issues. Both the Crown Office and Procurator Fiscal Service and the Scottish Court Service were content with the provision as drafted.

59. Ministers recognise that some consultees had a variety of practical questions about the detailed operation of these provisions and they would expect to deal with these in guidance as appropriate.

Sections 7 and 8 – Control and management of monuments and land under guardianship and provision of facilities, etc. at ancient monuments

Intention of provision

60. The Bill will update and clarify the powers of Scottish Ministers to provide a range of facilities and services for the public at properties in care of Scottish Ministers, to take account of the modern needs and expectations of visitors and other users, particularly community groups, and the wider range of facilities that they now expect to be offered. These provisions regularise existing practice and include the provision of information, interpretation, toilets, ticket sales, retail, catering, religious ceremonies, functions and events and other facilities that Ministers judge are in the public interest and consistent with the status of the monument.

Stakeholder response

61. Some respondents to the Bill consultation read all or part of these sections as putting properties in the care of Scottish Ministers in a privileged position in relation to other designated sites, somehow circumventing the system of control set out in the SHEP in paragraphs 3.25, 3.26 and 4.24 – 4.30.27 However, the Scottish Government can confirm that the provisions will simply update the 1979 Act as follows:

27 The SHEP can be found at the following web address: http://www.historic-scotland.gov.uk/shep-july-2009.pdf
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

(a) section 7 which relates to the management of monuments under guardianship deals with a technical issue and a difference in the legislation between properties taken into care before and after 1979, which however have proved to have no practical impacts and for which reason it seems sensible to take this opportunity to amend the legislation.

(b) section 7 also deals with permission to hold events, etc. in or on an ancient monument under guardianship, and clarifies and updates the control Historic Scotland may exercise on behalf of Scottish Ministers over events held at guardianship properties, for example, educational or entertainment events laid on for visitors, or private events such as weddings. Where such an event would, for example, involve the erection of structures or any “works” to the monument that would fall into section 2(2) of the 1979 Act, the normal control process as set out in SHEP would continue to apply.

(c) section 8 clarifies and updates the powers Scottish Ministers already have to provide facilities at all properties in their care. The 1979 Act was drafted at a time when visitors tended to expect, and were provided with more limited facilities. Again it does not over-ride the control process set out in SHEP.

Section 9 – Financial support for preservation etc. of monuments

Intention of provision

62. The Bill will introduce explicit powers to enable Scottish Ministers to offer ancient monument grants to a third party to undertake works of preservation, maintenance and management on a scheduled monument. At present such grants, under the terms of section 24(2) of the 1979 Act, can only be made at the “request of the owner”. This is unnecessarily restrictive as the owner may not be the person carrying out the works: tenants or third parties (such as a conservation charity) may wish to promote and undertake the works. It is likely that such persons would require the consent of the owner to carry out the works but the Scottish Government is of the view that the grant-giving powers of the Scottish Ministers should not be restricted in this way.

Stakeholder response

63. A majority of respondents who commented on this provision during the consultation on the draft Bill indicated that they fully supported the proposal.

Section 10 – Power of entry on land where monument at risk

Intention of provision

64. The Bill modifies the existing power of entry in section 26 of the 1979 Act so that the associated power to excavate is exercisable without the need for consent where the monument is at risk of damage or destruction. This will enable a person authorised by the Scottish Ministers

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28 Of the 346 properties in care 264 are in guardianship, others being in the ownership of the Scottish Ministers.
29 The provisions relating to holding events were included as a free-standing new section of the 1979 Act in the draft Bill. In finalising the text of the Bill, these changes are now being introduced through amendments to existing sections 13 and 15 of the 1979 Act, which will have the same practical effect as before, but more clearly reflects that the intention is only to clarify the extent of existing rights.
to enter land to record matters of archaeological or historical interest. The provision includes a power to carry out excavations for the purpose of archaeological investigation, where they know or have reason to believe that any ancient monument is at risk of imminent damage or destruction, if necessary without the permission of the owner. This will cover situations, for example, where an ancient monument is suddenly exposed and it proves impossible, despite best efforts, to contact the owner or their representative. Immediate threats to a monument might include being washed away due to coastal erosion. Unique information within the monument would be lost or destroyed without any record unless rapid action was taken.

Stakeholder response

65. A majority of those who commented on this provision during the consultation on the draft Bill fully supported the proposal as drafted. However, some concerns were raised about the definition of “imminent damage or destruction” and some respondents were concerned that the provision could be used in much wider circumstances, giving unfettered power of entry to excavate sites. The Scottish Government would only expect to use these powers rarely. Ministers will always seek to have a constructive relationship with owners. They therefore expect that only in rare cases will the significance of the potential loss be deemed to out-weigh the practicality or desirability of gaining consent.

66. Some consultees wondered if compensation for damage caused by exercising this new power will be covered by section 46 of the 1979 Act: this will be the case.

Section 11 – Inventories of gardens and designed landscapes and of battlefields

Intention of provision

67. The Bill will create a new statutory duty for Scottish Ministers to compile and maintain two new statutory inventories: an inventory of gardens and designed landscapes and an inventory of battlefields.

68. Currently Historic Scotland, on behalf of Scottish Ministers, compiles and maintains a non-statutory inventory of gardens and designed landscapes (currently there are 386 sites included in the inventory). The purpose of the inventory is to identify gardens and designed landscapes of national importance. Inclusion of a site on the inventory means that it receives recognition and a degree of protection through the planning system (see paragraph 70).

69. In 2008 Scottish Ministers consulted on historic battlefield policy and concluded that nationally important battlefield sites should be afforded additional protection through the creation of an inventory of historic battlefields along similar lines to that already established for gardens and designed landscapes. As with the gardens inventory, the purpose of the battlefields inventory is to identify sites of national importance and to provide information on them as a basis for the sustainable management of change through the planning system.30

70. Gardens and designed landscapes are currently afforded some statutory protection under the terms of the Town and Country Planning (Development Management Procedure) (Scotland)

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30 It is Historic Scotland’s intention that the inventory of battlefields will appear in two parts. The first – mainly key “iconic sites” – will be published in 2011, and the second part a year later.
Regulations 2008 (SSI 2008/432) (“the Development Management Regulations”). These regulations require planning authorities to consult Scottish Ministers in the case of applications for planning permission which may affect a historic garden or designed landscape (defined by reference to the Inventory) and also require applications to be accompanied by a design statement where an application relates to land situated within a historic garden or designed landscape. It is the Scottish Government’s intention to provide the inventory of battlefields with a similar level of protection by amending the Development Management Regulations to take account of the new inventory.

71. However, under the current arrangements, each time a garden and designed landscape is either added to or removed from the inventory, the Development Management Regulations have to be amended and the inventory published afresh to give the revised entries force. This would also be the case for sites added to or removed from the proposed inventory of battlefields. In the case of gardens and designed landscapes this process has proved to be both restrictive and time consuming.

72. The creation of a statutory duty to compile and maintain an inventory of gardens and designed landscapes and an inventory of battlefields will enable Scottish Ministers to update the inventories as and when required without having to amend the regulations each time the inventories are revised.

73. The new provision does not change the level of protection for gardens and designed landscapes or battlefields which will continue to be afforded the same level of protection in the planning regime as currently exists under the Development Management Regulations.

Stakeholder response

74. While this proposal was not formally consulted on as part of the draft Bill it was raised with a range of organisations and individuals as part of the wider programme of consultation in 2009 (see paragraph 29 above). The proposal was welcomed.

Section 12 – Development and understanding of matters of historic, etc. interest: grants and loans

Intention of provision

75. The existing grant powers that are available to Scottish Ministers in respect of activities relating to Scotland’s historic environment are limited in scope both in terms of the bodies or individuals who are eligible to receive the grant and in terms of the purposes for which the grant can be paid. The Bill will give Ministers greater flexibility to stimulate and respond to approaches from other bodies by introducing a new power that will allow Scottish Ministers to make payment of a grant or loan to organisations or individuals involved in promoting the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interests.

76. For example, under the 1953 Act Scottish Ministers can only grant aid properties that are of outstanding architectural or historic interest and only for the purpose of repair. This provision will enable Scottish Ministers in future to support other sorts of projects affecting a wider range
of historic buildings. This would enable, for example, funding feasibility studies into individual buildings which are at risk and which, while not outstanding, make a significant contribution to their townscape. It is intended that such financial assistance will be by way of grant or loan and will be given to any organisation or individual involved in promoting the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest (terms used in the 1979 and 1997 Acts). The new provision will be managed within existing budgets and additional resources will not be required to implement this new provision. The total amount payable under this new power in any given year is limited to £100,000, to put beyond doubt that this provision is intended only to create some marginal flexibility and there is no wish here to open the way either to significant new expenditure or to any substantial change in the pattern of grant spending by Historic Scotland.

Stakeholder response

77. The majority of the respondents who commented on this proposal during the consultation on the draft Bill fully supported the provision. The proposal for an annual limited was not included in the consultation draft, but is consistent with the commitment to minimal cost in draft Bill.

Section 13 – Regulations and orders under the 1979 Act

Intention of provision

78. Section 13 extends existing subordinate legislation-making powers in the 1979 Act. This expanded power enables subordinate legislation made under the 1979 Act to include a range of different types of provision where Ministers consider it necessary or expedient to do so. This is a general provision included as part of the updating and modernising of the legislation to put it beyond any doubt that any regulations made under the 1979 Act could include these sorts of provisions. It is in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Stakeholder response

79. This is a technical provision, bringing the drafting of these powers into line with what is now commonly found in other contemporary legislation. The section was not consulted on.

Section 14 – Meaning of “monument” in the 1979 Act

Intention of provision

80. The 1979 Act has been criticised for its lack of provisions to protect archaeological remains where there is nothing that can be clearly defined as a “structure” or “work”; as a consequence important sites of early human settlement or industry (such as artefact scatters; a scatter of flint tools marking sites of human occupation and the manufacture of stone tools; archaeological deposits, for example soils containing artefacts, food remains etc.) cannot be protected or managed. Scottish Ministers therefore intend to extend the range of historic environment assets that can be designated under the 1979 Act by expressly allowing Scottish Ministers to designate “any site comprising any thing, or group of things, that evidences previous human activity”. This is intended to cover the sorts of sites described immediately above.
Stakeholder response

81. In response to the consultation on the draft Bill a significant number of respondents supported this provision noting that the extension to the definition of monument would allow a more inclusive range of historic assets to be protected by designation. One respondent noted that this provision would be of particular importance with regard to the conservation and management of our earliest sites which are largely represented by scatters of stone tools. Another noted that the provision was in line with the proposed definition of marine historic assets in the Marine (Scotland) Act 2010.

82. However, there was consensus that the provision was open to wide interpretation and it was suggested that the Government might wish to consider clarifying the specific types of monument that would be captured by the revised definition of monument either on the face of the Bill or through regulation. Scottish Ministers intend that the new provision will be applied in relation to an extremely small number of very rare sites (provisional estimates on the basis of existing archaeological information suggest the around 10) and it is not their intention that the provision would be applied to palaeo-environmental sites or historic landscapes. The Scottish Government has considered carefully how best to provide greater clarity and reached the view that it is best achieved through issuing a policy statement on the types of monument which the legislation is specifically intended to bring within designation, rather than including further detail on the face of the Bill or using secondary legislation. A policy statement would allow Ministers to set out how they would intend to use this new discretionary power much more fully and clearly than could be done in legislation. The policy will be set out in the amended SHEP.

83. In summary the Scottish Government is satisfied that there is a real need for this new provision to allow Scottish Ministers to designate and protect a very small number of nationally important sites that are currently afforded no protection under the 1979 Act e.g. sites of early human activity such as Late Upper Palaeolithic and Mesolithic lithic scatters.

Section 15 – Scheduled monument consent: regulations as respects applications, etc.

Intention of provision

84. The Bill amends the regulation making powers available to Scottish Ministers in relation to the scheduled monument consent regime. This will enable Scottish Ministers to update applications and procedure when required without having to amend primary legislation to ensure that the process is up to date and fit for purpose. This will also bring the scheduled monument application process into line with the model used in the listed building and the planning legislation.

Stakeholder response

85. While this proposal was not formally consulted on, it was discussed with a range of organisations and individuals as part of the wider programme of consultation in 2009 (see paragraph 29 above). The proposal was welcomed.
Section 16 – Refusal to entertain certain applications for scheduled monument consent

Intention of provision

86. The Bill will introduce a power to enable Scottish Ministers to decline to consider a scheduled monument consent application where that application is similar to an application that had been made within the previous two years or at a time when a similar application is under consideration. There is currently no limit to the number of applications which can be submitted for scheduled monument consent, for very similar works to the same scheduled monument. This proposed approach is in line with provisions relating to “grounds for declining to determine application for planning permission” contained in the Town and Country Planning (Scotland) Act 1997 as amended by section 15 of the Planning etc. (Scotland) Act 2006. It is the Scottish Government’s view that while this provision will help harmonise and streamline the consents process it also represents best value in terms of the cost to the public purse of dealing with consent applications, although it is recognised this power is likely to be used only rarely. An application for any proposal will continue to receive full and proper consideration the first time it is submitted.

Stakeholder response

87. A majority of respondents who commented on this provision during the consultation on the draft Bill fully supported the proposal. One respondent suggested that 5 years may be a more appropriate time limit for similar applications. However, in the interests of ensuring parity with the planning regime when appropriate, the Bill retains the 2 year time limit for similar applications.

88. Another respondent suggested that repeated applications can occur due to lack of pre-application engagement and argued that if this provision were brought in both Historic Scotland and the local authorities must ensure that they are engaged in effective pre-application discussions with an applicant once an enquiry has been received. The Scottish Government is satisfied that significant steps have been taken in recent years to ensure that Historic Scotland engages fully in productive and meaningful pre-application discussions with applicants.

89. One consultee opposed the provision on the grounds that it was too restrictive, pointing out that developers may need to alter plans/proposals to keep their developments on track and to avoid financial penalties. Scottish Ministers believe that this may be a misreading of the current system, which already allows for the amendment of existing consents to take account of changed circumstances.

Section 17 – Application for scheduled monument consent: inquiries and hearings

Intention of provision

90. Under the present legislative arrangements before determining whether or not to grant scheduled monument consent Scottish Ministers must afford applicants an opportunity of appearing and being heard before a person appointed for that purpose. This may be done by means of an oral hearing or by means of a public local inquiry. The Bill will remove this automatic right to be heard in connection with scheduled monument applications under the 1979 Act. This will harmonise the scheduled monument consent application process with the proposed changes to the 1997 Act (see paragraph 102) and bring both in line with new...
provisions introduced by the Planning etc. (Scotland) Act 2006, which enable Scottish Ministers to determine the most suitable means of determining each application, through written submissions, a hearing or an inquiry or any combination of these.

Stakeholder response
91. This provision was not consulted on but a similar proposal for listed building consents was subject to consultation and generated no substantive comment.

PART 3 – MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 18 – Certificate that building not intended to be listed

Intention of provision
92. The Bill will introduce a new power that will enable Scottish Ministers to offer any person a certificate that they do not intend to list the building which will guarantee that a building will not be listed during the five years from the date of the certificate. The policy aim here is to provide certainty for owners and developers preparing proposals for a building or a group of buildings. It is the Scottish Government’s strong view that this provision will facilitate development and will also be of benefit to the wide range of contractors and sub-contractors in the construction industry. At present, Scottish Ministers already as a matter of policy will not “normally” consider a building for listing when it is subject to a live planning application (see paragraph 2.35 of the SHEP). However, Scottish Ministers believe that a formal process of certification would provide much greater certainty to developers. Ministers also believe that this will be a more satisfactory system for local communities, who could rest assured that any new development advanced with a certificate in place had already benefited from prior assessment by Scottish Ministers that there are no buildings of special architectural or historic interest on the site under consideration for development. Where consideration of a case leads to the conclusion that the building should be listed, a new list entry will be created in the normal way and it follows no certificate will be issued.

Stakeholder response
93. This section of the Bill attracted the largest number of comments from respondents to the consultation on the draft Bill. Of those who offered comment, some supported the provision as drafted but the majority raised a number of issues that may be summarised as follows: concerns that a large number of applications for a certificate would impact on Historic Scotland’s listing and resurvey programme; a desire for greater clarity on how applications for a certificate would be assessed; for greater clarity on the relationship between certificates and building preservation notices; and questions about whether five years was too long a period.

94. The Scottish Government is satisfied that Historic Scotland is very unlikely to receive a high number of applications for a certificate, based on experience in England where a system of such certificates has been in place for a number of years. In England 20 certificates were issued in 2008. Not all applications resulted in a certificate: in some cases buildings have been considered and then listed: since 1997 there have been around 50 such cases per year in England. Given the relative size of the building stock, this would suggest around 2 to 3 certificates issuing each year in Scotland, with a further 5 to 6 cases per year leading to a new listing rather than a
certificate, which would give as a comparator 7 to 9 applications a year under this provision. As the proposals in this Bill respond to concerns about the operation of the system in England, by not confining applications for a certificate to a late stage in the planning process, it is recognised that it is possible that applications may run at a somewhat higher rate in Scotland. It is difficult to place a precise estimate on how significant that difference is likely to be: however, taking account of the difference, Historic Scotland is comfortable with an estimate of 20 to 30 additional cases a year. Historic Scotland already operates a list maintenance programme and is confident that this work can be comfortably accommodated within this programme. Consideration for a certificate should usefully prioritise attention within the programme on subjects which are under threat of unmanaged change.

95. Applications for a certificate will be subject to the same rigorous assessment process that is applied when considering the merits of any historic building for designation i.e. applications will be assessed against the listing criteria set out in Annex 2 of SHEP (“Criteria for determining whether a building is of “special architectural or historic interest” for listing”).

96. Under the new provisions a building preservation notice could not be served on a property that is subject to a certificate.

97. Scottish Ministers are satisfied that a certificate should apply for a period of five years to enable owners and developers sufficient time to work up development proposals (this may include purchase of the property in question, securing funding, working up detailed development proposals, and applying for and negotiating appropriate consents) before beginning work which could be subject to a three year planning permission as introduced under the terms of the Planning etc. (Scotland) Act 2006. If certificates ran for a shorter period Ministers consider that a certificate not to list is more likely to expire part way through a development project, introducing uncertainty into the process. This would be at odds with the policy intention of ensuring certainty for owners and developers. As it is highly unlikely that our state of knowledge would change in a 5 year period to the degree that a fresh assessment would be required, this duration provides a more worthwhile and reasonable interval.

Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines

Intention of provision

98. The Bill will raise the level of fines on summary conviction under section 8 of the 1997 Act. Section 8 of the 1997 Act provides that offences created under that section (unauthorised works for the demolition or alteration or extension of a listed building and failure to comply with conditions attached to listed building consent) are triable either summarily or on indictment. The Bill will increase the level of fine that can be imposed on summary conviction under section 8 to £50,000 to act as an appropriate and effective deterrent to unauthorised works. This provision will also achieve harmony between the treatment of listed buildings and scheduled monuments. The full policy aims of this provision are commensurate with those underlying the proposed increase in fines under the 1979 Act set out at paragraphs 42 to 44 above.

Stakeholder response

99. Responses were in line with those for section 4, as set out at paragraph 45 above.
Section 20 – Declining to determine an application for listed building consent

Intention of provision

100. The Bill will introduce a power to enable local authorities to decline to consider a listed building consent application where that application is similar to an application that had been made within the previous two years. As discussed in relation to section 16 above, there is currently no limit to the number of applications which can be submitted for listed building consent, for very similar works to the same building. This proposed approach is in line with provisions relating to “grounds for declining to determine application for planning permission” contained in the Town and Country Planning (Scotland) Act 1997 as amended by section 15 of the Planning etc. (Scotland) Act 2006. It is the Scottish Government’s view that while this provision will help harmonise and streamline the consents process it also represents best value in terms of the cost to the public purse of dealing with consent applications, although it is recognised this power is likely to be used only rarely. An application for any proposal will continue to receive full and proper consideration the first time it is submitted.

Stakeholder response

101. This provision was not consulted on but has been taken forward after consultation to ensure complete harmonisation.

Section 21 – Hearings in connection with applications for listed building consent and appeals

Intention of provision

102. Under the present legislative arrangements applicants and appellants can insist on being given an opportunity of appearing and being heard before a person appointed for that purpose. This may be done by means of an oral hearing or by means of a public local inquiry. The Bill will remove this automatic right to be heard in connection with listed building applications and appeals under the 1997 Act. This is in line with new provisions introduced by the Planning etc. (Scotland) Act 2006, which enable Scottish Ministers to determine the most suitable means of determining each application or appeal, through written submissions, a hearing or an inquiry or any combination of these.

Stakeholder response

103. A number of consultees sought clarification, but no relevant substantive points were raised.

Sections 22 and 23 – Enforcement notice: requirement to cease works and stop notices and temporary stop notices

Intention of provision

104. The Bill will introduce new powers that will enable Scottish Ministers and local authorities to issue stop notices and temporary stop notices that will effect a halt – immediate in the case of temporary stop notices – to specified unauthorised works to listed buildings. Under existing legislation any alteration, extension or demolition of a listed building requires a listed building consent. The provisions for enforcement against works executed to a listed building
without the requisite consent, and those not executed in accordance with the terms of the consent or any conditions attached to it, are detailed in Chapter IV of Part 1 of the 1997 Act. The enforcement provisions already provide for a planning authority or the Scottish Ministers to serve a listed building enforcement notice to remedy such works. Section 22 will amend the 1997 Act to allow a listed building enforcement notice to specify such works as the planning authority or the Scottish Ministers require to be stopped.

105. Section 23 introduces stop notices. The new provisions will allow a stop notice to be issued where the planning authority or the Scottish Ministers consider it expedient that the unauthorised works should stop before the end of the period in which the enforcement notice requires to be complied with. A stop notice is to be served before the listed building enforcement notice comes into effect.

106. The existing legislation allows for an appeal to be made against the issuing of such an enforcement notice. Where an appeal is brought, the enforcement notice will not take effect until the appeal has been finally determined or withdrawn. In view of the possible delays to the aim of achieving a stop and remediation to unauthorised works, this additional provision will provide another tool to achieve a ban on works specified in the enforcement notice. The effect of the stop notice is to prohibit the carrying out of the alleged unauthorised works until such time as the enforcement notice to which it relates is withdrawn or quashed, the period of compliance of the enforcement notice expires, or the notice is withdrawn.

107. Furthermore, in an effort to achieve a more immediate conclusion to unauthorised works than a stop notice can provide for, the Bill will introduce new powers to enable planning authorities to issue temporary stop notices which will parallel similar powers in the planning regime. The planning authority will be able to issue such a notice where works have been or are being carried out to a listed building which involve a contravention of section 8(1) or (2) of the 1997 Act and where they consider it is expedient that the works are stopped immediately. This new power taken together with the new power to issue stop notices introduces a strengthened package of protection for listed buildings.

108. It should be noted that a stop notice is issued only when a listed building enforcement notice is or has been given, but a temporary stop notice can be issued even if no listed building enforcement notice has been given. It should also be noted that new powers of entry are provided for to complement the new listed building enforcement provisions.

109. In addition section 22(2)(d) makes a minor amendment to section 34 of the 1997 Act to provide a minimum 28 day time limit before a listed building enforcement notice takes effect. This provision will bring listed building enforcement provision in line with the planning enforcement regime.

110. The Scottish Government is satisfied that these provisions will be positive tools in preventing damage to listed buildings. The introduction of stop and temporary stop notices to the listed building enforcement notice regime will provide an effective method of ensuring that potentially damaging works to the character and appearance of a listed building are stopped at the earliest possible time.
Stakeholder response

111. Comments on this provision were very much as for section 6 (see paragraphs 57 to 59).

Section 24 – Non-compliance with listed building enforcement notice: fixed penalty notice

Intention of provision

112. The Bill will introduce a new power that will enable planning authorities to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice. The power parallels that introduced into the planning regime by section 25 of the Planning etc. (Scotland) Act 2006. It offers a quick, practical and viable alternative which will give local authorities an additional tool to deal with those who break the law, as well as safeguarding listed buildings. Local authorities will be able to issue a fixed penalty notice provided certain conditions are met.

113. The Scottish Ministers will set out the fixed penalty amounts in regulations. Further, it is intended that the amount of the fixed penalty imposed by legislation shall escalate in the event that the breach of the enforcement notice continues where the fixed penalty is paid. In such circumstances it is intended that a further enforcement notice will be issued followed by a subsequent fixed penalty notice for an increased amount and so on for escalating amounts.

Stakeholder response

114. One respondent argued that experience of the Planning etc. (Scotland) Act 2006 suggested that the flat fixed penalty under that Act had proved to be of limited value. Taking account of these comments, the Bill differs from the Planning etc. (Scotland) Act 2006 Act to allow Scottish Ministers to prescribe in secondary legislation different levels of fine for different cases. This will also allow Ministers to set out in regulations an incremental scale of fines related to previous breaches of listed building enforcement notices relating to the same steps or works.

Section 25 – Liability of owner and successors for expenses of urgent works

Intention of provision

115. The Bill will amend existing legislation by enabling a notice of liability for expenses to be registered in the appropriate property register against the listed building. This is intended to address the difficulties that can arise in terms of recovering costs when ownership of a property has changed or when the regulatory authorities have to deal with an absentee owner. Currently, under the terms of section 49 of the 1997 Act a planning authority may execute any works which appear to them to be urgently necessary for the preservation of a listed building in their district.31 The Scottish Ministers have parallel powers. The cost incurred through carrying out such works can be recovered under the terms of section 50 of the 1997 Act which empowers local authorities to “give notice to the owner of the building requiring him to pay the expenses of the work”. At present the planning authority and Scottish Ministers are limited to pursuing recovery of expenses from whoever was the owner at the time notification under section 50(2) was served.

31 Section 49(4) of the 1997 Act states that if the building is occupied such works may be carried out only on those parts which are not in use.
In practice, once an owner sells or otherwise disposes of the property, it can become very difficult to recover these costs.

116. The Scottish Government is concerned that this limited power of recovery may deter local authorities from undertaking urgent works, which if done timeously would prevent more severe deterioration, and therefore wishes to improve the powers to recover such expenses. The power to be able to recover the costs from such persons will remain but in addition, by enabling, in effect, a charge to be placed against the property itself, the new provision will provide that any new owner from time to time of the property will also be liable to pay the costs. This new power will enable the planning authorities or Scottish Ministers to register a notice of liability for expenses of works in the Land Register of Scotland or the Register of Sasines as appropriate. It is proposed that the notices will be in the form prescribed in regulation. Provision is also made to cover the situation where the Scottish Ministers make a determination of the amount recoverable following representations under section 50 of the 1997 Act against the notice received requiring the expenses of the works to be paid. Provision is also made for the discharging of a notice of liability for expenses. There is precedent for this approach in the Tenements (Scotland) Act 2004.

117. This provision is likely to be particularly relevant in relation to commercial properties where there is a higher rate of transfer of ownership compared to dwelling houses. As noted above the Bill therefore provides that the buyer should be severally liable with the seller for the unpaid debts. This means that the liability can either be discharged by the seller or the buyer at the point of sale. If the liability is discharged by the buyer the provision allows him to pursue the seller for the debt in the event that the amount of the liability has not been factored into the sale price of the property in question. The purpose is to ensure that it will be possible for the regulatory authorities to recover all costs associated with carrying out urgent repairs to a listed building.

118. The Scottish Government is satisfied that the provision will provide local authorities with added security in terms of debt recovery in relation to urgent works carried out by them and necessary for the preservation of a listed building. In the context of the 1997 Act it is important to note that “urgent works” relates to issues of preservation – these are not building control issues. Many works that can affect the special character of a listed building are essentially low level repairs such as blocked gutters for example. The Scottish Government believes that the new provisions will encourage owners to take better care of their listed buildings and that they will encourage the carrying out of small works before they become more expensive. It is also the view of the Scottish Government that the improved powers of debt recovery will encourage local authorities to carry out low value repairs to a property before the problem gets worse.

119. Financial risks to the local authorities will be greatly mitigated by this provision – and no owner who looks after his property will be penalised.

120. In summary the twin policy aims here are deterring owners from neglecting their listed buildings and encouraging local authorities to intervene sooner to carry out essential, often minor, but urgent low cost repairs.
Stakeholder response

121. Some stakeholders were concerned that the new provision might make owners less likely to sell properties against which a notice was attached, for example because they will be concerned that they will not be able to realise as much from the sale. However, Scottish Ministers are not convinced that this will have any significant impact on decisions to sell, which they believe will continue to be driven by a broad range of factors.

Section 26 – Recovery of grants for preservation etc. of listed buildings and conservation areas

Intention of provision

122. This provision replicates, in the 1997 Act, provision made by section 1 of the Bill in relation to the 1953 Act and the policy aims as set out at paragraph 33 above underlying the proposal are the same. Section 26 will amend those sections of the 1997 Act which enable the Scottish Ministers and local authorities to recover grants made under sections 51 and 69 of the 1997 Act. The intention is to make it clear that the grant can specify the amount recoverable or can make provision for calculating the amount recoverable in the event of a disposal such as a sale of the building or where a condition of grant has been contravened or not complied with. Section 26(2) is included to make it clear that grants as well as loans can be made subject to such conditions as the local authority may determine.

Stakeholder response

123. Comments on this provision were very much as for section 1 (see paragraph 35 above).

Section 27 – Provisions that do not bind the Crown

Intention of provision

124. Section 27 amends section 73A of the 1997 Act. Section 73A applies the 1997 Act to the Crown but disapplies certain provisions, in particular those imposing criminal sanctions. The changes are intended to follow this approach in relation to the new offences and obligations introduced by the Bill.

Stakeholder response

125. This section was not consulted on.

Section 28 – Regulations in connections with inquiries, etc.

Intention of provision

126. Section 28 makes changes to the 1997 Act and the Tribunal and Inquires Act 1992. It removes the power to make rules under the Tribunals and Inquiries Act 1992 for inquiries held under Schedule 3 to the 1997 Act and also enables the Scottish Ministers to make regulations in relation to inquiries held under the 1997.
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

Stakeholder response

127. This section was not consulted on.

Section 29 – Regulations and orders under the 1997 Act

Intention of provision

128. Section 29 extends existing subordinate legislation-making powers in the 1997 Act. This expanded power enables subordinate legislation made under the 1997 Act to include a range of different types of provision where Ministers consider it necessary or expedient to do so. This is a general provision included as part of the updating and modernising of the legislation to put it beyond any doubt that any regulations made under the 1999 Act could include these sorts of provisions. It is in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation

Stakeholder response

129. This section was not consulted on.

PART 4 – GENERAL

Section 31 – Ancillary provision

Intention of provision

130. Section 31 gives the Scottish Ministers powers to make supplementary, incidental, consequential, transitory, transitional or saving provision needed to give full effect to any provision of the Bill. This includes provisions amending or repealing any other enactment or instrument. This is a general provision in standard terms which allows Scottish Ministers to make provision by order to support the full implementation of what is an amending Bill. Any such provision must be considered necessary or expedient for the purposes of, or in consequence of or for giving full effect to any provision of the Bill. This provision is included to ensure the purposes of the Bill can be given full effect without the need for further primary legislation. Comparable provision has been included in, for example, the Marine (Scotland) Act 2010.

Stakeholder response

131. This section was not consulted on.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

132. The Bill’s provisions are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. The public consultation on the draft Bill noted that it was the Scottish Government’s view that it was “unlikely that the provisions of the Bill would have significant equalities impacts”, and invited views on the proposed amendments in that regard. The consultation document was sent to all the key equalities agencies in Scotland and
none offered an alternative view on this issue. The Scottish Government is satisfied therefore that the Bill will have no equalities impacts.

**Human rights**

133. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. Particular attention has been paid both at policy development and drafting stages to the necessity of ensuring ECHR-compliance. Consideration was given to whether the provisions in the Bill would be compatible with Convention rights. Article 6 which gives individuals a right to a fair trial, Article 1 of Protocol 1 which affords individuals the right to peaceful enjoyment of their property and Article 8 which gives individuals the right to respect for private life were considered relevant in relation to the provisions. The right of judicial review to an Article 6 compliant tribunal is considered sufficient to render the provisions compliant with Article 6. The rights under Article 1 of Protocol 1 are not absolute and they may be interfered with if this can be justified in the public interest, is proportionate and is in accordance with the law. Although there may be interference in the enjoyment of an individual’s property, such interference is considered limited in scope and subject to certain safeguards in pursuit of the aim of securing and managing the historic environment for future generations. This meets the fair balance test and does not offend Convention rights. The provisions also strike a fair balance between the right to respect for home in Article 8 and the public interest. The provisions do not go beyond what is necessary and proportionate and any interference will be in accordance with the law.

**Island communities**

134. The Bill is designed to benefit the whole of Scotland. It does not have specific implications for island communities and the effect of the Bill is to provide the regulatory authorities with an improved toolkit to enable them to sustainably manage the historic environment across Scotland.

**Local government**

135. The Bill is intended to assist local authorities in carrying out their functions in relation to the historic environment by introducing greater harmonisation of the law in this area and addressing gaps and weaknesses in the current heritage legislation framework, without creating significant new regulatory or financial burdens on local authorities.

**Sustainable development**

136. The Bill is expected to assist with sustainable development by introducing a series of provisions that will enhance the ability of Scottish Ministers and planning authorities to manage sustainably Scotland’s unique historic environment.

**Strategic environmental assessment**

137. Historic Scotland has applied the criteria specified in schedule 2 to the Environmental Assessment (Scotland) Act 2005 to the provisions of the Bill and has determined that the proposed amendments are exempt from strategic environmental assessment under section 7(1).
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

Regulatory impact assessment

138. A Partial Regulatory Impact Assessment (PRIA) was published for public comment as part of the consultation on the draft Bill which ran from 20 May to 14 August 2009 (see paragraph 27 above). A full Regulatory Impact Assessment will be published on the Historic Scotland website.
HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Historic Environment (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is a tightly-focused technical amending Bill that will introduce new provisions and remove barriers to the use of existing powers that will enhance the ability of the Scottish Ministers and planning authorities to manage our historic environment in a sustainable way for the enjoyment and benefit of future generations.

4. The Bill will also contribute to the Government’s central purpose of sustained economic growth by introducing a series of provisions that will enhance the ability of central and local government to manage Scotland’s unique historic environment. The amending Bill will support, in particular, the government’s Greener Objective and will provide the Scottish Ministers and the planning authorities with a much-improved toolkit to help manage, protect and enhance Scotland’s historic environment.

5. The draft Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill. The fourth Part includes provisions on ‘Interpretation’, ‘Ancillary Provision’ and ‘Short title and commencement’. The principal Acts are:
   - The Historic Buildings and Ancient Monuments Act 1953;
   - The Ancient Monuments and Archaeological Areas Act 1979 (‘the 1979 Act’); and,
Rationale for subordinate legislation

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Government has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill or the 1979 and 1997 Acts to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation;
- the need to make proper use of valuable Parliamentary time;
- the likely frequency of amendment;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of any provision in primary legislation approved by Parliament; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

7. Where subordinate legislation is required to implement Government policy some form of parliamentary procedure may be appropriate. A balance must be struck between the different levels of scrutiny involved in the procedures. In the Bill the balance reflects the view of the Government on the importance of the matter delegated by Parliament.

Delegated powers

8. The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. Some of the powers contained in the Bill are new, whilst others replace or update existing powers in the 1979 and 1997 Acts. The powers conferred in the Bill are mainly either of a technical and procedural nature, or are concerned with matters which require, because of their nature a flexible approach. It is therefore regarded as appropriate that they be dealt with by subordinate legislation.

9. Regulations and orders under the powers described below are mainly subject to negative resolution procedure in the Scottish Parliament. The Government has chosen this procedure where the delegated powers sought are required to prescribe procedural detail or other detail to supplement or update the provisions of the Bill or the 1979 and 1997 Acts. With regard to certain powers, affirmative resolution procedure is considered to be appropriate, as explained below.

10. This memorandum describes the provisions of the Bill which confer power to make subordinate legislation. It sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and,
- the Parliamentary procedure, if any, to which the exercise of the power to make subordinate legislation is to be subject.

PART 1 – AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

11. There are no delegated powers in Part 1 of the Historic Environment (Amendment) (Scotland) Bill.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 6 – Works affecting scheduled monuments: enforcement

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

12. Section 6 of the Bill inserts new section 9A to 9O into the 1979 Act. Inserted sections 9I and 9N make provision as regards compensation in relation to stop notices and temporary stop notices. The application of section 47 of the 1979 Act is extended to these provisions. New sections 9I and 9N therefore represent an extension of the cases in respect of which the existing power in section 47 may be used, rather than directly conferring a new power. Section 47 provides that any claim for compensation under the 1979 Act is to be made in the time and manner prescribed. By virtue of the definition of ‘prescribed’ in section 61(1) of the 1979 Act, this will be by regulations made by the Scottish Ministers. Such regulations are made by statutory instrument subject to negative resolution of the Scottish Parliament (section 60(2) of the 1979 Act).

Reason for taking power

13. This power has been delegated in line with any other claim for compensation under the 1979 Act as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain.

Choice of procedure

14. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure in keeping with other provisions in the 1979 Act dealing with compensation.
Section 13 – Regulations and orders under the 1979 Act

Power conferred on: Scottish Ministers
Power exercisable by: regulations or orders made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

15. Section 13 of the Bill amends section 60 of the 1979 Act and confirms that any power under the 1979 Act to make regulations or orders includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision where this is thought necessary or expedient. This provision does not introduce or confer new powers as such, but builds on existing powers so that a range of different types of provision may be made under them.

Reason for taking power

16. This is a general provision included as part of the updating and modernising of the legislation to put it beyond any doubt that any regulations made under the 1979 Act could include these sorts of provisions. It is in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Choice of procedure

17. Regulations and orders made under the 1979 Act are subject to negative resolution procedure (see section 60(2) of the 1979 Act) except where regulations are made under section 19 of the 1979 Act. This approach on procedure is in line with the approach now taken in most Bills.

Section 15 – Scheduled Monument Consent: regulations as respects applications, etc.

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

18. Section 15(2) inserts paragraph (1A) into Schedule 1 of the 1979 Act allowing Scottish Ministers to make provision in regulations about the manner in which scheduled monument consent is granted and the form and content of such consent. Section 15(3) amends paragraph 2 of Schedule 1 allowing the Scottish Ministers to make provision including that to require a certificate in the prescribed form to accompany an application for scheduled monument consent in order for it to be considered, make provision as to the form and content of such certificates, make provision publicising applications for scheduled monument consent and make provision as to the notice to be given of any application for scheduled monument consent and the form and content of such notices.
Reason for taking power

19. This will bring the scheduled monument consent application and granting process into line with the model used in the listed building and planning legislation.

Choice of procedure

20. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

PART 3 – MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 20 – Declining to determine an application for listed building consent – Subsection (2)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

21. Section 20(2) amends section 18(2) of the 1997 Act to allow an appeal to the Scottish Ministers where a planning authority have not given notice that they have exercised their power to decline to determine an application (as introduced into the 1997 Act by section 20(1) within the relevant period or agreed extended period. Section 18(3)(a) of the 1997 Act provides that the relevant period is such period as may be prescribed. Under section 81 of the 1997 Act prescribed means prescribed by regulations which under section 82(3) of the 1997 Act shall be subject to negative resolution procedure. The change to section 18(2) does not create or confer a new power, but merely extends the way the existing power in section 18(3) may be used.

Reason for taking power

22. The power is required since section 20(1) inserts a new section 10A into the 1997 Act allowing planning authorities to decline to determine applications in certain circumstances. The appeal provisions in section 18 of the 1997 Act are extended to include an appeal against the failure to give notice that the authority have declined to determine an application. In line with similar existing appeals the Scottish Ministers can specify the time within which such an appeal must be made.

Choice of procedure

23. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure in line with the procedure applicable in relation to the time period for existing appeals.
Section 23 – Stop notices and temporary stop notices - new section 41D – Compensation for loss due to stop notice - subsection (5)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
24. This provision allows Scottish Ministers to prescribe in regulations how claims for compensation for loss due to a stop notice must be made and the timeframe for such claims.

Reason for taking power
25. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain. This is in line with the provisions relating to compensation in the 1979 Act.

Choice of procedure
26. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 23 – Stop notices and temporary stop notices - new section 41G – Temporary stop notices: restrictions - subsection (1)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
27. Section 23 inserts new section 41G(1) which sets out that a temporary stop notice does not prohibit certain works as may be prescribed by regulations.

Reason for taking power
28. These powers will allow Scottish Ministers to set out in detail which works are exempt from being subject to temporary stop notices, and it is thought that since the types of works will likely change over time this is better set out in regulations than on the face of the Bill.

Choice of procedure
29. The power is subject to negative resolution procedure. Given the detailed and technical nature of these provisions this is thought appropriate.
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

Section 23 – Stop notices and temporary stop notices - new section 41I – Temporary stop notices: compensation - subsection (3)

Power conferred on: Scottish Ministers  
Power exercisable by: regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

30. Section 41I(3) applies subsections (5) to (9) of section 41D to compensation payable in relation to temporary stop notices as they apply to compensation payable in relation to stop notices under section 41D. This provision allows Scottish Ministers to prescribe in regulations how claims for compensation for loss due to a temporary stop notice must be made and the timeframe for such claims.

Reason for taking power

31. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain. This is in line with the provisions relating to compensation in the 1979 Act.

Choice of procedure

32. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 24 – Amount specified in fixed penalty notices for breach of listed building enforcement notice: procedure

Power conferred on: Scottish Ministers  
Power exercisable by: regulations made by statutory instrument  
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

33. This section inserts a new section 39A into the 1997 Act which allows the Scottish Ministers to determine the fixed penalty amount that may be paid when there has been a breach of a listed building enforcement notice.

Reason for taking power

34. What are appropriate fixed penalty amounts are likely to change over time and it is important to have flexibility to revise the amount when necessary. It is therefore appropriate to delegate the power to subordinate legislation.

Choice of procedure

35. As fixed monetary penalties are to be imposed on persons who are believed to have committed an offence, there is likely to be significant stakeholder interest in the level of the fixed
penalty and so it was considered appropriate to require an affirmative resolution of the Parliament. Section 82 of the 1997 Act is therefore amended by section 29(4) of the Bill to insert a new subsection (3A) providing for draft affirmative procedure.

**Section 25 – Liability of owner and successors for expenses of urgent works**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament  

**Provision**

36. Section 25(3) inserts new sections 50A to 50G (liability of owner and successors for expenses of urgent works executed under section 49) into the 1997 Act. Section 50G(1) gives the Scottish Ministers power to prescribe the form of notices specified in that section. These are: a notice of liability for expenses, a notice of renewal, a notice of determination and a notice of discharge.

**Reason for taking power**

37. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail of the form of notices. Flexibility is required as it is anticipated that the notices will be updated over time.

**Choice of procedure**

38. As this is an administrative measure it is considered appropriate to apply negative resolution procedure.

**Section 28(1) – Regulations in connection with inquiries, etc**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament  

**Provision**

39. Section 28(1) amends section 79(1) of the 1997 Act so that section 275A of the Town and Country Planning (Scotland) Act applies to the 1997 Act. This provision allows the Scottish Ministers to make regulations to set out both the process for dealing with applications and appeals in listed building cases and how any inquiry in connection with such an application or appeal is to be conducted.

**Reason for taking power**

40. It is considered appropriate for procedural arrangements in relation to inquiries, hearings etc to be set out in secondary legislation rather than on the face of the Bill.
Choice of procedure

41. As this is a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 29 – Regulations and orders under the 1997 Act

Power conferred on: Scottish Ministers
Power exercisable by: regulations or order made by statutory instrument and order with no Parliamentary procedure
Parliamentary procedure: affirmative/negative resolution of the Scottish Parliament

Provision

42. Section 29(6) amends section 82 of the 1997 Act and confirms that any power under the 1997 Act to make regulations or orders includes power to make such incidental, supplementary, consequential, transitory, transitional or savings provision where this is thought necessary or expedient. This provision does not introduce or confer new powers as such, but builds on existing powers so that a range of different types of provision may be made under them. Section 29(2)(b) and section 29(5)(b) amend section 82 of the 1997 Act to clarify that any power under the 1997 Act to make orders under sections 7(5), 54(5) and 67(7) or regulations under the 1997 Act includes power to make different provision for different purposes.

Reason for taking power

43. These are general provisions included as part of the updating and modernising of the legislation to put it beyond doubt that the specified orders and regulations made under the 1997 Act could include these sorts of provisions. They are in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Choice of procedure

44. Regulations made under the 1997 Act are subject to negative resolution procedure (see section 82(3) of the 1997 Act). Orders are subject either to negative resolution procedure, affirmative procedure or no Parliamentary procedure (see subsections (4) and (5) of section 82 of the 1997 Act and section 24 of the Bill inserting section 39A into the 1997 Act). Nothing in this power alters the fundamental nature of the substantive orders and regulations and therefore does not alter the procedure that should be applied to those regulations or orders.

Section 31 – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative/negative resolution of the Scottish Parliament

Provision

45. Section 31 gives the Scottish Ministers powers by order to make such supplementary incidental, consequential, transitory, transitional or saving provision needed to give full effect to
any provision of this Bill. This includes provisions amending or repealing any other enactment or instrument.

Reason for taking power

46. This is a general provision in standard terms which allows Scottish Ministers to make provision by order to support the full implementation of what is an amending Bill. Any such provision must be considered necessary or expedient for the purposes of, or in consequence of or for giving full effect to any provision of the Bill. This provision is included to ensure the purposes of the Bill can be given full effect without the need for further primary legislation.

Choice of procedure

47. Orders under section 31 are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of an Act, in which case the order is subject to an affirmative procedure.

48. It is appropriate that where the order changes primary legislation it should be subject to affirmative resolution procedure. This approach on procedure is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 32 – Short title and commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: None

Provision

49. Section 32 gives the Scottish Ministers powers to commence provisions of the Bill by order. Section 32 is exempt from the coverage of this power and will therefore come into force on any Act resulting from the Bill receiving Royal Assent.

Reason for taking power

50. To enable Scottish Ministers to appropriately and flexibly commence the provisions in the Bill.

Choice of procedure

51. The power is subject to no procedure as is typical for commencement powers.
Education, Lifelong Learning and Culture Committee

8th Report, 2010 (Session 3)

Stage 1 Report on the Historic Environment (Amendment) (Scotland) Bill

Published by the Scottish Parliament on 28 October 2010
Education, Lifelong Learning and Culture Committee

Remit and membership

Remit:

To consider and report on (a) further and higher education, lifelong learning, schools, pre-school care, skills and other matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning; and (b) matters relating to culture and the arts falling within the responsibility of the Minister for Culture and External Affairs.

Membership:

Alasdair Allan
Claire Baker
Kenneth Gibson (Deputy Convener)
Kenneth Macintosh
Christina McKelvie
Elizabeth Smith
Margaret Smith
Karen Whitefield (Convener)

Committee Clerking Team:

Clerk to the Committee
Eugene Windsor

Assistant Clerk
Emma Johnston
The Education, Lifelong Learning and Culture Committee

8th Report, 2010 (Session 3)

Stage 1 Report on the Historic Environment (Amendment) (Scotland) Bill

The Committee reports to the Parliament as follows—

EXECUTIVE SUMMARY

1. The Education, Lifelong Learning and Culture Committee recognises the importance of Scotland's historic environment, both in terms of understanding our cultural identity and contributing to the economy. Managing the historic environment to ensure its protection, whilst not placing unreasonable burdens on those who own, work or access protected land and buildings, is a constant challenge.

2. The Committee notes the broad support for the Historic Environment (Amendment) (Scotland) Bill and the fact that many of its proposals are a result of extensive consultation by Historic Scotland (HS) with the historic environment sector.

3. The Committee also notes the concerns raised by several organisations in relation to some sections of the Bill, particularly: the proposed inventories for gardens and designed landscapes and battlefields (section 11), extension of the definition of a monument (section 14), certificates of immunity against listing (section 18) and the liability of an owner of a listed building for expenses relating to urgent work (section 25). The issue of the accessibility of the information that identifies scheduled monuments and listed buildings was also raised.

4. The Committee is content, however, that the Bill’s proposals constitute a sensible and welcome approach to updating and modernising some aspects of historic environment legislation. On this basis, the Committee supports the general principles of the Historic Environment (Amendment) (Scotland) Bill.
INTRODUCTION

5. The Historic Environment (Amendment) (Scotland) Bill (SP Bill 43)\(^1\) was introduced in the Scottish Parliament on 4 May 2010 by Fiona Hyslop MSP, Minister for Culture and External Affairs. The Bill was accompanied by a Policy Memorandum, Explanatory Notes, including a Financial Memorandum, and a Delegated Powers Memorandum.

6. The Parliament agreed to refer the Bill to the Education, Lifelong Learning and Culture Committee for Stage 1 consideration and agreed that this should be completed by 12 November 2010.

7. Extracts of the minutes of the Committee can be found in Annex A. The delegated powers provisions were considered by the Subordinate Legislation Committee and its report is provided in Annex B. The Finance Committee’s letter to this Committee in relation to the Financial Memorandum is provided in Annex C. Oral evidence, associated written evidence and other written evidence can be found in Annexes D and E.

PURPOSE OF THE BILL

8. The Policy Memorandum states that the Bill is “designed as a tightly focused technical amending Bill to improve the management and protection of Scotland’s historic environment”, consisting of a series of provisions identified at central and local government level and by other stakeholders.\(^2\) The Policy Memorandum also states that the Scottish Government wants the Bill to harmonise historic environment legislation with other environment protection legislation while avoiding introducing significant new financial and regulatory burdens.\(^3\)

9. There are four parts of the Bill—

- Part 1 includes provisions amending the Historic Building and Ancient Monuments Act 1953 (the 1953 Act). Section 1 of the Bill proposes to amend certain grant making powers under this Act;

- Part 2 includes provisions amending the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act). Sections 2 to 17 make changes to the Act relating to the scheduling of monuments;

- Part 3 would, if passed, amend the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (the 1997 Act). The Bill includes provisions to amend the Act in relation to certain grant making powers and to the listing of historic buildings; and

- Part 4 sets out the provisions on interpretation and the short title and commencement.

\(^1\) Historic Environment (Amendment) (Scotland) Bill. Available at: http://www.scottish.parliament.uk/s3/bills/43-HistoricEnvironment/b43s3-introd.pdf

\(^2\) Historic Environment (Amendment) (Scotland) Bill. Policy Memorandum, paragraphs 3 and 4. Available at: http://www.scottish.parliament.uk/s3/bills/43-HistoricEnvironment/b43s3-introd-pm.pdf

\(^3\) Policy Memorandum, paragraph 11.
ISSUES CONSIDERED BY THE COMMITTEE

10. The Committee recognises the broad level of support for many of the proposals set out in the Bill and, for this reason, the Committee only highlights in this report the sections that concerned those who gave written and/or oral evidence.

Grants and the recovery of grants

11. Section 1 amends the powers under the 1953 Act to make grants for the repair, maintenance and upkeep of certain properties under the Historic Building Repair (HBR) grants scheme. The 1953 Act gives Scottish Ministers the power to set conditions when making such grants and to recover part, or all, of the amount of the grant should one of the conditions be contravened or not complied with or if the property were to be sold within 10 years. The Bill amends these powers to enable Scottish Ministers to specify the amount that would be recoverable at the point the grant was awarded.

12. The Policy Memorandum states that the policy intention behind this section is “to improve the government’s ability to work with partners interested in providing listed buildings with a more secure long-term future, and to provide owners with a definite amount that will be recoverable in the event of a sale”.

13. During evidence to the Committee, Historic Scotland (HS) officials elaborated on the rationale behind this provision. They stated that, whilst HS was usually able to inform owners that it would recover 100% of a grant if the building were to be sold after one year, 90% of the grant if it were to be sold after two years, and so on, the current legislation did not allow HS to give as precise details as would be desirable. Officials commented that the—

“challenge that we [HS] face is the fact that we cannot give a cast-iron guarantee to people who receive grant from us that that is precisely what we will do. … The bill gives us powers to be much more precise and say exactly how we will undertake grant recovery.”

14. In its submission, the Scottish Property Federation (SPF) queried whether the statement of the amount of grant recoverable might lead to ambiguity over the status of the grant, potentially “having an impact on bank funding and the viability of development appraisals”.

15. The Policy Memorandum recognises this concern but states that the Scottish Government is satisfied that this will not be the case since “the general power to recover grant is not new and major project funding partners such as the Heritage Lottery Fund have made it clear that they would wish to be able to factor this

4 Policy Memorandum, paragraph 34.
6 Scottish Property Federation. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 8.
information into their financial assessments as early as possible in the application process.\(^7\)

16. The Committee notes the concerns raised regarding section 1 of the Bill. The Committee believes, however, that enabling Scottish Ministers to set the amount of the grant, made under the Historic Building Repair grants scheme, that could, in certain circumstances, be recovered, at the point at which the grant is made seems sensible and would provide a higher level of certainty to recipients.

**Unauthorised works – modification of defences**

17. Section 3 of the Bill proposes changes to the defence under the 1979 Act in relation to unauthorised works on a scheduled monument. Under that Act, it is a defence to argue that one did not know that a monument was scheduled when carrying out unauthorised work. The Bill amends this provision to require that a person knows, or ought to know, that a monument is scheduled, thus revising this “defence of ignorance”.

18. The Policy Memorandum refers to broad support for this section, stating that “the historic environment sector in Scotland has made it clear that they consider that the defence is a weakness in the existing heritage protection legislative framework and that they would welcome its removal”.\(^8\)

19. A number of the written submissions received highlighted concerns regarding the removal of the “defence of ignorance”, specifically in relation to the availability of accessible and up to date information on designated sites and properties. Some submissions, including the National Trust for Scotland (NTS), noted that many scheduled monuments “are ‘invisible’ to the untrained eye”.\(^9\) This would be the case in more instances if the definition of monument were to be extended as proposed in section 14 of the Bill.

20. In its written submission, the Royal Commission for Ancient and Historic Monuments of Scotland (RCAHMS) highlighted its own work in relation to the Historic Environment Records (HER) in Scotland, in particular its work to set out a clear strategy to address some of the issues raised during the consultation on the Bill.\(^10\)

21. During oral evidence, HS officials spoke about the “defence of ignorance”, arguing that it—

> “sends out an immensely unhelpful signal. No parallel defence exists for undertaking unauthorised works on listed buildings. Similarly, in nature and

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\(^7\) Policy Memorandum, paragraph 35.

\(^8\) Policy Memorandum, paragraph 39.

\(^9\) National Trust for Scotland. Written submission to the Education, Lifelong Learning and Culture Committee, paragraph 4.

\(^10\) Royal Commission on the Ancient and Historic Monuments of Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 7.
maritime legislation, there is no ability to claim a general defence of ignorance.”

22. HS officials highlighted a number of sources of information which it argued is accessible and up to date, including the HS website, Register of Sasines and the future e-planning system. Officials also confirmed that, if the Bill is passed, they intend to contact owners of scheduled monuments to draw their attention to the legislation and its implications.

23. In contrast to this, Heads of Planning Scotland (HoPS) argued during its evidence that there was a lack of information relating to the historic environment, particularly on the condition of buildings. In relation to how effective the existing legislation has been to date, HoPS asked whether the Scottish Government is “sharpening a knife and then putting it back in the cupboard”.

24. During its evidence, the NTS argued that the focus should be on the ability of stakeholders to use the available information in a meaningful way, stating that “it is less about the completeness of the knowledge base, because the knowledge base is there, than it is about the ability to interpret and analyse that information, which requires you to have the relevant knowledge, skill and competence”.

25. When the Minister gave evidence to the Committee, she explained that the Scottish Government had originally proposed the removal of the “defence of ignorance” but that feedback to its consultation had supported a defence that “reasonable steps” had been taken to find out if a scheduled monument was affected by any works. The Minister also repeated that the Scottish Government intends to write to all owners of scheduled monuments to update them on their responsibilities under the legislation and that, as the current “defence of ignorance” has rarely been used, this section “will not result in a big change in practice”.

26. The Committee has considered the argument put forward by the Scottish Government for revising the “defence of ignorance” for unauthorised works to a scheduled monument and notes the support for this among stakeholders.

27. The Committee notes the Scottish Government’s intention, if the Bill is passed, to provide guidance to all owners/occupiers of land containing scheduled monuments to set out the implications of the legislation and remind them of their wider obligations as owners/occupiers. The Committee believes that this would ensure that an owner/occupier, who would be most

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likely to be responsible for any unauthorised works to a scheduled monument, would be unable to claim the "defence of ignorance". The Committee would appreciate the opportunity to consider a draft of this guidance as soon as possible, preferably in advance of Stage 2.

28. During consideration of this issue, however, a number of stakeholders have stressed the importance of accurate and accessible information relating to the historic environment. Although this issue is broader than the technical nature of this Bill, more general awareness of where scheduled monuments are located, especially if the definition of monument is widened as proposed in section 14, is critical to protect our historic environment.

29. The Committee recognises the importance of the information sources developed by the Scottish Government, such as the HS website, Register of Sasines and the future e-planning system. The Committee also recognises, however, the point raised by some stakeholders that expertise must be available to interpret this information. The Committee recommends that the Scottish Government considers this matter further in advance of Stage 2.

Unauthorised works – notices

30. Section 6 of the Bill introduces new powers for Scottish Ministers to serve enforcement notices where works have been carried out on a scheduled monument without the necessary scheduled monument consent (SMC). An enforcement notice would require the reversal or amelioration of works which were unauthorised or in breach of a condition of SMC “in such cases where such remedial works are desirable or reasonably practicable”.\(^{16}\) As an enforcement notice cannot take effect until 28 days have passed from the day it was served, the Bill also introduces stop notices, which could be served before the enforcement notice came into effect. In addition, temporary stop notices are introduced for use where an enforcement notice has not been served.

31. Enforcement notices are already available in respect of unauthorised works on a listed building and section 22 makes minor provision in relation to this. Section 23 introduces stop and temporary stop notices in respect of unauthorised works on a listed building.

32. The Policy Memorandum states that these provisions are deemed necessary as the 1979 Act does not provide for any situation involving unauthorised works. In addition, they harmonise arrangements for scheduled monuments with those for listed buildings.

33. The evidence received by the Committee showed broad support for these measures. The NTS, for example, referred to the powers as an “enhanced toolkit that is … extremely welcome”.\(^{17}\)

34. The SPF raised some concerns relating to temporary stop notices, questioning whether, as they could be issued without an enforcement notice, there

\(^{16}\) Policy Memorandum, paragraph 49.

could be issues around their robustness and consistency. It argued that they should be used as a last resort and should be accompanied by detailed guidance.\textsuperscript{18}

35. In response to this concern, HS officials stated that temporary stop notices were expected to be used as a “device of last resort to prevent significant harm and damage”. Officials also confirmed that detailed guidance would be set out in circulars and advice notes.\textsuperscript{19}

36. The Law Society of Scotland questioned whether the definition of works executed in, on or under a scheduled monument was sufficiently wide in scope. It queried whether neighbouring works outwith the boundary of the scheduled area, which might have the potential to damage or destroy the scheduled monument, should also be included, suggesting that such a situation might occur through flooding, drainage of a waterlogged area or where fragile remains were preserved.\textsuperscript{20}

37. In response to these points, HS officials confirmed that works outwith the boundary of a scheduled area would be covered by normal planning enforcement and that, when considering planning applications for such an area, a local authority would consider any impact on a scheduled monument.\textsuperscript{21}

38. The Law Society of Scotland also raised a number of points relating to appeals against enforcement notices. First, it highlighted that appeals against such notices are to the sheriff, are rare and, consequently, untested. The Law Society of Scotland suggested that relevant expertise and detailed knowledge of national and international policy relating to scheduled monuments lies with the Scottish Government’s Directorate of Planning and Environmental Appeals. Second, the Law Society of Scotland highlighted that the options available to a sheriff are to uphold or quash the notice, with no powers to rectify any defect or modify its terms. The Law Society of Scotland noted the wider range of powers of disposal available to a sheriff under other environmental provisions and called for these powers to be reflected in the Bill.\textsuperscript{22}

39. In response to these concerns, the Minister stated that appeals would be focused on a point of law and, therefore, knowledge of the particulars of a case or historic environment expertise would not be necessary—

“The process is about ensuring that the due legal process is carried out, so the sheriff would not need to have detailed specialist knowledge of historic

\textsuperscript{18} Scottish Property Federation. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 11.
\textsuperscript{20} Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 9.
\textsuperscript{22} Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraphs 11 to 16.
environment issues. It is about the process of law, rather than the evaluation of the historic environment.23

40. The Committee notes the broad support for the extension of enforcement notices to apply to scheduled monuments and the introduction of stop and temporary stop notices for unauthorised works on scheduled monuments and listed buildings.

41. The Committee is content that the wider planning enforcement rules would apply to works outwith the boundary of, but which might impact on, a scheduled monument.

Inventories of gardens and designed landscapes and battlefields

42. Section 11 would create a new statutory duty for Scottish Ministers to compile and maintain two new statutory inventories: an inventory of gardens and designed landscapes and an inventory of battlefields.

43. The Policy Memorandum states that HS already compiles and maintains a non-statutory inventory of gardens and designed landscapes in order to identify those of national importance and that the Scottish Government consulted on an inventory of battlefields in 2008. It also states that inclusion in the inventory confers recognition and a level of protection through the planning system.24

44. In its submission, the Historic Houses Association of Scotland (HHAS) stated its concerns about the inventory of gardens and designed landscapes, particularly around its compilation, purpose and whether any obligations or costs would fall on owners. Concern was also raised about whether inclusion in an inventory would oblige owners to maintain the site in a particular state, arguing that “it would be detrimental if any garden’s current layout was set in stone by this Bill”25 and “we do not want to get to the stage that we have to apply to change the azalea bulbs”.26

45. HHAS also argued that the creation of an inventory of battlefields was “fraught with difficulties”, particularly in relation to identifying the exact site of a battlefield. The HHAS also raised concerns about whether inclusion would result in an “unreasonable restriction on land use”27; the Scottish Rural Property Business Association (SRPBA) shared these concerns, arguing that normal land management practices should be allowed to continue unaffected.28

46. Other witnesses were less concerned that the inventories would result in obligations for owners. The RCAHMS argued that “the usage of the term

24 Policy Memorandum, paragraphs 68 and 69.
25 Historic Houses Association of Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraphs 11 to 14.
27 Historic Houses Association of Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 16.
‘inventory’ in this context can be a bit muddled” and that its understanding was that the term inventory referred to “a list of known sites”. The NTS went on to state that “fundamentally, this is about a responsibility to understand the resource and publicise the inventory”.

47. During oral evidence, HS officials sought to reassure stakeholders, stating that—

“inclusion on the inventory does not carry any obligation for owners to do any particular works or take any action to maintain the garden. All that it does is to register that we are aware that the garden is a nationally important site and that therefore, if there are any planning proposals that might affect it, local authorities must take it into account as a material consideration.”

48. HS officials went on to acknowledge the difficulties relating to identifying battlefield sites and stressed that inclusion in the inventory would be based on clear evidence. Officials stated that—

“we do our best to work on an evidence base. That is all that you can ever say in such cases. You work on archaeological data and other data depending on the period of the battle and in the end you have to reach a judgement. There is no way around that; there is never an absolute scientific approach for doing such things and in the end it has to be a matter of judgement and you have to be willing to wear your judgement.”

49. In the Minister’s letter to the Committee before giving oral evidence, she confirmed the practice set out in the Scottish Historic Environment Policy (SHEP) that a site must be of national importance and capable of definition on a modern map. This was reiterated during the Minister’s oral evidence.

50. The Committee believes that it is sensible for the Scottish Government to compile an inventory of gardens and designed landscapes and an inventory of battlefields of national importance to ensure that there is a comprehensive record of the location of these sites.

51. The Committee notes the concerns of owners of sites which may potentially be included in these inventories relating to any obligations, limitations or costs which might arise as a result of inclusion. The Committee is satisfied, however, with the Scottish Government’s assurance
that no obligations, limitations or costs would apply and that inclusion would only be relevant during consideration of a planning application.

Definition of monuments

52. The proposals in section 14 of the Bill would expand the definition of monuments to include “any site ... comprising any thing, or group of things, that evidences previous human activity”.

53. The Policy Memorandum states that this amendment is necessary as the 1979 Act has been previously criticised for its lack of provisions to protect archaeological remains where there is nothing that can be termed a “structure” or “work”, such as artefact scatters or archaeological deposits.34

54. In written evidence, a number of issues were raised regarding the extension of the definition of a monument. The SRPBA argued that “widening the definition in such a wide and vague manner is not an appropriate approach to ensure that a very small number of sites that do not currently fall within the statutory definition would be covered by legislation”. Instead, the Association suggested that the provision be reworded to “any site comprising any evidence of human settlement or industry” or to list the limited circumstances, not covered by the current definition, under which scheduling would take place.35

55. The Law Society of Scotland welcomed the broadening of the definition but argued that, rather than the proposed change, it would be more appropriate to give Scottish Ministers the power to act where there was a reasonable belief that the site was likely to comprise any thing or group of things that evidences previous human activity.36

56. During oral evidence, HS officials argued that “bringing in a reasonable belief test in that context would be quite a departure from how we have dealt with such definitions before” and that broadening the definition was “not the breadth that we should adopt”.37

57. The SRPBA elaborated on its concerns when it gave evidence to the Committee, arguing that “expanding the definition is akin to using a shovel when a spoon will do”. It emphasised the importance of certainty for landowners, stating that “a very wide definition is a problem for people who own and use land, because they do not know what will happen and whether there will be interest in the land being protected in some way.”38

58. The Built Environment Forum Scotland (BEFS) argued that the Scottish Government would “not schedule everything will-nilly” and that the guidance

34 Policy Memorandum, paragraph 80.
36 Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 19.
published to accompany the Bill would “provide peace of mind for landowners and others who are slightly worried about the open nature of the provision”.\textsuperscript{39}

59. In her letter to the Committee, the Minister reiterated that “only sites which are of ‘national importance’ may be scheduled” and that “the underlying theme of the criteria is how the monument contributes to the understanding or appreciation of the past”.\textsuperscript{40}

60. The Committee notes the concerns expressed by some stakeholders that the proposed expansion of the definition of a monument is too broad and that, potentially, more sites could be designated scheduled monument status with resultant constraints placed on land use.

61. The Committee expects, however, that the Scottish Government would act rigorously, having regard to strict criteria, when considering possible sites for designation. The Committee also acknowledges the Scottish Government’s commitment to produce guidance on this matter, which should provide further reassurance to owners of potential scheduled monuments.

Certificate of immunity to list

62. Section 18 introduces a power for Scottish Ministers to issue a certificate that would guarantee that a building would not be listed during the following five years.

63. The Policy Memorandum states that the policy aim for this provision is to facilitate building development and provide certainty for the construction industry.\textsuperscript{41}

64. The majority of respondents to the Committee’s consultation welcomed this proposal, although concerns were raised that anyone could apply for a certificate of immunity from listing.

65. The SRPBA argued that eligibility to make application for a certificate should be restricted to those with an interest in the building and that those who fall into this category should be listed.\textsuperscript{42} The Law Society of Scotland agreed that the right to make application should be restricted, suggesting that this be to the owner, lessee or the occupier of the land or buildings to which the application related. The Law Society of Scotland also argued that there should be a statutory right for an owner or interested person to be consulted on an application and that there should also be a right of objection and to a hearing or inquiry to determine unresolved issues.\textsuperscript{43} It also recommended that a duty of notification be placed on the planning authority to notify the owner, lessee or occupier and that there should be a time

\textsuperscript{40} Scottish Government. Letter from the Minister for Culture and External Affairs to the Convener of the Education, Lifelong Learning and Culture Committee dated 28 September 2010, paragraph 12.
\textsuperscript{41} Policy Memorandum, paragraph 92.
\textsuperscript{42} Scottish Rural Property Business Association. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 11.
\textsuperscript{43} Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 26.
limit for the issue of a certificate of between two and four months and a right of appeal.\textsuperscript{44}

66. The SPF was concerned that “one of the unintended effects will be that third parties will be able to request a listing for building outwith their ownership, which will lead to the historic buildings being subjected to lengthy and rigorous assessments and result in development being delayed”. The SPF went on to argue that certificates might, therefore, “provide an opportunity for hostile third parties to delay or derail a proposal, without the developer being aware.”\textsuperscript{45}

67. HoPS was unconvinced by these concerns, however, arguing that—

“experience elsewhere suggests this [applications for certificates being made without owner/occupiers’ knowledge] is unlikely to be the issue. This has to be seen in the context of the existing way in which HS decline to consider listing when there is a live planning application.”\textsuperscript{46}

68. Section 2.35 of the SHEP states that “a building will not normally be listed once a planning application in respect of it has been submitted, granted or while works which have received planning permission are under way”.\textsuperscript{47} The Law Society of Scotland asked for clarification over whether the convention set out in SHEP would stand should the Bill be enacted.\textsuperscript{48}

69. The Royal Town Planning Institute (RTPI) in Scotland supported the proposal that anyone can apply for a certificate of immunity against listing, arguing that “if a building is worthy of protection, that information should be available to everyone, not just to a limited number of people”.\textsuperscript{49}

70. During oral evidence, HS officials acknowledged that the proposal was “novel and untested”. In relation to the concerns that any person can apply for a certificate, officials stated that “the advantage of allowing any person to apply is that, although we would expect the owner or occupier to come forward in most cases, there might be times when someone who is considering buying a building, and who might be a key player in preserving that building, could become involved at a very early stage”.\textsuperscript{50}

\textsuperscript{44} Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraphs 36 and 37.

\textsuperscript{45} Scottish Property Federation. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraphs 14 and 15.

\textsuperscript{46} Heads of Planning Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 17.


\textsuperscript{48} Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 24.


71. The Minister, during her evidence, added that, by restricting applications to owner/occupiers, other people with a genuine interest in the building would be excluded.51

72. Officials also referred to the similar system in operation in England and Wales and stated that they were not aware of certificates being applied for reverse tactics [such as using an application for a certificate of immunity against listing to attempt to have the building listed] under that system. The Committee was told that the system being proposed in the Bill would allow people to engage with the listing process at an earlier stage than the system in England and Wales does.

73. Officials later stated that certificates of immunity to listing would replace the current policy set out in SHEP as “the difficulty with our current policy is that we say that we do not normally list in the face of a live planning application, but we cannot give an absolute guarantee that we will never do so … the certificate will deliberately create a period of absolute certainty”.52

74. In a letter to the Committee following her evidence, the Minister provided further clarification, explaining that the—

“main policy aim here is to provide certainty for owners and developers considering works to a particular building. In other words the policy is not, as a matter of principle, to exempt buildings from listing as the listing of a building would be a perfectly proper outcome of the process of considering a building for a certificate of immunity. The advantage here is that certainty as to whether a building would or would not be listed can be provided at an early stage in the development process so that those involved know the boundaries within which they are operating.”53

75. HoPS and the RTPI in Scotland both argued that a requirement for HS to regularly review the statutory list (every five or ten years) would minimise the need for such certificates and would ensure that local development plans had current information.54 During oral evidence, HoPS went on to argue that a regular review would be “proactive in identifying the heritage that is worthy of being protected in a more general sense rather than firefighting in an individual case”.55
76. The Minister argued against this policy, stating that it would require additional expenditure of £1-2m a year. She argued that the Bill “provides a better route to reaching a solution to help and support development”.

77. The Committee notes the debate around the possible advantages, and disadvantages, of the proposed certificates of immunity against listing. The Committee also notes that this scheme is “novel and untested”. The Committee considers, however, that the provision would be useful in raising the degree of certainty for developers when considering developments involving historic buildings.

78. The Committee has received strong representations against the proposal that any person could apply for a certificate. These centre on concerns that this provision could be used to delay unpopular building developments and these respondents have called for applications to be limited to owner/occupiers. The Committee believes, however, that there will be instances where a certificate is sought by a potential buyer who may not be prepared to purchase a historic building without the certainty that it would not be listed in the next five years. In addition, the Committee notes that it is currently possible for anyone to apply for a building to be listed and, thus, this tactic to delay unpopular building developments is already available to those who oppose a development. Accordingly, therefore, the Committee is not persuaded that the proposal for applications for a certificate against listing should be restricted to owner/occupiers.

79. The Committee believes that some concerns raised with it result from a lack of information about how the application process would work in practice, how long it would take and who would be consulted. The Committee recommends, therefore, that the Scottish Government provide further information on this to give greater assurance to stakeholders.

Liability of owner and successors for expenses of urgent works

80. Section 25 introduces a provision relating to the liability of an owner of a listed building for expenses relating to urgent work on that property undertaken before they took ownership.

81. Under the 1997 Act, a planning authority or Scottish Ministers may carry out any works which are considered to be necessary for the preservation of a listed building. Local authorities may give notice to the owner of the property of their liability to repay any expenses, but the power to recover expenses is currently limited to the owner of the property who was served the notice. The Bill amends this power to enable a charge to be placed against the property itself, rather than the owner, to make subsequent owners severally liable with the seller. The Policy Memorandum states that the amendment is necessary to “address the difficulties that can arise in terms of recovering costs when ownership of a property has

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changed or when the regulatory authorities have to deal with an absentee owner".57

82. The Law Society of Scotland argued that these provisions were almost identical to those contained in the Tenement (Scotland) Act 2004 and argued that primary liability rested with the original owner and that a successor owner could recover costs from this original owner.58

83. HoPS supported this provision, arguing in written evidence that it would “help address the situation where the owner tries to evade liability by moving ownership between different ‘paper companies’”. HoPS argued that the five year limit should be removed as this it was “likely to encourage owners to procrastinate to try and avoid repaying any costs”.59

84. When the NTS gave evidence to the Committee, it gave an example of a local authority which sought to recover expenses from an owner who transferred ownership of the property through a series of shell companies; the company which owned the company was finally located in Vancouver. It concluded that “if somebody wants to avoid repaying the grant, there are all sorts of mechanisms available to them to do so”.60 The NTS also opposed the five year time limit on recovering costs.

85. The HHAS argued that the objective behind this proposal is “laudable though problematic” and was concerned it would achieve the opposite effect to that intended. It called for the “weight of deterrence” to be directed towards the neglecting owner rather than the potential buyer. The HHAS also argued that the recovered expenses should be limited to the net proceeds of the sale only and that, where a building had a negligible or negative value, it would not be “wise” to impose the cost on a potential buyer as this might act as a disincentive. It stated that in such cases, public interest would be best served by “treating the cost of emergency repair as an unavoidable public contribution to the securing of a viable future for the building”.61

86. During oral evidence, HS officials stated that, where a local authority was considering serving a notice for urgent works on a building with a negligible or negative value, it would be aware that there were limited options for recovering of the expenses and would look at a wider range of options.62

87. During the Minister’s oral evidence, she confirmed that the responsibility for repayment would be met by the original owner, stating that—

57 Policy Memorandum, paragraph 115.
58 Law Society of Scotland, Planning Sub-Committee. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraphs 42 and 44.
59 Heads of Planning Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 20.
61 Historic Houses Association of Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 20.
“It is a bit like the situation that people might experience when they purchase a house. If urgent works need to be done, either the owner does them before they sell the property or the price of the works is included in the price that they buyer pays, but the works are done regardless. … Either way, the original owner who has not carried out the works will end up paying for them.”

88. In the Minister’s letter to the Committee received before she gave evidence, she confirmed that “the notice of liability is potentially indefinite, provided that it is renewed by the local authority every five years.” The Minister elaborated on this during oral evidence—

“If the period is indefinite, there is a danger that it will just lie there and nothing will ever be done. The fact that there has to be a reapplication will, I hope, mean better engagement between the relevant authorities and the owner.”

89. The Committee recognises that the proposals relating to extending liability for any expenses for urgent works to successor owners would address the situation where an owner transfers ownership to another company in order to avoid repayment.

90. The Committee is also content that, where ownership passes in a normal property transaction, any costs to the potential buyer would be likely to be identified during the conveyancing process.

91. Whilst some witnesses suggested that a five year limit should not be applied to the notice to repay expenses, the Committee accepts the Scottish Government’s position that this could easily be extended and would encourage local authorities to be more proactive in recovering expenses.

Additional provisions

92. A number of the written submissions received by the Committee raised concerns that the technical, amending nature of the Bill meant that the Scottish Government was missing an opportunity to legislate for a number of other issues relating to the historic environment.

Wider historic environment and undesignated sites and buildings

93. Some submissions argued that the Bill only deals with scheduled monuments and listed buildings and not the vast number of historic sites which are not officially recognised. Archaeology Scotland argued that “a problem remains unsolved in that the existing legislation is focussed on the designated assets and, consequently, this narrow view does not enable a holistic, sustainable approach to

64 Scottish Government. Letter from the Minister for Culture and External Affairs to the Convener of the Education, Lifelong Learning and Culture Committee dated 28 September 2010, paragraph 14.
managing the historic environment to be taken”.66 Many submissions highlighted figures set out in the Scotland’s Historic Environment Audit that suggest that 81% of known historic environment assets are currently undesignated. This figure rises to 95% in relation to archaeological assets.

94. In its written submission, BEFS made two requests for additional provisions in the Bill. First, it suggested that a responsibility be placed on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties. BEFS argued that this would place greater emphasis on the use of existing duties and encourage public bodies to take cognisance of the historic environment. Second, BEFS suggested that planning authorities be given access to and be required to have special regard to appropriate information and expert advice on the local historic environment in exercising their duties.67

95. During oral evidence, BEFS argued that the proposed responsibility on public bodies would build on the existing duties under the SHEP but argued that “there is no legislative bottom line, context or backbone to that policy.”68

96. Archaeology Scotland argued that, since all local authorities already had access to appropriate information and expert advice on the historic environment, a legislative requirement would not add any new burden and the benefits to the public would be significant.69 In contrast, however, HoPS highlighted a 2007 study which showed that 26% of local authorities in Scotland had fewer than one full time equivalent (FTE) member of staff dealing with heritage project and policy matters and argued that, in the current economic climate, “in the absence of any specific legislative duty to use such expert skills and advice … this will be an area of pressure”. HoPS also suggested sharing expertise across authority boundaries.70

97. Other stakeholders argued against giving a legislative footing to these proposals, suggesting that the objectives were sufficiently well served by their current status in guidance. The RCAHMS argued that leadership through policy—

“is a much better way of achieving what the BEFS proposes, and we should do it better than we have done. It comes down to working together and the single outcome agreements with local authorities. It would not be helpful to put additional legislative burdens on local authorities now.”71

98. The Minister argued that “historic environment” was a very broad definition and that such a duty would be likely to bring significant costs— “the term ‘historic

66 Archaeology Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 3.
67 Built Environment Forum Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 7 and 8.
69 Archaeology Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 5.
70 Heads of Planning Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 14.
environment’ is broad; it embraces large parts of older settlements as well as rural locations, which means that any duty to have regard to it could be extremely generous”.72

99. In her letter to the Committee following oral evidence, the Minister provided further information relating to the potential cost implications of the proposed statutory duty of care—

“Firstly, the Built Environment Forum Scotland’s (BEFS) proposal applies to every public body (whether its functions impact on the historic environment or not). Secondly, any duty framed in terms of “taking the Historic environment into account when exercising functions” would potentially have a much greater impact on say, the NHS or the MOD than the current Scottish Historic Environment Policy framework, which focuses attention of public organisations on good stewardship of the assets in their ownership or use. Thirdly, the ‘historic environment’ is a very broad term – it embraces large parts of our older settlements as well as many rural locations – any duty to “have regard to it” would have much more day to day impact on public bodies than anything done for the marine environment say and we assume that public bodies would have to look at how they complied with such a duty once enacted every time they exercised any of their functions, however remote the connection to the historic environment.”73

100. The Committee notes the support for the two amendments to the Bill proposed by the Built Environment Forum Scotland and recognises the support for and against these additional provisions which were expressed during the Committee’s evidence taking.

Listed building scheme – inclusion of historic pavements

101. The RTPI in Scotland argued for listing provision to be extended for the inclusion of historic road and footpath surfaces. The RTPI in Scotland elaborated on its suggestion during oral evidence—

“We are talking about relatively small pockets of clearly historic works rather than footpaths, rights of way or footfall. … We are talking about small and discrete areas of, for example, clearly and skilfully laid pieces of paving.”74

102. During oral evidence, both HS officials and the Minister committed to exploring this suggestion further with RTPI in Scotland.

103. The Committee is content with the Scottish Government’s undertaking to discuss the proposal that listing provision be extended to include pavements further with stakeholders. The Committee asks that it be updated on these discussions ahead of Stage 2.

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73 Scottish Government. Letter from the Minister for Culture and External Affairs to the Convener of the Education, Lifelong Learning and Culture Committee dated 14 October 2010, paragraph 14.
Listed building scheme – inclusion of ecclesiastical buildings

104. In its written submission, HoPS argued that the exemption for ecclesiastical buildings under the listing building scheme should be relaxed, stating that “a move to bring all historic places of worship within the listing building management system would closely fit the modernising planning agenda by simplifying the exceptions".75

105. When the Committee raised this issue during oral evidence, HoPS questioned whether owners of ecclesiastical buildings have sufficient knowledge to ensure that such buildings can be protected, arguing that—

“If we delegate the decision on protecting heritage to the ecclesiastical bodies, we need to ask whether they have in place appropriate systems to ensure that they take appropriate heritage conservation advice when they carry out any works. My experience suggests that adequate protections do not appear to be in place. They ecclesiastical exemption adds to the complexity of the planning system, and we need to ask whether there is a clear and obvious benefit from it.”76

106. In her letter to the Committee before giving evidence, the Minister for Culture and External Affairs explained that the exemption applies to any ecclesiastical building (both interior and exterior) being used for ecclesiastical purposes (although a voluntary scheme is in place which regards proposals for external changes to ecclesiastical buildings as if they were listed). The Minister also set out the implications of removing the exemption, arguing that “any change to the current exemption would be regarded as a very significant change by ecclesiastical bodies, and would also have significant resource implications for local authorities and owners”.77

107. During oral evidence, HS officials referred to a commitment to review this voluntary scheme and officials suggested that this “will provide an obvious point at which to talk to the churches about how the voluntary scheme is working”. The Minister was more robust in her response to the suggestion, highlighting HS’s “healthy and good relationship with the churches” and concluding that “if something is not broken, why fix it?”78

108. The Committee notes the points raised with it relating to the inclusion of ecclesiastical buildings within the listed building scheme. The Committee also notes an existing voluntary scheme which regards proposals for external changes to ecclesiastical buildings as if they were listed and welcomes HS’s commitment to review this scheme. The Committee believes that this would be a more appropriate opportunity for considering this issue.

75 Heads of Planning Scotland. Written evidence to the Education, Lifelong Learning and Culture Committee, paragraph 17.
77 Scottish Government. Letter from the Minister for Culture and External Affairs to the Convener of the Education, Lifelong Learning and Culture Committee dated 28 September 2010, paragraph 21.
POLICY MEMORANDUM

109. Rule 9.3.3(c) of Standing Orders requires a Policy Memorandum to accompany all bills when introduced. Amongst other requirements, the Policy Memorandum must set out the policy objectives of the Bill.

110. In its call for written evidence, the Committee sought views on the Policy Memorandum. The majority of submissions that commented on this indicated satisfaction with the Policy Memorandum, noting that it had been helpful in clearly setting out the Bill’s objectives.

111. The Committee notes the comments received in written evidence that the Policy Memorandum has been helpful in setting out the objectives of the Bill.

SUBORDINATE LEGISLATION

112. Rule 9.4A of Standing Orders provides that, where an Executive Bill confers powers to make subordinate legislation, a delegated powers memorandum must be provided.

113. The Subordinate Legislation Committee considered the Delegated Powers Memorandum and reported to this Committee on 23 June 2010. The Subordinate Legislation Committee’s report is provided in Annexe B.

114. The Committee notes the conclusions of the Subordinate Legislation Committee and is content with the provisions in the Bill regarding delegated legislation.

FINANCIAL MEMORANDUM

115. Standing Orders Rule 9.3.2 requires a Financial Memorandum to be provided to accompany a Bill when it is introduced. The Financial Memorandum must “set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise, best estimates of the timescales over which such costs would be expected to arise, and an indication of the margins of uncertainty in such estimates”. The Financial Memorandum for the Bill is included in the Explanatory Notes.

116. The Finance Committee considered the Financial Memorandum on 15 June 2010 and agreed to undertake level one scrutiny. This means that the Finance Committee sought written evidence on the Financial Memorandum but did not take oral evidence or publish a report.

117. The Finance Committee wrote to the Education, Lifelong Learning and Culture Committee on 13 September 2010 and the Finance Committee’s letter is provided at Annexe C.

118. The Committee notes the responses to the Finance Committee’s consultation on the Financial Memorandum and is content with the estimated costs.
CONCLUSIONS

119. The Education, Lifelong Learning and Culture Committee recognises the importance of Scotland's historic environment, both in terms of understanding our cultural identity and contributing to the economy. Managing the historic environment to ensure its protection, whilst not placing unreasonable burdens on those who own, work or access protected land and buildings, is a constant challenge.

120. The Committee notes the amending nature of the Historic Environment (Amendment) (Scotland) Bill and the Scottish Government’s intention not to use the Bill to introduce new or significant burdens on the historic environment sector. The Committee has taken this into account when considering the evidence.

121. The Committee notes the broad support for the Bill and the fact that many of its proposals are a result of extensive consultation by Historic Scotland (HS) with the historic environment sector.

122. The Committee also notes the concerns raised by several organisations in relation to some sections of the Bill, particularly: the proposed inventories for gardens and designed landscapes and battlefields (section 11), extension of the definition of a monument (section 14), certificates of immunity against listing (section 18) and the liability of an owner of a listed building for expenses relating to urgent work (section 25). The issue of the accessibility of the information that identifies scheduled monuments and listed buildings was also raised.

123. The Committee is content, however, that the Bill’s proposals constitute a sensible and welcome approach to updating and modernising some aspects of historic environment legislation. On this basis, the Committee supports the general principles of the Historic Environment (Amendment) (Scotland) Bill.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

124. The Committee notes the concerns raised regarding section 1 of the Bill. The Committee believes, however, that enabling Scottish Ministers to set the amount of the grant, made under the Historic Building Repair grants scheme, that could, in certain circumstances, be recovered, at the point at which the grant is made seems sensible and would provide a higher level of certainty to recipients. (paragraph 16)

125. The Committee has considered the argument put forward by the Scottish Government for revising the “defence of ignorance” for unauthorised works to a scheduled monument and notes the support for this among stakeholders. (paragraph 26)

126. The Committee notes the Scottish Government’s intention, if the Bill is passed, to provide guidance to all owners/occupiers of land containing scheduled monuments to set out the implications of the legislation and
remind them of their wider obligations as owners/occupiers. The Committee believes that this would ensure that an owner/occupier, who would be most likely to be responsible for any unauthorised works to a scheduled monument, would be unable to claim the “defence of ignorance”. The Committee would appreciate the opportunity to consider a draft of this guidance as soon as possible, preferably in advance of Stage 2. (paragraph 27)

127. During consideration of this issue, however, a number of stakeholders have stressed the importance of accurate and accessible information relating to the historic environment. Although this issue is broader than the technical nature of this Bill, more general awareness of where scheduled monuments are located, especially if the definition of monument is widened as proposed in section 14, is critical to protect our historic environment. (paragraph 28)

128. The Committee recognises the importance of the information sources developed by the Scottish Government, such as the HS website, Register of Sasines and the future e-planning system. The Committee also recognises, however, the point raised by some stakeholders that expertise must be available to interpret this information. The Committee recommends that the Scottish Government considers this matter further in advance of Stage 2. (paragraph 29)

129. The Committee notes the broad support for the extension of enforcement notices to apply to scheduled monuments and the introduction of stop and temporary stop notices for unauthorised works on scheduled monuments and listed buildings. (paragraph 40)

130. The Committee is content that the wider planning enforcement rules would apply to works outwith the boundary of, but which might impact on, a scheduled monument. (paragraph 41)

131. The Committee believes that it is sensible for the Scottish Government to compile an inventory of gardens and designed landscapes and an inventory of battlefields of national importance to ensure that there is a comprehensive record of the location of these sites. (paragraph 50)

132. The Committee notes the concerns of owners of sites which may potentially be included in these inventories relating to any obligations, limitations or costs which might arise as a result of inclusion. The Committee is satisfied, however, with the Scottish Government's assurance that no obligations, limitations or costs would apply and that inclusion would only be relevant during consideration of a planning application. (paragraph 51)

133. The Committee notes the concerns expressed by some stakeholders that the proposed expansion of the definition of a monument is too broad and that, potentially, more sites could be designated scheduled monument status with resultant constraints placed on land use. (paragraph 60)
134. The Committee expects, however, that the Scottish Government would act rigorously, having regard to strict criteria, when considering possible sites for designation. The Committee also acknowledges the Scottish Government’s commitment to produce guidance on this matter, which should provide further reassurance to owners of potential scheduled monuments. (paragraph 61)

135. The Committee notes the debate around the possible advantages, and disadvantages, of the proposed certificates of immunity against listing. The Committee also notes that this scheme is “novel and untested”. The Committee considers, however, that the provision would be useful in raising the degree of certainty for developers when considering developments involving historic buildings. (paragraph 77)

136. The Committee has received strong representations against the proposal that any person could apply for a certificate. These centre on concerns that this provision could be used to delay unpopular building developments and these respondents have called for applications to be limited to owner/occupiers. The Committee believes, however, that there will be instances where a certificate is sought by a potential buyer who may not be prepared to purchase a historic building without the certainty that it would not be listed in the next five years. In addition, the Committee notes that it is currently possible for anyone to apply for a building to be listed and, thus, this tactic to delay unpopular building developments is already available to those who oppose a development. Accordingly, therefore, the Committee is not persuaded that the proposal for applications for a certificate against listing should be restricted to owner/occupiers. (paragraph 78)

137. The Committee believes that some concerns raised with it result from a lack of information about how the application process would work in practice, how long it would take and who would be consulted. The Committee recommends, therefore, that the Scottish Government provide further information on this to give greater assurance to stakeholders. (paragraph 79)

138. The Committee recognises that the proposals relating to extending liability for any expenses for urgent works to successor owners would address the situation where an owner transfers ownership to another company in order to avoid repayment. (paragraph 89)

139. The Committee is also content that, where ownership passes in a normal property transaction, any costs to the potential buyer would be likely to be identified during the conveyancing process. (paragraph 90)

140. Whilst some witnesses suggested that a five year limit should not be applied to the notice to repay expenses, the Committee accepts the Scottish Government’s position that this could easily be extended and would encourage local authorities to be more proactive in recovering expenses. (paragraph 91)
141. The Committee notes the support for the two amendments to the Bill proposed by the Built Environment Forum Scotland and recognises the support for and against these additional provisions which were expressed during the Committee's evidence taking. (paragraph 100)

142. The Committee is content with the Scottish Government’s undertaking to discuss the proposal that listing provision be extended to include pavements further with stakeholders. The Committee asks that it be updated on these discussions ahead of Stage 2. (paragraph 103)

143. The Committee notes the points raised with it relating to the inclusion of ecclesiastical buildings within the listed building scheme. The Committee also notes an existing voluntary scheme which regards proposals for external changes to ecclesiastical buildings as if they were listed and welcomes HS’s commitment to review this scheme. The Committee believes that this would be a more appropriate opportunity for considering this issue. (paragraph 108)

144. The Committee notes the comments received in written evidence that the Policy Memorandum has been helpful in setting out the objectives of the Bill. (paragraph 111)

145. The Committee notes the conclusions of the Subordinate Legislation Committee and is content with the provisions in the Bill regarding delegated legislation. (paragraph 114)

146. The Committee notes the responses to the Finance Committee’s consultation on the Financial Memorandum and is content with the estimated costs. (paragraph 118)
ANNEXE A: EXTRACTS FROM THE MINUTES OF THE EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

20th Meeting, 2010 (Session 3), Wednesday 29 June 2010

Historic Environment (Amendment) (Scotland) Bill: The Committee considered and agreed its approach to the scrutiny of the Bill at Stage 1.

21st Meeting, 2010 (Session 3), Wednesday 8 September 2010

Historic Environment (Amendment) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Lucy Blackburn, Bill Director, Policy Group, Bill McQueen, Bill Manager, Policy Group, and Barbara Cummins, Deputy Chief Inspector, Historic Scotland; Emma Thomson, Principal Legal Officer, Solicitors Local Authority and Development Division, Scottish Government.

22nd Meeting, 2010 (Session 3), Wednesday 15 September 2010

Historic Environment (Amendment) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Eila Macqueen, Director, Archaeology Scotland; Simon Gilmour, Trustee and Convener, Bill Taskforce, Built Environment Forum Scotland; Alexander Hay, Chairman, Historic Houses Association for Scotland; Terry Levinthal, Director of Conservation, National Trust for Scotland; Diana Murray, Chief Executive, Royal Commission on the Ancient and Historic Monuments of Scotland; and Alison Polson, Member, Planning Group, Scottish Rural Property Business Association.

23rd Meeting, 2010 (Session 3), Wednesday 22 September 2010

Historic Environment (Amendment) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Dave Sutton, member, Heads of Planning Scotland; Charles Strang, Scottish Planning Policy Officer, and Stuart Eydmann, member, Royal Town Planning Institute in Scotland.

24th Meeting, 2010 (Session 3), Wednesday 29 September 2010

Historic Environment (Amendment) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Fiona Hyslop MSP, Minister for Culture and External Affairs, Scottish Government; Lucy Blackburn, Bill Director, Policy Group, and Barbara Cummins, Deputy Chief Inspector,
Historic Scotland; and Emma Thomson, Principal Legal Officer, Solicitors Local Authority and Development Division, Scottish Government.

25th Meeting, 2010 (Session 3), Wednesday 6 October 2010

Historic Environment (Amendment) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to, and the Committee agreed to consider a revised draft, in private, at its next meeting.

26th Meeting, 2010 (Session 3), Wednesday 27 October 2010

Historic Environment (Amendment) (Scotland) Bill (in private): The Committee considered and agreed a draft Stage 1 report.
ANNEXE B: SUBORDINATE LEGISLATION COMMITTEE

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 8 and 22 June 2010, the Subordinate Legislation Committee considered the delegated powers provisions in the Historic Environment (Amendment) (Scotland) Bill at Stage 1. The Committee submits this report to the Education, Lifelong Learning and Culture Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Historic Environment (Amendment) (Scotland) Bill (“the Bill”) was introduced in the Parliament on 4 May 2010 by the Minister for Culture and External Affairs, Fiona Hyslop MSP.

3. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

4. Correspondence between the Committee and the Scottish Government is reproduced in the Appendix.

5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections: 6 (inserting sections 9I and 9N of the Ancient Monuments and Archaeological Areas Act 1979); 13, 20(2), 23(1) (inserting sections 41D(5), 41G and 41I(3) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997), section 24 (inserting section 39A(5) of that 1997 Act), section 25 (inserting section 50G of that 1997 Act), sections 26(1), 29(6), 31 and 32.

Delegated powers provisions

Section 15 – Scheduled Monument Consent: regulations as respects applications, etc.

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative procedure</td>
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</tbody>
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6. Section 15(2) inserts a new paragraph (1A) into Schedule 1 of the Ancient Monuments and Archaeological Areas Act 1979. This allows the Scottish Ministers to make provision in regulations about the manner in which scheduled monument consent is granted, and the form and content of such consent.

79 Historic Environment (Amendment) (Scotland) Bill Delegated Powers Memorandum
7. Section 15(3) amends paragraph 2 of that Schedule 1. This will permit the Scottish Ministers to make provisions, including to require a certificate in the prescribed form to accompany an application for consent; provision for the form and content of such certificates; provision publicising applications for consent; provision as to the notice to be given of any application for consent, and the form and content of such notices.

8. The Committee considered that the explanation provided in the DPM to justify these delegated powers was very brief. “This will bring the scheduled monument consent application and granting process into line with the model used in the listed building and planning legislation”. The Committee therefore asked for further explanation why the power in section 15(2) requires to be taken, and why is it desirable to be consistent between those provisions and those for scheduled monument consent.

9. The Committee also asked why the power in section 15(3) is proposed as a discretion to make the regulations (at all) rather than a requirement, given that presently on the face of paragraph 2 of Schedule 1 of the 1979 Act, Ministers have the power to refuse to entertain an application for scheduled monument consent, unless it is accompanied by the certificates as specified in that paragraph.

10. On section 15(2), the response from the Scottish Government provides further explanation and clarification. There are broadly equivalent powers which enable Ministers to prescribe the form of the decision notice in sections 43 and 275 of the Town and Country Planning (Scotland) Act 1997, and sections 14, 18, 19 and 82 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Planning permission or listed building consent, as the case may be, is granted by such decision notice. Paragraph 19 in the Delegated Powers Memorandum was intended to indicate that the provisions conferred equivalent powers to those powers, rather than that they were directly modelled on the wording in those Acts. It is considered equally desirable to be able to prescribe the manner and form in which scheduled monument consent is granted.

11. The Committee was content with this further clarification, and that the power in section 15(2) appears appropriate to be exercised by negative procedure.

12. On the Government’s response on section 15(3), the Committee’s question was directed at the issue that the power itself in this subsection is proposed as a discretion to make the regulations, rather than a requirement. Presently on the face of paragraph 2 of Schedule 1 of the 1979 Act, Ministers have the discretion to refuse to entertain an application for scheduled monument consent, unless it is accompanied by the certificates as specified in that paragraph (as to the ownership of the monument). As and when section 15(3) comes into force, if the Scottish Ministers do not make the regulations (or until they do so), there will be no provision that an application for scheduled monument consent must not be entertained, unless accompanied by the relevant certificates. The response does not comment on this aspect - why the new power is framed as a discretion to make the provisions by regulations, at all, rather than a requirement to make them.
13. The Committee notes, however, that once section 15(3) is in force and until the regulations are made, it appears the position would be that Ministers would still have the discretion not to grant an application. There would just not be a statutory requirement to reject the application, nor would the form and content (and other arrangements) for certificates of ownership have been prescribed by regulations. Ultimately the Committee agrees that the power in section 15(3) deals with relatively administrative matters, and on that basis is content with the power in principle. The Committee is also content that negative procedure is applied to the exercise of the power.

14. The Committee also determined accordingly that it did not need to draw the attention of the Parliament to the delegated powers in section 15(2) and (3) of the Bill.
APPENDIX

Correspondence with the Scottish Government

Historic Environment (Amendment) (Scotland) Bill at Stage 1

Thank you for your letter of 8 June to Elspeth MacDonald of the Constitution and Parliamentary Secretariat requesting a response to the specific issues which were raised during the Committee’s recent consideration of the above Bill. Historic Scotland’s response is as follows:

- Paragraph 19 of the Delegated Powers Memorandum is more applicable to the provisions of section 15(3) of the Bill than section 15(2). Section 15(3) is largely modelled on provisions in section 10 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the Listed Buildings Act”) and section 35 of the Town and Country Planning (Scotland) Act 1997 (“the Planning Act”).

- As regards, section 15(2) of the Bill, this amendment will enable provisions to be made which, in particular, specify the form in which scheduled monument consent is given. There are broadly equivalent powers enabling Ministers to prescribe the form of the decision notice in sections 43 and 275 of the Planning Act and sections 14, 18, 19 and 82 of the Listed Buildings Act. Planning permission or listed building consent as the case may be is granted by such decision notice. Paragraph 19 in the Delegated Powers Memorandum was intended to indicate that the provisions conferred equivalent powers to those in the Planning Act and Listed Buildings Act rather than that they were directly modelled on the wording in those Acts. It is considered desirable to be able to prescribe the manner and form in which scheduled consent is granted.

- Currently paragraph 2 of Schedule 1 to the 1979 Act provides a discretion to refuse to entertain an application for scheduled monument consent unless it is accompanied by certain specified certificates. The purpose of section 15(3) is to confer essentially the same degree of discretion whilst enabling the administrative requirements for different certificates to be set out in regulations to allow administrative flexibility.
ANNEXE C: FINANCE COMMITTEE LETTER

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. The Committee agreed to adopt level one scrutiny in relation to the Historic Environment (Amendment) (Scotland) Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

All submissions received are attached to this letter. If you have any questions about the Committee’s scrutiny of the FM, please contact the clerks to the Committee via the contact details above.

Andrew Welsh MSP
Convener
14 September 2010

Submission from Aberdeenshire Council

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

No comments were submitted with regard to the financial assumptions made.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable to ourselves

3. Did you have sufficient time to contribute to the consultation exercise?

No comment

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Within the Financial Memorandum it is not always made clearly apparent whether it will be the Local Authority or Historic Scotland who will be liable for any financial burden given the discretionary nature of the Bill.
5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

It would be inappropriate to comment on the above when the financial burden is not clearly defined.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The Financial Memorandum appears to give a fair general representation with regards to the margins of uncertainty with regard to both cost and timescales.

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

No Comment

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

No Comment

Robert Gray
Head of Planning Policy and Environment

Submission from Fife Council

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Fife Council did not respond to the original consultation on the draft bill.

15. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable

2. Did you have sufficient time to contribute to the consultation exercise?

Not applicable.
Costs
3. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The focus of financial implications for local authorities is on administrative costs associated with serving stop, repair or enforcement notices; and setting up a system to record and monitor sites with immunity notices. We concur with the comments of some other local authorities in the earlier consultation that these will be minor costs.

4. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Particularly given the case that the basis of these powers is that they are discretionary, then yes these costs can be absorbed, if incurred.

5. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The Financial Memorandum suggests that there will be minimal costs and this does reflect the marginal nature of any costs. However, while Fife Council does welcome the new powers in the Bill, particularly in the current financial environment facing the public sector, careful consideration on whether to actually use these additional powers, on a case-by-case basis, will be required.

Wider Issues
6. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

No comment
7. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

It is difficult to comment on whether there will be any further future costs associated with the Bill. If, as suggested, there was subsequent subordinate legislation or more developed guidance, comment could only be made once their nature and detail were known.

Jonathon Bryson
Financial Analyst
Submission from North Lanarkshire Council

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?
No

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
N/A

3. Did you have sufficient time to contribute to the consultation exercise?
N/A

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

It is not anticipated that this Bill will have any financial implications for local authorities.

Submission from the Scottish Court Service

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?
N/A

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
N/A

3. Did you have sufficient time to contribute to the consultation exercise?
N/A

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
Yes. Figures requested by Bill team and provided by SCS.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Yes

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

No future associate costs expected for SCS.

Scottish Court Service
6 August 2010
ANNEXE D: ORAL AND ASSOCIATED WRITTEN EVIDENCE

21st Meeting, 2010, 8 September 2010

Oral evidence
Lucy Blackburn, Bill Director, Policy Group, Bill McQueen, Bill Manager, Policy Group, and Barbara Cummins, Deputy Chief Inspector, Historic Scotland; and Emma Thomson, Principal Legal Officer, Solicitors Local Authority and Development Division, Scottish Government.

22nd Meeting, 2010, 15 September 2010

Written evidence
Archaeology Scotland
Built Environment Forum Scotland
Historic Houses Association for Scotland
National Trust for Scotland
Scottish Rural Property Business Association
Royal Commission on the Ancient and Historic Monuments of Scotland

Oral evidence
Eila Macqueen, Director, Archaeology Scotland; Simon Gilmour, Trustee and Convener, Bill Taskforce, Built Environment Forum Scotland; Alexander Hay, Chairman, Historic Houses Association for Scotland; Terry Levinthal, Director of Conservation, National Trust for Scotland; Diana Murray, Chief Executive, Royal Commission on the Ancient and Historic Monuments of Scotland; and Alison Polson, Member, Planning Group, Scottish Rural Property Business Association.

Supplementary written evidence
Historic Houses Association for Scotland

23rd Meeting, 2010, 22 September 2010

Written evidence
Heads of Planning Scotland
Royal Town Planning Institute in Scotland

Oral evidence
Dave Sutton, member, Heads of Planning Scotland; and Charles Strang, Scottish Planning Policy Officer, and Stuart Eydmann, member, Royal Town Planning Institute in Scotland.
24th Meeting, 2010, 29 September 2010

Written evidence
Minister for Culture and External Affairs

Oral evidence
Fiona Hyslop MSP, Minister for Culture and External Affairs, Scottish Government; Lucy Blackburn, Bill Director, Policy Group, and Barbara Cummins, Deputy Chief Inspector, Historic Scotland; and Emma Thomson, Principal Legal Officer, Solicitors Local Authority and Development Division, Scottish Government.

Supplementary written evidence
Minister for Culture and External Affairs
Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 8 September 2010

[The Convener opened the meeting at 10:01]

Historic Environment (Amendment) (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I open the 21st meeting of the Education, Lifelong Learning and Culture Committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting. We have received apologies from Christina McKelvie, who is unable to join us because of illness, and I believe that Claire Baker will be here shortly.

I welcome everyone back after the summer recess. I hope that you all had a good summer and that you were working hard in your constituencies, not having big long holidays.

Item 1 on our agenda is stage 1 consideration of the Historic Environment (Amendment) (Scotland) Bill. I am pleased to welcome to the meeting a number of Scottish Government officials: Lucy Blackburn, the bill director; Bill McQueen, the bill manager; Barbara Cummins, deputy chief inspector at Historic Scotland; and Emma Thomson, a principal legal officer for the Scottish Government. I understand that Ms Blackburn will make an opening statement on behalf of the officials.

Lucy Blackburn (Historic Scotland): Thank you for the opportunity to make an opening statement, which I will try to keep brief. First, I will say a word about the team. A number of us are based in Historic Scotland, an executive agency of the Scottish Government whose functions include the provision of policy advice to ministers across the historic environment and which, for that reason, is leading on the bill.

Barbara Cummins, our deputy chief inspector, is particularly able to assist in issues concerning relations between local and central Government, the role of the planning system more broadly in protecting the historic environment and all issues around listed building consent. Bill McQueen, the bill manager, has been with the process throughout and is particularly well placed to talk about the bill’s evolution, the process leading up to the draft bill’s production last year and various provisions in the bill. Emma Thomson, who is a member of the Scottish Government legal directorate, is also with the bill team. Finally, as bill director, I am the senior manager with overall responsibility for the bill process and planning for its implementation.

All that I want to emphasise is the importance that the Scottish ministers attach to Scotland’s historic environment, which is intrinsic to our sense of place and our strong cultural identity. It makes, as a number of respondents to your call for submissions have noted, a significant contribution to the economy through, for example, tourism and support of indigenous craft skills, and provides us all with a rich environment in which to live and work. The bill is an opportunity to address specific gaps and weaknesses in the current heritage legislation framework that have been identified in discussions with stakeholders. It is expected to improve the ability of regulatory authorities—which, in practice, means Historic Scotland and the planning authorities—to manage Scotland’s unique historic legacy for the benefit of our own and future generations. It is worth emphasising that the bill has been drafted, throughout, with the intention of avoiding placing new duties or burdens on public or private bodies or individuals.

In conclusion, I invite the committee to note that the bill needs to be seen as part of a much wider programme of administrative reform involving particularly our own relations with local government, but also broader reforms in the planning system.

The Convener: Thank you for your comments, Ms Blackburn. The committee has several questions for you relating to various sections of the bill. Can you expand a little on how you envisage the awarding of grants for restoration, particularly of historic homes, working and how you intend to recover that money?

Lucy Blackburn: The existing powers to make grants under the Historic Buildings and Ancient Monuments Act 1953 are dealt with in section 1 of the bill. They cover a scheme that we call the historic building repair grant scheme. Under that scheme, ministers are empowered to make grants to assist with the repair of outstanding historic buildings. In practice, Historic Scotland administers a scheme whereby we advertise for applications, judge those against certain criteria and then provide grants.

We already recover an element of the grant. The thinking behind that is that there should not be private gain at public expense. For example, if we give a grant to a property owner who does the property up and then sells it on, having benefited from the public grant, we are entitled to claim an element of the grant back. At the moment, when we make our grant offer, we explain that we have
that power and that in certain circumstances, the most obvious of which is onward sale, we will recover grant. We usually say that we would expect to recover it at the rate of 100 per cent in the first year and 90 per cent in the second year, with the amount tailing off over 10 years.

The challenge that we face is the fact that we cannot give a cast-iron guarantee to people who receive grant from us that that is precisely what we will do. In many cases, it does not matter at all, but in a number of the cases in which we are involved, the building is done up specifically with the aim of being redeveloped and sold on. That is an entirely respectable outcome. For example, the Anchor Mill flats in Paisley were a successful project on which we worked with the Prince’s Trust. The building, which is prominently placed in Paisley, was derelict and the only reason that the trust was able to get involved was the fact that it knew that, once the building had been done up, it could recover some of its costs through the sale of the property. That was a very big project, but the same would be true for some local building preservation trusts that work on a revolving-door principle, whereby they do up a building, sell it on and then use the proceeds to do up another. For them, knowing precisely what our grant recovery intentions are is very valuable. It does not happen in many cases, but in some it is important.

The problem that we have at the moment is that, because of the way in which the law is drafted, we cannot give that guarantee. Technically, that would be fettering ministers’ discretion, as a future minister in four or five years’ time might not want to go down that path. The bill gives us powers to be much more precise and say exactly how we will undertake grant recovery. As I say, that may not be relevant in many cases, but in some—particularly those in which the onward sale of the building is crucial to the whole plan—it ought to be helpful. Those provisions are mirrored elsewhere in the bill for local government grants just for consistency.

The Convener: That is helpful. It makes sense that the Government would want to recover that public investment. Indeed, it would seem a little irresponsible if it were not to attempt to do so, given the current financial context. However, the Historic Houses Association for Scotland has raised concerns in its written evidence about the possibility of future owners being liable for the recovery of those grants and the buildings having no value. I assume that the Scottish Government has considered that issue. If so, how have you attempted to address those concerns?

Lucy Blackburn: That should not be an issue, as the grant is recovered from the original recipient. The original grant recipient must notify us when they sell the house, and that is the point at which the grant would be recovered. We do not have a contract with the onward buyer, so the HHA’s concerns should not come to pass. We perhaps need to go and talk to the HHA further and ensure that it understands where we are coming from. We are comfortable that, as the principle of recovery is long established in legislation, the bill will simply provide us with a little bit more traction about how the provisions can be used in practice.

The Convener: That is helpful. My final question arises from the Scottish Property Federation’s concerns that the proposals on recovery could, by impeding the ability of developers to attract funding from a bank or third party, affect the viability of future development proposals. Has the Scottish Government considered that?

Lucy Blackburn: As I said, the grants that we make already include a proviso that we may come in and reclaim the grant. That has not been an obstacle to people making applications and it has not prevented projects from proceeding. What might be happening is that awareness of the fact that we can reclaim grant has not been very high because it has not been relevant to many cases. The principle of grant recovery has long existed and has not impeded the scheme. There is nothing new about a power to come in and recover grant and, indeed, such provisions are quite common. For example, the Heritage Lottery Fund includes in its contracts a provision that, if the building is sold on, the fund would expect to come back and reclaim grant. Again, that has not been a problem for the applications that the fund receives or for projects going forward. We are absolutely comfortable that there is nothing new in the bill that will change the fundamental structure.

Perhaps the powers of recovery have not been an obvious part of the system and the bill has simply drawn attention to them. In the past four or five years, we have recovered about £0.75 million altogether. As a proportion of our grant budget, that is relatively low, but it is still a potentially useful source of income that it is reasonable to pursue.

Margaret Smith (Edinburgh West) (LD): I seek clarification. Does grant recovery not happen very often because the criterion for recovery is that the recipient sells the property and the number of those selling on is quite small, or does Historic Scotland sometimes decide that the amount of money that would be recovered is not worth pursuing? To what extent does that happen?

Lucy Blackburn: Mainly it is that the number of those selling on is quite small, so there are not that many cases in which the requirement bites. In recent years, we have been more diligent in ensuring that we are fully informed and up to
speed on whether properties change hands, so I think that we would look into every case in which that happens. I cannot say for sure in what proportion of cases that we look at we decide that the grant is not worth recovering, but I could provide the committee with more data on that. I have the overall figures for grant recovery to hand, but I am not entirely sure how far discretion is used not to pursue recovery in different cases. However, I think that the reason that grant recovery seldom happens is largely because the turnover is not that great. For example, many of the larger cases that we support are for local authority buildings that will not change ownership.

Ken Macintosh (Eastwood) (Lab): Those who have carried out work that has damaged a scheduled monument or listed building can currently plead that they were ignorant of the fact that the building was scheduled or listed or that they did not know the significance of the building, but the ability to make such a defence will be modified by the bill. First, why is that being changed? Secondly, some of the written submissions have suggested that there is not enough information about all the scheduled monuments and sites of historic importance around Scotland to provide sufficient clarity to property owners. If there is not enough information for owners to be fully aware, are steps being taken to tackle that?

Lucy Blackburn: I will talk about the background to the modification of the defence of ignorance. In 2007 we had discussions with people on the front line and one thing that stuck out about the existing legislation was that, very unusually, those who have damaged a scheduled monument can claim that they did not know that the building was scheduled. We feel that that sends out an immensely unhelpful signal. No parallel defence exists for undertaking unauthorised works on listed buildings. Similarly, in nature and marine legislation, there is no ability to claim a general defence of ignorance.

In the draft bill that was published in May 2009, we proposed to remove the defence of ignorance. A number of people came back—as you mentioned—to say that that was too dramatic a change. There was support for it in the sector, but there was a great deal of concern among groups—particularly those active around archaeological sites—that it was an unhelpful signal in law about the value that is placed on those sites.

10:15

We looked at the draft bill consultation responses and concluded that there was a problem with simply removing the defence of ignorance, mainly because of the issues that you mentioned. For example, scheduled monuments in particular are not always immediately obvious. We looked at what we had in the Ancient Monuments and Archaeological Areas Act 1979 for metal detectors, and what that said was that a person can claim ignorance but must show that they took reasonable steps to identify whether there was a scheduled monument. We then considered the provisions that the draft bill contained on the use of metal detectors and we decided that that was a safer model to follow than simple repeal, so we imported that concept into proposed new section 2 of the 1979 act.

You are right that the question of how we take reasonable steps and the issues around the availability of data remain. We have looked very hard at the issue, because we take seriously those points—which are clearly well made—about creating a new offence and our ability to deal with that. I have several things to say about the availability of information on scheduled monuments. The Historic Scotland website contains an easily accessible map of every scheduled monument that outlines and defines the precise extent of each monument. Also, most scheduled monuments are listed in the register of sasines, so when people take on ownership of a site they should be made aware of the fact that it contains a monument. We have a system of monument wardens who examine scheduled monuments on a regular basis and make contact with owners and occupiers—not every year by any means, but over a cycle of years.

Most important, given the number of changes—not least the one that we are discussing—that affect the 1979 act, we plan under the bill to contact owners of scheduled monuments directly to draw their attention to the changes and in particular to the information that is already available. We have had long discussions with various bodies—not least the Scottish Rural Property and Business Association—about how we can use their membership networks and newsletters and so on to publicise the changes and to identify owners. We can identify most owners; many scheduled monuments are owned by bodies such as the Forestry Commission or the Ministry of Defence, with which it is easy to liaise. However, it will always be harder to locate some of the owners, as well as the day-to-day occupiers and tenants. We expect, under the aegis of the bill, to do a lot of work on contacting owners.

It is worth mentioning e-planning. I think I am right in saying—perhaps my colleague Barbara Cummins can tell me—that the plan is that people will, in a few years’ time, be able to use e-planning to identify all the various restrictions that apply to a property. Someone will be able to look at a map of their own property and see information on Scottish Environment Protection Agency or Scottish
Natural Heritage designations, scheduled monuments and listed buildings. It will all be in one place.

We accept that there is work to be done, but we are prepared to do it.

Ken Macintosh: So you are changing the law to provide a level playing field and to synchronise things, rather than because there is a problem with people claiming ignorance and taking advantage of that defence.

Lucy Blackburn: It would be fair to say that we have not prosecuted under that law for a long time.

Ken Macintosh: So people are not using the defence as an easy opt-out.

Lucy Blackburn: It is not coming up at the court level, although it is harder to tell at the level below that. We are never keen to prosecute—we prefer to build a constructive relationship with monument owners. The fact that the provision exists has sometimes been unhelpful in our discussions with owners.

Ken Macintosh: A number of suggestions have been made. You could make it a legal—as opposed to just a nominal—requirement to include listed building or scheduled monument status in the register of sasines. I believe that Historic Scotland currently has a duty to notify the owner if a building is listed; you could place a similar duty on it to notify owners of scheduled monuments.

Lucy Blackburn: We do those things already. When we schedule a new monument, we always register it in the sasines and notify the owner.

Ken Macintosh: With regard to someone’s state of knowledge, the bill refers to whether a person

“knew or ought to have known”

that their actions affected a protected monument. Will you define what sort of person ought to know?

Lucy Blackburn: That is a reference to a part of the bill that deals with section 28 of the 1979 act, which was put in place to deal with deliberate damage to monuments. It is not used for owners so much as for cases in which there has been, say, vandalism of a scheduled site that could not be defined as works under the earlier parts of the act. Currently, the law says that a person “knew” that they were damaging. Saying that a person “ought to have known” is a legal drawing out of that, simply to avoid people saying that they were unaware, when they clearly should have been aware when they took their spray paint to this statue or that rock. Trying to define further who those people are would be hard. Given the limited number of times that the provisions will be used, we would worry that that would not make sense as a way forward.

Ken Macintosh: Why did you decide to increase fines from £10,000 to £50,000? There seems to be slight difference in the levels of fines with regard to scheduled monuments and listed buildings—at least the Law Society of Scotland suggests that there may be. It suggests that there is no justification for any differences between the penalties imposed with regard to scheduled monuments or listed buildings and that all penalties should be synchronised. Do you agree with that?

Lucy Blackburn: Yes, absolutely. We have synchronised penalties of £50,000. I think that the society supports us, as we are synchronising. My reading was the same as yours, and I had to go back and look at things to reassure myself. Perhaps we will talk to the society to ensure that we have not missed something. As far as we are aware, we have synchronised.

The original penalties were £10,000 and £20,000, and we wanted to synchronise penalties between the two types of asset, whatever we did. A common penalty for equivalent offences under the nature conservation legislation is £40,000, and £50,000 is the equivalent fine under the Marine (Scotland) Act 2010, which is the most recent legislation. We thought that the benchmark in that act probably made sense, as it is the most relevant legislation. In fact, it specifically includes offences against historic marine assets, so it was the obvious benchmark to go for. Hence, we went for £50,000.

Margaret Smith: I will ask about enforcement notices. The Law Society of Scotland questioned whether the description of works executed

“to land in, on or under”

a scheduled monument is sufficiently wide in scope. For example, neighbouring works outwith the boundary of the scheduled area may have the potential to damage or destroy the scheduled monument. What do you say about that claim? Is new section 9A of the 1979 act broad enough to cover detrimental unauthorised works outwith the scheduled area?

Lucy Blackburn: I ask Barbara Cummins whether she is happy to speak about that.

Barbara Cummins (Historic Scotland): I am. Wide enforcement powers exist in the planning regime anyway. Scheduled monument enforcement action would be specific to the monument and would cover potential damage or harm to it, whereas works outwith the scheduled monument would be covered by normal planning enforcement. Therefore, if a development was unauthorised, there would still be a route through
which to take enforcement action, but it would not be specific to the monument. If something is not within the scheduled area, it would not be appropriate to take scheduled monument enforcement action. Ordinary planning enforcement action would be taken.  

**Margaret Smith:** So the fact that a piece of work on somebody else’s property was going to be done alongside a scheduled monument’s general area would simply be taken into account in the normal planning process.

**Barbara Cummins:** For any proposal that has the potential to impact on the setting of a scheduled monument, you must consider the setting. So, in taking enforcement action under planning requirements, you need to consider what the impact of granting planning permission would be. You are taking account of the monument in that respect.

**Margaret Smith:** Okay. The Scottish Property Federation expressed concern about the introduction of temporary stop notices, as there is no definition of what an urgent threat is. It believes that that could lead to inconsistency in their use. It also asked that notices be accompanied by detailed guidance that says why the notice was issued and detailed steps for how people can appeal. Is there sufficient clarity about when stop notices should be used?

**Barbara Cummins:** Obviously, there is a parallel in the planning process. Such notices are rarely used. They are a device of last resort to prevent significant harm and damage—I suppose that the loss of a monument, for example, might be one such case. In planning, the details are covered in circulars and advice notes rather than in primary legislation. We intend to do something similar to make clear what is required, what the process is and what people’s rights are.

**Margaret Smith:** Is it your intention to give examples of the kind of works that you are talking about?

**Barbara Cummins:** It would behove us to do that in order to be helpful.

**Alasdair Allan (Western Isles) (SNP):** People will probably welcome the move to create an inventory of gardens, designed landscapes and battlefields. Will you say more about the intention behind that, and comment particularly on how such sites will be selected?

**Lucy Blackburn:** I will talk about the way in which we will look at battlefield sites in particular. In the Scottish historic environment policy we set out how we intend to present the inventory, and work on that is currently under way. We are looking for sites of national importance where we can demonstrate clear evidence that the battle took place there. There are always difficulties in defining exact areas for battlefields, which is the challenge that we face. However, we have engaged closely with specialist advisers to try to scope out the areas that are most easily defensible as being of national importance and that is our starting point. There will not be an enormous number of sites, but there are passionate feelings about the sites that we have. Ministers understand that the current absence of any recognition in the system specific to battlefields has been felt to be a weakness. That is why we are doing what we are around planning. I will ask Barbara Cummins to expand in more detail on precisely how the planning system operates, as that is the main way in which battlefields and gardens will be protected.

**Barbara Cummins:** We anticipate that battlefields will operate in a similar way to how gardens and designed landscapes operate at the moment. Within the regulations that cover planning, you are obliged to consult on any development that has the potential to affect a garden or designed landscape. That would be equally true of battlefields. The regulations are not yet written because the bill is not yet passed, but we are thinking about them. Historic Scotland has a role in advising local authorities on when a development has the potential to impact in that way. As part of the designation process, we are establishing what is significant about the battlefield and what the features and characters are to which planning authorities will have to have a mind in making their decisions.

**Alasdair Allan:** Lucy Blackburn said that there are sometimes battles about what constitutes a battlefield. I can think of an example from my constituency where a group of people hotly defended a site as being a mass grave from a battle and another group pointed out that if that were true the same bodies would have been cremated several times over by generations of peat cutters. How do you cope with contested sites when designating battlefields?

**Lucy Blackburn:** We do our best to work on an evidence base. That is all that you can ever say in such cases. You work on archaeological data and other data depending on the period of the battle and in the end you have to reach a judgment. There is no way round that; there is never an absolutely scientific approach for doing such things and in the end it has to be a matter of judgment and you have to be willing to wear your judgment. The main point is that the judgments that we make about what we put on the register and why it is there are transparent and we make available the evidence on which they are based. That is the main thing that we can offer, so that other people can look at what has been done and judge for themselves whether they feel that it is a
reasonableness of decisions. That is the most that you can ever say in such cases.

Alasdair Allan: Will any of you comment on the obligations that listing on the inventory will create? For example, the one that leaps to mind relates to gardens. What does inclusion on the inventory imply for the maintenance of a garden site?

Lucy Blackburn: Inclusion on the inventory does not carry any obligations for owners to do any particular works or take any action to maintain the garden. All that it does is to register that we are aware that the garden is a nationally important site and that therefore, if there are any planning proposals that might affect it, local authorities must take it into account as a material consideration. It also means that Historic Scotland becomes a statutory consultee in the planning process. The changes in the bill are essentially about making that system knit together in a more efficient manner than it currently does, but it does not change the basic structure, which is a planning process. So inclusion does not place any obligations on owners.

I know that one or two consultees raised concerns that the bill was seeking to place such burdens on people. If you own one of these sites or are carrying out developments near it, you will be, as with any planning material consideration, under an obligation to bear that in mind in your works, but no proactive duty will be placed on, for example, the owner of a garden to do any works to it.

10:30

Claire Baker (Mid Scotland and Fife) (Lab): In light of concerns that were raised in some responses to our consultation about the new power in section 18 to issue certificates of immunity, will any costs be attached to such applications? Secondly, does the application process have any timescale? I understand that there is a timescale for the decision process but no indication of how long the application process will take.

Lucy Blackburn: There will be no cost to applicants. We looked very hard at the issue and concluded that charging for applications is not the right approach. After all, the aim of the provision is to encourage people to come to us and that might not happen if we put a charge on them. The approach is generally consistent with that which is taken in heritage protection; for example, people are not charged for scheduled monument or listed building consents.

The legislation contains no timescales for the application process or for how quickly we will deal with applications, but we are fully committed to issuing guidance that will give people very clear information on how to apply and what happens after. It is not really possible to offer a deadline for how quickly we will issue a certificate—indeed, it would be misleading to suggest that we could do so. I can say, though, that it typically takes between four and six months to list a building. It depends very much on the site. We need to take into account obligations in administrative and policy terms to consult and statutory obligations to consult local authorities and would normally expect most applications to take a few months. That said, we can take less than a month over some cases if it quickly becomes apparent that the building in question falls below the tests for listing.

Nevertheless, we are very committed to scrutinising applications for the certificates in the same way that we would scrutinise any listing proposal to ensure that, if a certificate is issued, anyone with an interest can be fully confident that it has received the same amount of scrutiny as any other case that we would look at. That will take some time.

Claire Baker: The Royal Town Planning Institute in Scotland suggested that the applicant should bear the cost. Is it possible to attach a cost to the process?

Lucy Blackburn: Based on our best estimates, we think that the average cost to Historic Scotland of listing a building is £605 and that the cost of dealing with certificates under section 18 should be very much in the same range. Of course, the total cost to Historic Scotland will depend on the number of applications that we receive. In the financial memorandum, our best estimate for costs is between £12,000 and £18,000, but that will obviously depend on how many people come to us. As I have said, we can give a reasonably secure figure of about £600 for the cost of listing a building.

Claire Baker: The power seems intended to encourage developers to make decisions about which properties should be developed. Concern has been expressed that if an application for a certificate of immunity is not granted, the site will automatically be listed, which is the reverse of the situation that was being sought. Is that right?

Lucy Blackburn: We expect that, under the process, we will receive an application for a building that is not listed at the moment. All the listing tests will be applied, which could well result in the building’s being listed. After all, if it passes the tests, we are obliged to list it. As a result, what you have suggested would certainly be the flipside in most cases; in fact, it is hard to imagine a case in which you would not end up with either a certificate or a listing.

Claire Baker: That is why the SPF has raised these concerns. Who is able to apply for the
certificate of immunity? It has been suggested that third parties or other people might be interested in applying for a certificate, given that it could lead to a listing.

Lucy Blackburn: We are very aware of those concerns and, indeed, have continued to discuss them with the SPF, the Law Society of Scotland and the Scottish Rural Property and Business Association. We are aware of the continuing worry about the breadth of who may apply, which we are not managing to assuage through various kinds of reassurance.

The model of any person applying comes from two places. At the moment, any person may apply for a building to be listed, and there is no restriction on who may come to us with a suggestion. Historically, that has always been the case, and that will be an important part of any legislation. We take that as a starting point.

We are conscious that, although the provision in England is different in some respects, it also contains the openness whereby any person may apply. We are not aware that it has been used for reverse tactics.

Having said that, we are conscious that our provision here is different from the English provisions, in that it allows people to come in at an earlier stage in the process. We are continuing to discuss the matter. The advantage of allowing any person to apply is that, although we would expect the owner or occupier to come forward in most cases, there might be times when someone who is considering buying a building, and who might be a key player in preserving that building, could become involved at a very early stage. If we limited who may apply we might lose some valuable cases of the certificate enabling buildings to be kept. It is a difficult issue, but we are continuing to discuss it with a number of the bodies concerned. We recognise that their concerns remain, despite the various discussions that we have held.

Claire Baker: You mentioned a similar scheme in England, which has attracted a relatively small number of applications.

Lucy Blackburn: Yes.

Claire Baker: Are you confident that the proposed scheme will be capable of achieving the desired outcomes? There are quite a few flipsides to how the scheme will operate, and the opposite outcome from what some people are trying to reach might be achieved instead.

Lucy Blackburn: The provisions in England were used, but not on a great scale—the numbers were not high. The English system required a person to wait until they had planning permission before they could apply for a certificate.

As I mentioned, there are some differences, one of which is that we did not follow that model. We felt that one of the reasons why the English system had not taken off was that, by the time that people reached the planning permission stage, they would already have invested heavily in the proposed work. If applications can be made sooner—before considerable investment has been made in plans and development—and if people know at an earlier stage whether they are within or without the listed building consent regime, that is potentially more helpful.

Interestingly, when consideration was being given to how to revise the legislation applying to England, there were plans to move to a model like the one that we have proposed for Scotland. The limitation on when to apply was regarded as a problem. The approach whereby any person can apply was stuck to in the draft UK bill.

We are conscious that the provision is novel and untested. As with anything of this sort, we hope that we have something that will fulfil the intention. It has been used in England up to a point, and that gives us some comfort, but we continue to discuss the issues with the key bodies, particularly the SPF, which is one of our target groups. We would be more comfortable if we could reach a point at which the SPF was more comfortable with how the system was functioning.

Kenneth Gibson (Cunninghame North) (SNP): I wish to discuss briefly the expansion of the definition of “monument”. Should that definition be extended to include any instances in which there is reasonable belief that a site comprises evidence of previous human activity?

Lucy Blackburn: The Law Society of Scotland, in particular, has been making that point. Considering how the law is drafted, there is no easy way of including such a test, at a legal level. The detailed list of what a monument is can be found in the interpretation provisions in section 61 of the 1979 act. That is simply a list of types of monument. Bringing in a reasonable belief test in that context would be quite a departure from how we have dealt with such definitions before. We are not convinced that that is necessary in order to achieve what we need to do.

We are conscious about the concerns over the proposed changes being quite a broad move. The Law Society’s proposals would broaden out the circumstances in which the power could be used and, to our mind, that is not the breadth that we should adopt.

We are fairly confident that those sites that we would wish to tackle are ones for which we could justify the use of the power outright, with the evidence that is provided. With a flint scatter, for example, it can be demonstrated where the flints
are scattered or whatever. Broadly speaking, we do not feel that such a development is needed. The proposal has come in at quite a late stage in the process, and we have not had very long to look at or think about it. The issue was not raised with us previously. Our initial response is that such a change is not necessary.

**Kenneth Gibson:** The Royal Town Planning Institute calls for an extension of listing definitions to include historic road or footpath surfaces that are currently unprotected. Has any consideration been given to that?

**Lucy Blackburn:** Again, we have only just received that issue, so I have to be honest and say that we are still considering it. The issue has not been put to us previously. I believe that a road surface that is clearly man made can already be protected, but I will just check with Barbara Cummins that that is correct.

**Barbara Cummins:** There are protected parts of Roman roads.

**Lucy Blackburn:** And military roads, too, I think.

**Barbara Cummins:** Yes.

**Lucy Blackburn:** However, if the only thing that created a path is footfall, we do not have a provision that would allow us to protect it. Having said that, we are not aware that there are any such paths that require protection, and the matter did not arise in the early stages of the consultation. We have not had an awful lot of time to consider the issue, so we are still doing that. The protection of historic footpaths did not emerge as a key issue in our earlier discussions with stakeholders. I cannot add a great deal to that at this point.

**Kenneth Gibson:** General Wade’s roads and Roman roads seem the obvious ones but, apart from that, I wonder how practical such an extension would be. The same applies to the Law Society’s suggestion. Scotland has been inhabited for thousands of years, so we cannot protect every place where someone has lived at some point. There must be a requirement for something to have real historical importance when we are defining a monument. On those suggested expansions, am I right in thinking that there is an issue about practicality as much as anything else?

**Lucy Blackburn:** Yes. The Ancient Monuments and Archaeological Areas Act 1979 says clearly that for something to be scheduled, it must be “of national importance”—that is the key test. I know that some people have been worried that the expansion of the definition of “monument” under section 14 will mean that we will be able to designate anything that we like, but we will not—it has to be nationally important. We need to be able to demonstrate reasonably that what we are designating is of national importance. That remains a fundamental part of the scheduling system. Ditto for listed buildings, for which there is a tight definition about special architectural or historical interest. I agree that the role of national designation is about the key assets that are of national importance, particularly on the archaeological side.

Footpaths are not an issue that has been raised with us formally. I am not aware that we have had any prior discussion on that. It is a new issue to us and we are not clear where it has come from. We might want to explore with the RTPI what is behind that comment to try to understand what it is about. If the RTPI is aware of cases, there might be answers in the current system. That is as much as we can offer.

**Kenneth Gibson:** Clearly, any case would have to meet the test of national importance.

**Lucy Blackburn:** Absolutely.

**Elizabeth Smith (Mid Scotland and Fife)** (Con): I want to draw attention to a difficult and sometimes slightly controversial issue: the repair and maintenance of deteriorating buildings and the liability for that. The witnesses will be aware that some of the submissions that we received were of slightly different opinions about exactly how that can be resolved. The HHA has made two suggestions, the first of which is that "Where a building having an economic value is sold recovery should be made out of, and limited to, the net proceeds of sale. The open market value should be independently assessed in such cases."

The second suggestion is that “The weight of deterrence should be directed towards the neglecting owner, not the potential buyer.”

Personally, I think that that is an interesting point. What is your reaction to those suggestions?

**Lucy Blackburn:** On the issue of how the powers are used, I point out that, when a building is in a state that requires an urgent works notice, one would expect the local authority never to submit that notice in isolation. It would consider the building and the longer-term plan for it. Undoubtedly, the local authority would consider the value of the building and what would happen if it was repaired or not repaired.

In practice, we cannot imagine that a local authority would ever seek to recover more than it could recover. The HHA point is fair in the sense that the local authority can recover only what it can recover. Broadly speaking, if a building gets to the point at which it is worth much less than the cost of repairs, the local authority will probably be in discussion with the owners about what is to happen. There can be buildings for which the
repairs that are needed might be a great deal higher than the building would cost. However, that is not common—it is a very rare occurrence. At that point, the local authority would go into that knowing that the recovery powers would be rather constrained. The local authority would rather talk to the owner about what could happen next to the building and what their plans are.

In legal terms, it is hard to put in tests around this issue. It is much more about giving local authorities the powers to recover, as they already do. There is nothing new here, in the sense that local authorities can already go in and recover.

Elizabeth Smith: Is it not the case—this is certainly the perception of the public and some of the groups that submitted evidence—that when something has been neglected, we should be targeting the person responsible for that neglect, who has caused the problem and who is not necessarily the current owner? Perhaps you could explain which part of the bill would address that.

10:45

Emma Thomson (Scottish Government Legal Directorate): With the notice of liability for the recovery of works, the basic proposition is that the original owner will always be liable. The buck stops with them. The provisions are set up to ensure that if, for whatever reason, that is not possible, we have the option of getting the seller and successive future owners. The provisions are set up so that in the normal conveyancing process, any buyer will be aware of what has happened and will negotiate a reduced purchase price from the original seller. That will probably work out and the purchase price will be reduced. In cases where it is not—and there is no negotiation—the new owner can always go back to a former owner to recover the costs from them.

Elizabeth Smith: Sorry, forgive my ignorance, but will you explain how that happens?

Emma Thomson: The former owner always remains liable in a situation where the normal conveyancing transaction and process have not balanced out on an economic basis. One of the provisions is that the former owner is still liable and the new owner can recover the amount from the original owner.

Elizabeth Smith: Right. It was suggested that a five-year development period was perhaps too short. Will you give your reaction to that, too?

Lucy Blackburn: There is nothing to stop the notice being rolled over, so the person can reapply. The original period is five years, but if nothing has happened in that five years and the authority thinks that it is worth doing so, it can extend the period by taking out a further notice.

Elizabeth Smith: And the onus is on the person who is the owner of the property.

Lucy Blackburn: The original act—the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997—which contains the original powers of recovery from owners, is absolutely about owners. That has always been a principal tenet of recovering costs—it is the owner of the building who is ultimately liable for such works. What the owner does subsequently with the occupier is up to them. As far as we are concerned, the owner is the key contact.

Elizabeth Smith: Do you think that it is a valid concern that the five-year period is too short?

Lucy Blackburn: If there was not a provision to roll it forward, there might be a concern. However, it is possible to go back to the registers and ask for the notice to be refreshed. The bill will require local authorities to be careful not to let the notice expire, because if it expires it is not possible to go back and do that again.

Elizabeth Smith: I want to be clear about that. Is it a local authority’s obligation to check that?

Lucy Blackburn: It would be the local authority’s obligation, because the local authority is seeking to recover the costs. We would expect that a standard process in such cases would be for the authority to keep things under review and to consider just before the end of the five-year period whether it was worth reregistering with the keeper.

Elizabeth Smith: On a slightly different theme, has the Scottish Government considered using the bill to impose a duty on all public bodies to “protect, enhance and have special regard to Scotland’s historic environment in exercising their duties”?

Lucy Blackburn: We looked very carefully at that, because it has been a key concern from a number of stakeholders. Obviously, it came up in the consultation on the draft bill in May 2009 and we have continued to discuss it with stakeholders over recent months. The key thing to say is that this is about means, not ends. There is no difference between the Government and the bodies that have been commenting on the bill with regard to the commitment to good stewardship by public bodies. We completely agree that the role of public bodies in caring for Scotland’s historic environment, whether as the owners of assets or more broadly in their other duties, is very important.

A number of policy statements—the Scottish historic environment policy, planning policies and so on—reiterate the importance that ministers attach to public bodies, not least planning authorities, caring for the historic environment and not just its designated elements, but the wider
elements about which respondents to the committee have expressed concern. The issue is the role of law, or where a legal duty fits in.

Ministers have taken the position that a legal duty is not the most appropriate way of pursuing that agenda. There is a strong degree of consensus that, if we are to encourage public bodies and large and small organisations to take care of assets, it is critical to win over hearts and minds at senior level in those organisations. The work that we have done on joint working agreements, which involves talking in depth and individually to local authorities about how they carry out their functions, and the leadership that we are providing through policy statements, seem to us to be key. We have also spoken to local authorities at senior level as part of the single outcome agreement process.

Again, we have taken the chance to talk about the historic environment not just as a planning issue but more generally, as an asset and benefit to communities. If thought about broadly, it can bring enormous benefit. The value that communities place on their historic environment is about wellbeing, community feeling, health benefits and so on. We are keen to have a broad debate with public bodies about those benefits and to encourage them to see the historic environment as an asset.

Where does a legal duty fit into that machinery? There are people who feel strongly that a legal duty is a necessary part of it, but so far the argument has not been made persuasively enough. We are looking at the impact of imposing a legal duty. We know that it would be controversial and we have received a clear indication that local authorities are not keen on it. We also know that at the moment we are managing to do what we do with a high degree of consensus. When we knock on local authority doors, they are often open to us; we have been pleased with the responses that we have received.

The same applies to the Scottish historic environment policy, which provides a framework within which all public bodies can be accountable to Scottish ministers. The expectation that bodies should produce a five-yearly report on their historic environment assets has gone down smoothly—we have not met great resistance in promulgating it. The concern is that, if a legal duty is imposed, people will start to be much more anxious about compliance issues, the debate will become very different and we may not achieve what we want to achieve. We also need to consider whether a legal duty would make much difference in the end. It is a live debate, and we recognise the strength of feeling that exists.

Elizabeth Smith: My final question relates to an interesting comment that you have just made. My impression is that the principles of the bill have met with reasonable approval across the spectrum but that concerns remain about definitions, clarity and some legal issues. I know that the matter is difficult—as Mr Gibson said, we are dealing with thousands of years of Scottish heritage. Nonetheless, do you accept that there are still a few concerns about tightening up some technicalities and that a bit of extra clarity may be needed in some definitions to ensure that it is clear in law, if necessary, who is responsible for certain duties?

Lucy Blackburn: Ministers will want to look hard at the outstanding issues, because we have been working hard with stakeholders to resolve them. I am sure that ministers will want to look carefully at some unresolved issues, where there may be scope for doing more. In other cases, it may be more difficult to address concerns.

In some areas where further definition is an issue, such as section 14, we have said that we will produce policy statements, which are the framework that has been used under such legislation for many years to provide greater clarity. We are absolutely committed to producing drafts of those statements for stage 2, so that the committee and stakeholders can see what we think the non-statutory picture will look like. That may help people to decide whether they think that there is genuinely still an outstanding need to produce more legal definition. We make that commitment in the policy memorandum and are working hard to ensure that we fulfil it.

The Convener: That concludes the committee’s questions to you and the formal part of our deliberations this morning. Thank you for your attendance.

Meeting closed at 10:54.
SUBMISSION FROM ARCHAEOLOGY SCOTLAND

Who we are

1. We are a key centre for knowledge and expertise for Scottish archaeology, providing support and education for those interested and involved in archaeology and promoting Scotland’s archaeological heritage for the benefit of all. We have been in existence for over 60 years (as Council for British Archaeology (CBA) Scotland, Council for Scottish Archaeology and now known as Archaeology Scotland) and we are a citizen-led organisation.

General principles of the Bill

2. We are strongly supportive of the general principles and provisions within this Bill to amend aspects of the law relating to ancient monuments and listed buildings, including provision in relation to unauthorised works, powers of enforcement in connection with such works, offences and fines, powers of entry to ancient monuments, the control and management of certain ancient monuments, and liability for the expenses of urgent works on listed buildings; to make provision for the creation of inventories of gardens and designed landscapes and of battlefields; to provide for grants and loans in respect of the development and understanding of matters of historic and other interest, and for connected purposes.

Concerns

3. We still believe, as noted by the Historic Environment Advisory Council for Scotland (HEACS)¹, that a problem remains unsolved in that the existing legislation is focussed on the designated assets and, consequently, this narrow view does not enable a holistic, sustainable approach to managing the historic environment to be taken. These points were raised in our consultation response on the draft Bill².

4. The Built Environment Forum Scotland (BEFS) response clearly indicates what additional provisions need to be made within the Bill. Archaeology Scotland strongly support these asks that the Bill—

- Provide for a responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties.

²Responses to the consultation can be found at the following web address—http://www.historic-scotland.gov.uk/index/about/consultations/consultation-responses-bill.htm
• Ensure that planning authorities have access and give special regard to appropriate information and expert advice on the local historic environment in exercising their duties.

Rationale

5. We would argue that since all local authorities currently have access to appropriate information and expert advice on the historic environment, that making this a legislative requirement will not add any burdens to local authorities, and the benefits to the public and to the understanding of our past will be significant. Local authority archaeology services, outsourced trusts and other organisations that currently provide services are a mainstay of public engagement in, and promotion of, the historic environment.

6. Annual public programmes organised by local authority archaeology services such as Highland Archaeology Fortnight, Perthshire Archaeology Month and East Lothian Local History and Archaeology Fortnight attract thousands of visitors each year and contribute significantly to the local economy.

7. For our members in local archaeological societies and those interested in learning more about their local historic environment, initiatives such as these are very important aspects, increasing their quality of life and helping to deliver the Scottish Government’s National Outcome 12: “We value and enjoy our built and natural environment and protect it and enhance it for future generations”.

8. There are different models of how a planning authority can access the expert advice necessary to manage change in the historic environment. Archaeology Scotland agree with the Institute for Archaeologists (IfA) that the best mechanism for accessing expert advice is through a Historic Environment Records (HER) Service.

9. A lack of local curatorial advice will affect the quality and quantity of mitigation work leading to irreplaceable archaeology being lost or not adequately dealt with. There will also be an impact on archaeological companies that work with developers to mitigate damage to, and enhance the return from, the historic environment.

10. The historic environment is a highly significant contributor to the Scottish economy. Tourism expenditure attributable to the historic environment, but not including museums, is estimated to support some 37,000 full time equivalent employees in Scotland. This represents nearly £1.3 billion in respect of gross value added (GVA).

3 The ALGAO Scotland newsletter can be found at the following web address—http://www.algao.org.uk/Association/Scotland/ScotIntro.htm

11. Archaeology Scotland is concerned that, especially in the current financial climate, but also with regard to the heritage legacy we leave for the future, a lack of legislation with regard to the unprotected archaeological assets (which make up around 95% of our known heritage assets)\(^5\) will mean a real loss in terms of the quality of place left for future generations.

12. HEACS supported the case for providing for a duty of care provision in heritage protection legislation for public bodies\(^6\) and BEFS, which brings together the key organisations in the historic environment in Scotland and of which Archaeology Scotland is a member, has also agreed that this is a priority.

**Summary**

13. Additional provisions need to be made within the Bill to—

- Provide for a responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties.

- Ensure that planning authorities have access and give special regard to appropriate information and expert advice on the local historic environment in exercising their duties.

Eila Macqueen  
Director  
20 August 2010

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\(^5\) The figure of 95% is derived from the 144,000 archaeological sites on the NMRS database (www.rcahms.gov.uk), as listed on the latest Scottish Historic Environmental Audit, in proportion to the 8,021 scheduled monuments. In contrast to the 12% of the area of Scotland designated for its natural heritage, less than c0.3% is statutorily protected for its historic or archaeological heritage.

SUBMISSION FROM THE BUILT ENVIRONMENT FORUM SCOTLAND (BEFS)

1. This evidence is submitted on behalf of members of the Built Environment Forum Scotland (BEFS); a forum which brings together 21 non-governmental organisations – both professional and voluntary – representing interests within the historic and contemporary built environment sector. Established in 2003, BEFS has played a significant role in bringing together those bodies with a strategic interest in historic environment policy development. BEFS is now, thanks to funding from Historic Scotland, developing as the strategic intermediary for this sector. Through its members\(^1\), BEFS connects with over 325,000 individuals through 540 organisations. This written evidence has been prepared by a taskforce\(^2\) leading on the Bill within the Forum. Along with some of its members, BEFS will be giving oral evidence on 15 September 2010.

Endorse provisions

2. Members of BEFS strongly endorse the provisions set out in the Bill, which will go a significant way towards closing gaps and loopholes in the current legislative framework.

3. We welcome in particular the harmonising elements within the Bill, which seek to ensure consistency between elements of the historic environment legislation with the planning regime, and align aspects of the listing and scheduling systems, for example clauses relating to increasing levels of fines, enforcement powers and consent processes. We also welcome the removal of defence of ignorance and development of scheduling criteria, as these measures represent a proportionate response to strengthening the management of our unique resource.

Why this legislation is important

4. Overall, the historic environment sector is estimated to contribute in excess of £2.3 billion to Scotland’s national GVA\(^3\), directly supporting 41,000 full time equivalent employees. The greater share of economic impacts relate to tourism expenditure attributable to the historic environment (representing nearly £1.3 billion in respect of GVA). Recent data released by Historic

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\(^1\) A list of BEFS members and subscribers is available at—
http://www.befs.co.uk/index.php?option=com_content&view=article&id=72&Itemid=72

\(^2\) A list of taskforce members is available at—
http://www.befs.co.uk/index.php?option=com_content&view=article&id=86&Itemid=79

\(^3\) Economic Impact of the Historic Environment in Scotland (Ecotec, 2008)—
Scotland highlights this value, indicating a 7% increase in visitor figures in the last 12 months⁴.

5. The historic environment is not only a major contributor to the Scottish economy, but also sits at the heart of place-making – acting as a catalyst for regeneration and an opportunity for people to get involved with their local ‘place’. Research in 2008 identified that 12,449 volunteers carry out a total of 167,721 hours per annum⁵ - a clear indication of people's enthusiasm for the historic environment. The historic environment provides the context for achieving quality places that are valued (and therefore valuable), that work for people and that are distinctly Scottish.

6. The historic environment is valuable in many ways and it is therefore important to ensure that the legislative framework that manages change within this significant resource is fit for purpose. The provisions in the Bill, as introduced, will simplify processes without weakening controls, and close some loopholes that presently allow unacceptable threats to the historic environment. However, Members of BEFS believe that there is scope for the Bill to go further in pursuit of the aim 'to improve the management and protection of our historic environment'.

Proposals

7. We ask Ministers to consider that the Bill:

- provide for a responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties.

- ensure that planning authorities have access and give special regard to appropriate information and expert advice on the local historic environment in exercising their duties.

8. Members of BEFS fully recognise the current challenging economic climate and the Government’s view that it should not impose new statutory duties and burdens. It is not the intention that these additional proposals represent additional burdens. The objective behind the first proposal is to place stronger emphasis on the use of existing duties, so that in undertaking their functions public bodies take cognisance of the historic environment. It would also provide a legislative context for Scottish Ministers’ policy on the historic environment⁶. The objective behind the

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⁴ http://www.historic-scotland.gov.uk/news_search_results.htm/news_article.htm?articleid=28639
second proposal is to ensure that public bodies continue to have access to appropriate information and expertise on the historic environment. We believe that these proposals would indeed complement and help reinforce the provisions already set out in the Bill, for the reasons set out below.

Rationale behind these proposals

9. We believe that a responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties, is necessary because it will—

- Help ensure that public bodies protect and sustainably manage our unique and irreplaceable historic environment for future generations, especially in extremely challenging financial circumstances.

- Underpin the future care of Scotland’s historic environment as an integral component in the wider management of resources, by providing a stronger emphasis within the strategic operational context of public bodies.

- Provide a baseline provision and legislative context for the Government’s strategic policy on the historic environment.

- Help ensure better assessment of the significance of historic assets (both those currently unrecognised or unprotected as well as those afforded statutory protection through scheduling, listing etc.).

- Inform understanding of what is important, which enables us to assess the impact of development proposals and identify better, sustainable solutions for change in the historic environment.

Planning authorities to have access and give special regard to appropriate information and expert advice on the local historic environment in exercising their duties.

10. We see this piece of legislation as providing an opportunity to ensure that communities of interest can secure expert advice on the local historic environment through the planning system. The principle is important because—

- **The vast majority**\(^7\) of our historic environment is not protected by statutory designation and therefore not covered by the provisions set

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\(^7\) For example, referring to data provided by *Scotland’s Historic Environment Audit*, it can be calculated that 81% is unprotected (this calculation uses the RCAHMS dataset as the basis for the total record of ‘known’ historic environment assets: on this basis listed buildings and scheduled monuments comprise 19% of the dataset – 81% is therefore undesignated). The proportion rises further to 95% in relation to archaeological
out in this Bill. Both designated and undesignated assets are managed at local level through the planning process. Expert advice is therefore essential to help communities protect and appreciate important local assets.

- Understanding what is significant or valuable about a historic environment asset is essential to inform the management, protection and enhancement of such assets. In the absence of appropriate information and expert advice, understanding is reduced, to the potential detriment of the historic environment.

- Understanding the wider context of our designated historic environment is vital, since it informs decisions on what is nationally and locally significant and worthy of designation, protection and sensitive management.

Summary

11. The examples\(^8\) below highlight the positive outcomes that can be achieved when the ‘conditions’ are right; when the historic environment is prioritised and/or expert advice involved. We believe that the two proposals set out above would strengthen the operational context and help provide the right ‘conditions’ for achieving good outcomes for both the historic environment and the people that value and appreciate it.

Jo Robertson
Historic Environment Officer
20 August 2010

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\(^8\) For further information contact the BEFS office: Jo Robertson, Historic Environment Officer (jrobertson@befs.org.uk)
BEFS is currently collating case studies which show how the historic environment is managed (well - and where things have gone wrong) on the ground. In the context of the current Historic Environment (Amendment) (Scotland) Bill, these serve to highlight the crucial role that public bodies, in particular local authorities, play in ensuring the effective management of Scotland's historic environment. There is strong concern, particularly in the current financial climate, that local authorities will not have the capacity (which is already patchy) to be able to ensure the effective protection and management of the historic environment - both designated and undesignated.

http://www.befs.co.uk/index.php?option=com_content&view=article&id=118&Itemid=119

We hope that committee members find these helpful in illustrating the need to ensure that authorities give sufficient priority to the appropriate protection and management of the historic environment.

Should you wish further information please contact Jo Robertson, Historic Environment Officer at the BEFS office at 0131 220 6241.

Kellearn House – Reuse of unlisted former country house as housing, Killearn

Why valuable
Killearn House was built around the core of a 1688 house in c.1850. Stone-built in a Tudor Gothic style. Unlisted, and by early 1990s in ruinous condition.

How
Scottish Civic Trust and Architectural Heritage Society of Scotland commented on several schemes for the site. Both organisations encouraged the retention of the maximum amount of historic fabric and a clear relationship between the old and new parts, along with a reduction in the scale of the development, respecting both the building’s character and its setting. With no statutory designations to protect the building, without interest and expert advice both from the voluntary sector and the local authority the building could have been converted very unsympathetically or demolished, despite being of capable of reuse and having some historic and architectural interest. The earliest schemes submitted for the building appear to have proposed significant demolitions which would have destroyed any archaeological evidence of the earlier 1688 house.

Outcome
Building successfully converted into 3 houses and 10 luxury apartments, completed in 2008. A 2–bed property currently for sale has an asking price of £395,000!
M74 Upgrade - Major series of excavations including work at the former Govan Iron Works and the Caledonian Pottery at Rutherglen

Why valuable
Significant new evidence on the industrial development of South Glasgow from early 19th century to present day.

How
In advance of the M74 Completion an extensive programme of archaeological works was funded by Transport Scotland, Glasgow City Council, South Lanarkshire Council, and Renfrewshire Council under the supervision of the West of Scotland Archaeology Service (WoSAS) which advises all three Councils. WoSAS and Glasgow Museums service worked with the contractors to provide the brief, standards and make sure that community involvement was central to the project. Careful planning allowed the excavation work to be carried out prior to construction work taking place and thus causing minimum delay to the project.

Outcome
Recording of significant new evidence. High level of community engagement, with local people appreciating revelations on their past.

Greenlaw Town Hall - Reuse of A listed building and new affordable housing, Greenlaw, Scottish Borders (due for completion in November 2010)

Why valuable
A Category A listed building designed by John Cunningham in 1829 to celebrate being the County Town of Berwickshire. In the Building at Risk Register, despite being the centre piece of the town, there was a real risk that the building would be demolished.

How
A unique partnership approach between private trust, a local landowner and the local authority. Crucially, this project involved a unique solution to fundraising. Also, the site was not in the Local Plan and this required an innovative planning policy solution.

Outcome
This project has saved a building that is intimately tied into the identity and sense of place of Greenlaw. The restored building will provide 242 m² of rented office space and a community hall. There will likely be indirect benefits such as employment generation and increased footfall to local shops. A key benefit is the purchase of a site which will in turn lead to the construction of 16 new affordable housing for rent within the village but not compromising the setting of the heritage asset.
1. The Historic Houses Association for Scotland (HHAS) represents 250 independently owned historic castles, mansion houses and gardens throughout Scotland, lived in and run by the families who own them. Of these, over 40 properties are open daily to the public during the season. Another 100 or so allow public access to interesting and memorable historic private homes on a less frequent or more informal basis. Indeed, the majority of Scotland’s historic environment is in independent ownership. The properties are situated in some of Scotland’s finest scenery and many have beautiful gardens. One of our properties is home to Europe’s only remaining private army and many others hold unique collections of art, porcelain and furniture.

2. HHAS is part of the UK wide Historic Houses Association, HHA, which works for a fiscal, political and economic climate in which private owners can maintain Britain's historic houses and gardens for the benefit of the nation and for future generations.

3. We draw on the practical knowledge and experience of our members, obtained through case studies and nationwide surveys, to inform our lobbying to government, at the European, national, regional and local level. But the contribution of historic houses extends much wider than this: they generate jobs and incomes in fragile rural economies; they are invigorating places for learning and understanding; and they provide places where people can come to share a common history and to escape the routine of their daily lives.

4. The HHA works in partnership with other heritage and conservation organisations to demonstrate the importance of heritage to the cultural, social and economic life of the nation - fundamental to people's health, happiness and quality of life.

5. The HHA believes that—

- the conservation and understanding of heritage, and within that, privately owned heritage, is essential for a healthy and modern society and economy, and supports the public's understanding of their individual and common identity, our place in history and our vision for the future

- the continued ownership and conservation of heritage in the private sector, in trust for the future, is the most cost effective way to deliver heritage benefits to the public as a whole

- heritage should be embraced as a means to fulfil a number of Government objectives, on health, education, urban and rural regeneration and employment as well as culture and tourism
we should acknowledge the "existence value" of heritage and recognise that it is irreplaceable - lost for ever once it is gone.

public policies should enable owners and heritage managers to make this contribution. In particular, regulation for the protection of heritage should work with the grain of private ownership.

6. In Scotland we meet regularly with Historic Scotland and the National Trust for Scotland in the forum of the Historic Properties Group to discuss common concerns and ways we can co-operate and to plan joint ventures such as the Homecoming Pass and its successor, the Heritage Pass. We have for a long time worked in close association with Historic Scotland and look forward to strengthening our relationship with Ruth Parsons the Chief Executive.

7. Scotland’s castles and historic houses are a major reason for overseas tourists to visit our country. These historic houses, castles and gardens are the stewards of a rich cultural heritage, unmatched in Europe, in that only in the UK can so much of a country's art, furniture, textiles and ceramics be seen in the houses and surroundings for which they were intended. HHAS is proud and privileged to be able to take its part in attracting visitors through sustainable tourism, while at the same time, preserving these precious national treasures and their contents for generations to come.

**Articles potentially affecting HHA members**

8. It is considered that the following articles and provisions in the Bill may affect HHA members.

  - *Section 1 – Recovery of grants for repair, maintenance and upkeep of certain property and*

- **Part 3: modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997**
  - *Section 26 – Recovery of grants for preservation etc. of listed buildings and conservation areas*

9. The HHA is broadly in favour of the objective of these proposals. Some of the HHA’s concerns can be addressed by ensuring clarity at the point of making the grant. We suggest that—

- conditional grants be restricted to those cases where conditionality is in the public interest (for example conditions as to maintenance); and
- the conditions be absolutely clearly stated at the outset; and
- the proportion recoverable be absolutely clear from the outset; and
- that there be a cut off point (whether a date, or another event such as on-sale) which is clear and can therefore be factored into any funding arrangements.
10. We suggest that in seeking to recover grants, care needs to be taken not to worsen the problem of buildings which have a negligible or negative value due to their condition. We would not favour making a buyer liable for grants made available to a previous owner as this would have the effect of inhibiting possible sales to restoring buyers. We suggest that—
  - where a building in respect of which a grant has been made is sold for less than the amount of the grant, recovery should be limited to the amount of the net free proceeds of the sale. Mechanisms would have to be introduced to assess true market value to avoid sales at artificially low prices.
  - where such a building has negligible or negative value we suggest that, in order to not to worsen the prospects of a sale, there should be no claw-back of grant. We believe that the public interest is better served by accepting reality than insisting in every case on recovery.
  - where a condition is of a continuing nature (eg public access) and the buyer is willing to continue to comply we suggest that there should be no claw-back of grant since the purpose for which the grant was given continues to be served.

Part 2: modifications of the Ancient Monuments and Archaeological Areas Act 1979

Section 11 – Inventories of gardens and designed landscapes and of battlefields

Designed Landscapes and Gardens

11. The HHA is broadly in favour of consolidation of inventories of designed landscapes and gardens. However, we would appreciate understanding better what the purpose of the Inventories is. We have some concern that formalisation of inventories may lead to increased complication in Planning and Listed Building consent applications, and that further restrictions may be placed on the use of land which is the subject of these Inventories.

12. Once the process of compiling the Inventories is completed we feel that interested parties should be consulted so that agreement can be reached on—
  - The value of the items in the Inventory, and
  - Whether and if so to what extent, they merit protection, and
  - What form such protection might take.

13. We would be concerned if inclusion in an inventory were to result in obligations to restore to, or to maintain in, their current or any specific state a designed landscape or garden. As long as this provision is applied with a degree of flexibility and common sense to reflect the fact that any garden or landscape, whether historic or otherwise, has always been subject to improvements and/or natural changes. It would be detrimental if any garden's current layout was set in stone by this Bill.
14. There is a concern that the proposed inventories for gardens and designed landscapes could involve interference with schemes for replanting or replacing various shrubs, trees, or other features from time to time. If so this could also lead to unnecessary delays in obtaining approval thereby causing a replanting programme perhaps having to be postponed to a subsequent planting season.

15. The HHA would like to be reassured that no further costs would accrue to the owners of a designed landscape and/or garden as a result of inclusion in an inventory.

**Battlefields**

16. The HHA believes that the creation of an inventory of battlefields is fraught with problems. In many cases there is no known physical evidence of the battle. In such circumstances we feel that an inventory, particularly if protective measures are attached to it, would cause unreasonable restriction on land use. Where there is known and significant archaeological or other evidence on the site then the HHA would have no issue with a measure of reasonable protection. As ever, we would wish to avoid the imposition of new administrative or maintenance burdens

**Part 3: Modifications Of The Planning (Listed Buildings And Conservation Areas) (Scotland) Act 1997**

*Section 18 – Certificate that building not intended to be listed*

17. The HHA supports this proposal.

*Section 20 – Declining to determine an application for listed building consent*

18. The HHA believes that this proposal is a good thing for historic buildings as it will encourage a better standard of application. Accordingly the HHA supports this proposal.

*Section 25 – Liability of owner and successors for expenses of urgent works*

19. The HHA believes that the objective of improving recovery is laudable though problematic. We believe that the proposal will have the opposite effect from that desired.

- We suggest that where a building having an economic value is sold recovery should be made out of, and limited to, the net proceeds of sale. The open market value should be independently assessed in such cases.

- Where a building has a negligible or negative value (as independently assessed) we do not think it wise to impose the cost on a potential buyer since this will merely have the effect of discouraging potential buyers, thereby increasing the chance of ultimate disaster for the building. In such cases we believe that public interest is best served by treating the cost of emergency repair as an unavoidable public contribution to the securing of a viable future for the building.

- The weight of deterrence should be directed towards the neglecting owner, not the potential buyer. Thus, where a building sold has a
value the costs come out first. Where there is no value, the neglecting owner gets no benefit from selling.

Financial memorandum

20. The objective is laudable. HHA members are concerned that the process should not result in additional financial or administrative burdens being placed on them.

21. The HHA would like to stress that the imposition of further controls and/or financial or administrative burdens on them reduces the pool of resources available for maintenance and this is one of the most significant worries of our members. We therefore hope that during the process of streamlining existing legislation this will be kept firmly in mind.

22. The HHA hopes that any transfer of functions from HS to Local Authorities will be preceded by adequate resourcing of the relevant Local Authority departments.

23. The sale of properties with notices attached will become unnecessarily complex.

How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?
24. Useful shorthand enabling us to grasp the issues with greater ease.

Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?
25. We were glad to be consulted and are ready to take part in any further discussions.

Sally Hampton
Co-ordinator
20 August 2010
SUBMISSION FROM THE NATIONAL TRUST FOR SCOTLAND

Introduction

1. The National Trust for Scotland (the Trust) welcomes the opportunity to respond to Stage 1 of the Historic Environment (Amendment) (Scotland) Bill and comment on the principles that underpin it. We also take this opportunity to acknowledge the support the Trust receives through agencies of the Scottish Government which assist it with its work on the conservation of the nation’s cultural and natural heritage assets in its care, particularly here the grant received from Historic Scotland. The Trust contributed to the consultation stage response to the Bill, as previously titled the Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill, through the Built Environment Forum Scotland (BEFS). With it the Trust welcomed much in the Bill to simplify procedures without weakening controls and close some loopholes that could currently allow unacceptable threats to the historic environment.

2. As a major owner of heritage assets the Trust comments on the principles of the Bill as required from the perspective of owners but also from the perspective of the Trust’s role as advocates for the conservation of heritage which its ownership and management of assets informs. Further to the summary we identify principles contained within the Bill and Policy Memorandum and consider in more depth how they impact both on areas of detailed and broader concern and opportunity. The Trust will give oral evidence on 15 September.

Summary

3. In recognition of a principle of natural justice, the Trust calls for the preparation of guidance on appropriate levels of fines and for any such income to be ring fenced to grants for historic environment purposes to give more balance between deterrence and incentive.

4. Many scheduled monuments are “invisible” to the untrained eye. Under sections dealing with the ‘removal of defence of ignorance’ the Trust calls for measures to include information about a scheduled monument to be included under Sasines and that in the case of new or amended scheduling Historic Scotland be required to notify owners. By including information on the Property Register or Sasines, Scottish Ministers would ensure that information on these is openly and readily available to all property owners.

5. Greater clarification is called for about the impacts of decisions on Certificates of Immunity (Col) from Listing regarding sustainability and listing.
6. Conservation area legislation appears not to have been considered to the same depth as scheduled monuments and listed buildings. The Trust calls for further consideration to be given to simplifying Article 4 Direction procedures together with appropriate safeguards.

7. Whilst we welcome actions to address the anomalies created by the Shimizu (UK) ruling in the Bill in connection with the part demolition of unlisted buildings in a conservation area, the Bill provides no further remedy or assistance to local planning authorities in the instance of unlawful demolition. No action is available under the Act to address this, which the Trust feels is inconsistent with an enhanced enforcement position for listed buildings and scheduled monuments.

8. The change in name of the Bill to Historic Environment gives an impression of a new wider scope rather than the mainly technical nature of amendments to listed building and scheduled monument legislation which is still the main body of its content.

9. The Trust calls for a broader interpretation of the historic environment and how that may be served by a ‘duty of care’ by appropriate public bodies, as in other recent legislation, and by leaving a way open to the consideration of a new designation for ‘Scottish Heritage Areas and/or Sites’.

Overview

10. From the draft Bill and Policy Memorandum we identify the following main principles—
   - Streamlining, simplifying, harmonising and clarifying the legislative approach
   - Raising the level of deterrence
   - Balancing interests
   - Enhancing the ability to value and manage sustainably Scotland’s unique historic environment and enhance it for future generations.

11. Our views remain broadly similar to those expressed through BEFS though with more time we question whether there has been a too narrow assessment of the consequences of the changes proposed and in restricting the consideration of a wider range of options. A broader approach might more fully address the principle of valuing and sustainably managing the historic environment.

12. Aspects of harmonisation with planning law, for example, have already in themselves introduced new decision making burdens which now would not be too greatly extended by the call for a more general duty of care. Similarly exploration of other broader approaches like the proposals outlined in the equivalent but aborted English legislation (referred to in the
case of CoI) for the use of class consents for changes to listed buildings, monuments and other natural heritage aspects of large estates might have been of benefit to larger scale owners of heritage assets and offer incentive to the preparation of management plans to research and justify the need for any proposed changes.

13. Though possibly outside the remit of this Bill, and whilst acknowledging the strengthening of powers, could deterrence yet be balanced by more investigation of fiscal changes, like those investigated by RICS and others1, to improve financial incentives for owners at times of restricted levels of grant. Their work reviewed a range of tax credits, incentives, exemptions, concessions etc in place of direct aid by government yet showed such measures leading to increased revenues through the positive impacts on heritage conservation and neighbourhood revitalisation. Whilst acknowledging the Scottish Government’s restricted role in decision making over the VAT regime this might be particularly helpful given the imminent rise in VAT rates.

14. Firstly we use the principles, as we identify above, to inform certain detailed aspects of the Bill which could benefit from further refinement. Secondly in questioning whether the objective to avoid adding new regulatory and/or financial burden has constrained too greatly the use of this opportunity we offer ways that a more holistic consideration may be made to enhancing the protection and appreciation of the historic environment.

Evidence

Part 1 section 4 & Part 3 section 19 – Fines: Increases and duties of courts in determining amount

15. We support the introduction of a raised level of fine up to £50,000 on summary convictions in both cases of damage to scheduled monuments and/or unauthorised works to listed buildings. We note that reference is made to taking factors into account, principally development benefit, when setting the level of fine. It would be of further benefit to offer guidance on the level of fines appropriate to types of damage in both these areas. Whilst acknowledging possible difficulties, it seems unfortunate that no reference or allowance is made to a monument or building’s intrinsic historic importance as part of the calculation of value.

16. We support the powers set out regarding identification of conditions and levels of grant recovery and the extension to a wider range of bodies to whom grant may be available but note that the overall sums available are not to be increased. In the event of fines being imposed the Trust calls for any such income to be ring fenced to increase the sums available from

historic environment grant schemes. This might also be informed by experience with fines through equivalent planning procedures.

Section 3 Scheduled ancient monuments and offences - removal of defence of ignorance

17. We note the amendment ‘so that the defence now allows lack of knowledge only to be used in defence where a person can show they took all reasonable steps to find out whether there was a scheduled monument in the area affected by the works’. Whilst we welcome the commitment signalled in the Memorandum that the Scottish Government will undertake steps to ensure that there is further improvement in the quality of information and advice that is available we still have concerns about circumstances where monuments may not be visible or only visible to a person trained in their recognition. We understand there is no legal requirement for either ancient monument or listed building designations to be included under Sasines so unless identified by a solicitor at the time of conveyancing, prospective owners are not always made aware of their presence. We suggest rectifying this could offer to improve knowledge and protection. With regard to new additions or amendments to the schedule we suggest a duty be placed on Historic Scotland to notify the owners in a way similar to the process already adopted by Historic Scotland for listed buildings.

18. Reference is retained to a person’s state of knowledge which deals with intentional and reckless damage, subject to the addition that an offence is committed where a person knows or ought to know that their action affects a protected monument. It would be helpful if the Government could set out the type of persons that it thinks ought to know about scheduled monuments. Whilst this may seem a minor point it is raised as one of clarity in law. We point to proposed change from “damage” to “disturbance” to emphasise the point.

Part 3 section 18 – Certificate that building not intended to be listed

19. We echo BEFS concerns about what the consequences of Col from listing would be. In the case of a certificate being granted is there an implicit assumption that buildings can be demolished. With consequent loss of materials, their embodied energy and possible implications for land fill this may not represent the sustainable option. When certificates are not given do the buildings involved then become listed. At a BEFS working seminar on this subject, Historic Scotland indicated that the Policy Memorandum would make it clear that if a Col was refused, the property would be listed automatically. This is not the case, leaving open the unsatisfactory option that a Col could be refused but the building not listed. Further, whilst acknowledging that the idea of Cols was introduced in later aborted English legislation, the wording used here is different and as such the evidence about the numbers and resource implications are not comparing like for like.
Part 3 sections 18 to 26 - conservation areas

20. The majority of these sections relate still to powers regarding listed buildings, the one practical implication for conservation areas being the power to recover grant in section 26. The response prepared by BEFS suggested more attention could be given to conservation areas and identified the issue of simplifying and reduce the burdens of preparing Article 4 Directions. We understand a number of approaches were suggested in the consultation process through control by universal conservation area restrictions on permitted development without the need to go through the Article 4 Directions process. This could offer further efficiency and streamline the designation process. Indeed, such a suggestion has appeared in a number of Scottish Government consultations on the new planning system.

21. It would also seem that there are no deterrents in terms of fines for owners who damage or demolish unlisted buildings in conservation areas. The only “power” is to seek the reinstatement of the building or structure through the civil courts but such remedy does not lie within the legislative framework. NTS suggests that this is significant weakness. Often these buildings may play an important role in providing the conservation area context and ‘sense of place’ in which other more prominent and listed buildings may be set. This might be assisted by added backing, as also identified by BEFS, to the preparation by local authorities of conservation area character appraisals and management plans with a simple rewording of section 63 of the Planning (Listed Buildings & Conservation Areas) (Scotland) Act 1997.

Part 3 sections 21 to 24 - stop notices (and compensation)

22. In the interests of balance we support BEFS call for Historic Scotland to look into the issue of compensation for loss due to a Stop Notice including the appropriate circumstances, restrictions on the level of compensation to reasonable loss, liability in the event of stop notices being withdrawn / altered etc.

A broader view of heritage

23. Whilst we do not consider that these principles are necessarily contradictory we wonder whether the latter has acted as too much of a constraint in considering how the historic environment may be considered and on how its importance might be developed and nurtured. The Policy Memorandum makes reference to the work commissioned by HEACS on the importance of the historic environment sector to the Scottish economy estimated at some £2.3 billion representing approximately 2.6% of the Gross Value Added Project per year. This must include substantial contributions to public finances. Whilst recognising the severity of present financial circumstances the opportunities for legislation on the sector are infrequent and long lasting. In recognition of the sectors cultural and economic
significance might the opportunity have been taken to consider the historic environment more holistically (see below) and by introducing powers conditional on economic improvement or by opening the door to later secondary legislation.

24. The Trust’s work is governed by legislative remit which is developed through statements of policy. Its conservation policy from 2003 echoes the Government’s principle in its interpretation of its conservation role as ‘to ensure that change is managed by negotiation so that present and future generations may enjoy the benefits of places or features of significance’. The breadth of principle mentioned at several instances in the Policy Memorandum is commended. In the case of the Trust such a perspective has come about through developing an understanding that the historic environment is a broad field which encompasses not only scheduled monuments and listed buildings but also their contents, their settings whether they be gardens, designed landscapes or conservation areas, their wider contexts and sense of place. It also includes their historic and social contexts and processes, their interpretation and promotion through time. These themes are often brought together in statements of significance and set within property management plans to guide future management, maintenance and other opportunities for access, enjoyment and education. We identify two ways below in which a more holistic approach to the historic environment might be taken forward.

Duty of care
25. In other ways the Policy Memorandum refers to harmonisation with aspects of other recent legislation and similar comparisons may be made with the call to introduce a ‘duty of care’ for appropriate public bodies involved in the care or management of the historic environment. This was raised in the response from BEFS. Whilst much is done in the Bill to protect important ingredients of our heritage that is designated such a duty would help to understand and make explicit the holistic significance of our heritage and so better aid the way we all value, engage and manage Scotland’s unique historic environment.

Scottish heritage area or site designation
26. The idea for some broader possibly combined cultural and natural heritage designation has come to our attention from the consultation process but is in essence what the Trust manages and offers already in many circumstances. It seems an idea that might help progress this appreciation

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of historical significance discussed. We recognise that above we already call for greater progress with character appraisals for existing area designations like conservation areas and are conscious of the Government’s wish to not introduce at present new regulatory requirements or extra financial burdens. Could the way be left open in the Bill for the use of such a designation in future pending further investigation.

27. Similar designations exist for areas of natural heritage areas for use in a wide range of circumstances. This might cover areas or sites of national significance and as well as monuments and buildings include archaeological sites, gardens, landscapes, infrastructure, battlefields either individually or in combination together with other associations of cultural, social, historic, industrial, craft etc significance. In addition to the Bill’s aims to broaden the scope of bodies that might apply for grant such a designation might help to broaden the area and scope of activities that might be eligible for assistance should funding improve in the future. It does seem as though World Heritage Sites have caught the public’s imagination in understanding and appreciating our past and such an approach for a Scottish version might offer greater resonance with our own historic environment both nationally and locally.

John Rosser
Policy Officer
22 August 2010
WRITTEN EVIDENCE FROM THE SCOTTISH RURAL PROPERTY BUSINESS ASSOCIATION (SRPBA)

Introduction

1. The SRPBA is a membership organisation, uniquely representing the interests of landowners and land managers in Scotland. Our membership includes those who own or manage listed buildings or rural land on which ancient monuments are sited, as well as professional firms who advise rural land managers. We believe that the Association and its membership are key stakeholders and therefore the SRPBA welcomes the opportunity to comment on the content of this Bill.

General Comments

2. The SRPBA believes that the education and awareness raising programme to be carried out as part of the Bill process is to be applauded. However, the Association feels that some issues of clarity relating to the legislation should be dealt with in primary legislation rather than through guidance or advice.

3. The SRPBA has appreciated the increased engagement carried out by Historic Scotland during the development of the Bill, and accepts that many of the issues raised by the Association during the draft Bill consultation have been addressed either through changes to the provisions or through assurances in relation to the content of guidance and/or the education programme.

4. Although the Bill does address some of the problems with the current legislation, there are issues in the wider heritage environment which must be addressed. These include lack of definition of curtilage, need for consistent guidance and the approach to siting of developments in relation to scheduled monuments. The SRPBA appreciates that these may not be dealt with through primary legislation but would like a commitment from Historic Scotland that such problems will be addressed.

5. The SRPBA is supportive of the general principles of the Bill but does have a few specific concerns—

6. One of the areas that concerns the SRPBA is the application of the legislation to land covered by an agricultural tenancy. We have discussed this at length with Historic Scotland and are comfortable that they now have an increased awareness of the issues, particularly in relation to notification and enforcement. We are pleased that Historic Scotland has committed to working with the SRPBA and others to raising awareness across the agricultural sector of the impact of the provisions as well as ensuring that all parties are aware of all legislation and good practice in this area. We do feel that specific guidance must be provided to the agricultural sector – including contractors, and looks forward to progressing this with Historic Scotland.
Section 9 – **Financial support for preservation of monuments**

7. The SRPBA strongly supports this proposal.

Section 10 – **Power of entry on land where monument is at risk**

8. The SRPBA is heartened that Historic Scotland has confirmed that compensation for damage caused by exercising the new power will be covered by section 46 of the 1979 Act. We are also pleased that the policy memorandum states that best efforts will be made to contact the owner or occupier of the land prior to exercising this right of entry. However, we do not feel that this commitment is reflected in the legislation.

Section 11 – **Inventories of gardens and designed landscapes and of battlefields.**

9. Whilst the SRPBA thinks it is laudable to create an inventory of battlefields, we do think that there are practical problems. In a significant number of cases, no known physical evidence of the battlefield exists and its exact site and the extent of the site is unclear. In these cases, an inventory may cause unreasonable restriction on land use.

Section 14 – **meaning of monument in the 1979 Act**

10. The SRPBA remains opposed to the widening of the definition of monument to include ‘any site comprising any thing, or group of things, that evidences previous human activity.’ We fully support the objectives behind the proposal but believe that widening the definition in such a wide and vague manner is not an appropriate approach to ensure that a very small number of sites that do not currently fall within the statutory definition would be covered by legislation. We have suggested to Historic Scotland that if a wide definition is required then perhaps the provision should be amended to ‘any site comprising any evidence of human settlement or industry.’ However, the SRPBA maintains that the most appropriate approach would be to list the limited circumstances under which scheduling could happen, which do not fall within the current definition, and also include a power for Scottish Ministers to add to this list at a later date. The SRPBA contends that experience has shown that wide or vague provisions can result in unintended consequences.

Section 18 – **Certificate of Listing**

11. Whilst the SRPBA supports this in principle, we do have a number of specific concerns. Firstly, we do not feel that it is appropriate that ‘any person’ can apply to Scottish Ministers for a certificate for a building not be listed for a period of five years, but rather believe that this right should only be available to those with an interest in the building. This ‘interest’ would need to be defined in the legislation. Secondly, clarity is still required on the extent of the certificate. If an estate with multiple buildings was being sold and the purchaser required a certificate of immunity as a condition of sale, would the seller be required to obtain a separate certificate for each building?
12. Thirdly, clarity is also required on the notification process in relation to the certificate application. Will an owner be advised of any application and will he be given the opportunity to make representation or indeed appeal? We agree that this may only be required in a limited number of cases but the owner of the property must surely have a right to be involved in the process.

Section 25 – Liability of owner and successors for expenses of urgent works
13. The SRPBA supports the comments made by the Law Society.

Sarah-Jane Laing
Head of Policy
9 September 2010
SUBMISSION FROM THE ROYAL COMMISSION ON THE ANCIENT AND HISTORIC MONUMENTS OF SCOTLAND (RCAHMS)

1. The RCAHMS welcomes the opportunity to submit evidence to the committee and take part in the roundtable discussion on 15 September.

2. We fully support the general principles of the Bill and its stated aims to address some of the gaps and weaknesses in the present legislation that have become apparent over time. We also enthusiastically support the Scottish Government’s programme to streamline, simplify and clarify the system for protecting and managing the historic environment. The work of RCAHMS contributes to that agenda by providing an essential evidence base that enables those in the front line of protecting Scotland’s historic environment to be well-informed so that they may do their jobs effectively. The underpinning work of RCAHMS also provides a storehouse of knowledge and original material from which the sector generally can capture additional economic and added value.

3. We have been asked to consider how the general principles of the Bill will impact on RCAHMS and we would like to make the following points preparatory to the discussions in September:

Mission
4. The mission of RCAHMS is to help people to value and enjoy their surroundings, to provide a world-class record of the historic and built environment to local, national and international audiences, as well as advancing understanding of the human influence on Scotland’s places from earliest times to the present day. We achieve this through strategic field investigation, research and our dynamic national collection, which together provide a unique, authoritative and internationally important resource for the study and management of the historic and built environment.

Role – investigation to create the inventory
5. One of our roles, therefore, is to be ahead of, and independent of, the legislative process by undertaking investigatory programmes of work to establish evidence upon which the management of the historic environment is based. The evidence is used for designation and management of sites and also for the management of undesignated sites. RCAHMS provides reliable independent information, which is available to all parties without bias. Gathering information and research, so that monuments and buildings do not disappear unrecorded, is especially important at a time of rapid landscape and urban change, through changing economic pressures for example on the countryside and in industry.

6. RCAHMS works closely with Historic Scotland and with local authorities and others to ensure that investigative priorities are aligned to fill gaps in knowledge. It is essential that this work is carried out independently of scheduling and listing powers. RCAHMS has investigatory powers and
right of access under its Royal Warrant to gather information. Our investigatory work therefore is essential to underpin regulation. We do not see any specific impact on this work by the implementation of this Bill, beyond widening our national survey to include artefact scatters now regarded as monuments and ensuring better definition of the areas defined as heritage assets.

Role - inventory and historic environment records
7. The inventory is a database of information compiled from our investigations over more than 100 years, and fulfils Scotland’s requirements under the Valetta Convention (European Convention on the Protection of the Archaeological Heritage (revised) – Valetta, 16 January 1992) for a national inventory. We work closely with Historic Scotland and local authorities to ensure that data is shared and widely available to those who manage the cultural and natural environment and to the public. We are working towards the establishment of a shared GIS based register for the historic environment of Scotland that will eliminate duplication, improve efficiency and save costs. Three reports have been produced to examine the current position and the feasibility of this (Casey 2009; Middleton 2009a; Middleton 2009b). While this is not part of the Bill as currently framed, we will be working with Historic Scotland and others including CoSLA, Association of Local Government Archaeological Officers (ALGAO) Scotland, Institute of Historic Building Conservation (IHBC) and Built Environment Forum Scotland (BEFS) to set out a clear strategy for Historic Environment Records in Scotland to address some of the issues that have been raised during the consultation on the Bill.

Role – safeguarding unique archive
8. We also work closely with Historic Scotland and local authorities to ensure that the unique records created during excavations - records that can never be recreated - are safely looked after in perpetuity in the National Collection. This is vitally important at a time of financial uncertainty for commercial archaeology.

Role – Recording our marine heritage
9. We note reference to the Marine (Scotland) Act 2010 and the Nature Conservation (Scotland) Act 2004 in the consultation document. We note the awareness of these parallel Acts and welcome even the small steps taken to align fines for offences. The underpinning inventory that is available for the historic environment on land is also required for the marine environment – something that RCAHMS is working towards in conjunction with Historic Scotland.

Role – threatened buildings survey
10. RCAHMS has a statutory role to record listed buildings and selected non-listed buildings that are under threat of demolition or alteration. The proposed amendments do not alter our powers but we welcome the clarification that the Bill provides in this area. We are developing a more
strategic approach to our own work with the aim of streamlining and clarifying the system for planners, owners and developers.

Role – education and enjoyment
11. A key role for RCAHMS is to help people to value and enjoy their surroundings. By assisting and encouraging people to celebrate their national culture and to understand, enjoy and participate in the recording of the historic landscape, towns or cities where they live, we know that people come to recognise how their surroundings contribute to the sense of place. This fundamentally helps in the protection and enhancement of the historic and the natural environment for the future. We therefore welcome that the Bill does not seek to increase regulation but is seen as part of a package of measures that improves the way that national and local authorities work together to carry out their protection and management roles.

Conclusion
12. Our cultural, built, historic and natural environment together contribute to what makes Scotland a unique place. We believe that these amendments provide a valuable step forward towards the better protection of our Historic Environment within this wider context as expressed in the National Outcome – We value and enjoy our built and natural environment and protect it and enhance it for future generations.

Diana Murray
Chief Executive
20 August 2010

References
Three reports have been produced by RCAHMS in conjunction with the Local Authority Archaeologists and Historic Scotland

Delivering Efficient Data Management
Local Authority Archaeological Liaison, (Casey, S 2009)
http://www.rcahms.gov.uk/assets/files/Survey/DATA_MANAGEMENT_COMPLETE.pdf

Polygonisation, The Shape of things to come
What are the needs for Scottish polygonised Historic Environment Data? (Middleton, M 2009a)

Inspired
The IT capabilities of the Scottish Sites and Monuments Records, (Middleton, M 2009b)
Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 15 September 2010

[The Convener opened the meeting at 10:00]

Historic Environment (Amendment) (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I open the 22nd meeting of the Education, Lifelong Learning and Culture Committee in 2010. I remind all those present, including visitors to the committee, that mobile phones and BlackBerrys should be switched off for the duration of the committee’s deliberations today.

Agenda item 1 is our second evidence-taking session on the Historic Environment (Amendment) (Scotland) Bill. I am pleased to welcome Ella Macqueen, the director of Archaeology Scotland; Simon Gilmour, a trustee of the Built Environment Forum Scotland and convener of its bill task force; Alexander Hay, the chairman of the Historic Houses Association for Scotland; Terry Levinthal, the director of conservation at the National Trust for Scotland; Diana Murray, the chief executive of the Royal Commission on the Ancient and Historical Monuments of Scotland; and Alison Polson, a member of the planning group at the Scottish Rural Property and Business Association. I thank you all for attending the committee today and for providing written submissions in advance. We are not going to ask you to make opening statements, not least because we would be here for ever. Your views will be explored when the committee asks questions.

I will start by asking about the recovery of grants. What do you think about the principle of giving grants and the mechanism for recovering them that is in the bill?

Alexander Hay (Historic Houses Association for Scotland): We have no objection to grants being recovered if the conditions attached to them have not been fulfilled. My personal view is that grants are not now appropriate for private owners. It would be wonderful to have grants, but some of the conditions that are imposed on private owners are so burdensome that very few owners whose properties are not already open to the public will take them up. We would prefer there to be a time limit for the recovery of the grants but, if the conditions cannot be fulfilled, it is perfectly reasonable for them to be recovered.

Our main worry in a lot of cases is that houses in private hands are not always worth a great deal of money and that the grant will sometimes not find its way into the value of the house. It is a slightly convoluted explanation, but the value of houses nowadays is going down quite fast, especially if they are not in particularly good condition. If a house has to be sold, there may not be that much money in it.

The Convener: The purpose of the grants is not to improve the value of the properties but to secure the property for the future because it has some historic merit.

Alexander Hay: That is the idea.

The Convener: Given that it is public money, the consideration should not be the value of the property but whether losing the property will have a detrimental effect on our understanding of a particular period in history and why the property was built.

Alexander Hay: It is difficult to give examples. I am not aware of many private owners who have taken grants from Historic Scotland in recent times, for exactly the reasons that I have mentioned. We fully accept that less money is available and that, if an owner takes public money, there must be a public benefit. We do not expect to get anything for nothing. However, I am not aware of houses in private hands that have accepted money. A number of our members are charitable trusts, which find it easier than private owners do to get grants.

Simon Gilmour (Built Environment Forum Scotland): The Built Environment Forum Scotland believes that grants are an important resource and that the provisions in the bill are entirely proportionate—we are happy with them as they stand. However, we are not legal experts, so we defer to others on the exact wording of how grants will be reclaimed after the sale of a house or other events. We are happy to support the provisions in principle.

The Historic Houses Association for Scotland is a member of BEFS. In discussions that take place within BEFS, we recognise some of the issues that Alex Hay has raised about the conditions that are placed on grant giving. There is an argument to be made about whether we could streamline those conditions and make them easier or more suited to the 21st century and how we as a nation expect to support, protect and manage our historic environment for future generations.

The Convener: Have there been discussions with the Scottish Government about how you can make that possible? We do not want a situation to arise in which, in circumstances in which it is deemed to be in the public interest to protect a building, we do not have a system of grant making
that is open, transparent and easily understood by everyone. Discussions must have taken place to ensure that that process is of equal value and worth both to the Scottish Government or the agencies that give out money and to those who own the properties.

**Simon Gilmour**: The bill highlights the issues and provides us with an opportunity to have discussions with the Scottish Government. The door is open both ways. Some of the issues were bubbling under the surface and had not really been brought to the fore or into the forum’s domain, but now they have. From now on, the way is open to have such discussions. The bill is bringing issues to the fore, so it has been useful in itself.

**Alasdair Allan (Western Isles) (SNP)**: Both Mr Hay and Mr Gilmour mentioned that Historic Scotland imposes conditions that deter owners from applying for grants. Can Mr Hay give examples of such conditions and indicate what he and Mr Gilmour would like to see changed?

**Alexander Hay**: I was not saying that I want the conditions to be changed, because I fully understand that Historic Scotland is acting in the public interest and that there must be public benefit; I was just explaining why owners have not applied for grants. I have not been involved in grant applications for some time, for reasons that I will outline.

When Historic Scotland provides a grant for improvement works, normally it dictates how those works should be done, which usually means that they are more expensive than the owner originally intended. Historic Scotland can also insist that a programme of works be carried out over a period of, perhaps, 15 years, but it cannot guarantee that the programme will be grant funded.

There is also the issue of open access. I do not know whether you appreciate just how expensive it can be to set up a house to give open access, because of other subsidiary regulations. Fire regulations are a particularly emotive issue for our members, and I am delighted that Historic Scotland has produced a document in conjunction with the Scottish fire services about the implementation of fire regulations in what they call traditional buildings. We are appreciative of that work, which is helpful to our members.

Another important issue is the requirement under the Disability Discrimination Act 1995 to create disabled access to these houses, which is often difficult and can be expensive. Also, there are the added security problems of having unfettered access on certain days. That is the sort of thing that deters our members. If your house is already open to the public—as the houses of a number of our members are—the issue is not so great. However, getting to the position in which you can have members of the public coming around is expensive. We appreciate that little money is available these days, but the money that is available under grants does not make the work worth while.

What I have just said should be understood to be a personal view of mine, rather than necessarily being the view off the HHA, but it represents the basis of the problem.

**Elizabeth Smith (Mid Scotland and Fife) (Con)**: I would like to draw your attention to the reliability of the information that we have and to the accessibility of that—quite a few of your submissions suggested that we have some issues with that. First, how accurate is the information that we have about our scheduled monuments, listed buildings and conservation areas? That seems to be quite a controversial issue.

**Diana Murray (Royal Commission on the Ancient and Historical Monuments of Scotland)**: The information that we have about archaeological monuments and historic buildings has been gathered over more than a hundred years. That information is collected through desk-based research, gathering together collections, excavation and field survey, and our knowledge is, therefore, changing all the time.

With regard to the information that has to be put together to ensure that the legislation on planning and—in terms of this bill—sites of national importance is properly applied, the evidence has to be drawn on and scrutinised carefully to ensure that buildings and archaeological sites are of national importance before they go through the scheduling and listing process. That does not mean that, in future, knowledge will not change or information will not come to light that will inform the situation. We are talking about using the best evidence that is available at the time when things are listed or scheduled and ensuring that there is a permanent record and that that knowledge can be added to whenever. That is the role of the Royal Commission on the Ancient and Historical Monuments of Scotland, of local authority archaeologists, who have much more contact on the ground, in many cases, and of staff at Historic Scotland, who have to be well aware of the latest knowledge that is available.

The commission believes that it is incredibly important that that information is online and available for everyone to use and that it is the best knowledge that is available. We are working with the local authorities and Historic Scotland to integrate that information in a way that is much easier for the public to understand and for professionals to use.
Elizabeth Smith: Having information available online is fine for people who have access to the internet. What is your organisation doing with local authorities to promote the dissemination of that knowledge?

Diana Murray: The information is primarily available online. There are other ways of making information available, of course, and information is published in various forms, but the easiest way in which to make knowledge available—especially with regard to e-planning and so on—is to publish it online, where it can be accessed through local libraries and so on. We have been working with local authorities for a number of years to try to collate that information. We exchange information between national and local records to make it much more easily available. We have done a study in conjunction with local authority archaeologists and Historic Scotland to see whether we can develop a better and much more efficient arrangement for the future.

10:15

Terry Levinthal (National Trust for Scotland): The knowledge of heritage assets is very much at the fore with the National Trust for Scotland. It is less about the completeness of the knowledge base, because the knowledge base is there, than it is about the ability to interpret and analyse that information, which requires you to have the relevant knowledge, skill and competence. The fact that the trust has been a member of the Built Environment Forum Scotland task force means that the issue has been thought about consistently. It is about having access to suitable professionals to help all parties—the development industry, the public and the Scottish ministers or local planning authority as the ultimate decision taker—to understand that information. The presentation of just the core data does not get you to a good place; you need the knowledge behind the data to help you to deal with them.

Eila Macqueen (Archaeology Scotland): I want to point out the role of local societies and groups in gathering knowledge and information. A number of groups are recording sites and artefacts across the country, such as the Biggar Archaeology Group, which has been surveying the upper Clydesdale area and has discovered about 500 new sites. About 20 per cent of the sites that Historic Scotland is now scheduling were found as a result of the group’s work. It is not alone: groups the length and breadth of Scotland are now engaged in activities to record and disseminate such information. At our community archaeology conference last year, we had more than 20 groups sharing information with the wider public, which can be found in “Community Archaeology in Scotland 2009”, which is available from us and from East Lothian Council. The group has strong links with the local authority archaeologists, local museums, the RCAHMS Scotland’s rural past project, and the shorewatch project. The volunteers and professionals in the historic environment work together closely to try to boost their level of knowledge.

Margaret Smith (Edinburgh West) (LD): Before I ask my question, I associate myself completely with the previous comments. As somebody who represents Cramond, I know that the volunteers who have been involved with the discovery of the Roman baths and everything that has gone on since then in Cramond have done fantastic work over the past decades—indeed, this year is the 50th anniversary of the Cramond Association.

Do any of the witnesses have particular concerns about the operation of enforcement notices? You might have seen our exchanges with Historic Scotland on a number of issues last week.

Margaret Smith: The Law Society of Scotland and the Federation of British Councils have expressed concerns about the operation of enforcement notices. You might have seen our exchanges with Historic Scotland on a number of issues last week.
undertaken, is adequate to protect scheduled monuments?

_Terry Levinthal:_ The National Trust for Scotland has a number of monuments across the piece. The issue that you are addressing concerns the knowledge that we have already discussed—people’s understanding of when something may or may not have a direct impact on a monument. Having a direct impact on a monument is when there is an impact on its setting or context. That is where you need to have a dialogue with somebody who can help you to understand that.

_Margaret Smith:_ In general, is the planning system assisting people with that? I am thinking of people who do not own the monument but who are close neighbours or whose property is part of the context of the monument. Are the information and assistance available to people to ensure that they get it right?

_Terry Levinthal:_ Provision is extremely patchy across all the planning authorities. It should be noted that any works affecting a scheduled monument are not a planning matter but a matter directly for Scottish ministers, although many planning authorities have developed policies that seek to protect the context of monuments. It comes back to the knowledge and information base, and it is extremely helpful to have access to the online resources that the royal commission has been talking about. It could also be helpful to have people who could interpret what the policies mean on the ground and guide people through the management of those processes.

_Alasdair Allan:_ Let us turn to the proposed inventories of gardens, designed landscapes and battlefields, on which we heard evidence last week. The Historic Houses Association has concerns about the inclusion of inventories. What are those concerns?

_Alexander Hay:_ We are very happy with the inventory of gardens. In fact, I have already received a letter from Historic Scotland, saying that it has conducted its survey and will let us know what the results are. Our concern is about the conditions and responsibilities that will be placed on the owners. Gardens are different from houses in that they are organic and evolve; they change. We do not want to get to the stage that we have to apply to change the azalea bulbs. I do not think that that will happen; our concern is just about the purpose of the inventory. If it is just to record what is there, that is fine—we have no qualms about that at all.

_Alasdair Allan:_ You have touched on this in your answer, but is your mind put at ease by the evidence that we heard from the witnesses from Historic Scotland? When I asked them about the inventory, they said that they envisage no burdens at all for a garden’s owners other than in the fact that the place will be registered. Are you reassured by that?

_Alexander Hay:_ I think that we are reassured. The situation is the same for battlefields. What are the planning restrictions in that regard? Battlefields do not really come under the HHA’s remit, but—

_Alison Polson (Scottish Rural Property Business Association):_ They are ours.

_Alexander Hay:_ Yes, they are yours.

_Alison Polson:_ SRPBA members are concerned about what is done with the inventories. It becomes a development management issue—what size of area will be included in an inventory and what is the effect of inclusion in an inventory when our members want to do other things there? What protection is afforded as a result of inclusion? Furthermore, people are not exactly sure where certain battles took place, so very large areas can be involved. The question is what will be inventoried and what that will mean for the people who own and use the land.

_Diana Murray:_ The role of the royal commission is to create inventories. I did not put this in my evidence, but the usage of the term “inventory” in this context can get a bit muddled. My understanding of the term “inventory” is that it is a list of known sites. In terms of the inventories of historic gardens and battlefields that are of national importance, I think that there should be an inventory of all sites held by RCAHMS. That is where the knowledge and information should be. What is then chosen to be of national interest is an issue for Historic Scotland, which should draw its selection from the inventory. Part of the confusion is to do with whether statutory restrictions apply to anything on the list. It would be helpful if RCAHMS and Historic Scotland clarified the terminology between us, so that we can make it clear to the public what we are talking about.

_Alasdair Allan:_ Alison Polson just raised the question of how to define battlefields, including their area. There is also the issue of disputes over whether a battle ever took place in an area. What are the panel’s views?

_Alison Polson:_ The SRPBA’s concern is that normal land management practices should be allowed to continue and should not be affected.

_Terry Levinthal:_ Obviously, the National Trust for Scotland owns an awful lot of battlefields and designed landscapes. As the policy memorandum makes clear, there is existing provision for designed landscapes under regulation 15 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008, which requires a consultation process involving Scottish ministers for any significant
proposals that affect such landscapes. My understanding of the bill is that it imposes a duty that does not exist at present to maintain an inventory of designed landscapes and battlefields. Fundamentally, this is about a responsibility to understand the resource and publicise the inventory. Again, the policy memorandum makes it clear that there is no change over and above regulation 15. Perhaps it can be viewed as a means of creating an opportunity to have a dialogue if necessary.

Simon Gilmour: When the concept of making an inventory of battlefields was raised, which must be at least two or three years ago, the Built Environment Forum Scotland held a one-day workshop with Historic Scotland so that all the parties who might be affected by the proposals could discuss the issues. One express aim of the day was to decide how a battlefield might be defined. We see the workshop as the beginning of the process and feel that we are now at the intermediate stage where we get an idea of the definition. How to physically define a battlefield is an academic discussion. It needs to be held transparently and openly with wide discussion among all the parties who may be involved and with expert advice on hand. There are experts out there who know a lot about battlefields; they know how to decide on definitions and so forth. We need to draw on their expert advice.

Christina McKelvie (Central Scotland) (SNP): I turn your attention to section 14, on “Meaning of ‘monument’”. What are your views on the expanded definition of “monument”? I will start on a positive note. We whole-heartedly welcome the expanded definition, in that it will allow the Scottish ministers and Historic Scotland to protect monuments that were previously not eligible for protection because they were quite ephemeral. The sites that are envisaged include some of the potentially most important in Scotland, such as the site of the first human settlement or intrusion into Scotland, perhaps 10,000 years ago. Such remains are very fragile and are currently difficult to protect.

We understand that there are concerns about the broad nature of the terminology that is used in the bill, but we point out that although overarching legislation allows almost anything to be scheduled, the Scottish ministers do not schedule everything willy-nilly. A set of criteria is laid out in “Scottish Historic Environment Policy”, against which ministers must measure an asset before it is scheduled. Not everything will be scheduled.

The devil will be in the detail. If the bill is enacted in its current form, the guidance that follows will be essential. The guidance will provide peace of mind for landowners and others who are slightly worried about the open nature of the provision.

Alison Polson: The SRPBA’s view is that expanding the definition is akin to using a shovel when a spoon would do. The definition is very broad indeed. It could almost be argued that the whole of Scotland could be considered to be a “site ... comprising any thing, or group of things, that evidences previous human activity” that should be protected in the national interest, if the additional requirement is that it is in the national interest that such sites be protected. Let me give an example on a smaller scale. After tomorrow, Bellahouston park will contain much evidence of “previous human activity”. Will it be in the national interest that the park should appear on a schedule of monuments in future?

A very wide definition is a problem for people who own and use land, because they do not know what will happen and whether there will be interest in the land being protected in some way. The need for certainty is behind our concern.

There is also a dislocation between the activity and the national interest. For example, if Prince William decides to bring Kate back to his university roots and propose to her in a ploughed field in Fife, will the field become something that it would be in the national interest to list as a monument? The furrows from ploughing are the signs of human activity, but the national interest aspect of the matter is dissociated from that. At the end of the day, we could drive a cart and horses through the principle behind the approach.

A criteria-based approach has been taken in other legislation and policy. There would be no difficulty in having a generalisation and then criteria that show what is covered, which could be added to through guidance. The SRPBA’s objection to the width of the definition is about the operability of the approach.

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Simon Gilmour: I suppose that this is not the place to have a debate about the issue, but I point out that although overarching legislation allows almost anything to be scheduled, the Scottish ministers do not schedule everything willy-nilly. A set of criteria is laid out in “Scottish Historic Environment Policy”, against which ministers must measure an asset before it is scheduled. Not everything will be scheduled.

The devil will be in the detail. If the bill is enacted in its current form, the guidance that follows will be essential. The guidance will provide peace of mind for landowners and others who are slightly worried about the open nature of the provision.

Christina McKelvie: Have the witnesses’ organisations been consulted by Government officials on what should be included in that guidance?
Simon Gilmour: We have had brief discussions with them about it and they have said that full guidance will be produced. We would like further discussions, especially on exactly what sort of sites we are talking about and would envisage being protected under the bill.

Christina McKelvie: That is a nice lead-in to my next question. Should consideration be given to covering historic road and footpath surfaces? That issue has come through in evidence, so I would not mind hearing your opinions on it.

Terry Levinthal: It should simply be noted that, in England, the listing of historic surfaces and footpaths is considered and done. It is a policy issue.

Simon Gilmour: I simply draw the committee’s attention to the fact that, were such sites to be scheduled, they would still have to be judged against the stringent criteria—significance, national importance and so forth—before any consideration was given to protecting them.

Christina McKelvie: Historic Scotland said in its evidence that such sites are already covered. Is that your understanding?

Terry Levinthal: In bits, yes. The Corrieyairack pass, for example, is a scheduled monument and a number of other parts of military roads are scheduled, so the practice is undertaken, but that is done against firm criteria. The issue is not to do with the legislative side of the matter but the accuracy and transparency of the policy guidance that sits behind it.

Christina McKelvie: So it comes back to guidance again.

Terry Levinthal: Indeed it does.

Claire Baker (Mid Scotland and Fife) (Lab): I will ask about section 18, which introduces a new power to issue certificates of immunity from listing. It is intended to provide developers with some assurances if they wish to take on an historic property.

The proposal is that anyone could apply for a certificate of immunity, but concerns have been raised about hostile third parties trying to use the system to slow up a development that was under way. Do any of the witnesses have examples or experience of that? Is it a reasonable concern?

Terry Levinthal: I hesitate to say this but, in a past life, I advised many community groups to use that tactic. The potential exists for it to be used, but it should be noted that, with many sites, evidence of value comes forth only once somebody starts to take an active interest in the site and people actively begin to examine it. We learn more as we begin to think about something and it is obvious that, if we are not thinking about it, we will learn less.

It should also be noted that, under the existing English legislation, only parties who have planning consent or have applied for it can apply for a certificate of immunity. That is where the English sit the issue of the developer not being wrong footed when he gets into the game of trying to do something.

The nature of any system that is open for use is that people may choose to use it for reasons for which it was not intended. That is the nature of being open and transparent.

Claire Baker: Is it necessary to introduce the certificate of immunity? Communities can already exercise some power and influence because, as has been explained, they can apply for a building to be listed. That is open to everyone, so does section 18 change the situation much?

Terry Levinthal: The certificate’s introduction provides a useful opportunity. The Scottish ministers, through Historic Scotland, operate a policy that they will not list or consider listing if there is a live planning application for a site. There are sound reasons for that and it is not an unreasonable policy position, but there are times when we may wish to list.

If a certificate of immunity system is in place, the regulator can say, “Under the legislation, you have a mechanism available to you to put up a barrier at any time.” I made the point that sometimes knowledge comes up only when you are actively engaged in something. In many ways, the introduction of a certificate of immunity system provides a very helpful tool for the Scottish ministers in compiling the list of buildings of architectural and historic merit, because it removes that time gate or allows it to be managed differently.

Claire Baker: Does Alison Polson have any comments? The Scottish Rural Property Business Association sought clarity about what would happen if there was a group of buildings and whether there would have to be a certificate for each individual building. Have you had any clarity on those issues?

Alison Polson: We have concerns about various aspects of the proposal. If the application can be made by “any person”, it is very broad. It is akin to the planning system, in that anybody can put in a planning application. However, in the planning system the views of owners and people with an interest are taken into account as the application goes through. It is a permissive system; it looks to enable people to do something. The proposed system is the other way round. The application process may be enabling if you get a certificate of immunity, but if any person can apply
for a certificate, the role of someone with an interest in the property is not clear from the legislation. That is why we are interested in what would happen with a group of buildings, and what rights of appeal would exist or what integration there would be. The owners and people with an interest could have obligations at the end of the day, yet they would not be included in the proposed system.

Section 18 is very short. I know that we are talking about principles at the moment and, in principle, a certificate of immunity sounds like it could aid developers if the application was successful. However, I think that we are all aware of the problems that could be caused as a result of the way in which the section is currently worded, particularly the use of the phrase “any person”. I think that it would be possible to define the people who could apply for a certificate of immunity as those who have an interest in the building—a personal interest, for example, in the missives, if someone was thinking of purchasing it. As happens with planning permission, the contract would be conditional on something being obtained. It would be possible to define the interest in that way.

It would also be possible to specify whether a certificate would apply to a group of buildings, which is how some listings are done, or one building. What you get from a listing is protection of not only the building itself but the setting of the building. If you apply for a certificate of immunity and it is not granted, it appears likely that you would effectively achieve a listing. That may therefore inhibit people from dealing with not only a physical building but the much larger area round about it. When you are trying to attract foreign or institutional investment in a large site, the investors want certainty. If there is a chance of getting a certificate of immunity, those investors will probably look for one. If someone other than the people who are interested in what happens on the land in that immediate area has started the process for some other reason, there could be problems.

10:45

Kenneth Gibson (Cunninghame North) (SNP): Let us turn to section 25, on liability for expenses for urgent work. Section 25 permits notice of liability for expenses for urgent work to be registered in the property register for five years. However, in its written submission, Glasgow City Council expresses disappointment that the notice will expire after five years, stating that it believes that it would be beneficial if the burden were preserved until such expenses had been recovered. That request is echoed in the written submission from Heads of Planning Scotland, which believes that, otherwise, owners will be encouraged to procrastinate in order to avoid repaying any costs. What are the panel’s views on the issue?

Alexander Hay: The Historic Houses Association is here to persuade our members not to let their properties get into a neglected state—I hope that very few are in that position. I am not aware that any of our members has had urgent works carried out, the cost of which needs to be recovered. As I said in my first answer, our main worry is that, if a property has to be sold to recover the cost of work that has been carried out, the owner might be left out of pocket. It is a long way down the line before properties get into that state. Obviously, such situations exist, but I have not personally come across them.

Terry Levinthal: The National Trust for Scotland does not have a position on the issue. However, to help the committee, I will give an example of the kind of situation that I think that Glasgow City Council and Heads of Planning Scotland have in mind.

Angus Council was keen to take action to prevent the further deterioration of a category A-listed Playfair building—the name escapes me at the moment, for which I apologise; I will remember it as soon as I leave. The owner was transferring the property to a series of shell companies globally and the council had to chase him for the money. Eventually, it got him surrounded, so to speak, in a shell company that was based in Vancouver. If somebody wants to avoid repaying the grant, there are all sorts of mechanisms available to them to do so.

If the ultimate aim of the provision is to enable a planning authority to take action to prevent the decay of our built heritage, the bill should not put a time gate on recovery of the grant, given the hurdles that the authority might have to get over. It is also an issue for the Scottish ministers. I am sure that you are well aware of the case of Mavisbank house and the fictitious people everywhere who were supposed to own part of it. Given the enormous difficulty in that case, had there been such a time gate, the positive actions that were taken would not have been possible.

Ultimately, the question is, what is the purpose of the bill? I would argue that it is a very positive one. It is about taking action when action is required. Does it really matter whether it takes five years or six years?

Ken Macintosh (Eastwood) (Lab): Mr Gilmour, the Built Environment Forum Scotland has suggested that the bill could go further than it currently does. You propose that a duty be placed on all public bodies to
“protect, enhance and have special regard to Scotland’s historic environment in fulfilling their duties”.

Furthermore, you ask ministers to
“ensure that planning authorities have access and give special regard to appropriate information”.

Why do you think that there is a need for that? Do other panel members support the argument that the bill could go further than it currently does?

Simon Gilmour: That is laid out in our written submission, and I shall summarise the two elements.

First, we feel that the bill offers the opportunity to give a legislative context to Scottish ministers’ existing historic environment policy with regard to public bodies, and to widen the concept of what those public bodies are. A whole chapter—chapter 5—of “Scottish Historic Environment Policy” is dedicated to what ministers expect public bodies to do with regard to the historic environment in undertaking their duties. However, there is no legislative bottom line, context or backbone to that policy, so in some respects, our first ask is simply a request for context to be provided. I do not know how to put it without sounding like we want to put a burden on anyone, because we do not. The idea is that public bodies should already be undertaking what we suggest, in line with Scottish ministers’ views.

Our second ask comes back to something that Terry Levinthal laid out earlier: the provision of expert advice to the planning process within local authorities as a bottom line. We hear a lot about front-line services—what needs to be protected and what does not—and, if the historic environment has a front-line service, that is it.

The day-to-day decisions on changes that might happen to our historic environment are made through the planning process. The bill is generally about material that is already designated, but that forms a very small percentage of our wider historic environment and we ask that it somehow be ensured that specialist advice is at the heart of planning decisions. We have no particular preference for how that is done; we simply want to ensure that advice is provided and maintained, particularly in the period of public service cuts that we are about to go into. Because historic environment advice, as opposed to planning advice, is not a statutory necessity for local authorities, it could end up being severely diminished in future, to the detriment of our historic environment.

Alison Polson: The SRPBA has not canvassed its members on the issue. I suspect that some would support the introduction of a duty and some would not. The only other helpful comment that we can make is that our members recognise, as they have done in connection with other legislation, that with the responsibility of power comes duties. If public authorities are to have extensive powers, duties should go with them.

Diana Murray: I am not fundamentally convinced that it is helpful to put such a duty into the bill, although I thoroughly support what Simon Gilmour said.

Lucy Blackburn mentioned leadership through policy in her evidence. That is a much better way of achieving what the BEFS proposes, and we should do it better in the future than we have done in the past. It comes down to working together and the single outcome agreements with local authorities. It would not be helpful to put additional legislative burdens on local authorities now, but that is not to say that they do not have a responsibility to do what the BEFS asks, both as a result of guidance and by working together.

It is essential that there be someone at the local level with the knowledge, expertise and ability to give advice in the planning process. I thoroughly support that, but I do not believe that it would be helpful to do it through legislation.

Terry Levinthal: The National Trust supports the BEFS position on the matter, being a member of the forum. The committee should be aware that about 20 per cent of all planning applications that are made in Scotland involve a listed building. You can see in the volume that is involved the need for knowledge and specialism.

With my planning authority hat on, I am conscious that there are no proposals for a key performance indicator on historic environment management in the current planning monitoring system for reporting information on a planning authority’s performance to the directorate for the built environment. As I understand it, there are discussions between Historic Scotland and local authorities on rolling out the concordat with individual planning authorities. That is an extremely welcome way of managing the process and could tie into an SOA, but a national indicator to enable us to understand what people were doing could be a useful barometer and might help.

There are duties elsewhere in the wider context. There is a duty on authorities to plan for biodiversity, so there is precedent for thinking about such a duty.

Alexander Hay: The HHA is quite neutral on the issue. Our members are encouraged to have a care for their properties anyway, and I presume that they would wish to care for them. The houses were built to be lived in and we wish that to continue. Although the National Trust and Historic Scotland do a good job in looking after their properties, we feel that the best way of maintaining properties is through their being lived in and used. Our members would say that the
fewer people who were looking over their shoulder, the better, although that is the way of the world—we think that we have got enough people telling us what we can and cannot do.

We are, however, neutral on the issue. If the duty is there, it is there; if it is not, that does not worry us.

**Ken Macintosh:** The vast majority of sites in Scotland are unscheduled. Does the bill go far enough in offering protection to those sites, which are still of historic value and importance to Scotland?

**Diana Murray:** That comes back to the original premise that we need to build an inventory of knowledge and information. There are 290,000 unique records in our record and some 265,000 in local authority records. Many of those are records of the same sites but with different information. About 5 per cent of archaeological sites are protected and a much higher percentage of buildings are protected.

It is often difficult to match the criteria for protection to archaeological sites, as people sometimes find them difficult to see and it is often difficult to estimate their national value. However, that does not mean that they are not of value. Local authority archaeologists do a very good job in helping to protect many sites that are unscheduled but which are of importance in the local context. Without them, it would be hard to protect the number of sites that we protect, which are not just the scheduled monuments. If you asked any archaeologist or architectural historian, they would say that they would like to preserve many more sites, but we must be realistic and recognise that other things have to be done.

One of the biggest protections for archaeological and historic environment heritage in Scotland is ensuring that everybody understands what they have on their doorstep. It is hugely beneficial if they appreciate and understand the historic environment that they live in. I do not think that we really appreciate what we have in Scotland. The other day, I was talking to someone from Singapore who was absolutely astonished that the historic environment in Scotland is managed—she thought that it was just there. When I told her what I and my colleagues do, she was absolutely amazed. We have what we have in Scotland because over the years we have had legislation and people have paid attention to our historic environment. The historic environment is really good for tourism and for people’s sense and understanding of place. It is important for our identity and the identity of Scotland.

No, there is not enough protection of our historic environment. On the other hand, we must keep a balance. Getting people to understand it, enjoy it, see it—a lot of people do not see it because they do not know that it is there—and recognise the value of it is the best way to get it protected.

**Simon Gilmour:** The simple answer to your question whether the bill protects the 81 per cent of the historic environment that is not designated is no, because it amends three pieces of legislation that deal only with designated assets. One of the reasons why the BEF is making its second ask in particular and seeking an additional amendment is that it could provide not only that protection but the ability to manage the resource better at the front line through the planning process.

11:00

**Eila Macqueen:** Archaeology Scotland fully supports the BEF’s two asks and is 100 per cent behind the need for additional legislation. Although we applaud Historic Scotland’s work in talking to local authorities and influencing hearts and minds, the fact is that we are facing stringent cuts, and we feel that we have to take a firmer line on protecting our historic environment.

It is not easy to measure what might be lost, simply because we do not know what is there, but I can give a couple of examples that highlight the importance of having local advice. Not too far from here at the Huly hill bronze age site, on which the City of Edinburgh Council’s archaeologist had placed some conditions, they discovered an iron age chariot burial, the first of its kind in Scotland and, indeed, one of the most significant finds of recent years. If a local authority archaeologist had not been in post, that could well have been lost to the nation or irretrievably damaged.

Another example is the site at Allasdale, which features on VisitScotland’s Western Isles archaeology trail. Although the site is very interesting, the local authority curator probably would have preferred visitors to be directed to somewhere else because the kists there are eroding in the sand. We must ensure that we have that kind of joined-up thinking between the local and national aspects.

**Alison Polson:** As I have said, the SRPBA is concerned about the definition used in the bill. Although we fully support attempts to make people understand what is to be protected, the fact is that once something has been scheduled it is very difficult to do anything not only with it but with the adjoining land, which can be a large area. We need to know what Historic Scotland wants to protect, but at the moment the definition is so wide that it could well take in vast swathes, if not the whole of Scotland.

**Ken Macintosh:** The NTS’s submission notes that the bill does not contain sufficient
“deterrents in terms of fines for owners who damage or demolish unlisted buildings”.

Is there any support for such a move?

**Terry Levinthal:** That issue sits more within conservation area management, which is outwith the scope of the bill. I should also say that the NTS fully supports the bill’s provisions, and from discussions with Historic Scotland and others I think that such conservation area management issues, which are slightly different, should be covered at another time.

Since you ask, though, I should point out that there are mechanisms for changing or carrying out works to a listed building, but if someone actually demolishes an unlisted building in a conservation area—and we should remember that the conservation area designation covers townscape management—there is very little recourse to action. I am quite comfortable to take that conversation offline, because many other issues come into it.

As for your specific question about the undesignated elements of the assets, I think that pragmatism requires us to draw the line somewhere. Nothing prevents any planning authority introducing through its development plan a policy to manage, protect and conserve that which is beyond the designated list. Indeed, Scottish Borders Council once had a policy stating an expectation that anything on its sites and monuments record would be properly managed. There are other ways of meeting that objective that do not require legislation.

**The Convener:** That concludes the committee’s questions. I thank the witnesses very much for their attendance and suspend the meeting briefly to allow them to leave.

11:05

*Meeting suspended.*
1. It would seem that in the process of summarising the proposal, some misunderstandings have crept in—

2. Clarity: the present position is that all grants are conditional and the conditions are clearly set out in the grant award document; invariably the making of a grant is conditional on public access, continued maintenance, insurance etc. It is also made clear that Scottish Ministers have the right to recover (from the person who received the grant) if the property is sold within 10 years of the making of the grant.

3. Recovery of grant money: currently, Scottish Ministers have the right to recover up to 100% of the full grant in all cases if the property is sold within 10 years after the giving of the grant. What is proposed here (as I understand it) is a change not to the principle of recovery, but a clarification of what may be recovered, namely the full amount of the grant less 10% for every year which elapses between the making of the grant and sale of the building by the person to whom the grant was made. So if a building were say sold after 7 years, Scottish Ministers would recover 30% of the grant.

4. Who is liable? We appear to have been labouring under a misapprehension here: the proposal is not to make grants recoverable from buyers, nor to make the grants a burden on the property. Both ideas are well understood to be impractical for (amongst others) the reasons that we gave in our response. So our worries on that score are groundless, as no proposal to recover from buyers has in fact been put forward.

Sally Hampton
Co-ordinator
13 September 2010
The planning context

1. The Scottish Government aims to deliver a modern planning system that is—
   - Efficient: up to date development plans at the heart of an efficient system that provides certainty
   - Inclusive: local people more involved in the decisions that shape the development of their communities
   - Fit for purpose: with a clear sense of priorities, and to address different issues in different ways
   - Sustainable: development contributing to sustainable economic growth - in the right place, and of the right quality.

   It is assumed that these are the criteria against which the Bill should be assessed.

2. This Bill forms part of the wider streamlining of the heritage framework – which has seen the related guidance move from the Memorandum and separate national policy guidance (NPG) (NPG 05 on archaeology and NPG 18 on the historic environment), Scottish planning policies (SPP) (SPP 23) and replaced by the consolidated SPP (paras 110 to 124), the Scottish historic environmental policy (SHEP), and the emerging historic Scotland managing change series. The planning advice notes (PANs) (PAN 71 on conservation areas and PAN 42 archaeology) are not as yet affected. Whilst this has sought to broadly leave the guidance framework unchanged – there are areas where the lesser detail will now require Historic Scotland (HS) “Managing Change” series to pick up some of the omitted detail (related to demolition; enabling development; setting; etc).

3. Mindful of this important transition (and thus the material weight to be accorded) from legislation, through national policy to national guidance and advice, to local policies and guidance, it would assist if the higher level guidance was to formally recognise and ensure that due weight is attached to the lower level guidance. Whilst this provides the flexibility needed, there should be a strong emphasis placed on the value of promoting good practice consistently at all levels.

4. The Bill also needs to be seen in the context where the present system is perceived not to have sufficient problems to warrant major legislative reform. The response to the Historic Environment Advisory Council for Scotland (HEACS, now defunct) report on Heritage legislation (August 2006) concluded (December 2007) that “it would be more efficient and effective to invest our resources in improving the workings of the current system”. The then Minister continued, saying that “improving the system relates in part to the clarification of roles, duties and responsibilities; which brings me to your report on local authorities. We do not wish to impose new duties or burdens on local government. Instead, we want to develop
outcome agreements with local authorities, in keeping with the general approach adopted in our new Concordat with CoSLA.”

5. Within this context HoPS is supportive of the general principles of the Bill and welcomes the approach to tidy up and align the approaches to unauthorised works and to enforcement. The Bill does not impose new duties or burdens, but rather seeks to streamline the existing powers and align listed buildings, scheduled monuments with the planning enforcement process. The required compilation and maintenance by HS of an inventory of gardens and designated landscapes and of battlefields (s.11 of Bill) is welcomed.

6. Sharpening the powers in the amending bill is welcome - as far as it goes. The Committee may however wish to question HS as to the extent to which the powers are actually being used in practice, and the extent to which the current framework is ensuring that the built heritage is contributing positively to the agreed national outcomes, the most relevant of which are—
   - We value and enjoy our built and natural environment and protect and enhance it for future generations
   - We live in well-designed, sustainable places where we are able to access the amenities and services we need
   - We take pride in a strong, fair and inclusive national identity
   - We live in a Scotland which is the most attractive place for doing business in Europe
   - Our public services are high quality, continually improving, efficient and responsive to local people’s needs and
   - We realise our full economic potential with more and better employment opportunities for our people.

7. The SHEP (para 1.13) identifies Scottish Minister’s key outcomes—
   - Key Outcome 1: that the historic environment is cared for, protected and enhanced for the benefit of our own and future generations.
   - Key Outcome 2: to secure greater economic benefits from the historic environment.
   - Key Outcome 3: the people of Scotland and visitors to our country value, understand and enjoy the historic environment.

8. However, despite the Scottish Environment Link Report (with its heritage targets in section 5) there is not as yet clear guidance from HS as to how these objectives should be measured.

9. Whilst some concerns have been raised regarding the status of the Historic Environment Record (HER) it is considered that the requirement that planning authorities “should ensure” that they have access to a SMR/HER in para 124 of the SPP addresses this concern.
The data context – or lack thereof

10. The latest data context is the Scottish Historic Environment Audit (SHEA) of March 2007 and draft SHEA 2010. The lack of consistent and up-to-date data is of concern – with HS yet to define heritage targets or clarify the annual data needing collection (whether through e-planning system or through LA Conservation Officers). No data is understood to be available on the use of listed building enforcement action, or the use of urgent works or repair notices. The draft SHE Audit 2010 indicated that—

- There are approximately now some 47,540 (47,329 in 2007) listed buildings and 8,151 (7,882 in 2007) scheduled monuments in Scotland (fig 27). Some 27,573 (58%) (27,782 (58%) in 2007) are Cat.A or Cat.B listed buildings. There is a small increase in Conservation Areas to 638 (of which it is understood some 32% (204) have an appraisal (LAHEF July 2010).

- The number of listed buildings demolished or suffering fire damage was unavailable in 2007 (fig 27, SHEA). The draft 2010 data suggests 418 Cat.A fires in 2008/09 – improving on the 509 CAT.A fires in 2007/08.

- It is not however clear how many listed buildings or scheduled sites are in “a poor, very poor or ruinous condition” in Scotland. From the buildings at risk survey by the Scottish Civic Trust (Jan 2006) of some 3,055 buildings (6% of total LB) – some 851 (28% - down from the quoted 1,036 when non-listed buildings are excluded) were identified as “at risk”, and 676 (some 22%) were assessed as being in “a poor, very poor or ruinous condition” (buildings at risk survey Jan 2006). HS subsequently limited the survey to Cat A listed buildings only so it remains difficult to know the extent of the problem.

- In England the 2010 Heritage At Risk (HAR) report provides useful annual data, not just on buildings, but also on the condition of monuments and other designations (81% return, e-survey). It indicates that the 3.8% of Grade I and Grade II* listed buildings at risk in 1999 had been reduced to 3.1% in 2010. Of the 968 LB’s At Risk some 676 (70%) are identified as being in “a poor, very poor or ruinous condition”. If applied to Scotland, this would crudely suggest at least some 603 Cat A or Cat B listed buildings in Scotland would be in a “poor, very poor or ruinous condition”. By comparison, the 2009 BARR in Scotland suggests 8.7% (277 out of 3199) of A-listed buildings are at risk – varying from 6% in urban areas and small towns, to 14% in rural and remote areas. Some 42% of these A-listed buildings (111 – or 3.47% of 3199) are considered to be at high or critical risk. The similarity to the 2006 BAR data (para 44) suggests either very little overall change or lack of up to date data.

- Local variations in the 2010 English heritage at risk survey show that between 1% and 16% of all listed buildings being at risk - equivalent to somewhere in the region of 473 to 7,500 LB in Scotland. This is consistent with the 11.2% (35/311) number of LB on the BAR Register in my authority.
The 2010 HAR survey goes on to suggest that only between 12% and 13% of buildings on the at risk register are “economic to repair”, but that some 44% are capable of beneficial use.

It may be noted that 8.2% (3,250) of the 39,409 planning applications determined in Scotland in 2009/10 (planning statistics report) related to separate listed building or conservation area consent applications (table 29 and 32). The 6,233 planning enforcement cases taken up (table 26) in the year are not broken down to show heritage cases. HS should have the data on scheduled monument applications – if not on their condition. In the absence of specific data, it is suggested from experience that the number of heritage enforcement notices is likely to be considerably less.

11. This concern at the lack of an up-to-date or comprehensive database or system for rolling updates of the SHEA Audit extends to the lack of up-to-date data on the actual use of the legislation being amended, and thus an inability to assess the extent to which it is “fit for purpose”. Suffice to say that there are a substantial number of Listed Buildings in Scotland not being maintained by the current owner which hinder achieving the national outcome targets (paras 6 and 7 above). The lack of such data also, for example, hinders the targeting of HS or HLF grants towards reducing the number of buildings on the BAR Register.

Key issues

12. Experience suggests there are a number of potential reasons for the low usage of the legislation now being amended – some of which are reflected in the calls for more substantive legislative changes.

Staff skills

13. It is essential to have staff with the relevant heritage skills – in line with SHEP para 1.16(f) which suggests the relevant bodies with responsibilities for any aspect of the historic environment should ensure that: “suitable knowledge, skills, materials and technologies are available to enable conservation and management to be carried out in ways that safeguard the intrinsic archaeological, architectural, historical, physical and cultural significance of the heritage”. The question is whether the “good stewardship” sought by the SHEP can be achieved without appropriately qualified staff?

14. The “Survey of LA Policies, Staffing and Resources for the Historic Environment in Scotland” (Arup, 2009 – but of December 2007 survey) indicated that 9 authorities (26%) had fewer than 1.0 FTE dealing with Heritage project and policy matters. Given the broader economic climate the situation is likely to only get worse. In the absence of any specific legislative duty to use such expert skills and advice it is envisaged that this will be an area of pressure. How can “informed decisions” (SHEP 1.30) be taken without using and taking advice from skilled staff? There is also, as experience elsewhere has shown, an increased risk of “maladministration” if relevant skills are not available or used. However this concept of an
“implied duty” to use and take advice from skilled staff is long standing. There is considered to be scope for sharing such expertise across administrative boundaries to minimise any additional burden.

Retaining the value of the heritage asset

15. Currently there are – despite the frequent public perception – no direct requirements on the owners of Heritage assets to maintain these assets. Para 1.40 of the SHEP does refer to “the long-established policy that all government departments should discharge properly their duty of care for heritage assets and the SHEP generally emphasises the important role of “good stewardship” (1.33) and “informed decision making” (1.30). Frequently however older buildings are seen as a problem that can best be addressed by neglecting and flattening the site – so as to minimise maintenance and security costs, or a lever to try and secure further enabling development. The related blight does little to secure the outcomes and objectives set out in para 6 and 7 above – where such heritage buildings usually make an important contribution to local character and identity.

16. The case for extending VAT reduction (beyond the current limited remit) and encouraging buildings to remain in use (e.g. through limiting Council Tax exemptions) has long been made. The lack of a “duty of care” on all owners remains a concern. Indeed, notwithstanding Chapters 1 and 4 of the SHEP, it is understood that related NHS Guidance or Asset Management Plan (AMP) guidance still needs to be aligned to promote the “good stewardship” identified in the SHEP. The HS Managing Change Series could usefully strengthen the sustainability and financial cases for retaining and reusing older buildings.

17. Two other points have been raised regarding listing—

- Concerns regarding s.18 “certificates of immunity”. Experience elsewhere suggests this is unlikely to be an issue. This has to be seen in the context of the existing way in which HS decline to consider listing when there is a live planning application (or in practice, a live building standards application). It can be useful at pre-app stage to have the “special interest” of a heritage asset assessed independently. It is not considered that such a request should be limited to the owner- but it should ensure that there is protection afforded to the heritage asset during the evaluation of its special interest (a point not addressed in s.18). A requirement for HS to regularly review the statutory list for each area (say every 10 years) would further minimise the need for such certificates.

- The ecclesiastical exemption from the legislation for LB in use. A move to bring all historic places of worship within the listed building management system would closely fit the modernising planning agenda by simplifying the exceptions. The increasing disposal of such heritage assets adds merit to this aspect. Experience suggests there is scope to improve the current position on in-house assessment of ecclesiastical works.
Assessing and limiting the risk of any action

18. The actual use of listed building enforcement notices (s.34), or urgent works (s.49) or repair notices (s.43) (using Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997) is understood to be very limited. Usually action under the Building (Scotland) Standards Act 2003 – either a defective building notice under s.28 or a dangerous building notice under s.30 (amended to indicate that demolition is not an immediate option for a listed building) or even an amenity notice (s. 179) of the Town and Country Planning (Scotland) Act 1997) – will be faster and more easily served.

19. In part this ease is considered to arise from their more frequent usage and the safety aspect and related budget. However there may be a number of other issues that limit the use of the legislation—

- the potential legal challenges – particularly the need for the works to be “the minimum necessary for the preservation of the building”. This has occasionally led to minimum works which do not “preserve in a cost effective way” or limit the deterioration of the listed building.
- the potential for a compensation notice to be served in return (again – virtually unused in practice so far as I am aware) – leading Council’s to be very cautious.
- the lack of any budget for such one-off works. A HS central “revolving grant fund” could assist.
- the complexities of moving through the use of a repairs notice and subsequent CPO, and the complexities of “back-to-back” agreement with a 3rd party – in an era of procurement and disposal regulations. It may however be noted that the Disposal of Land by Local Authorities (Scotland) Regulations 2010 (SSI 2010/160) will be beneficial in recognising that disposal of land at a “less than best” consideration can be appropriate when it is associated with the promotion or improvement of economic development, regeneration, health, and social or environmental well-being. It would have further assisted if heritage assets had been identified as an appropriate circumstance.

20. The Bill helpfully allows urgent works liability to be registered (s.25) which helps address the situation where the owner tries to evade liability by moving ownership between different “paper companies”. However the Glasgow Council suggestion of removing the 5 year limit (s.50B (1)(c)) is supported – as it is otherwise likely to encourage owners to procrastinate to try and avoid repaying any costs.
Unauthorised works to heritage assets

21. The benefits of using a skilled conservation agent and pre-application discussions are fairly obvious. However many listed building applications take longer to be processed because of the inadequate details submitted with the application. A “validation checklist” for work to heritage assets – perhaps as part of the Managing Change series – would help ensure agents are aware of the level of detail required.

22. The positive role of Council’s to help and advise owners at pre-app stage should not be under estimated. Neither should the growing number of applicants who wilfully and deliberately bypass the due process. That is why the time limits on enforcement action need to be addressed – not just for heritage assets – but also to maintain the wider credibility of the planning system. Equally the suggested extension of time limits – to 5 years for declining to determine an application (s.20 – currently two years) is supported.

23. The alignment of listed building enforcement procedures, as well as stop notice and temporary stop notice procedures (s.41) with those of the planning processes is welcomed. Equally the proposed fixed penalty notices (s.24) are a welcome addition.

24. In passing it is worth noting that the lack of digital map definition of the curtilage of the heritage asset does not assist the move to e-planning. The Bill fails to either set out and define the case law tests or to set a long term objective to define on a map the extent of the heritage asset to be protected.

25. The Bill also omits to take the opportunity to both simplify and strengthen the legislation relating to development in conservation areas. The public expectations to control the cumulative impact of minor changes on the overall character of conservation areas are hindered by the cumbersome Article 4 process. Simplifying the complex permitted development regulations and GDO is understood to be under discussion. In conservation areas a simple “visibility from a public route or footpath?” test might allow the administrative burden to be reduced and facilitate an easier understanding of the legislation.

Conclusion

26. As previously stated, HoPS is supportive of the general principles of the Bill and welcomes the approach to tidy up and align the approaches to unauthorised works and to enforcement. The consultation and involvement prior to tabling the Bill has helped address some concerns.

Dave Sutton
North Lanarkshire Council and on behalf of Heads of Planning Scotland
17 September 2010
1. The RTPI is the UK body chartered to represent the planning profession and offers these comments from the point of view of a diverse and politically-neutral professional body committed to supporting devolved government in Scotland. The Institute has approximately 2,100 members in Scotland, working across all sectors of central government, local government, government agencies, the voluntary sector, private consultancy, the development industry and education.

2. Since devolution, the Institute has empowered its RTPI in Scotland Office, together with its Scottish Executive Committee, with the responsibility for working with government and public bodies generally for the improvement of the planning system in Scotland. This is in accordance with its charter obligation to work for the public interest.

3. The Institute participates in the work of the Built Environment Forum Scotland (BEFS) and subscribed to the views contained in the BEFS letter of 19 August 2009 commenting to the Policy Team within Historic Scotland on the then draft Bill.

4. The Institute notes that the Historic Environment Advisory Council for Scotland (HEACS) suggested that there should be a major review of heritage legislation in Scotland. Clearly this Bill is not that but, within the limitations set by Government, the Institute offers the comments below. Paragraph numbers refer to the sections of the draft Bill.

Amendment of the Historic Buildings and Ancient Monuments Act 1953

Recovery of grants for repair, maintenance and upkeep of certain property

5. Such a provision seems sensible.

Modifications of the Ancient Monuments and Archaeological Areas Act 1979

Control of works affecting scheduled monuments

6. It is appropriate to introduce a similar provision to that for listed buildings, to be used only where it is in the best interests of the scheduled monument.

Offences under sections 2, 28 and 42: modification of defences

7. Wider education, and access to information about the significance and extent, as well as the conservation management regime, of a scheduled monument, is to be encouraged.
Fines: increases and duty of court in determining amount
8. Increases will bring a level of consistency with other ‘environmental crimes’.

Powers of entry to inspect condition of scheduled monument
9. Such formal access is an essential part of the statutory planning regime, albeit rarely required.

Works affecting scheduled monuments: enforcement
10. Stop notice provision is a welcome introduction consistent with the general planning regime.

Control and management of monuments and land under guardianship
11. It is hoped that any such provision of facilities will be the subject of consultation and within an overall conservation management plan for the property.

Provision of facilities, etc. at ancient monuments
12. See paragraph 11.

Financial support for preservation etc. of monuments
13. Agreed.

Power of entry on land where monument at risk
14. Agreed

Inventories of gardens and designed landscapes and of battlefields
15. The settings of gardens, designed landscapes, and battlefields on the inventories should also be the subjects of consultation.

Development and understanding of matters of historic, etc. interest: grants and loans
16. Agreed

Regulations and orders under the 1979 Act
17. No comment.

Meaning of “monument” in the 1979 Act
18. We agree with this greater flexibility. We would also like such flexibility to be introduced into listed building legislation where, for example, listing should be extended to appropriate historic road or footpath surfaces which are currently largely unprotected.

Scheduled monument consent applications: regulations and refusal to entertain
19. Proposals consistent with the planning regime.
Refusal to entertain certain applications for scheduled monument consent
20. Proposals consistent with the planning regime.

Application for scheduled monument consent: inquiries and hearings
21. Proposals consistent with the planning regime.

Modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Certificate that building not intended to be listed
22. The full cost of this assessment should be charged. Review of listing should be carried out ideally on a 5-yearly cycle (more realistically perhaps a 10-year one) so that local development plans (and indeed development management staff and developers) have current information: this would then be a similar cycle to the local development planning regime. Improved information, including on the qualitative aspects of more modern buildings, could also be anticipated.

Offences in relation to unauthorised works and listed building consent: increase in fines
23. Consistent with other ‘environmental crimes’, see above.

Declining to determine applications for listed building consent
24. Proposals consistent with the planning regime.

Hearings in connection with applications for listed building consent and appeals
25. Proposals consistent with the planning regime.

Enforcement notice: requirement to cease works
26. Proposals consistent with the planning regime.

Stop notices and temporary stop notices
27. Proposals consistent with the planning regime.

Non-compliance with listed building enforcement notice: fixed penalty notice
28. Proposals broadly consistent with the planning regime.

Liability of owner and successors for expenses of urgent works
29. While improved powers of recovery are welcome, a central government bridging loan or grant provision for planning authorities would be also be beneficial.

Recovery of grants for preservation etc. of listed buildings and conservation areas
30. No comment.
Crown application
31. No comment.

Regulations in connection with inquiries
32. Proposals consistent with the planning regime.

Regulations and orders under the 1997 Act
33. Proposals consistent with the planning regime.

Interpretation, ancillary provision, short title and commencement
34. No comments on paragraphs 30-32.

How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?
35. These are helpful. The general thrust of changes could be said to bring the legislation more into line with planning legislation, and this is welcomed, with the caveat that the Institute is very concerned about the resources available, presently and in the future, for planning (including the historic environment), and will be responding accordingly to Scottish Government’s current consultation *Resourcing a High Quality Planning System*.

Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?
36. It is worth reiterating that the Institute participates in the work of BEFS and subscribed to the views contained in the BEFS letter of 19 August 2009 commenting to the Policy Team within Historic Scotland on the then draft bill.

Veronica Burbidge
National Director
20 August 2010
Historic Environment (Amendment) (Scotland) Bill:
Stage 1

10:00

The Convener: Item 2 is the committee’s continued consideration of the Historic Environment (Amendment) (Scotland) Bill. I am pleased to welcome Dave Sutton, who is representing Heads of Planning Scotland; Charles Strang, who is the Scottish planning policy officer with the Royal Town Planning Institute in Scotland; and Stuart Eydmann, who is a member of the RTPI. I thank them for attending the committee and for their written submissions in advance of the meeting.

The committee will put a number of questions to the witnesses. I will start.

How easy is it to access reliable and accurate information about the condition of historic buildings, scheduled monuments and listed buildings? Are the witnesses confident that it is easy to access that information and that, when they access it, it is up to date and accurate?

Dave Sutton (Heads of Planning Scotland):
The pastmap website is excellent for accessing information on listed buildings in that we can find the list description of the building and search for it by parish and area. It is good for finding out whether a building is listed. I understand that Historic Scotland is moving to do the same with scheduled monuments but is not quite there yet. The work on the historic environment record is at a much earlier stage because, although it is mentioned in the Scottish Planning Policy, I am not sure that we are all aligned with the European regulations. Heads of Planning Scotland is liaising with the Royal Commission on the Ancient and Historic Monuments of Scotland and Historical Scotland. In time, that will all come together.

The basic information on the listing of a building is less of an issue, but the picture on the condition of the building is much more mixed. My authority was surveyed early for the buildings at risk register. When that survey was carried out, all categories of listed building were included but, subsequently, Historic Scotland has surveyed only category A buildings for the register. I am not convinced that that provides a robust enough picture. There is more work to be done to get an up-to-date record.

In England, there is the heritage at risk survey, an electronic survey that English Heritage carried out. The agency got an 81 per cent response from local authorities, but that survey enabled it to have
a big picture of not only the category A buildings but all categories of building.

There is scope for the RTPI, the Institute of Historic Building Conservation and local authorities to work with Historic Scotland to get a better annual update. The most recent report from Scotland’s historic environment audit was in 2007 and we have just had the draft data for 2010. What about 2008 and 2009? The SHEA report should be an annual publication.

Stuart Eydmann (Royal Town Planning Institute in Scotland): We agree that access to information on individual buildings and individual cases in Scotland is good and getting better. There may be a deficit in the general picture of the built environment in Scotland as a whole—precisely how many buildings are at risk, how many historic buildings there are and where they are. In the higher-level information, we sometimes struggle to get a good snapshot of the state of the country’s historic environment, but the information on individual cases is good.

The Convener: Does the legislation need to be amended to allow that information to be collected annually or could the matter be more easily addressed through guidance? Could it even be something that the minister could address by directing Historic Scotland to undertake that work? It would be helpful to know your opinion on the most effective way in which that could be done.

Dave Sutton: There would not necessarily be any benefit from legislation on that. Elected members could just expect Historic Scotland to produce an annual statement. I put a link in my report to the Scottish Environment LINK that sets out a page and a half of suggested performance initiatives. We still do not have clarity from Historic Scotland on how our councils are to be assessed on their performance on the historic environment. We do not know how many times urgent works and repair notices are being served, yet every quarter we get a freedom of information request from a private sector solicitor asking us for that information. It would be much better for Historic Scotland to be proactive, and to collect that information and publish it, so that everyone can see it and we can compare how different authorities are doing. Instead, one private firm pursues it, and we have to spend our time dealing with freedom of information requests.

When we are considering the legislation on enforcement, the question to ask is whether it is being used. To put it another way, are we sharpening a knife and then putting it back in the cupboard, where it is not being used? We welcome the general thrust and direction of the bill but, at the end of the day, is the legislation being effective? There are concerns about the deterioration of the historic environment and whether it is being effectively monitored.

The Convener: Do you believe that that monitoring role should sit firmly with Historic Scotland?

Dave Sutton: Yes.

Kenneth Gibson (Cunninghame North) (SNP): In its submission, the Royal Town Planning Institute in Scotland called for an extension of listing definitions to include “historic road or footpath surfaces which are currently largely unprotected.”

However, the Scottish Rural Property and Business Association believes that any expansion of the definition of “monument” would make it too wide and too vague. Will the RTPI expand on its suggestion that monument listings should be extended to cover historic road or footpath surfaces?

Charles Strang (Royal Town Planning Institute in Scotland): Just to clarify, the reference is to the listing of buildings not the scheduling of monuments. We understand that there is a lacuna in the legislation that means that the surface treatment in the Square in Kelso, for example, cannot be listed. There appears to be case history in which proposals for listing have been knocked back by what were described as “Scottish Office lawyers”, who took the view that it was not covered by the legislation. We think that there is perhaps an opportunity to correct that in the small number of circumstances in which it would be appropriate. The aim is primarily to safeguard features of local interest. I cannot see that it would be of any major financial consequence, but it might prevent local authorities or owners of private roads from removing something that has been there for many years and is of historic interest and is—dare I say it?—important to the quality of place. We are simply suggesting that that be considered.

Kenneth Gibson: The SRPBA disagrees. Section 14 of the bill refers to “any site ... comprising any thing, or group of things, that evidences previous human activity”.

Surely that is pretty wide ranging. You are talking about a small number of circumstances, but the SRPBA disagrees because it seems almost like a catch-all. The Law Society of Scotland thinks that it might be more appropriate to allow ministers to act when they hold a reasonable belief that the site is likely to comprise any thing or group of things that evidences previous human activity. That narrows it down to the focus that you were talking about a couple of minutes ago, Mr Strang.

Charles Strang: I am afraid that we are getting confused with the scheduling of ancient
monuments and the suggestion that the range of possibilities for scheduling be expanded. I am talking about listed buildings and a completely different piece of legislation; the possibility of listing has nothing to do with the rather more esoteric possibilities that the Scottish ministers would have in scheduling ancient monuments. I hope that I am right in that, but I look for support from those to my right and left.

Kenneth Gibson: The point has been brought to our attention by previous witnesses. They have concerns about the expansion of the definition of “monument”. That is the issue that we are talking about.

Stuart Eydmann: I want to reinforce what Charles Strang said. What is being proposed in the RTPI’s submission is the expansion of the definition or scope of listed buildings. It refers to surfaces of an historic nature, which—off the top of my head—could be the rather unusual but not unique paving that exists at the back of Charlotte Square and in parts of Falkland. It is probably 150 years old and was laid at the same time as the houses around it were built, and therefore it contributes to the setting of important buildings and the areas in which they are. We are talking about relatively small pockets of clearly historic works rather than footpaths, rights of way or footfall, as one of the witnesses previously described it. We are talking about small and discrete areas of, for example, clearly and skilfully laid pieces of paving.

Alasdair Allan (Western Isles) (SNP): We have had evidence from HOPS about situations in which owners try to evade liability by moving ownership between different paper companies. Will you comment on that and the extent to which you feel it is a major issue?

Dave Sutton: We discussed the issue, and we would suggest that there is little usage by local authorities of either urgent works notices or repair notices—the number is unlikely to be in double figures. At the very start, we should gather the information to find out whether the legislation is being used. In three years in North Lanarkshire, we have used one urgent works notice. The legislation is not hugely used, as we would normally prefer to use dangerous structures notices under the Building (Scotland) Act 2003. They tend to have a budget because they are focused on health and safety, and often it is a question of making the site secure to prevent the building from deteriorating.

On evasion by owners, when we served the urgent works notice, the first thing that the owner did was move ownership of the property to another company. Indeed, in my experience of serving urgent works notices, it is best to err on the wider side. I have found that, if there are any doubts, ownership will usually be clarified a day or two before any legal action. We served the notice on the individual owner and on both of the companies lest there be any doubt. The suggestion in the legislation that there will be a legal charge against the property is therefore to be welcomed. However, the five-year limit on the recovery of costs would be of concern. We have to take a long-term view for some sites, and I am not sure whether any costs incurred by the council in making the site safe would always be resolved in the five-year time limit that is suggested.

Alasdair Allan: Do you believe that the five-year time limit would encourage procrastination? If so, what is the solution?

Dave Sutton: We negotiate with owners to try to get them to look after the listed building; they negotiate probably to get enabling development—to knock down part of the building or whatever. The more it falls down, the better for them. We have 40 to 50 ruined buildings that we are trying to find ways of unlocking, which is difficult in the current climate with the limited grants and so on. If the council takes action to make the building safe for the local community and prevent further deterioration, it is a legal charge on the property. The liability notice expires after five years. If I am an owner three years into the period of the notice, I will wait for another couple of years because then I will get away without having to pay it.

Estimates have been done of the cost to the council of serving an urgent works or repairs notice, which might be one of the reasons why they are used so little. Should local authorities be able to get financial support from Historic Scotland for serving such notices? It is about managing the risk to local authorities. As I said, when our council looked at the matter in detail, we felt safer acting under the building standards legislation in which there are fewer defences against notices. The repairs notice has no enforcement attached other than the use of a compulsory purchase order. If a CPO is used, there is the possibility of a counter notice being served. Then there are the complications of having a back-to-back agreement with building preservation trust. It is incredibly complex. That is why there is reluctance to use either of those measures.

Elizabeth Smith (Mid Scotland and Fife) (Con): May I pursue that point further? Are you confident that the technicalities of those details are sufficiently well laid out in the bill?

Dave Sutton: The processes relating to an urgent works or repair notice are clearly laid out, but the question is whether they are effective in practice. It seems that the bill tries to shut the door
after the horse has bolted. I offer you an example. Residents ring me up to say that their neighbour is not maintaining his dovecot, which is a listed building, and they have to deal with the pigeons and deterioration of the listed wall. We cannot take any action until the building either needs urgent works or becomes dangerous.

There has been a lot of discussion about the duty of care. I think that the public expect owners of listed buildings to care for that piece of heritage, but there is no financial incentive for them to do so. Indeed, on the contrary, they might let the need for repairs accumulate to the point at which they need to do much more substantial works. Although some works might be exempt, there is currently no tax or VAT incentive for normal repairs. Although we designate the historic environment and say that we want it to be cared for, we do not have a corresponding system to help people to care for it. The local authorities’ role is as a last resort when a building gets to a serious stage of disrepair. Councils understand that but, because of the complexity of the legislation and the number of defences set out in it and in case law, they are reluctant to use it.

Elizabeth Smith: Notwithstanding your valid point about the lack of financial incentives, is there anything else that we can do to encourage people to take up their duty of care more than they do at present?

Dave Sutton: The Scottish historic environment policy from Historic Scotland contains a duty of care—I describe it as an implied duty of care. It is for politicians to consider whether that duty should be in the policies or in the legislation. If an authority is not carrying out that duty of care or using appropriate expertise, the defence mechanism is for someone to make a complaint of maladministration. We have seen that happen more in England as councils have cut back on conservation services. Councils that do not have either the appropriate expertise or the resources have sometimes cut corners. That has led to a number of successful maladministration cases.

You asked whether there are other things that we can do. Historic Scotland’s inform guides are a good-practice example of educating people in how to care for the historic environment. The number of stone buildings that I see being destroyed because people are trying to care for them but are using cement pointing or things like that is ridiculous. There needs to be an education process. For example, I understand that there is no slate training course north of Arbroath to train people in the slate industry and skills are being lost. Increasingly, when we are looking to have a listed building refurbished, we find that we need to ensure that the people who are doing the work—whether it be leadwork, stonework or work involving some other trade—know what they are on about. In the longer term, we need to plan to address that skills shortage.

Ken Macintosh (Eastwood) (Lab): How big is the problem of people damaging their buildings or letting their buildings go to wrack and ruin? I do not quite grasp how widespread that is. There is little information on how much the current powers are used against owners.

Dave Sutton: In England, the heritage at risk survey shows that, over a 10-year period, the proportion of buildings that are rated 1* and 2*—equivalent to categories A and B in Scotland—has come down from about 3.9 per cent to about 3.1 per cent. In Scotland, it is suggested that the figure is about 6 per cent, but that is based on a survey of category A listed buildings only. The short answer is that we do not know. Based on anecdotal evidence—we talked about this earlier—we suggest that there is a much higher level of deterioration of the heritage. That is why the starting point is to ensure that there is a proper annual survey that gives us a bit more confidence about the state of that heritage. For example, the 2010 data that Historic Scotland has just issued refer to a net gain in listed buildings. I have asked Historic Scotland how many listed buildings were demolished last year, but I have not received an answer. If we do not monitor what is being lost as well as what is being added, we will not know how much we are losing.

Many of the good listed buildings are fairly obviously listed. There is much discussion of whether people should be able to acquire immunity from listing. A much better alternative would be to ensure that Historic Scotland has reviewed every area within the past 10 or 12 years, because then we would have an up-to-date list in a preventive sense rather than a firefighting sense. There is concern that Historic Scotland’s listing focuses too much on individual requests and not enough on either thematic reviews or overall area reviews.

Ken Macintosh: We will come back to the issue of immunity from listing. You make a good point about the need to collect information. Can you confirm that you do not want that to be a duty in legislation and that you see it just as good practice?

Dave Sutton: Yes.

Ken Macintosh: All of you are members of the Built Environment Forum Scotland, which has suggested that the scope of the bill could be extended much further and that a duty could be placed on public bodies, especially local authorities, to take account of the built environment. Do you think that such a duty is needed?
Stuart Eydmann: We have not seen a mechanism for how that could work. In theory, it is wonderful. As has been mentioned, there is already an implied duty in national policy. It is not clear to the RTPI how that could be implemented and enforced in a legislative sense, but we welcome anything that would reinforce the responsibility of property owners.

Dave Sutton: The SHEP includes what I describe as an implied duty of care, but I do not know whether that has been carried through into Improvement Service guidance on asset management plans. I wrote to the service a year and a bit ago, when it was consulting on asset management plans, which relate to councils' property services departments. Why does the guidance that the service issues not address heritage issues? Our more recent discussions with national health service bodies have indicated that the NHS property sector may be starting to receive some guidance, because those bodies are talking about the need for management plans for all their properties that will address the situation of the historic environment. It is about starting to build the objectives of the SHEP into the good-practice guidance, and making sure that that is linked to easily monitored data on the heritage environment and performance under the legislation.

Ken Macintosh: Would placing a duty in statute be helpful in that regard?

Dave Sutton: Heads of Planning Scotland supports the bill because it does not go that extra step into the legislation. Some councils probably run a negligible historic environment service and, in my view, they put themselves at risk of maladministration cases. I do not know that the bill adds anything. I would rather have something that is practical and working than legislation.

On the two requests from the Built Environment Forum, such a duty is built into the existing Scottish historic environment policy.

Ken Macintosh: Historic Scotland says that it wants a partnership approach. That is your view too.

The Built Environment Forum called for the bill to ensure that local authorities have access and give special regard to appropriate information and expert advice. Your submission has highlighted your concern about the lack of staff with relevant skills.

Dave Sutton: There might be some councils now that do not have those skills in-house, and that is of concern.

Ken Macintosh: Would you therefore welcome it if the bill imposed a duty on local authorities to ensure that they have access to those skills?

Dave Sutton: There is a requirement on councils to take expert advice, but the question is about what happens when they do not take that advice. I do not know that legislation would make a huge difference. It would be an unnecessary burden on local authorities. One of our concerns was that, when Arup did a detailed staffing survey of local authorities, that took around 18 months to surface publicly, by which time it was largely out of date. It is not rocket science to monitor the numbers who are employed in local authorities. Part of the staffing survey illustrated some of the complexities of defining the built heritage staff, especially if planners or people without dedicated skills and knowledge are being used. When councils have trained officers, it is very easy to define the staff. The emphasis should be more on gathering information, so that we can have an informed debate, rather than on legislation. I do not know what legislation would add.

Ken Macintosh: Your points are well made, and I do not think that anyone around this table or any of the witnesses who have given evidence on the bill would disagree with what you are saying. The difficulty for the committee is that we are trying to work out what should go into statute and what should not.

Our concern is that you are talking about good intentions and good practice in some cases, but poor practice in others. It is a common argument that if something is put into statute, it is given extra force or weight and local and other authorities pay particular attention to it. The RTPI's submission raises a concern about the lack of available resources. At a time of financial constraint, local authorities and others will retreat from everything other than their statutory duties. Are you not therefore tempted to put more statutory duties in the legislation?

Charles Strang: It would be a naive local authority that considered only its statutory responsibilities and cut to that point. We certainly view the planning service as being rather more complicated than that. It is certainly true that there is an important consultation out at the moment to which we intend to respond. Our response will be informed by hard information, and there does not seem to be a great deal of that around at the moment, which is unfortunate, as has been explained. Hard and current information is an essential part of any sound planning process. We are not in an ideal position, but no doubt those points will be made in response to the consultation.

10:30

Stuart Eydmann: The consultation that Charles Strang refers to is “Resourcing a High Quality
Planning System”, which comes from your house to us as consultees.

It is worth mentioning that specialist staff working in the historic environment are not solely concerned with day-to-day control matters, which much of the bill is concerned with; the presence of specialist staff has a substantial educational aspect and a community liaison aspect. Having specialist staff means that the local authority can act as a one-stop-shop on historic environment matters for people who may not be able to take the time and effort to contact Historic Scotland at a national level. Specialist staff and services have been embedded in the planning system since the 1970s. They are not a relatively new development; they could be vulnerable, but they have a much wider role than only the day-to-day control aspects that we have talked about.

Charles Strang: For the avoidance of doubt, we would see that as being very relevant to the ongoing round of development plans—both strategic development plans and, in particular, local development plans, because understanding of the historic environment and the physical environment is tremendously important in terms of place and all the other things that the wider community perhaps thinks of as key aspects of planning.

Ken Macintosh: I have another question about listing, but perhaps I should ask it later.

The Convener: I clarify, for the record, that the consultation on resources for planning is being undertaken by the Scottish Government, not the Scottish Parliament or the Education, Lifelong Learning and Culture Committee.

I also point out that someone clearly has a mobile device switched on, because it is interfering with the sound system. Can we all ensure that our mobile devices are off and not just in silent? [Interruption.] I do not disbelieve you, deputy convener. The mobile device is much more likely to be in the vicinity of Mr Macintosh, as it was his microphone that was being interfered with.

Christina McKelvie (Central Scotland) (SNP): Good morning. I will move on to certificates of immunity from listing, which Ken Macintosh mentioned earlier. Some organisations have expressed quite strong concerns. I ask Mr Sutton to give us a wee bit insight into how HOPS feels about the issue. It has been suggested that the process could “be used by hostile third parties to delay or derail a proposal without a developer being aware of the request for a certificate”.

Dave Sutton: I do not think that the proposed certificate of immunity is a big issue. All those worries were expressed when the certificate of immunity was introduced in England, and they have withered away because there has been very little use of such certificates. It is more important to look at their role if there is a development application and the building is not already listed. I would rather that the emphasis was on Historic Scotland doing an area listing review within a 10 or 12-year period, because that is being proactive in identifying the heritage that is worthy of being protected in a more general sense, rather than firefighting in an individual case.

If there is a development application and the building is not already listed—and we have had some applications in relation to health authority buildings, for example, that were identified in the Historic Scotland thematic review and that one might, therefore, have considered to be worthy of listing—the problem is that Historic Scotland goes into a state of suspended animation, because if there is a current planning application or, indeed, a building regulation application to demolish a building, it cannot say anything. We want local authorities to make decisions early on about what is worthy of protection. Let us know whether something is or is not worthy of protection, then that can be considered through the planning process. That helps developers. It has been suggested that third parties should not be able to apply for a certificate of immunity. In my view, if something is important, it is better to have that assessed as early as possible in the process, so that we know what it is important to try to preserve, protect or enhance.

There are also people—although there are fewer of them in Scotland—who wilfully ignore the planning regulations. If they get a sniff of the fact that listing is being considered, the wall in question will be flattened by the end of the weekend; authorities do not work over the weekend, so the wall will just disappear. There is a need for protection while listing is being considered. The bill does not provide explicitly for stop notices or protection notices over a two to four-week period.

It is in everyone’s interest to have early, quick assessment. Stuart Eydmann may want to caution the committee about how the process might be abused.

Stuart Eydmann: I am not sure that I have any concerns. Certain parts of our legal fraternity might see the issue as another thing to build into the home report or the preparatory information for which people are required to pay before they buy or sell property, but that is not really an issue for the Royal Town Planning Institute. I emphasise that it should be open to all, rather than a limited number of people, to apply for certificates. If a building is worthy of protection, that information should be available to everyone, not just to a limited number of people. It should be in the public domain.
Christina McKelvie: My memory is telling me about an historic wall that was knocked down in the very circumstances that you describe. Is that the type of situation in which a stop notice should be issued?

Dave Sutton: That is why legislation needs to make it explicit that if there is to be an emergency review, the presumption is that no works will be undertaken during consideration of a site’s importance, and that if someone undertakes preemptive works, they will be legally liable. My preference is for regular area reviews; Historic Scotland can advise on whether such reviews should take place on a 10 or 12-year basis. Again, that is preventive action. Educating and working with owners on what is important and is to be looked after will avoid the need for urgent works, enabling development and so on.

Christina McKelvie: It is a worry that we may have lost to the demolishers some things that would have been valuable.

Dave Sutton: That emphasises the need for comprehensive and thorough reviews. One difficulty for us in authorities is that when Historic Scotland lists a building, it does not state a curtilage. In e-planning, we are moving to digital mapping, which involves polygon data rather than point data. Our authority will include best-guess polygons in the planning process, because listed building curtilage is defined by case law not legislation. There are five tests, although Historic Scotland persists in suggesting that there are four, without telling us on what basis it does so. My preference is to stick to the five tests that are set by case law.

In 90 per cent of instances, it is obvious what the curtilage is, but assessing the curtilage for some larger estates and more complex sites is quite complex, particularly if there have been changes of ownership over time. Even if something is defined as a listed building, there are still issues for us to discuss with Historic Scotland. Historic Scotland suggests that modern listed buildings—post-1948 buildings—have no curtilage, which I find incredibly strange. It has in one case changed its view, and we are still in discussion with it, but it seems to me that buildings that are listed as modern architectural gems must have a curtilage or boundary. Clarifying technical issues of that sort would be more helpful than worrying unduly about other points.

If a building is listed but people do not see it as worthy of listing, or if it is unlisted but people consider it worthy of listing, it is right and proper that there should be a review procedure, provided that the status quo is maintained during the short period of the review.

Christina McKelvie: That is heard loud and clear.

Why does the Royal Town Planning Institute believe that applications for a certificate against listing should be subject to a charge?

Charles Strang: That is not because we are necessarily pro-charging. In fact, I am reliably informed that the institute has been opposed in principle to the introduction of fees for planning applications. In this case, we believe that a charge should be made because of the extent of the time and effort that might be required by Historic Scotland’s listing folk and the need to backfill that in a meaningful way. Charging a reasonable fee that represents the cost of carrying out the work would also mean that only serious requests rather than vexatious ones arose. However, that point is not to be understood as meaning that we believe in charging a fee for everything, as that is not the case.

Christina McKelvie: Finally, I want to explore a bit further Mr Sutton’s earlier point about having a review of listing every five or 10 years. What are your views on that and how would it work?

Dave Sutton: That goes back a year and a half or so, to a meeting we attended with Historic Scotland, when my understanding was that it was spending about 60 per cent of its time on individual requests for listing. In my view, that is disproportionate. I understand that Historic Scotland had a case in Edinburgh in which there was a freedom of information request and accusations of collusion with the local authority. In my view, listing needs to be a clear and professional judgment that is based on stated criteria.

I moved up to Scotland a number of years ago, and I find that the listing process here is, shall we say, more political, rather than being an objective assessment. It is important to have clear and objective criteria on the purpose of listing. I would rather put the emphasis on properly managed area reviews. Our area has been reviewed in parts, but some reviews are 15 years old and some are four or five years old. Once the work has been done thoroughly, a requirement for periodic review should mean a lot less work every 10 years or so.

Christina McKelvie: Does the Royal Town Planning Institute have a view on timescales?

Charles Strang: I was tempted to pull Dave Sutton up there, because we are in a place where describing something as “political” might not necessarily be taken to be a bad thing. However, what he says makes sense. There is no point in working towards a five-yearly review of local development plans if we are working with 15 or 20-year-old data on the quality of historic...
buildings. There is no firm statement in relation to historic buildings; it rolls forward. The rough rule of thumb in Scotland is that a building can be considered for listed status either after it is 30 years old or after the architect is dead. Obviously, if a list for an area is 20 or 25 years old, it will miss a significant number of buildings.

Some authorities will be able to deal with that and to identify some of the important buildings, but other authorities will not. If the job is worth doing, it is worth doing properly. We have the skills; we just need to put in the manpower and effort to give us the raw data to make sensible plans.

The Convener: Mr Macintosh, has your question on listing been covered?

Ken Macintosh: No. It was for Heads of Planning Scotland. Its written submission makes a point about ecclesiastical exemptions—the concern is about churches and other places of worship.

10:45

Dave Sutton: Ecclesiastical buildings that are in use are exempt from the planning system. They might or might not need listed building consent for external works, but they do not for interior works. For example, a resident wrote to complain about pews being removed—albeit from a modern church, but one in which they were part and parcel of the character. We wrote to the Church of Scotland, but did not even get the courtesy of a reply or acknowledgement. The resident then made a freedom of information request to the council, so we said, “Here’s all the information—we’ve done what we can.”

If we delegate the decision on protecting heritage to the ecclesiastical bodies, we need to ask whether they have in place appropriate systems to ensure that they take appropriate heritage conservation advice when they carry out any works. My experience suggests that adequate protections do not appear to be in place. The ecclesiastical exemption adds to the complexity of the planning system, and we need to ask whether there is a clear and obvious benefit from it.

At present the situation is more complex, because there are questions around whether a church is in use, and whether that means the whole church—perhaps the main church is in use but the church hall is not. In the end, it is only about the exterior; some churches are listed because of their fine interiors, but there is no control of that whatever.

Charles Strang: My understanding is that the reason for having an ecclesiastical exemption in the first place is more to do with the role of the church and state in England, and the fact that the monarch is the head of the church; for some reason, that means we enjoy the imposition of the ecclesiastical exemption in Scotland. I do not really understand that, and over the years people have suggested that it is not appropriate.

As with any building, concerns are expressed about how changes occur—how pews or stained glass are removed, for example. The listed building legislation is about managing change, rather than preventing things from happening. Informing change and involving the views of the community seem to be sensible objectives, and I suggest that the ecclesiastical exemption is in truth an anachronism.

Ken Macintosh: Is the exemption in legislation or in guidance?

Charles Strang: I think it is legislative.

Dave Sutton: I think it is legislative.

Ken Macintosh: The Heads of Planning Scotland submission states that bringing places of worship into the listed building system "would closely fit the modernising planning agenda by simplifying the exceptions."

Are there exemptions or exceptions other than just for churches that are in use?

Charles Strang: I am aware of Crown exemption.

Dave Sutton: That is a complex one. In England, Crown exemption is now being removed from the listed building legislation, but I will pass on the question because we have not had to deal with any Crown buildings in Scotland. I understand that the intention in England is to move in that direction, but Crown exemption is currently the other main exemption.

You asked earlier about ground surfacing. There was a legal case some years ago that means that we would avoid giving a direct answer on whether a change of surface materials needs listed building consent. It affects the character, but that legal case suggested that it would not in itself require a listed building application.

The rule of thumb with listed building applications is whether the proposed change will affect the historic character in any manner. The custom and practice among people who work in the field means that they are quite easily able to interpret how that rule should be applied in what I would regard as a common sense and practical way.

Crown and ecclesiastical buildings, being exempt, are at the edges of the definition of what requires listed building consent, and so are conservation areas. The Shimizu case, which defined what constitutes a minor change, has had
a major adverse impact on conservation areas. In designing a conservation area, the council is expected by you—and the public—to protect it. We do a character assessment and produce a management plan—hopefully within a five to 10-year period—but there is no protection in relation to minor changes.

In some conservation areas, we have a big issue with uPVC windows. We have an article 4 direction and, technically, the change of windows requires permission, but people have not got it. We do not want people to have to redo the windows immediately, but we could do it over 15 years, because uPVC windows are not expected to last longer than that before they have to be replaced. If we take a more sensitive approach, does that take us beyond the five-year or four-year limit for enforcement action? Those are some of the day-to-day issues with which we have to wrestle.

Ken Macintosh: You mentioned the Shimizu case.

Dave Sutton: It was a legal case in London that hinged on the definitions of alterations and what constitutes a minor alteration. In effect, it defined alterations as being substantial—for example, if someone was changing something like 80 per cent of the building.

It used to be that, in conservation areas, if someone took out a window that was set back 4in and then set it flush with the outside, which would have a major effect on the building’s character and appearance, the change would be picked up on the basis that it affected the character in any manner. The Shimizu case changed the definition of alterations in conservation areas, so that there is a great deal less protection in relation to minor works in conservation areas.

Historic Scotland’s standard answer would be, “Well, you can use an article 4 direction”, but that is administratively complex and therefore quite resource intensive. Clearer national guidance is needed on which changes require consent in conservation areas, because it is very often not the big changes, such as the demolition of a wall or a property, but the minor changes to windows, doors and chimneys and the modern accoutrements of life, such as satellite dishes, that mean that, before you know it, the character of a conservation area is gone.

The Convener: That concludes our questions to you today; I thank you for your attendance.

I suspend the committee to allow our witnesses to leave and the next set of witnesses to join us.

10:52

Meeting suspended.
LETTER FROM THE MINISTER FOR CULTURE AND EXTERNAL AFFAIRS, DATED 28 SEPTEMBER 2010

1. As this Historic Environment (Amendment) (Scotland) Bill has many technical aspects I thought it would be helpful ahead of my appearance tomorrow to provide clarification on some of the issues raised in the Stage 1 evidence session.

2. I hope this is helpful background and reference information to assist the committee in completing its stage 1 report.

Section 1: Recovery of Grants (amends s4A of the 1953 Act)

3. Some earlier evidence to the Committee suggested that powers to recover grant under the Historic Building Repair (HBR) grants scheme, were new. While it has since been clarified that the powers of recovery are already contained in the 1953 Act, a few other points have been made where it may be helpful to offer clarification.

Access requirements on grant recipients
4. One witness might have been understood to say that the requirement on grant recipients is always for full public access.

5. As the guidance notes provided to applicants - and published on the Historic Scotland website - explain, the level of access required is in fact determined case by case and depends on the circumstances of the case and the size of the grant. Public access is normally required, but may be waived in some cases: most commonly, because a building is in domestic use. In some cases, no internal access is required. Where appropriate, access may be purely by appointment only. Historic Scotland would not insist in a level of access which itself demanded further works or other expenditure (eg for fire safety or disability access) on the part of the grantee. The Historic Scotland website lists all those grant cases where access is part of the agreement and sets out the terms for that access in each case.

Need for a review of grant conditions
6. Some witnesses suggested that the grant conditions were in need of review, in terms of transparency and simplicity. While the Scottish Government is always open to specific suggestions for practical improvements to its grant schemes, it may be helpful to clarify that the HBR grant scheme was fully reviewed in 2004-05, including a formal public consultation. Following that, the scheme was extensively modernised and detail about all aspects of the scheme, including all the documentation for applicants, is on the HS website.
Section 11: Inventory of gardens and designed landscapes and battlefields (new provision)

Requirements on owners
7. It may be helpful to reinforce the point that inclusion on the current inventory of gardens and designed landscapes places no additional requirements on owners to seek consent for works. One witness raised the issue of bulb planting, for example: we cannot easily imagine a context in which this would be affected. Only where an owner, or other person, wishes to undertake works which would anyway require planning permission does inclusion on the inventory become relevant. At that point, the local authority is required to consult Historic Scotland. The impact on the site and its setting would be a “material consideration” in determining planning application.

8. The movement of the Inventory onto a statutory footing, proposed in the Bill, does not change this.

Impact of new battlefields inventory
9. Some witnesses have expressed concern that this new inventory will include large areas where the link to a past battle is unclear. The Scottish Historic Environment Policy (SHEP, published July 2009) sets out that “To be included in the inventory a site must be of national importance and be capable of definition on a modern map. Where nationally important sites cannot be adequately mapped, they will not be included on the Inventory” (para 2.70). Annex 5 of the SHEP sets out in greater detail the criteria by which sites will be considered for the Inventory.

10. Witnesses also expressed concern that the inclusion of an area on the battlefield inventory could interfere with normal land management practices. Exactly as for gardens, the intention is that inclusion on the inventory will only become relevant where works are being contemplated which would anyway require planning permission. This will require a change to the consultation requirements under subordinate legislation dealing with planning procedures.

Section 14: Meaning of monument (amends section 61 of the 1979 Act)

Scope for new monuments
11. One witness suggested that the addition of “any site … that evidences previous human occupation” could take in a wide variety of sites evidencing recent activity, including the residue of any event of “national interest” and gave 2 examples [signs of previous activity at Bellahouston Park after papal visit; hypothetically, the spot in a field where a royal marriage proposal takes place].
12. Section 1(3) of the 1979 Act sets out that only sites which are of “national importance” may be scheduled (there is no “national interest” test). The criteria Ministers - in practice Historic Scotland - use to determine what is of national importance are set out in the SHEP, at Annex 1 and were subject to public consultation in 2006. The underlying theme of the criteria is how the monument contributes to the understanding or appreciation of the past. Against that background, neither of the specific examples suggested would be contemplated for scheduling, even with the proposed change in the law.

Limits on agricultural practice
13. A particular concern was expressed that the scheduling of a site could interfere with the established agricultural practice on that land, specifically ploughing. This would not happen. Under section 3 of the 1979 Act, Ministers may make a “class consents order”, which specifically exempts certain practices from requiring scheduled monument consent. The Order currently in place dates from 1996, and excludes from the consent regime agricultural, horticultural and forestry works, provided these are of the same kind as works previously executed lawfully in the same place any time in the previous 6 years (or 10 years in the case of ploughed land). The exemptions are qualified: in the case of ploughed land any works must not be likely to disturb the soil more deeply than previously executed lawful ploughing.

Section 25: Liability of owners and successors for urgent works (amends s50 of the 1997 Act)

5 year limit
14. Several witnesses have suggested that the notice of liability - the mechanism by which the cost of urgent works can be placed against the building rather than the original owner - should be open-ended. For the avoidance of doubt, the notice of liability is potentially indefinite, provided that it is renewed by the local authority every 5 years: section 50C of the Bill (“Notices of Renewal”) deals specifically with the process by which the notice may be renewed and there is no limit on the number of times this may be done. The provision follows the model in the Tenements (Scotland) Act 2004. An authority will need to keep track of when notices are due for renewal, as they must be renewed before expiry, and will have to bear whatever administrative costs this process requires.

Point of intervention
15. Some evidence to the Committee suggested that urgent works powers are only usable once a building is in an advanced state of deterioration and therefore add little to powers under other legislation, such as building control.
16. Section 49 of the 1997 Act simply enables local authorities to undertake any works they believe are urgently necessary for the preservation of the building and not limited to the point where extensive problems emerge. For example, we understand they have been successfully used to allow authorities to undertake relatively minor works - such as the removal of plants from guttering etc - before a building becomes seriously damaged by water ingress. Such works can be a very effective means of preventing serious damage occurring in the first place. At that early stage, other powers, such as those in building control, would not necessarily be available.

Interim protection (not included in the Bill, but raised by some witnesses as a potential area the Bill could address)

17. One witness was concerned that there was no protection for a building while it is being considered for designation. It may be worth highlighting that section 3 of the 1997 Act already allows local authorities to issue a building preservation notice against any unlisted building they believe is at threat. Section 3(1) states:

**Temporary listing: building preservation notices**

(1) If it appears to a planning authority that a building in their district which is not a listed building—
(a) is of special architectural or historic interest, and
(b) is in danger of demolition or of alteration in such a way as to affect its character as a building of such interest,
they may serve on the owner, lessee and occupier of the building a notice (in this Act referred to as a “building preservation notice”).

18. When the issue of extending the availability of interim protection was raised in the consultation on the draft Bill, further evidence of the need was sought from the body which raised it. It was only able to come up with one named relevant case, some years ago, in England. It was not clear how it was envisaged that a more universal form of interim protection would work without having a significant practical impact on a large number of properties, in particular during area-based or thematic surveys, during which a wide range of buildings may be given some consideration.

Ecclesiastical exemption (not included in the Bill, but raised by some witnesses as a potential area the Bill could address)

19. Witnesses on 22 September were unsure about the origins of the ecclesiastical exemption and its basis in law. It may be helpful to clarify that ecclesiastical buildings are exempt from requiring to seek listed building consent under section 54 of the 1997 Act, though the origins of this exemption lie in UK legislation from 1913. That said, the independence of the Church of Scotland from the state, enshrined in the Church of Scotland Act 1921, is also potentially relevant here.
The exemption applies to any ecclesiastical building which is for the time being used for ecclesiastical purposes and applies to all faith groups. The exemption does not apply to a building used wholly or mainly as a residence for a minister of religion.

20. One witness suggested the exemption only applies to interiors. The exemption in law applies to the whole of the building. There is however a voluntary scheme in place under which those denominations which have signed-up to the scheme agree to seek consent for proposed changes to the exteriors of churches in their ownership, as if the normal listed building consent regime applied.

21. We would expect that any change to the current exemption would be regarded as a very significant change by ecclesiastical bodies, and would also have significant resource implications for local authorities and owners.

Listing of pavements (not included in the Bill, but raised by one witness as a potential area the Bill could address)

22. One witness suggested there was a live issue with the ability to list pavements. The case of Kelso, to which the witness from the RTPI referred, appears to have been current sometime before 1993. Historic Scotland officials are not aware of this issue having been raised more recently. Officials would be happy to discuss this issue further with the RTPI.

Frequency of data collection (not included in the Bill, but raised as a potential area the Bill could address)

23. The witness from the Heads of Planning regretted that the Historic Environment Audit is not an annual exercise and the Committee sought clarification as to whether there was any case for putting a requirement on the government for annual data collection.

24. It may be helpful as background to explain that the Audit was established by the previous administration in response to a report by then Historic Environment Advisory Council for Scotland. It was developed in partnership with a Steering Group including a number of key stakeholders, including the Heads of Planning. The range of data to be collected and the frequency of collection were agreed with the Steering Group.

25. The Group strongly agreed that a three-yearly cycle of collection offered the best value for money for the public purse. The Group agreed that the value in this data was in identifying trends, and felt that the speed of change in this area meant that year-on-year collection was likely to reveal relatively little in terms of trends and not justify its cost of collection. The Group took into account that publication on this cycle would make it easier to draw on a variety of existing data collection exercise and limit the amount of new data whose collection was required
specifically for the Audit. The three year cycle has also enabled the work of managing the data gathering and collation to be easily managed in-house by Historic Scotland at minimal cost.

26. The baseline data for the Audit was published in 2007 and was very positively received. The first full audit report is due for publication next month.

Fiona Hyslop MSP
Minister for Culture and External Affairs
28 September 2010
12:06

On resuming—

Historic Environment (Amendment) (Scotland) Bill

The Convener: I reconvene the meeting. The second item on our agenda is our final evidence-taking session on the Historic Environment (Amendment) (Scotland) Bill.

I am pleased to welcome Fiona Hyslop, the Minister for Culture and External Affairs, to the committee. She is joined by Lucy Blackburn, who is the bill director; Barbara Cummins, who is deputy chief inspector at Historic Scotland; and Emma Thomson, who is the principal legal officer with the Scottish Government. I thank them for attending the committee and thank the minister for her letter in advance of the meeting, which responds to some of the evidence that we have already taken.

Minister, are you keen to make a brief statement before we start?

The Minister for Culture and External Affairs (Fiona Hyslop): Yes, if that is okay. I am pleased to be able to talk to you about the Historic Environment (Amendment) (Scotland) Bill. I will take the opportunity to comment on the overall policy aims that underpin the bill and to touch on some of the provisions in it that achieve those aims.

I stress that we should recognise the importance of our historic environment and its contribution to Scotland. It not only contributes fundamentally to our sense of place and our cultural identity but provides a wide range of employment opportunities, contributes significantly to the national economy and provides the setting for Scotland as an attractive place to invest in, visit, work and live. Only this morning, I was pleased to visit a world heritage education conference that is taking place at New Lanark.

I am keen to ensure that the regulatory authorities have the appropriate legislative tools to help them to manage our rich national asset sustainably. The Government’s aims in introducing the bill are threefold. First, we aim to improve the management and protection of our unique historic environment by addressing specific gaps and weaknesses in the current legislative framework that were identified during a year-long stakeholder engagement in 2007. Secondly, we aim to avoid introducing significant burdens or duties on local or central government, owners of assets, business or members of the public. Thirdly, in the challenging economic climate, we aim to keep the implementation costs low.

The bill will help to achieve those aims by: harmonising aspects of the listing and scheduling systems where possible; harmonising aspects of historic environment legislation with the modernisation of planning; enhancing regulatory authorities’ ability to work with developers; enabling Government to work more creatively with partners; increasing the capacity of regulatory authorities to deal with urgent threats; increasing the efficiency and effectiveness of deterrents; and clarifying the powers of the Scottish ministers to provide facilities and events at properties that are in their care. The bill is intended to make the existing system more efficient and will result in a much improved heritage protection framework in Scotland.

In response to the committee’s call for written evidence and during the recent evidence-gathering sessions, some organisations, while indicating support for the general principles of the bill, raised issues that are not addressed in it or that relate to how one or two provisions might work in practice. I hope to have the opportunity to address some of those issues during the course of the meeting, and I will touch on two of them briefly in this opening address.

Calls have been made for the bill to place a statutory duty on all public bodies to have special regard to the historic environment and for all planning authorities to have access to appropriate information and expert advice on the local historic environment in exercising their duties. Placing statutory duties on local authorities would be at odds with our new way of working with them as expressed through the Scottish Government’s concordat with the Convention of Scottish Local Authorities and the single outcome agreement process. It would also place new burdens on planning authorities in a difficult financial climate.

I am confident that there are better and more proportionate means to address the concerns that the Built Environment Forum Scotland expressed, for example by improved partnership working between Historic Scotland and local authorities, the application of sound policy guidance and the development of a robust administrative framework within which the regulatory authorities can better manage the historic environment.

I have also listened to the concerns expressed to the committee about the proposal to introduce a system of certificates of immunity from listing—in particular, the calls that have been made to amend the provision by limiting the types of individuals or organisations that would be eligible to apply for such certificates. One of the underlying aims of the bill is to harmonise historic environment legislation with the planning process where possible, and I am concerned that such an amendment would be at odds with the planning system, in which any
individual or organisation can apply for planning permission regardless of who owns the property in question. However, I am interested to hear the committee’s views on that and any specific suggestions that members might have.

I know that the committee will have a number of questions for me, but I hope that that introduction was helpful.

**The Convener**: It was, minister. I am sure that we will cover some of the points that you referred to in your opening statement.

What happened in Scone in the past couple of days showed the relevance and importance of the bill. If it seemed a little abstract to us over the past few weeks, its relevance has been brought home to us all following that awful accident.

Our attention has been drawn to the modification of defences under section 3. No longer will somebody be able to claim ignorance— that they did not know that something was an historic monument—as a defence. Will you explain why that is important? How confident are you that accurate information is available to everyone to ensure that they all know the importance of a particular part of the historic environment?

**Fiona Hyslop**: You raise an important point. I suspect that politicians and ministers might like to have the defence of ignorance at certain points, but it is an unusual defence to have and we discussed whether we should remove it completely. The original draft of the bill said that the defence of ignorance was not justifiable in any circumstance, but we received feedback that we should introduce a defence that the accused had taken “all reasonable steps” to find out whether there were any issues with scheduled monuments.

That brings us on to the second part of your question. The change is all very well, but it means that people have to have access to information to be able to take “all reasonable steps” to find out where the issues are. I notice that a number of witnesses have been complimentary about the availability of information, but the issue is how we ensure better access.

If the Parliament passes the bill, we plan to contact all owners of scheduled monuments once it is enacted to remind them that they own a scheduled monument, remind them of their responsibilities and explain what the new law means for them. That would be an initial action as a result of the bill, but there are others. Historic Scotland’s website provides access to information, but access is a recurrent theme and it is important that we ensure that information is available.

The defence of ignorance as it currently stands has rarely been used anyway, so section 3 will not result in a big change in practice. However, it makes the legislation similar to that for the marine environment and listed buildings, for which the defence of ignorance is not available.

**The Convener**: Some of the evidence that the committee has received certainly said that some good and detailed information is available. However, other organisations raised concerns. In particular, the National Trust for Scotland said:

> “Many scheduled monuments are ‘invisible’ to the untrained eye.”

Heads of Planning Scotland also raised significant concerns, and was extremely exercised about the matter in the committee last week. How do we get the balance right and ensure that it is not just the historic buildings and monuments that are obvious to us that are protected, and that people know about the ones that are not on everyone’s radar?

12:15

**Fiona Hyslop**: That is an important point. All 8,000-odd owners of scheduled monuments and sites would be directly contacted as a result of the bill. If there were any problems, they would be responsible. The information is already available, so it is a case of increasing awareness of and access to it rather than documenting it. We are working with stakeholder bodies such as the Scottish Rural Property and Business Association to help to raise awareness. We are taking steps to make people aware of existing sites, whether or not they are obvious.

**The Convener**: What role does the Government envisage for the historic environment records scheme in relation to the issue?

**Fiona Hyslop**: We will work with COSLA and BEFS, with advice from the Royal Commission on the Ancient and Historical Monuments of Scotland, to manage a short project to provide clear information on the state of local environment records in Scotland and identify priorities for future work. The report will be presented to ministers and COSLA—remember that local authorities also have a great deal of responsibility in this area—around the end of the year. We will do that to ensure that there is better scope for sharing resources and records.

Local development control is important in that area—it is not just about national systems. That is where alignment with the planning system is important. Often, the same body—the local authority—deals with both planning and monuments. Policy statements already exist on records and local authority services in relation to Scottish planning policy. Obviously, one of the central features—although, interestingly, it was not referred to much in witness statements to the committee—is the Scottish historic environment policy, which comprehensively sets out a single
statement of how we should manage not only the historic environment but records in particular. However, we are conscious that we need to improve the records and we are working with the key people to do that.

**The Convener:** On that issue, are you confident that there will be sufficient resources to allow those records to be kept up to date? Local authorities are some of your key partners in all of this, and they might find it easier not to direct resources to this area when there are currently so many other pressures on their budgets.

**Fiona Hyslop:** One of the challenges in relation to the historic environment is the sharing of experience, expertise and resources. The historic environment is a strong candidate for cross-council co-operation to identify what resources can be shared in putting together records. The bill will help to pull together, on a more national basis, the various organisations that work on the historic environment. I am keen for that theme to be developed in other areas of heritage and the historic environment. We are aware of the vulnerability of resources—it is an important issue—but, in terms of the expertise in this area, the bill provides an opportunity to save resources by sharing resources.

**Margaret Smith (Edinburgh West) (LD):** I want to ask about enforcement and stop notices. The Scottish Property Federation raised concerns about temporary stop notices and questioned whether, as such notices could be issued without an enforcement notice, there might be issues about their robustness and consistency. It argued that temporary stop notices should be accompanied by detailed guidance. How will Historic Scotland ensure that temporary stop notices are used consistently?

**Fiona Hyslop:** It is important that they are used consistently. We should recognise that the bill will align the procedure for stop notices and temporary stop notices with the planning system. On the issue of enforcement, the bill will harmonise other guidance, particularly in relation to listed buildings. We are bringing together enforcement notices and stop notices on scheduled monuments and aligning that process with the one that already exists in the listed building system. I ask my Historic Scotland colleagues to say how they currently manage the use of stop and temporary stop notices for listed buildings to maintain consistency. I expect that to be similar to the process under the bill for scheduled monuments.

**Barbara Cummins (Historic Scotland):** The powers are not extensively used. They are part of the toolkit that planning authorities have to use for enforcement. Stop notices are very much a last resort and temporary stop notices are an emergency power. They are part of the toolkit—some of the sticks in the system, rather than the carrot of doing things by co-operation. The powers are very much used as a last resort, and that is the intention for scheduled monuments, too. They are used at the final stage, when negotiation and co-operation have failed to work.

**Margaret Smith:** The Law Society of Scotland raised a couple of points about appeals against enforcement notices. It feels that, because the Scottish Government directorate for planning and environmental appeals has such a great wealth of information and experience on such matters, appeals should be made to it rather than to a sheriff. The Law Society also wants to know why the sheriff would have the power only to agree or disagree with a notice—to uphold or quash it—but not in any way to modify it or to consider ways in which it might be changed.

**Fiona Hyslop:** It is nice to know that the Law Society has such confidence in the planning appeals process. We are trying to align the procedures. The process is about ensuring that the due legal process is carried out, so the sheriff would not need to have detailed specialist knowledge of historic environment issues. It is about the process of law, rather than the evaluation of the historic environment. I suspect that you are inferring from the planning appeals system, but it is slightly different. In relation to planning applications, detailed knowledge is needed of the application, planning issues and the development that is involved. That is more of an evaluation that involves reporters and other aspects. I believe that there is almost a qualitative evaluation in planning appeals, although I will stand corrected if that is not the case. Under the bill, we are talking about consideration of whether due legal process has been carried out, and the sheriff obviously has responsibility for that. That is the difference. I will just check whether Barbara Cummins is comfortable with that.

**Barbara Cummins:** I am.

**Christina McKelvie (Central Scotland) (SNP):** I move on to the two new statutory inventories—one for gardens and designed landscape and one for battlefields. In relation to the gardens inventory, the Historic Houses Association Scotland has raised concerns about its compilation and purpose and about the obligation on and cost for owners, and whether inclusion on the inventory would oblige someone to maintain an area in a particular state.

On battlefields, we received evidence that the issue is fraught with difficulties and that it would be difficult to identify the exact site of some battlefields. The HHAS was concerned that inclusion on the inventory might result in "unreasonable restriction on land use."
Will you reassure the stakeholders? We have the letter that you gave us this morning, which goes into some detail on that, but will you give reassurance about the purpose of the inventories and say whether inclusion will place an obligation on owners?

Fiona Hyslop: Those are important points. We are trying to clarify what already happens, although the bill aims to extend the areas that the inventory covers. It is important to stress that inclusion on the inventory imposes no additional duties on owners in terms of maintenance, access or requiring consent for works. The bill will allow us to put the existing inventory on a statutory basis without additional cost. That will enable local authorities to pick up any changes to the inventory immediately without having to wait for the periodic updating of the development management regulations, as they do currently.

Returning to the convener’s point about record keeping, the inventory involves a just-in-time process, so that it can be referred to at any point. That is particularly relevant for some activities that are covered by the inventory, for example when what is effectively a planning process is involved for a garden design, landscape or battlefield. That is when having a record on the inventory would be helpful for the process.

Your second point was about identifying battleground sites. At the time of the consultation, that was one of the most popular areas for responses. I am not sure whether that reflects the bill as a whole and all its technical aspects, but people feel passionately about the subject, hence the high level of response.

The current Scottish historic environment policy for battlefields, which was published in July 2009, includes the following definition:

“To be included in the Inventory, a site must be of national importance and be capable of definition on a modern map … Where nationally important sites cannot be adequately mapped, they will not be included in the Inventory.”

That provides clarity. If we just think that there is something at a certain place, or if it is vaguely described, that is not helpful to anybody.

On land use, there can be issues in areas where land is being cultivated for agricultural use, which might include ploughing. If there has been regular ploughing on a site for the previous six years, I think it is, nobody will stop the farmer doing that activity there just because the site is on the inventory. Experience will show that ploughing has gone on previously to a certain permitted depth. A commonsense approach is taken to that. The point is to develop a more statutory status for the inventory than has been the case.

Christina McKelvie: Many of my colleagues in Central Scotland could tell you that the battle of Bothwell bridge is still being waged. I can get back to some of my constituents with up-to-date information. Thank you.

Lucy Blackburn (Historic Scotland): The ambition for the battlefields inventory is for the first wave of sites to be out for consultation some time before Christmas, so that the first wave of the inventory is in place around March or April next year. There will be full public consultation. There will be concerns, debates and discussions over what should be covered, and there will be an opportunity for those concerns to be considered properly and transparently.

Christina McKelvie: That is helpful.

Fiona Hyslop: Members are no doubt all considering which battlefields are in their constituencies.

Christina McKelvie: Different battle lines might be drawn up now.

Alasdair Allan (Western Isles) (SNP): I have a question regarding archaeology and the definition of monuments in that context. It has been suggested in written evidence that

“any site … comprising any thing, or group of things, that evidences previous human activity”

could be decided to be a monument. Is that definition wide enough to capture all sorts of archaeological remains, or is it too wide? Have you given consideration to questions of definition?

Fiona Hyslop: The bill provides an opportunity for ministers to designate, if they wish to do so. As part of the decision making, the evaluation will lie with ministers, and I hope that you think that we will take a reasonable, commonsense approach. We expect most of the definitions to be in terms of archaeology, and we anticipate that there will be fewer than 10.

In my letter to the committee, I cited some examples that one of your witnesses gave you. It was suggested to you that “human activity” is a wide-ranging definition, but the site must be of real national significance in relation to historical human activity. Even then, it would be up to ministers to determine which areas to designate.

Important archaeological sites are probably underidentified with regard to protection and legislation, which is why we want to include them, although we do not anticipate there being an extensive number of sites. We wish to issue policy guidance to explain to people what we mean. That is not something for the bill—it will be done secondarily—but I am happy to provide it around stage 2, if that would be helpful to the committee.
The Convener: Thank you for that commitment, minister.

12:30

Elizabeth Smith (Mid Scotland and Fife) (Con): Thank you, minister, for your helpful letter regarding the section 25 issue. I note that what you say in the letter clarifies quite a few concerns that witnesses raised.

From a public perception point of view, the key is to ensure that the liability for any damage to property is targeted at the person who caused the damage rather than the owner. How will the bill deal with that specific issue, notwithstanding your comments to clarify some witnesses’ concerns? Could you give us some clarification on that central point?

Fiona Hyslop: It is important to reflect that the bill gives responsibility to the owner. I will explain our thinking on that. The main purpose is to improve the quality of buildings that have fallen into disrepair or need urgent works. The issue is what we can do to help to get the works done, rather than who then pays for it.

It is a bit like the situation that people might experience when they purchase a house. If urgent works need to be done, either the owner does them before they sell the property or the price of the works is included in the price that the buyer pays, but the works are done regardless. We are trying to take an approach that will ensure that the works are done, but the liability has to be with the owner and their successors. Either way, the original owner who has not carried out the works will end up paying for them either by reducing the purchase price for the successor or by doing the works themselves before they sell.

Elizabeth Smith: I accept that, minister, and it is absolutely fair. However, are you confident that the bill will address the problem of coming to terms with the person who has caused the problem, especially given the fact that the current situation is a bit more vague?

Fiona Hyslop: That is difficult. How do we get people to repair buildings? That is one of the biggest challenges faced by every single town and city in Scotland. People can be fined and punished for not repairing buildings, but that is not what we are saying here. We are trying to impose on them the liability for expenses for urgent works. It is important that we engage with owners and ensure that they are aware of what they need to do and what their responsibilities are, but we will not necessarily do that through legislation. It would be disproportionate to the scale of the problem if we went round Scotland fining and punishing people for neglecting their homes and buildings, although a great deal of activity needs to take place and improvements need to be made. The bill aims to help the process by ensuring that the liability is such that repairs are more likely to be effected, as opposed to punishing the owner for not doing them in the first place.

Elizabeth Smith: Do you feel that the new legislation will act as a greater deterrent?

Fiona Hyslop: Yes.

Elizabeth Smith: Why do you feel that?

Fiona Hyslop: The idea is to deter owners from allowing their buildings to fall into unnecessary disrepair to the extent that they need urgent works. Owners will be penalised in terms of the financial value of their property when they come to sell it.

Elizabeth Smith: Your letter clarifies the point about the five-year limit for the notice of liability. Some witnesses were concerned about that, although I note your reasons for it. Are you convinced that the five-year limit is appropriate and that people will not try to go up to the limit and then get out of it and leave themselves no longer liable?

Fiona Hyslop: The fact that the notice of liability has to be renewed after five years is important. If the period is indefinite, there is a danger that it will just lie there and nothing will ever be done. The fact that there has to be a reapplication will, I hope, mean better engagement between the relevant authorities and the owner. The authorities will be able to tell the owner that the notice still stands and is to be renewed because the liability still exists. If the notice lasted forever, it could just hang on the wall and no one would pay any attention to it. That is why we think that the five-year limit is appropriate.

Claire Baker (Mid Scotland and Fife) (Lab): Section 18 relates to certificates of immunity. The minister acknowledged in her opening statement that there has been a level of debate around this issue, particularly in relation to hostile third parties, and some organisations have expressed concern. Will the current practice of not processing applications during consideration of a live planning application apply to applications for a certificate of immunity?

Fiona Hyslop: I will ask someone else to give you the details, but Historic Scotland is committed to turning an application around within eight weeks, to ensure that there are no unnecessary hold-ups. I suppose that you are asking whether the processes can run in parallel or whether the period for considering the application for the certificate would be at the front end. The benefit will be to developers—this is an improvement for developers that are looking to do works. The frustration that you might have heard from people
involved in some of these exercises is that they have to hang around to see whether there is any interest if the building is listed, only for people to turn round and say that they are not interested—a great deal of time is lost. I will ask someone else to comment on whether there will be a parallel process or whether the consideration of the application for the certificate will be at the start.

**Lucy Blackburn:** The current position is that we have a policy of not listing in the face of a live planning application. The intention would be that once certificates are in place, we would no longer need that policy. What we are proposing would be the alternative to it.

The difficulty with our current policy is that we say that we do not normally list in the face of a live planning application, but we cannot give an absolute guarantee that we will never do so. Any developer involved in a planning application will assume that we will probably not list, but, given the way the law is framed, we can never rule that out. If a developer comes to us and asks whether we can guarantee that we will definitely not list during their live planning application, we cannot do so. The certificate will deliberately create a period of absolute certainty. In some cases that might mean that the building is listed, but at least people will know which regime they are in.

**Claire Baker:** There has been a lot of discussion about whether there is a problem with hostile third parties. It has been suggested that applications be restricted to owners and occupiers, which I think is the situation in England, although there are other differences between the two systems. It has also been proposed that a charge should be applied, which might reduce the risk of vexatious applications. The committee has tried to explore that. I do not think that we have taken a final view on it. We tried to draw out whether the concerns that have been expressed are reasonable. Does the minister have anything to add to what she said about that in her opening statement?

**Fiona Hyslop:** We do not expect a large number of certificates. A system of certificates has been in place in England for a number of years and there have been seven to nine applications a year. We anticipate that even if there were more than that, Historic Scotland would be comfortable with an estimate of about 20 to 30 a year. I suppose that the issue is whether there is fairness in the system. People might have different views on this, but there was a big debate when the Planning etc (Scotland) Act 2006 went through as to the fairness for third parties and owners and who has the upper hand. On fairness and equity, local communities might want to own their town or village. I was in West Kilbride in Kenny Gibson’s constituency over the summer. If a community really wants to take ownership of the town, wants to reinvent itself and wants its high street or other areas to be redeveloped, it might be interested in asking for a certificate of immunity. It could then involve other developers in reinventing or regenerating the town. In that situation, the community would not necessarily own the buildings, unless we are talking about some kind of community buy-out. If you restricted applications for certificates of immunity to the people who own the property or are about to develop them, would you be cutting out other people who have a genuine interest?

There is a genuine debate to be had, and I would be interested to hear the committee’s views. The other point is that there might be vexatious applications that are not about development but about ensuring that nothing ever happens, by trying to get everything listed. There are pros and cons to the proposed system, and it would be helpful in due deliberations for stage 1 to set out those pros and cons and whether the committee has a view. It is an important point.

**Lucy Blackburn:** What we know is that the provision has not been tried in Scotland—it is untested in that sense. It is a new policy, and there is always uncertainty about where to cast the boundaries. We have always been conscious of not wanting to prejudice when the certificate will be useful, which is the main issue. If we limit who can apply, cases may come forward later to which we wish to respond positively but there is a legal barrier to doing so. With such a provision, we are never quite clear what cases might come forward and, as the minister said, in what situations people might find the certificate useful.

It is worth saying that it is and will continue to be the case that any person can ask ministers to consider a building for listing. That has always been a fundamental part of the listing process—part of its democratic base—and it will continue. It is important to bear that in mind—and that people who do not want to use the route in the bill will always have the other avenue. That is the balancing act that we are looking at.

**Claire Baker:** I think that there was broad support for the certificate. The aim of giving confidence to developers who are looking to take on buildings was recognised but, as Lucy Blackburn said, the flip-side to the system is that if a developer applies for a certificate of immunity and it is refused, it is likely that the building will be listed. There were questions about whether the provision will produce the policy outcomes that it is intended to produce, but I appreciate that it is an untested system and that we will have to wait and see how it operates in practice.

There was a suggestion from some witnesses that, rather than have a certificate system, the
Government could introduce a policy of reviewing listed buildings every four to 10 years, which would provide accurate listed building information for each local authority. Have you thought about alternatives to the certificate?

Fiona Hyslop: In principle we could do that, but it brings us back to the convener’s question about resources. Unless we are about to agree in the budget to have additional resources rather than to implement the reduced budget that we expect, I do not think that that system would be feasible. A more cost-effective way of obtaining the end result is by dealing with a more limited number of cases through the route in the bill. If we were to resurvey every 10 to 12 years, we would be contemplating additional expenditure of £1 million to £2 million per year. We think that the bill provides a better route to reaching a solution to help and support development.

Claire Baker: I have a final question. When we took evidence from Lucy Blackburn previously, she said that there were on-going discussions among the Government, the Scottish Property Federation and the Law Society about concerns on the issue. Are those discussions still on-going? Have there been further meetings?

Lucy Blackburn: I will meet the SRPBA tomorrow.

Claire Baker: Thank you.

Ken Macintosh: As the minister mentioned in her opening statement, a number of stakeholders and bodies have suggested that the bill’s powers could be enhanced specifically to include a duty on all public bodies to have special regard to Scotland’s historic environment and to require local authorities to have access and give regard to appropriate information. From your opening remarks I understand fully that that would be at odds with the relationship with local authorities in the concordat, and I note the point about partnership being preferable. The third argument you deployed was that costs would be involved and that it is disproportionate to place statutory duties at a time of financial restraint, but I do not understand why there would be any costs involved in that proposal.

Fiona Hyslop: It would be difficult to cost, but the implication from the people who argue for the duty of care is that we bring with it a greater policy and resource application to caring for the environment. That is implicit in the arguments that have been made. I do not think that we can judge that in the current circumstances, because it is a bit of an unknown.

On the duty of care for different bodies, we are not talking about just the usual suspects, such as local authorities. The Forestry Commission, for example, is an important partner in the care of historic buildings and sites because monuments might be on its land, and there might be a number of sites on Ministry of Defence land. It is not just a matter for councils; it can be for other bodies, too.

The important issues are building relationships and the application of expertise. I come back to the point that what is important in Scotland, and what I as minister am keen to facilitate and drive forward, is how we have that sharing of expertise and resources across different areas. It is about sharing expertise and resources not only within council areas but with all these other partners, whether the matter relates to motorways, forestry or the Ministry of Defence.

We are working with all the different bodies and the concern that has been raised has been met with the response that we need to get everybody around the table to establish what effective duty of care would mean not in respect of legislation but in practice. That is probably a more effective approach than having a provision in the bill. There is strong resistance from local government to the imposition of statutory duties in general. You will have come across that in respect of bills that you have dealt with and a number of other issues. Local government is trying to resist as much statutory enforcement from national Government as it can.

Ken Macintosh: I note the broader principle, but I was asking about costs. The minister is suggesting that it is implicit, but it is not implicit in the argument of the organisations who are proposing the duty; they explicitly state that costs should not be involved. Several submissions make that point. I will quote from the submission from the Society of Antiquaries, which states:

“Scottish Government and local authorities are clearly opposed to any additional burdens and costs … However, we argue that these provisions do not add any significant burdens to either public bodies or local authorities, since information and expert advice is already available to the local authorities”.

In fact, it is a duty that Scotland’s public bodies should have regard to in fulfilling the duties that they already have.

My second point relates to ecclesiastical buildings, which you helpfully mention in your letter to the committee. I welcome the point that you make in the letter that the churches and other owners of ecclesiastical buildings would probably strongly object to the current voluntary situation being amended. Did you think about making such a change and consult upon it and decide not to? In other words, has there been any consultation with the churches or any other bodies about bringing ecclesiastical buildings into the listed building system?
Fiona Hyslop: I will ask others to respond in relation to the consultation, because it took place before I became the minister.

Lucy Blackburn: The Government never had a proposal to remove the ecclesiastical exemption so, strictly speaking, we have not consulted because it has never been a proposal; it was introduced by some of the responses to the draft bill. It was considered at that point by ministers and it was not taken forward in the final bill.

We have built a relationship with the ecclesiastical bodies that have major holdings, such as the Church of Scotland, and we meet them periodically to discuss how we can assist them with estate management, because they clearly face significant challenges as they have more buildings than they need. We want to work with them. The approach that we have taken is to encourage them to look at their needs and to come to talk to us so that we can identify which buildings—it will not be all the buildings they wish to vacate, in terms of this part of the agenda—they feel they do not want, so we can help them see ways through, because we can bring in expertise and knowledge about successful projects involving redundant church buildings.

We are committed to reviewing the exemption from the voluntary scheme for external works. We will need to do that quite soon as it is probably overdue for review and it will provide an obvious point at which to talk to the churches about how the voluntary scheme is working.

Fiona Hyslop: I note from my experience in my time as minister that there is a healthy and good relationship with the churches in respect of grants, restorations and so on. The issue is therefore: if something is not broken, why fix it? The review that Lucy Blackburn is talking about will identify whether there are any issues for improvement. I stress that there was not any sort of strong demand or push for a review, but what she has said refers to that.

Your first point was about the duty of care. The concern is to do with harmonisation with other areas. The term “historic environment” is broad; it embraces large parts of older settlements as well as rural locations, which means that any duty to have regard to it could be extremely generous. I know that some of the organisations that have called for that duty have said that there would be no cost attached to it, and I have met people who have been hopeful that it would allow better stewardship of the historic environment. Again, you have to take what you have been given as evidence.

The duty to have regard to the historic environment would have a much greater impact on public bodies than similar duties such as those that are in the Marine (Scotland) Act 2010. We have to be conscious that, just as we are trying to harmonise scheduled monuments provisions with listed monuments provisions and the historic environment with planning aspects, we are also trying to harmonise, as far as possible, environmental protection of the built environment with environmental protection of the non-built environment and the marine environment. That is another argument for keeping the situation as it is just now.

Ken Macintosh: Including in legislation ground surface treatments such as the cobbles in Charlotte Square has been raised a couple of times. Have you thought about extending some sort of statutory or regulatory protection to those areas?

Fiona Hyslop: No, but I would be interested to know whether there are examples of situations that demonstrate that there is a need to do that.

I understand that there is a situation in Kelso that is relevant to this point—I think that it might have been referred to in the letter that was sent to you—but I think that it was an issue before 1993. However, we are not aware of anything more current being raised by Historic Scotland in that regard.

I think that there are concerns about the refusal to list pavements, but I am not sure that there is a strong argument for it. Equally, I am not sure that there is a strong argument against it, either.

Historic Scotland might have other views on pavements.

Lucy Blackburn: We would like to talk to the Royal Town Planning Institute at a later stage in the bill process about the particular cases that have been raised, because we would like to understand the particular situations and what the scale of the issue might be. Listing legislation talks about structures but, until we have had test cases that have failed to go through, it is difficult to see what the problem would be.

Fiona Hyslop: So, our proposal seems to be: if in doubt, leave it out.

Ken Macintosh: The minister suggests that 1993 is a long time ago. In historic environment terms it is yesterday. I am sure that the residents of Kelso still hold a grudge about losing the cobbles.

Fiona Hyslop: If, in evidence to the committee, a strong case has been made for the proposal, it would be helpful if that were included in your report.

Ken Macintosh: We had an interesting discussion about the curtilage of modern buildings and the fact that some modern buildings have no
protected curtilage. I think that that is a discussion to be had before stage 2.

**Fiona Hyslop:** We will identify with the clerk any such issues that you would like us to come back to you on in relation to your preparation for stage 2.

**The Convener:** That concludes our questions to you, minister. I am sure that it makes a change for you to get such a warm welcome at the committee.

12:54

*Meeting suspended.*
LETTER FROM THE MINISTER FOR CULTURE AND EXTERNAL AFFAIRS,
DATED 14 OCTOBER 2010

1. I would like to thank the Committee for inviting me to speak about the Historic Environment (Amendment) (Scotland) Bill on 29 September. I hope you found the session useful.

2. Having reflected further on the session I thought it might be helpful to provide the Committee with a short note which both clarifies and supplements some of the more technical aspects of my evidence of 29 September (see annexes A and B).

3. I would also like to take this opportunity to re-emphasise a point made about the policy aims underpinning the proposal to introduce a system of certificates of immunity from listing (under section 18 of the Bill) which the Committee took a particular interest in. As noted during the Committee session, the main policy aim here is to provide certainty for owners and developers considering works to a particular building. In other words the policy is not, as a matter of principle, to exempt buildings from listing as the listing of a building would be a perfectly proper outcome of the process of considering a building for a certificate of immunity. The advantage here is that certainty as to whether a building would or would not be listed can be provided at an early stage in the development process so that those involved know the boundaries within which they are operating.

4. I hope you and the other members of the Committee find this information helpful and that it will assist you in preparing the Stage 1 report.

ANNEXE A

Section 3 – Offences under sections 2, 28 and 42: modification of defences

Clarification on availability of and access to information

5. The potential loss of an unqualified defence of ignorance from the 1979 Act has led to a number of queries about the availability of and access to information on historic environment assets. In some instances it seems to me that the distinction between the availability of, and ease of access to, information on designated historic assets as compared with undesignated sites has been missed.

6. The proposed amendments in section 3 of the Bill relate solely to scheduled monuments which are defined in the legislation as monuments of ‘national importance’. There are several ways to find out about scheduled monuments.
7. Information on scheduled monuments is available online from Historic Scotland’s data website: http://data.historic-scotland.gov.uk. Here you can download maps and copies of the legal documentation for each scheduled monument, as well as find out about other types of designation, such as listing. If you do not have access to the web then you can request this information from Historic Scotland.

8. Scheduling documents are available to anyone searching the Register of Sasines or the Land Register for the title to a property.

9. Historic Scotland also makes its data available on PASTMAP (www.pastmap.og.uk), a website jointly developed with the Royal Commission on the Ancient and Historic Monuments of Scotland (RCAHMS), where you can search for information on Scotland’s Historic Environment from multiple sources.

10. I would also like to reaffirm that there will be a programme of education and information dissemination targeted at owners about the location of scheduled monuments if the Bill is passed ie Historic Scotland, acting on behalf of Scottish Ministers, will re-notify all owners of scheduled monuments and as part of that process will draw to their attention to the legal changes introduced by the Bill.

Section 6 – Works affecting scheduled monuments: enforcement

Point of clarification
11. In responding to a point about the enforcement provisions in the Bill I referred to harmonisation across the different Acts and I thought that the Committee might welcome further clarification on this issue. The draft powers in the Bill that will enable Scottish Ministers to serve a scheduled monument enforcement notice (SMEN) harmonises the Ancient Monuments and Archaeological Areas Act 1979 with the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 where a similar power already exists in relation to listed buildings. The introduction of a system of ‘stop notices’ and ‘temporary stop notices’ for both scheduled monuments and listed buildings under the Bill (sections 6 and 23) mirrors similar powers in the planning regime. Collectively, these provisions reflect one of the overarching policy aims of the Bill which is to align aspects of the listing and scheduling systems whenever possible and to align historic environment legislation with the planning regime when practicable to do so.
Section 11 – Inventories of gardens and designed landscapes and of battlefields

Point of clarification
12. In responding to a query relating to battlefields, I also included information on how a related procedure (known as the “class consents order”) works. The Committee’s question was about how works on battlefields would be managed. I should confirm this will be done purely through the planning system. The specific rules around ploughing which I mentioned are by contrast a feature of the scheduled monument consent system. However, it is probably useful for the Committee to be aware of how the “class consents” work.

13. Under section 3 of the Ancient Monuments and Archaeological Areas Act 1979, Ministers may make a “class consents order”, which specifically exempts certain practices from requiring scheduled monument consent. The order currently in place dates from 1996, and excludes from the consent regime agricultural, horticultural and forestry works, provided these are of the same kind as works previously executed lawfully in the same place any time in the previous six years (or 10 years in the case of ploughed land). The exemptions are qualified: in the case of ploughed land any works must not be likely to disturb the soil more deeply than previously executed lawful ploughing.

Issues out with the Bill

Costs associated with a duty of care for the historic environment – supplementary information
14. In addition to the concerns I expressed about placing a new statutory duty on public bodies when there are more effective and proportionate ways to encourage them to manage historic environment assets in a sustainable way, the Committee did ask about the potential cost implications of such a duty. While it is very difficult to cost such a duty as so much depends on the exact framing of the provision there are a number of factors that give rise to considerable concern on my part about the potential financial implications of such a duty. Firstly, the Built Environment Forum Scotland’s (BEFS) proposal applies to every public body (whether its functions impact on the historic environment or not). Secondly, any duty framed in terms of “taking the Historic environment into account when exercising functions” would potentially have a much greater impact on say, the NHS or the MOD than the current Scottish Historic Environment Policy framework, which focuses attention of public organisations on good stewardship of the assets in their ownership or use. Thirdly, the ‘historic environment’ is a very broad term – it embraces large parts of our older settlements as well as many rural locations – any duty to “have regard to it” would have much more day to day impact on public bodies than anything done for the marine
environment say and we assume that public bodies would have to look at how they complied with such a duty once enacted every time they exercised any of their functions, however remote the connection to the historic environment.

15. There are two established definitions of the 'historic environment'. The first is found in the Scottish Historic Environment Policy (SHEP) which sets out Scottish Ministers’ strategic policies for the care and management of the historic environment and the second is set out in the Scottish Planning Policy (SPP) which is the statement of the Scottish Government’s policy on nationally important land use planning matters. Both definitions are attached at Annexe B for reference.

Point of clarification
16. In commenting on the BEFS’s proposal regarding the introduction of a statutory ‘duty of care’ I may have given the impression that there was no general duty in the Marine (Scotland) Act 2010. That is not the case as a general duty is set out in section 3 of that Act.

17. However, that duty is narrowly focussed on the clearly defined “Scottish marine area” and is limited to functions contained in that Act.

18. In contrast, the combination of the wide ranging nature of the historic environment (evidenced by the broad definitions in SHEP and SPP) and the significantly wider set of functions to which the BEFS’s proposal applies, would embrace so much of Scotland that the day to day impact on public bodies of any such duty would be of a completely different order. Indeed, it would be so vague and wide ranging as to make its practical application difficult to envisage.

ANNEXE B

Working Definitions of ‘Historic Environment’

19. Scottish Historic Environment Policy (Chapter 1, paragraph 1.2)—

“Our whole environment, whether rural or urban, on land or under water, has a historic dimension that contributes to its quality and character. It has been shaped by human and natural processes over thousands of years. This is most obvious in our built heritage: ancient monuments; archaeological sites and landscapes; historic buildings; townscapes; parks; gardens and designed landscapes; and our marine heritage, for example in the form of historic shipwrecks or underwater landscapes once dry land.
We can see it in the patterns of our landscape – the layout of fields and roads, and the remains of a wide range of past human activities.

Importantly it also includes our buildings erected before 1919. Although the majority of older buildings are not listed, most provide flexible and often spacious domestic and non-domestic accommodation. A huge investment of money, energy and materials went into these buildings – it would be poor stewardship of this inheritance to neglect it.

The context or setting in which specific historic features sit and the patterns of past use are part of our historic environment. The historical, artistic, literary, linguistic, and scenic associations of places and landscapes are some of the less tangible elements of the historic environment. These elements make a fundamental contribution to our sense of place and cultural identity”.

20. Scottish Planning Policy (paragraph 111)—

“The historic environment includes ancient monuments, archaeological sites and landscapes, historic buildings, townscapes, parks, gardens and designed landscapes and other features. It comprises both statutory and non-statutory designations. The location of historic features in the landscape and the patterns of past use are part of the historic environment. In most cases, the historic environment (excluding archaeology) can accommodate change which is informed and sensitively managed, and can be adapted to accommodate new uses whilst retaining its special character. However, in some cases the importance of the heritage asset is such that change may be difficult or may not be possible. Decisions should be based on a clear understanding of the importance of the heritage assets. Planning authorities should support the best viable use that is compatible with the fabric, setting and character of the historic environment. The aim should be to find a new economic use that is viable over the long term with minimum impact on the special architectural and historic interest of the building or area”.

Fiona Hyslop MSP
Minister for Culture and External Affairs
14 October 2010
ANNEXE E: OTHER WRITTEN EVIDENCE

Aberdeenshire Council
Glasgow City Council
Highland Council
Institute for Archaeologists
Law Society of Scotland
Midlothian Council
National Council for Metal Detecting (Scottish region)
North Lanarkshire Council
Perth and Kinross Council
Scottish Civic Trust
Scottish Property Federation
Society of Antiquaries of Scotland
South Lanarkshire Council
SUBMISSION FROM ABERDEENSHIRE COUNCIL

What are our organisations views on the general principles of the Bill?

1. Aberdeenshire Council welcome the Scottish Governments recognition of the significant role that the historic environment has to play in developing a sustainable economic future for Scotland. The general principles of the Bill, to harmonise the 1979 & 1997 acts and align historic environment legislation within the Planning regime can be supported by this Authority. The principles and contents of the Bill strengthen the Local Authorities’ effectiveness and ability to protect and manage the built environment.

2. Fundamentally the principles of the Bill appear to be sound and robust, removing previous weaknesses that exist between the existing acts. To function efficiently it is essential that the Local Authorities’ burdens and duties are not increased as a result of the Bill and this principle of the Bill is equally as important.

How helpful do you find the policy memorandum and financial memorandum accompanying the Bill?

3. The policy memorandum is an extremely useful document as it clearly and concisely outlines the aims, objective and context behind the Historic Environment (Amendment) (Scotland) Bill. The Financial Memorandum seeks to outline what it believes will be possible financial implications as a result of the introduction of the Bill.

4. Although it is not envisaged that the Bill will not place any new significant burdens or duties on Local Authorities, the full financial significance cannot realistically be comprehended until the commencement of the Bill.

Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?

5. No Comment

Robert Gray
Head of Planning Policy and Environment
11 August 2010
SUBMISSION FROM GLASGOW CITY COUNCIL

1. Glasgow City Council remains supportive of the general principles of the Bill, however, there are a number of points of detail and clarification to be resolved as set out in the Council’s submission to Historic Scotland’s consultation on the draft Bill (The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill).

2. Furthermore, whilst outwith the scope of the Bill, Glasgow City Council supports the development of measures to strengthen legislation governing development in conservation areas, thereby removing the burden on local authorities to prepare Article 4 Directions.

3. In addition, the removal of ecclesiastical exemption warrants consideration within the context of this amending Bill in order to bring all historic places of worship within the listed building management system would be welcomed.

4. The policy and financial memoranda that accompanied the Bill were informative and comprehensive and the consultation exercise was inclusive, offering ample opportunity to consider the content and implications of the Bill in conjunction with other stakeholders.

Steve Inch
Executive Director for Development and Regeneration Services
30 July 2010
SUBMISSION FROM THE HIGHLAND COUNCIL

1. The general principles of the Historic Environment (Amendment) (Scotland) Bill are supported. It is considered appropriate that the legislation for the protection of the historic environment is reviewed and where appropriate updated.

2. The Bill, as presented, attempts to acknowledge the strengths of the existing legislation, identify weaknesses and strengthen where necessary. In principle these three aims are considered to represent an appropriate methodology for the review of historic environment legislation in Scotland. It is also considered a key strength of the legislative review that it is based on the strengths of existing legislation which has been largely effective through time.

3. Equally, the principle of retaining separate legislation for monuments and buildings is considered a significantly positive approach and ensures that the legislative changes contained in the Bill can be implemented within existing service resources and expertise at both local and national level.

4. The aim of ensuring that modernisation of historic environment protection is kept up to date and in line with the changes to the planning system ensures that the individual disciplines within the planning process can function cohesively in the future. This will be key to ensuring effective service delivery for local planning authorities and as such is considered a positive aim and principle of the proposed amendments.

5. It is not clear from the Bill how efficient new provisions are likely to be in reforming the legislation sufficiently to assist local authorities in taking appropriate action when there are breaches of control within the management process. For example the fixed penalty notice for failure to comply with a listed building enforcement notice. Whilst the principle behind the introduction of such new measures is fully supported a greater degree of clarity for the new provisions would have allowed for more in depth consideration of such proposals and the implications of their implementation for local planning authorities and Scottish Ministers.

6. It is disappointing that the Bill does not make greater provision for local planning authorities to take action against owners of buildings which are occupied and falling into disrepair. This is a difficult area to deal with in practice under the provisions of the current legislation.

7. The Bill will need to be supported by strong, effective national policy and guidance if it is to achieve its key aims and principles. Whilst it is recognised that there are proposed changes to the Scottish Historic Environment Policy to incorporate new legislation proposed by the Bill it is considered that further strengthening of national policy and the position and role of Historic Scotland on behalf of Scottish Ministers would increase the positive impact of the Bill in managing Scotland’s historic environment.
8. Whilst the decision not to embrace the English model of legislative reform for the historic environment is fully supported it is considered that it may be useful to adapt the strengths of the English system in delivering and implementing the legislation at national level.

9. The accompanying policy memorandum published to support the Bill is a useful document in ensuring that the provisions of the Bill are clear and transparent. The memorandum also provides information regarding the rationale behind the legislative changes proposed by the Bill. This is considered an important aspect of the process to ensure that there is transparent reasoning and justification for the introduction of changes to existing legislation. Overall, the memorandum is a useful resource in considering the principles and proposals presented by the Bill.

10. It is recognised and acknowledged that the current Bill was drafted following extensive consultation with relevant stakeholders, this approach to legislative amendment is welcomed and supported. The level of stakeholder involvement, engagement and consultation appears to have been appropriately extensive and commensurate to the review of national legislation.

Kerry Bennett
Conservation Officer
19 August 2010
SUBMISSION FROM THE INSTITUTE FOR ARCHAEOLOGISTS (IfA)

1. The Institute for Archaeologists (IfA) is a professional body for the study and care of the historic environment. It promotes best practice in archaeology and provides a self-regulatory quality assurance framework for the sector and those it serves. IfA has over 2,850 members and more than 60 registered practices across the United Kingdom. Its members work in all branches of the discipline: heritage management, planning advice, excavation, finds and environmental study, buildings recording, underwater and aerial archaeology, museums, conservation, survey, research and development, teaching and liaison with the community, industry and the commercial and financial sectors. This evidence has been prepared by the Scottish Group of IfA, which has over 300 professional archaeologists in its membership.

2. IfA is a member of Built Environment Forum Scotland (BEFS) and commends the BEFS evidence to you.

3. IfA welcomes the Bill’s steps to align more closely the provisions relating to scheduled monuments and listed buildings, allowing statute to reflect better a professional trajectory towards holistic treatment of the historic environment, and in so doing making the workings of the legislation easier to understand by the public. The harmonisation of penalties reinforces the principle that all parts of the historic environment are important to the public and should be appropriately protected. The potential to improve responses to urgent threats is also a very valuable development.

4. The Institute commends the open way in which Historic Scotland has consulted with professional practitioners in the sector during preparation of the Bill and we are pleased to see that many of the unintended loopholes of the 1979 Act have now been closed, giving the potential for much more consistent delivery of the Scottish Government’s historic environment policy and removing some of the unfairnesses that previously existed.

5. However, like many others in the sector, we are disappointed that the Bill remains essentially a valuable but limited tidying-up exercise covering just a small percentage of those elements of the historic environment that have significance and meaning for the people of Scotland. As consultation responses have indicated, the Bill presents an opportunity for the public to achieve far more benefit from its heritage. The BEFS response lays out very clearly additional provisions that should be included in the Bill to ensure that the Scottish Government does not squander that opportunity.
6. IfA supports those proposed additional provisions—

- A ‘responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties’ should not provide any additional burden on responsible public bodies, but would act as a powerful reminder of their environmental obligations

- IfA very strongly supports the BEFS proposal for ‘planning authorities to have access to and to give special regard to appropriate information and expert advice on the local historic environment in exercising their duties’.

  - IfA believes that the best mechanism for fulfilling such a responsibility would be through a Historic Environment Records (HER) Service

  - HER services provide the understanding and information that are fundamental to the sustainable management of change in the historic environment

  - HERs should contain a summary of information that is known about the historic environment of any location in Scotland, including records of any archaeological investigations and chance finds there

  - they provide information that helps planning authorities make informed, proportionate, reasonable decisions about the significance of a building, site or landscape (whether designated – listed, scheduled, conservation area etc – or not), and to determine the extent to which proposed development should be modified in order to protect – and exploit the benefits of – the historic environment

  - that modification includes planning obligations on developers to compensate for the damage they must necessarily sometimes cause to our heritage, by commissioning archaeological investigations: these projects result in published reports in a variety of accessible and archives available for future study, and frequently allow for public participation. Without HER Services there would be no provision to ensure the levering in of millions of pounds of private sector investment annually into exploring and explaining the past – a process of unparalleled public benefit

  - the vast majority of Scotland’s known historic environment is undesignated: the HER may be the only information source that flags it up to the planning process
much of Scotland’s heritage remains to be discovered - interpreting patchy and missing information is a specialist skill dependent on in-depth understanding of the history and prehistory of an area: HERs need specialist staff and must have access to archaeologist and conservation officer skills

skilled staff can also help local communities use HERs as a research tool, enabling them to explore what is special about where they live. HERs are also valuable tools for academic research.

Scotland presently has full coverage of HERs, albeit of varying scope, so a statutory responsibility would not present an additional burden

HE services are under threat as local planning authorities make cuts: only a statutory requirement to have access to an HER service can protect them effectively.

7. IfA would not like to see the failure to include this provision in the Bill result in a loss of essential local services and consequent damage to Scotland’s fragile and unique heritage. Nor would we wish to see the absence of such a provision lead to a failure to use the huge potential of heritage to contribute to Scotland’s continuing economic, social and cultural regeneration.

8. We do also have some concerns that the absence of such an important provision might weaken the credibility of and support for the Bill.

9. I hope that the Committee finds this written evidence helpful. I am sure that the points made here will be borne out by BEFS in oral session, and I have no doubt that that BEFS’ evidence, representing as it does all the relevant non-Government organisations in the sector, will prove invaluable to the Committee in its deliberations.

Peter Hinton
Chief Executive
20 August 2010
SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

1. The Planning Law Sub-Committee of the Law Society of Scotland (The Sub-Committee) welcomes the opportunity to comment upon the general principles of the Historic Environment (Amendment) (Scotland) Bill as introduced into the Scottish Parliament on 4 May 2010 and should like to respond to the Scottish Parliament’s Education, Lifelong Learning and Culture Committee’s call for written evidence upon the general principles of the Bill in the following terms.

General comments

2. The Sub-Committee met with Historic Scotland’s Policy Team in August 2009 and responded to Historic Scotland’s Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill on 17 August 2009 (the Draft Bill) The Sub-Committee met again with Historic Scotland’s Policy Team on 17 August 2010 in order to discuss and debate the general principles of this Bill, and in particular Section 18 of the Bill which attracted the largest number of comments from respondents to the Historic Scotland consultation on the draft Bill. The Sub-Committee’s comments are detailed below, but in essence the scope of those entitled to apply for a certificate that Scottish Ministers do not intend to list should be narrowed from “any person” to the owner, lessee or occupier of the land and buildings to which the application relates.

3. As stated in its general comments upon the terms of the draft Bill last year, the Sub-Committee generally welcomes the continued drive towards synchronisation and harmonisation of legislation and procedures in related areas of control and notes that the Scottish Government is keen to avoid additional unnecessary burdens on economic interests in times of pressure. The Sub-Committee reiterates its view that economic interests are best assisted by absolute clarity and predictable effects in terms of legislation and ambiguity or complexity is unhelpful.

4. The Sub-Committee notes the background to the Bill and its policy aims and acknowledges that the Bill consists of a number of tightly focused amendments to the three pieces of primary legislation namely the Historic Buildings and Ancient Monuments Act 1953, the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and retains the core of the current system with its separate regimes for the process of scheduling monuments of national importance, listing buildings of special architectural or historic interest and the individual consent processes for each.
5. The Sub-Committee is generally supportive of the Bill and is of the view that it is sensible to retain these separate legal frameworks for scheduled ancient monuments and listed buildings.

Specific comments

Part one - amendment of the Historic Buildings and Ancient Monuments Act 1953

Section 1 - Recovery of grants for repair, maintenance and upkeep of certain property
6. The Sub-Committee notes that Section 1 of the Bill is in identical terms to Section 1 of the draft Bill as referred to above and reiterates its comments made in terms of its response to Historic Scotland’s policy team on 17 August 2009 in that these are consequential amendments to Section 4A of the 1953 Act. These consequential amendments appear convoluted in their terms and the Sub-Committee therefore questions their necessity.

Part two – modifications of the ancient monuments and Archaeological Areas Act 1979

Section 6 - Works affecting scheduled monuments: enforcement
7. The Sub-Committee notes Section 6 inserts new Sections 9A to 9O into the 1979 Act.
8. The Sub-Committee reiterates its concerns previously stated in respect of its response to the draft Bill in August 2009.
9. The Sub-Committee questions whether the works executed in on or under a scheduled monument are sufficiently wide in scope. For example, neighbouring works outwith the boundary of the scheduled area may still have the potential to damage or destroy the scheduled monument. Such a situation may occur where there is a danger either of flooding, or of drainage of a waterlogged area or where fragile remains are preserved.
10. In Section 9A(4) the two sub-paragraphs (a) and (b) should have the word “and” inserted as a division between the two sub-paragraphs. The Sub-Committee notes that the word “or” has been deleted from the draft Bill but suggests that subsection 4 still appears to construe alternative, mutually exclusive reasons.

Section 9C - Appeal against scheduled monument enforcement notice
11. The Sub-Committee notes that appeals against enforcement notices are to the sheriff. The Sub-Committee has no particular concern with regard to this method of appeal but highlights that appeals to the sheriff on this subject matter are relatively untried, the closest equivalent being appeals to the sheriff against various measures arising from environmental
protection legislation and the release of information. Such appeals remain rare and accordingly untested.

12. The Sub-Committee continues to question why it was felt necessary to provide a new offshoot of appeals to the sheriff and suggests that relevant expertise and detailed knowledge of national and international policy with regard to scheduled ancient monuments lies with the Scottish Government’s Directorate of Planning and Environmental Appeals.

13. The Sub-Committee does note from the terms of paragraph 58 of the Policy Memorandum that Scottish Ministers are, however, satisfied that such a referral to the sheriff is a reasonable and appropriate appeal mechanism as it is the Scottish Ministers’ view that the issue which sheriffs will be asked to consider relate to due legal process and sheriffs will not require detailed specialist knowledge of historic environment issues.

14. In any event, the Sub-Committee notes that the powers of the sheriff in determining the appeal under Section 9C(4) are to either uphold or quash the notice are restricted and there is no power to amend the notice if the sheriff considers that a minor amendment to the notice would be appropriate. Given the importance of the notice in protecting an irreplaceable national resource, the Sub-Committee suggests that such consideration is given to enabling the sheriff to rectify any defect of the notice or to modify its terms.

15. The Sub-Committee notes from the terms of Paragraph 13 of the Environmental Liability (Scotland) Regulations 2009 that an operator may appeal to the sheriff on questions of fact and law if aggrieved by a requirement imposed by a competent authority and the sheriff can, in terms of Paragraph 13(4), confirm the competent authority’s decision, quash the decision, remit the decision or make such other order.

16. The Sub-Committee respectively suggests that, on the basis that an appeal to the sheriff is considered appropriate in this instance, the provisions at Paragraph 13 should be reflected in the Bill in order that the sheriff can determine matters of fact and law and has a wider remit with regard to disposal.

Section 9D - Execution of works required by scheduled monument enforcement notice

17. The Sub-Committee reiterates its comments in terms of its response to the draft Bill and accordingly questions why the word “occupier” is omitted from Section 9D(1)(b) restricting the powers of recovery only in respect of the owner or lessee. A person occupying land without a lease may well be a person who damages an ancient monument.

18. Section 9D(3) provides for a remedy available to the owner of a monument or land, where the occupier is being obstructed. This
supports the argument that the occupier should be a person potentially liable for any damage. However, it is suggested that this measure requires clarification. It should be made express in terms of the section that this is intended to be a self standing summary application for an order available to an owner unable to comply and that it need not require to be raised in the context of an appeal, or any other measure. It is suggested that the measure should be available only where the owner of the land has no contractual right of entry. If the owner has such a contractual right, then he should be required to use it in order to avoid the necessity of a potentially defended action in the sheriff court with consequential delay and consequential damage. Such an action should only be available to the owner where he or she has no other remedy against the occupier.

Section 16 - Meaning of “monument” in the 1979 Act
19. The Sub-Committee welcomes the extension of the definition of “monument” but suggests that it may be more appropriate to confer on Scottish Ministers the power to act where Scottish Ministers hold a reasonable belief that the site is likely to compromise any thing or group of things that evidences previous human activity. Given progress in archaeological research and techniques and the ephemeral nature of the evidence, it is possible that whether or not a site evidences human activity may be unclear for a certain period. The Sub-Committee suggests that a reasonable belief that a site is likely to comprise important evidence could well be sufficient for Scottish Ministers to take legitimate action.

Part 3 – Modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Section 18 - Certificate that building not intended to be listed
20. The Sub-Committee has a number of concerns with regard to buildings being listed by Scottish Ministers and the issue of certificates that buildings are not intended to be listed which are as follows.

21. The listing of a building by Scottish Ministers can have adverse economic consequences for the development of a building where that development materially affects its character as a building of special architectural or historic interest. The effect of listing means that in addition to planning permission, listed building consents will be required for any works to the building that materially affect its character as a listed building. Obtaining listed building consent is a different process from obtaining planning permission and one where the policy guidance is very much weighted against the granting of consent for any proposal which is considered to be harmful to the aesthetics or significance of the building. Listing also imposes further statutory duties as in granting planning permission for a proposal which affects a listed building or its setting or a planning authority (or Scottish Ministers) must have special regard to the desirability of preserving the building or its setting or any features of
special architectural or historic interest it possesses (Section 59 of the 1997 Act refers), when carrying out any of their planning functions.

22. The scope of listing extends protection to (1) both the exterior and interior of a listed building and (2) any man-made object or structure fixed to a listed building or present within the curtilage of a listed building if it has been present since 1 July 1948.

23. Existing arrangements allow Scottish Ministers to undertake “spot listing”. Reference is made in the updated SHEP policy that—

“While a decision to list will be taken on the merits of the case, a building will not normally be listed once a planning application in respect of it has been submitted, granted or while works which have received planning permission are underway. Similarly, a building would generally not be listed in the course of an appeal period or current appeal against refusal of planning permission.”

24. These policy statements are not, however, expressed in such terms as could be reasonably relied upon in any property transaction. The Sub-Committee seeks clarification on whether it is the Scottish Government’s intention to delete or modify this policy when the provisions of Section 18 are in force.

25. The Sub-Committee is concerned that the Bill does not introduce any statutory right of objection on the merits to the listing of a building although the Sub-Committee fully understands that in certain circumstances Historic Scotland on behalf of Scottish Ministers will as a matter of courtesy undertake a degree of consultation and will consider representations to the effect that a building does not merit listing.

26. The Sub-Committee believes, however, that there should be a statutory right on an owner or interested person to be consulted on a proposal to list a building and that there should be in addition a right of objection to a proposal to list a building together with a right to a hearing or inquiry in order to determine unresolved issues. Such a right would be consistent with other orders or proposals under the Town and Country Planning (Scotland) Act 1997 where development rights are restricted. The Sub-Committee does not consider that the lack of this right is sufficiently compensated by the proposed immunity certificate procedure in terms of Section 18 of the Bill.

27. If protection of the building during this period is a concern, consideration could be given to an interim safeguard being provided through extending the existing offences for carrying out works to a listed building without consent to include works to a building which is the subject of a pre-listing notice of intention to list.
28. The Sub-Committee is also of the view that Part Three of the Bill does not address the difficulties which arise at present as to the extent and scope of the listing of a building when it is listed. The current process is not “map based”, but rather the property is identified by way of a short written description (usually a postal address) with further information which is considered to be information of no legal significance to the listing. In practice, this causes difficulties on the scope of what actually is listed as the modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 expressly provides that any object or structure fixed to the building or situated within the curtilage of a building since 1 July 1948 shall be treated as part of the building and accordingly protected.

29. In the absence of a map based system of listing, a practical difficulty arises with regard to establishing the extent of the curtilage of a listed building and there is no statutory process for establishing this. The term curtilage broadly includes any land or building used for the comfortable enjoyment of the building although it need not be enclosed. The practical consequences are that even although not referred to in the written description in the “list”, stables, mews blocks and garden walls are examples of what may be included as listed buildings, regardless of the fact that these properties may have passed into separate legal ownership since listing.

30. The Sub-Committee notes that the definition of the curtilage has been subject to judicial interpretation and Historic Scotland has previously set out four “tests” that should be applied in their Memorandum of Guidance on Listed Buildings and Conservation Areas published in 1998 and now withdrawn. These tests are summarised as follows—

- At the date of the listing were the two buildings in the same ownership?
- Were the structures built before 1 July 1948?
- Is the building functionally related to the listed building?
- Are the buildings divided by any modern road that would re-define the relationship between the buildings?

31. It is the Sub-Committee’s view that such practical difficulties could be removed altogether by Scottish Ministers simply adopting a map based system of listing which identifies the extent of the curtilage and the existence of any particular objects or structures to which the listing is intended to apply. This would improve the efficiency of the system and it is considered that in contemplating the listing of a building these matters will have been thoroughly considered by Historic Scotland in any event. Such a proposal would simply be documenting in a more complete way, an existing process.
32. The Sub-Committee, with particular reference to Section 18 of the Bill notes that “any person” can apply to Scottish Ministers for a certificate for a building not to be listed for a period of five years. Following the issue of the certificate, planning authorities may not serve a building preservation notice in respect of the building during this time. The Sub-Committee notes in terms of Paragraph 93 of the Policy Memorandum, that this Section of the Bill attracted the largest number of comments from respondents to the consultation on the draft Bill and that issues such as the adequacy of resources to handle applications, clarity on the basis of assessment and relationship with Building Preservation Notices and whether the five year period is too long were raised.

33. The Sub-Committee is in general supportive of this provision and notes that a similar provision exists in England and Wales in terms of Section 6 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and that such applications are generally known as “certificates of immunity” although usage is low.

34. In contrast to the Bill, which envisages an application at any time, under Section 6 of the 1990 Act applying to England and Wales, the application can only be made after planning permission has been applied for or has been granted. The decision to award immunity follows an assessment by English Heritage and if immunity is refused, the building will normally be listed.

35. The Sub-Committee accordingly has a number of concerns with regard to the arrangements proposed under the Bill, its main concern being that an application for a certificate can be made by “any person”.

36. This provision as set out in the new Section 5A to the 1997 Act as inserted by Section 18 would enable parties who are potentially hostile to change or development to make an application for a certificate in order to frustrate a property development proposal. The Sub-Committee accordingly considers that this right should be restricted to the owner, lessee or the occupier of the land and buildings to which the application relates. Further, there is no requirement under the proposed arrangements for the owners, lessee or the occupier to be notified that an application has been made. That means that such an application, although relevant to a property development, would not necessarily be indentified during the early stage of the due diligence exercise ordinarily undertaken by those contemplating development. The Sub-Committee believes that there must be a duty of notification placed on the planning authority to notify the owners, lessee or the occupier as the case may be (i.e whichever one of these is not the applicant) of an application.

37. The Sub-Committee is also concerned that there is no time limit within which a certificate should be issued and no right of appeal against the
Scottish Ministers’ decision to refuse the certificate and presumably to list the property.

38. The Sub-Committee considers that a period of two to four months, reflecting existing planning rules should be sufficient to issue such a certificate and if it is not determined within that timeframe it should be deemed to have been granted. Provision could be made for extension by agreement.

Section 19 - Offences in relation to unauthorised works and listed building consent: increase in fines
39. The Sub-Committee suggests that there is no justification for any difference between penalties imposed with regard to scheduled monuments or listed buildings and suggests that all penalties should be synchronised.

Section 25 - Liability of owner and successors for expenses of urgent works
40. It is noted that under Section 49 of the 1997 Act, both the planning authority and Scottish Ministers have the power to carry out works urgently necessary for the preservation of a listed building having given seven days notice to the owner and, in terms of Section 50 thereof, the costs can be recovered from the owner, but only upon raising a payment action and enforcing the payment decree in the normal manner.

41. The Sub-Committee notes that, in terms of the proposed new Section 50A as inserted by Section 25 of the Bill, the owner of a listed building liable for expenses will remain liable after the sale of a building severally with the new owner, but only if a notice of liability for expenses is registered at least 14 days before the acquisition date and the notice has not expired before the acquisition date. The Sub-Committee notes that in terms of Section 50A(7) the acquisition date is defined as the date on which the new owner acquired right to the listed building.

42. The Sub-Committee notes that these provisions are in almost identical terms to the provisions regarding notices for potential liability for costs contained in Section 12 of the Tenement (Scotland) Act 2004 although such notices are not in fact applicable where the work is being carried out by the local authority and could be secured by Charging Order. Primary liability therefore remains with the original owner and the new owner can recover the costs from the previous owner.

43. Such a notice unless renewed in terms of the new Section 50C, expires at the end of the period of five years beginning with the date of its registration in terms of Section 50B(1)(c). The Society notes that there is a three year period as outlined in the 2004 Act and the Bill also contains provisions that require the planning authority or Scottish Ministers when the debt is met to register a discharge of the notice in terms of Section 50E of the Bill. The Sub-Committee presumes that the planning authority will cover the cost of doing so. It appears that on the
expiry of the notice, liability of the new owner ceases, although the previous owner could still be pursued by the new owner.

44. The Sub-Committee highlights a practical difficulty with regard to definition of acquisition date as this may be construed to be either the date on which the title is either registered or recorded or the date of conclusion of missives. The Sub-Committee further highlights that those acting for purchasers of listed buildings will require to check the position before settlement by way of Form 10/12 and the missives of sale will require to be amended in order to make appropriate provision (generally retention from the price) for situations where a notice has been disclosed.

45. The Sub-Committee also highlights that the new notice of liability for expenses does not rank prior to all other securities, unlike the Charging Order and that its purpose would appear to be simply to alert the new owner of a listed building to potential liability.

Law Society of Scotland
20 August 2010
SUBMISSION FROM MIDLOTHIAN COUNCIL

1. Midlothian Council accepts the general principles of the legislative changes proposed in the bill and which have been determined through discussion following the report of the Historic Environment Advisory Council for Scotland.

2. Midlothian Council believes that the proposals will strengthen its ability to protect and enhance the historic built environment especially with regard to buildings included in the Scottish Ministers’ list of buildings of architectural or historic interest. Midlothian Council is therefore supportive of the bill.

Ian Young
Projects Manager and Conservation Officer
22 July 2010
1. The National Council for Metal Detecting (NCMD) Scottish Region, submitted a consultation response to Historic Scotland on 2 July 2009 concerning the proposal within paragraph 2.8 of the draft Bill that section 42(7) of the Modifications of the Ancient Monuments and Archaeological Areas Act 1979 should be removed.

2. The NCMD considered that the defence statement in s42(7) of the 1979 Act should remain for a number of reasons which were detailed in its response to Historic Scotland and which were subsequently discussed with them at a meeting on 1 October 2009.

3. The amended Bill, as it now stands, no longer contains the original proposal to remove the defence statement, and the position may be best summarised as follows—

Section 42 existing wording—

(6) In any proceedings for an offence under subsection (1) above, it shall be a defence for the accused to prove that he used the metal detector for a purpose other than detecting or locating objects of archaeological or historical interest

(7) In any proceedings for an offence under subsection (1) or (3) above, it shall be a defence for the accused to prove that he had taken all reasonable precautions to find out whether the place where he used the metal detector was a protected place and did not believe that it was.

Proposed changes within the current Bill—

(4) In section 42 (restrictions on use of metal detectors)—
(a) in subsection (6) for the word “prove” substitute “show”,
(b) in subsection (7)—
(i) for the words “prove that he had taken all reasonable precautions” substitute “show that—
   (a) he had taken all reasonable steps”,
   (ii) for the words “and did not believe that it was” substitute; “and (b) he did not know and had no reason to believe that that place was a protected place”.

4. The NCMD Scottish Region is pleased to note that the proposed changes mean that its main concern is no longer relevant and that, for all practical purposes, the defence statement remains with only minor changes to modernise the drafting.
5. The Council does, however, feel that the remaining concerns raised in its letter to Historic Scotland regarding the accessing and interpreting of Historic Scotland information on scheduled areas are yet to be addressed, but these would appear to be internal operational or policy matters which, I understand, are under consideration by Historic Scotland.

Alastair Hacket
Secretary
24 July 2010
1. I am writing in response to your request for written evidence on the general principles of the above bill. North Lanarkshire Council supports the policy objectives of the Bill which aim to improve the management and future preservation of Scotland’s historic environment. We welcome the provisions of the Bill and believe the proposed amendments to current heritage protective legislation will provide a good framework to ensure the long term sustainability of North Lanarkshire’s heritage.

2. A number of Roman, secular and industrial monuments are located within the boundaries of North Lanarkshire, including the archaeological remains of Summerlee Iron Works. Due to the site’s significance as the most complete 19th century pig iron works in Scotland, it was designated a Scheduled Monument in 1995. In relation to our responsibility for managing the site, we support the modifications of the Ancient Monuments and Archaeological Areas Act 1979 contained within the Bill.

3. We are of the opinion that the proposed changes to the Bill will offer a greater degree of protection to the nation’s monuments, specifically in relation to the control of works, modifications of defences, increasing fines, enforcement notices and power of entry. These measures will ensure greater accountability for those responsible for managing and maintaining monuments, and strengthen the capacity of the Scottish Government to deal with actions which threaten our historic environment.

4. Furthermore, the intention of provision to widen the range of activities eligible for funding would be welcome. In broadening this to include activities which promote greater understanding and enjoyment of our historic environment, it will be a valuable resource for local authorities and stakeholders. For example, a Conservation Management Plan of Summerlee Ironworks undertaken by Austin Smith: Lord in 2009 highlighted the importance of providing further interpretation and a programme of learning activities in order to make the site’s significance more accessible and fully understood by the local community and a much wider audience.

5. The Planning Services also supports the new provisions within the Historic Environment (Amendment) (Scotland) Bill.

6. In summation, North Lanarkshire Council supports the Bill and believes that the changes proposed will enable the preservation and sustainable development of Scotland’s heritage for future generations.

Lizanne McMurrich
Head of Community Information and Learning
18 August 2010
1. The Council responded to the draft Bill in August 2009. As previously expressed, in general the Council welcome the provisions of the Bill, and agree that the changes to existing legislation will assist the regulatory and planning authorities in managing the historic environment in a sustainable way. The Council note that some amendments have been made to the scope and detail of the Bill following consultation. However the Council has no substantive comment to make on these changes.

2. The policy memorandum and financial memorandum accompanying the Bill are useful in providing background explanation of the processes leading to the issue of the Bill and its predicted financial impact, although the Council question some of the assumptions and cost estimates, such as those for preparation of urgent works notices which appear to have been underestimated on the basis of local experience of the actual costs that have been incurred in relation to this activity.

3. The Council is generally content that no additional resources will be required for the implementation of the Bill in relation to the management of historic environment by regulatory and planning authorities and welcomes the enhanced penalties for those that damage the environment.

4. The Council does however have some concerns that there may be initial pressures to re-prioritise work responding to the new powers introduced by the Bill. For example, there may be some impact on Historic Scotland’s regular listing programme as a result of the listing team having to respond to requests for certificates that a building is not intended to be listed. This in turn may initially impact on the relationship between Historic Scotland and authorities’ front-line activities and hamper the policy objective to streamline the management of the historic environment through greater partnership working and local decision-making.

5. The Council has no comments on the consultation the Scottish Government carried out prior to the introduction of the Bill.

Bernadette Malone
Chief Executive
19 July 2010
SUBMISSION FROM THE SCOTTISH CIVIC TRUST

1. The Scottish Civic Trust is a charitable non-government organisation working to protect and promote Scotland’s built environment. The Trust is an active member of Built Environment Forum Scotland (BEFS) and in addition to this written evidence, we fully support the written evidence submitted by BEFS on behalf of its members.

2. The Trust wishes to register its strong support for the provisions currently set out in the Historic Environment (Amendment) (Scotland) Bill, particularly the harmonising proposals which will ensure that arrangements across heritage and planning legislation are consistent.

3. Overall, the historic environment sector is estimated to contribute in excess of £2.3 billion to Scotland’s national GVA, directly supporting 41,000 FTE (full-time equivalent) employees. The greater share of economic impacts relate to tourism expenditure attributable to the historic environment (representing nearly £1.3 billion in respect of GVA). Recent data released by Historic Scotland highlights this value, indicating a 7% increase in visitor figures in the last 12 months. In addition, the care and maintenance of the historic environment is an important factor in the economic security of Scotland’s construction industry. More than half of the industry’s annual £6.5 billion turnover comes from the repair and maintenance of existing building stock and £1.2 billion is spent on pre-1919 buildings.

4. The historic environment is not only a major contributor to the Scottish economy, but also sits at the heart of place-making – acting as a catalyst for regeneration and an opportunity for people to get involved with their local ‘place’. Research in 2008 identified that 12,449 volunteers carry out a total of 167,721 hours per annum - a clear indication of peoples’ enthusiasm for the historic environment. The historic environment provides the context for achieving quality places that are valued (and therefore valuable), that work for people and that are locally distinctive.

5. The provisions in the Bill, as introduced, will simplify processes without weakening controls, and close some loopholes that presently allow unacceptable threats to the historic environment. However, the Scottish Civic Trust would also suggest additional amendments which are considered to be in the spirit of the Bill and will allow the Bill to go further in pursuit of the aim ‘to improve the management and protection of our historic environment’.
6. We ask Ministers to consider that the Bill—

- provide for a **responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment in exercising their duties.**
  - The Scottish Civic Trust fully recognises the current challenging economic climate and the Government’s view that it should not impose new statutory duties and burdens. It is not the intention that these ‘asks’ represent additional burdens. The objective behind this first ‘ask’ is to place stronger emphasis on the use of **existing duties**, so that in undertaking their functions public bodies take cognisance of the historic environment. This will:
    - Help ensure that public bodies protect and sustainably manage our unique and irreplaceable historic environment for future generations, especially in extremely challenging financial circumstances.
    - Underpin the future care of Scotland’s historic environment as an integral component in the wider management of resources, by providing a stronger emphasis within the strategic operational context of public bodies.
    - Provide a baseline provision and legislative context for the Government’s strategic policy on the historic environment.
    - Help ensure better assessment of the significance of historic assets (both those currently unrecognised or unprotected as well as those afforded statutory protection through scheduling, listing etc).
    - Inform understanding of what is important, which enables us to assess the impact of development proposals and identify better, sustainable solutions for change in the historic environment.

- ensure that **planning authorities have access and give special regard to appropriate information and expert advice on the local historic environment in exercising their duties.** Stakeholders, in consultation with Historic Scotland, are currently exploring what such a provision might look like. At strategic level, the principle is important because—
  - **81%** of our historic environment is not protected by **statutory designation** and therefore not covered by the provisions set out in this Bill. These are the buildings that form the character of Scotland’s towns and burghs. Undesignated assets are managed at local level through the planning process. Expert advice is therefore essential to help communities protect and appreciate important local assets.
  - Understanding what is significant or valuable about a historic environment asset is essential to inform the management, protection and enhancement of such assets. In the absence of
appropriate information and expert advice, understanding is reduced, to the potential detriment of the historic environment.

- Understanding the wider context of our designated historic environment is vital, since it informs decisions on what is nationally and locally significant and worthy of designation, protection and sensitive management.

7. We believe that the two ‘asks’ set out above would strengthen the operational context, or help provide the right ‘conditions’ for achieving good outcomes for both the historic environment and the people that value and appreciate it.

Gemma Wild
Technical Officer (Conservation and Design)
20 August 2010

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ii http://www.historic-scotland.gov.uk/news_search_results.htm/news_article.htm?articleid=28639
iii Scottish Historic Environment Policy (Historic Scotland, 2009)
v Scotland’s Historic Environment Audit – 2008 baseline data tables (Historic Scotland)— http://www.heritageaudit.org.uk
The Scottish Property Federation (SPF) welcomes this opportunity to comment on the proposed Historic Environment (Amendment) (Scotland) Bill, to which we have submitted comments at earlier stages of the preparation process. We are happy for our comments to be made public.

The SPF is a representative body for the Scottish commercial property industry and speaks for over 100 corporate members. Included within our membership are commercial property developers, landlords and managers, fund managers, property owners and long term investors in both commercial and residential property. We are an integral part of the UK-wide British Property Federation which represents most of the UK’s largest property investors, developers and professional property industry advisers.

According to research published at the end of 2007 the commercial property industry in Scotland was worth some 8.5% of gross value added to the Scottish economy, representing some £7.34bn in 2005. Since the onset of the credit crunch in late 2007 the economic output of the sector has been significantly impaired leading to a fall of some 40% in the value of new construction orders by the commercial property industry in Scotland from 2007 to 2008. Commercial property values in Scotland are also estimated to have fallen by some 40% since their peak in mid-2007.

The SPF supports the over-arching intentions of the amending Bill; to improve the management of historic environment and to contribute to sustainable economic growth. We encourage appropriate protection and investment in historic buildings and monuments of significant national importance and recognise that it is important that policy protects and safeguards such buildings.

However, there have been previous concerns expressed by our members that the use of listed building powers is not always consistent or is sometimes arbitrary and ineffective. Further, some have suggested that the listing of buildings is an overly complex process and leads to conservation bodies being overly protective of every building, where a more sampled approach may suffice. Overall, we believe that the best possible form of preserving heritage property is to ensure its appropriate continued use and maintenance. This can require the refurbishment and modernisation of some parts of a building in order to preserve its usability.

SPF agrees with the aims of this consultation document to improve the protection and management of the historic environment and simplify the legislation. In 

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1 GVA Grimley: the role and contribution of commercial property in the Scottish economy, commissioned by the Scottish Property Federation (2007)
2 Annual Construction statistics, then UK Department for Business, Enterprise & Regulatory Reform (2009)
3 Jones Lang La Salle (December 2008)
particular, we are generally supportive of the introduction of Certificates of Immunity (CoI) and the increased certainty for developers and property owners in relation to grants.

7. We welcome the harmonisation of legislation relating to the historic environment and we support much of this policy initiative. However, it will be crucial to understand how certain aspects of the amending Bill will be implemented in practice, such as the removal of the defence of ignorance and enforcement procedures, and we look forward to further guidance being issued.

Increase clarity on grants and their removal
8. Members have raised concerns over the proposal by Ministers to state from the outset the amount that they will recover if the conditions of a grant are not complied with. Members point out that this may lead to ambiguity over the status of the grant and concern by lenders that it may be withdrawn. Members suggest that by highlighting the amount that can be withdrawn at the start of the process, could impact on bank funding and the viability of development appraisals.

Removal of defence of ignorance
9. SPF recognises the importance of requiring developers to show that they have taken all reasonable steps to ascertain whether there are important historic articles, before embarking on a development. We support the recognition by ministers that this defence cannot be completely removed, as suggested in the earlier consultation, and that there is still potential for developers to show that they have taken reasonable steps to find out whether a scheduled monument is affected by works. SPF welcomes the proposed awareness-raising of these issues and look forward to the additional guidance being produced to assist developers.

Fines; increases and duty of court in determining the amount
10. The increase in maximum fine up to £50,000 is considered to be a very significant increase from the previous maximum of £10,000. This is at a time when the development industry is already facing major economic hardship and is considered to potentially be rather excessive. However, we agree with the theory of the fine being set at a scale to act as an appropriate deterrent to illegal development and to bring it into line with other fines for crimes against the environment. However, caution must be taken that this fee is imposed upon the person who is set to make financial benefit from the illegal activity and not other parties.

Enforcement- stop notices
11. There is some concern relating to the introduction of temporary stop notices, as there is no definition of an ‘urgent threat’ and this may lead to ambiguity and inconsistency of their use. The fact that these notices can be issued by planning authorities without the requirement for an enforcement notice, has raised questions over their robustness and raised concerns that they may be issued on an ad hoc basis. Members believe that these notices should only be used as a
last resort. Additionally, notices should be accompanied by a detailed guidance
advising of the reasons why the notice has been issued and detailed steps of how
it can be appealed.

Greater flexibility on grants and loans
12. We recognise that the Bill is largely intended to amend existing legislation and
practice, offering greater clarity and certainty to businesses and public authorities
about the intention of government policy and the process of protecting heritage
property (and monuments). Our members welcome this greater clarification and
direction in relation to grants. We support the increased powers and flexibility
given to the Scottish Government to issue grants and loans to stimulate
appropriate development of the historic environment.

Certificates that building is not intended to be listed
13. Our members broadly agree with the introduction of certificates of immunity for
listed buildings, as if used appropriately we believe that they can deliver greater
certainty to landlords and developers considering a particular building project.
Given the relatively small cost, we feel that that this proposal should therefore be
supported. However, we would like to see further certainty in relation to any
potential costs and projected timescales for approving CoI requests and greater
detail of how the applications will be assessed. We acknowledge that immunity is
not guaranteed and therefore, members will only apply after very careful
consideration. Additionally, we believe that greater clarification is required to define
what ‘urgent cases’ would receive temporary listing, as this statement has the
potential to reduce the benefits of CoI, if it can be invoked at any time.

14. We note from the policy memorandum accompanying the Bill the intentions for the
Bill to benefit the development industry. However, one key change to CoI’s from
the previous consultation that has been drawn to our attention, relates to Section
18 where it is proposed that any person can apply to Scottish Ministers for a
certificate for a building not to be listed for a period of five years, without having to
notify the owner, occupier or tenant. Members are concerned that one of the
unintended effects will be that third parties will be able to request a listing for
buildings outwith their ownership, which will lead to the historic buildings being
subjected to lengthy and rigorous assessments and result in development being
significantly delayed. Further, there is concern that buildings that do not attain a
COI will be automatically listed by Scottish Ministers. Thus, applications for CoI
may not be made for the purposes set out by the Bill Guidance.

15. It is suggested in fact that CoIs will provide an opportunity for hostile third parties
to delay or derail a proposal, without the developer being aware. Therefore, SPF
believes that this point should be revised and reworded, so that those who are
entitled to apply for a certificate is restricted to the owner or some other person
with a legal interest in the building (i.e. a consultant on behalf of an applicant). It
would also be helpful if there is an agreed timeframe for Scottish Ministers to issue
the certificate or determine otherwise.
16. It is acknowledged that Cols have operated in England over a number of years. However, they have not been deemed to be straightforward benefit for developers, due to the high level of scrutiny and process involved. This may explain the relatively small numbers of applications that have been made in England (e.g. 20 applications in 2008).

17. Overall, SPF is broadly supportive of the amending Bill and its aims of simplifying legislation and improving consistency of policy in relation to the historic environment. The Scottish Property Federation would be pleased to explain our comments in greater detail at your convenience.

Naomi Cunningham
Policy Officer
20 August 2010
SUBMISSION FROM THE SOCIETY OF ANTIQUARIES OF SCOTLAND

1. The Society of Antiquaries of Scotland is pleased to welcome this new Bill which will help to clarify and harmonise legislation affecting those historic buildings and archaeological monuments which currently enjoy protection in law, and close loopholes in the current legislative framework, thereby ensuring better preservation and management of the protected portion of Scotland’s built heritage for future generations. For these reasons the Society Council and Fellows strongly endorse the provisions set out in this Bill, and will support it through Parliament.

2. The Society has commented in detail on most aspects of this Bill in its draft form as consulted on in August 2009. However, there are certain aspects for which the Society would like to emphasise its support.

3. Part 2 Section 3: The Society strongly supports amendments to the 1979 Act in respect of defences involving knowledge or belief. We believe the wording currently suggested is reasonable. To ensure that these changes are effective, enhancing public knowledge of sites and buildings protected by legislation would be very desirable. This would best be achieved as part of a concerted effort to make readily available accessible and understandable information on all historic environment assets. This Society considers this endeavour to include (but not to be restricted to) the continued investment in, and development of, PASTMAP and similar web-based presentations of heritage information (supporting SHEP sections 1.53c and 1.51). Presentational tools such as PASTMAP best highlight the collaboration between Central Government and other bodies, including in this case Historic Scotland, RCAHMS, the local authorities and other holders of relevant historic environment data; we strongly recommend the improvement of information on the precise location and, importantly, extents of historic environment assets.

4. Part 2 Section 4 and Part 3 Section 19: The Society considers the increased fines to be proportionate and welcomes the harmonisation with other environmental deterrence. The Society is also pleased that financial benefit can be taken into consideration in the determination of fines, which should allow this deterrent to be particularly effective.

5. Part 2 Section 6: The introduction of scheduled monument enforcement notices will allow for the more efficient management of protected monuments, and in our judgement is balanced by both Section 9C (allowing for appeal) and the introduction of retrospective scheduled monument consent in Part 2 Section 2 of the Amendment Bill. Allied with the amendment to allow excavation of scheduled monuments without consent from the owner in certain circumstances (Part 2 Section 10) this will allow the fullest understanding and knowledge to be derived from nationally important sites where this might otherwise be unreasonably prevented by difficult circumstances.
6. Part 2 Section 14 improves/clarifies the definition of “monument” and allows the full range of the historic human experience in Scotland to be protected where applicable. Previously, some of the most important sites in Scotland, such as the evidence for the earliest human activity, could not be protected by legislation, because they did not consist of ‘monuments’, as previously defined; this amendment addresses that serious issue, and is appropriately in line with similar provisions in the Marine (Scotland) Act 2010.

7. The Society also welcomes, in Parts 2 Section 17 and 3 Section 21, the harmonisation of heritage legislation with planning legislation through the intention to allow Scottish Ministers to determine the most suitable means of appeal for scheduled monument and listed building consents, the extension of subordinate legislation and the ability to decline consent applications in certain circumstances.

8. However, the Society is acutely aware that our unique and irreplaceable heritage includes more than our protected buildings, sites and monuments as detailed in the main Acts being amended by this Bill. This is a very rare opportunity to strengthen current Government and Ministerial policies on the management of the remainder (indeed the bulk) of these valuable assets.

9. We are therefore asking Government and Ministers to include within this Amendment Bill an additional provision to ensure that all public bodies protect, enhance and have due regard to Scotland’s historic environment in exercising their duties. This request has precedents in natural environment legislation with regard to biodiversity, and recently in the Marine Scotland Act in terms of the Scottish marine area. Many (but by no means all) public bodies already take account of the historic environment in their work, and the Scottish Historic Environment Policy makes it clear in paragraphs 1.40 and 1.41 that all government departments should discharge properly their duty of care for heritage assets they own or lease, and that Scottish Ministers expect all departments and agencies of the Scottish Government, all UK Government departments and agencies operating in Scotland, and all non-departmental public bodies to adopt and adhere to current policy and guidance.

10. However, there is a clear distinction between policy and legislation. While Ministers may expect policy to be adopted, it is only through legislation that public bodies are obliged to comply. Incorporating this short amendment to the requisite legislation will provide the appropriate legislative framework for much of the excellent work that public bodies, Historic Scotland and local authorities already carry out. An excellent example of what can be done is the Scottish Historic Buildings National Fire Database collaboration between Historic Scotland, RCAHMS and the Scottish Fire Services.
11. In addition, in common with many others in the heritage sector, the Society is keen / asks that a provision be included to ensure that local authorities have access, and give due regard to, appropriate information and expert advice on the local historic environment during (the) planning (decision) processes.

12. This second request has been made twice before, in 2002 and 2006. The more recent attempt was to amend the planning legislation, but at that time it was suggested by Government that the Act was not the appropriate vehicle for such a provision, and that a Heritage Bill would be better suited to the purpose. In the absence of such a Bill, the Society feels that it is important that this key provision in included in this Amendment Bill.

13. Why is this important? The internal curatorial advice given to planning authorities with regard to any particular planning application, and on the creation of development plans, is the “front line” for the protection and management of Scotland’s historic environment. The majority of our historic environment is neither listed nor scheduled, and can only be adequately managed through the planning process. The provisions made in relation to planning applications are the key means of securing adequate mitigation when total preservation is not feasible, and underpin much of the work undertaken by the applied commercial sector dealing with the historic environment. From these provisions flow many of the recognised advantages and benefits of Scotland’s historic environment: providing for regeneration and place-making; tourism; education of all types on Scotland’s past; and community engagement. Its loss would be devastating; and inclusion of the above amendment would help to ensure that does not occur.

14. The present difficult financial context, both public and private, with a likely bias towards prioritising public budgets for health, education and policing, potentially means an increased threat to all services not so prioritised, and not underpinned by legislation. There will moreover be a series of retirements over the next three years from various key Local Authority historic environment curator posts: a recent survey indicated that nearly 32% of the small number of staff engaged in this activity were over 50. Local Authorities are contemplating very large spending cuts. Against this, recent research into the historic environment, not including museums, suggests that it provides £2.3billion GVA and directly supports 41,000 jobs in Scotland. It has to be acknowledged that some of this is, directly or indirectly, driven by the planning process, and much is linked to tourism, which thrives on Scotland’s historic environment as much as its natural environment. Expert historic environment advice in

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1 Survey of LA Policies, Staffing and Resources for the Historic Environment in Scotland, Geoff Peart Consulting with Arup Planning, 2009
2 HEACS Report and Recommendations on the Economic Impact of the Historic Environment in Scotland, Feb 2009

Note The Society is a member of Built Environment Forum Scotland (BEFS) and commends the BEFS evidence to you. Information on BEFS is available here—http://www.befs.org.uk/
local authorities contributes much, and – with the additional endorsement suggested above – could contribute more, to this excellent return for Scotland.

15. Scottish Government and local authorities are clearly opposed to any additional burdens and costs arising from this legislation. Indeed, both have made it plain that they oppose the sector’s proposed additions to the Bill. However, we argue that these provisions do not add any significant burdens to either public bodies or local authorities, since information and expert advice is already available to the local authorities, i.e. they are already paying for it, and the sector is already considering how best to develop that information provision and expertise in the face of necessary change over the next decade.

16. The provisions requested as amendments to the Bill are therefore aimed at drawing a firmer line in the sand, to help protect the Historic Environment as much as we can for both the short and long term. They do not, and cannot, place any expectations on the precise models of how that protection may be afforded, but they do try to bring all undesignated historic environment assets in the landscape into a framework of primary legislation, such that they cannot simply be ignored.

17. In summary, as presently cast, the Bill will provide an enhanced toolkit for much improved management and protection of part of our historic environment. However, the addition of the two provisions considered above would ensure a wider and lasting legacy of which Scotland’s people could be proud.

Dr Simon Gilmour
Director
20 August 2010
SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL

1. South Lanarkshire Council notes the principles underlying the changes being proposed in the bill and generally welcomes the way in which they will assist planning authorities in dealing with these matters. The changes made to the bill following consultation are also noted and the Council has no comment to make in this regard.

2. The Council considers that these proposals should help towards making improvements in the way in which the historic environment is protected and enhanced. The Council therefore supports the bill.

Gordon Cameron
Headquarters Manager, Planning and Building Standards
20 August 2010
Note: (DT) signifies a decision taken at Decision Time.

**Historic (Amendment) (Scotland) Bill:** The Minister for Culture and External Affairs (Fiona Hyslop) moved S3M-7295—That the Parliament agrees to the general principles of the Historic Environment (Amendment) (Scotland) Bill.

After debate, the motion was agreed to (DT).
Historic Environment (Amendment) (Scotland) Bill: Stage 1

The Presiding Officer (Alex Fergusson): The next item of business is a debate on motion S3M-7295, in the name of Fiona Hyslop, on the Historic Environment (Amendment) (Scotland) Bill.

14:55

The Minister for Culture and External Affairs (Fiona Hyslop): I begin by thanking Karen Whitefield and the Education, Lifelong Learning and Culture Committee for their careful and informed scrutiny of the Historic Environment (Amendment) (Scotland) Bill and for preparing the stage 1 report on the bill. I also thank all the individuals and organisations who commented on the draft bill, which was subject to public consultation in 2009, and those who contributed to the wider stakeholder engagement process that has played a key role in helping to develop and refine the bill’s provisions.

Before I move on to discuss the bill and the key issues that are raised in the committee’s report, I would like to say a few words about the importance of Scotland’s historic environment. The role that the historic environment plays in providing the people of Scotland with a sense of place has been brought home to me in rather stark fashion in recent weeks with the damage, through fire, of the Star and Garter hotel in my home town of Linlithgow. The hotel, which is a B-listed Georgian building, has adorned the east end of the town since the middle of the 18th century and has been an iconic building in Linlithgow’s townscape. The reaction to the fire has demonstrated the prominent role that that listed building has played in helping to define the physical character of Linlithgow High Street, and the obvious connection that it has with the sense of place that is felt by the people who live there.

The importance of the historic environment is not limited to a sense of place. It also makes a significant contribution to the economy, for example through tourism and the support of indigenous craft skills. It is intrinsic to our strong sense of cultural identity, it provides the people of Scotland with a rich environment in which to live and work, and it is inspiring and has a significant role to play in developing a sustainable economic future for Scotland.

In introducing the bill, the Scottish Government’s aims have been threefold: to improve the management and protection of our unique historic environment by addressing the specific gaps and weaknesses in the current legislative framework that were identified during a year-long stakeholder engagement process in 2007; to avoid placing significant burdens or duties on central or local government, owners of assets, business or members of the public; and, in a challenging economic climate, to keep the implementation cost low.

One of the bill’s underlying objectives is to harmonise aspects of historic environment legislation with the planning regime when it is practicable to do so, which has been particularly welcomed by stakeholders. However, the bill should also be seen to complement the work that is already being done by Historic Scotland in partnership with local authorities to streamline and simplify our system of heritage protection. Examples of that are the establishment of joint working agreements between local government and Historic Scotland, and the managed removal of a duty on local authorities to notify the Scottish ministers of certain casework.

The bill will contribute to the Scottish Government’s purpose by enhancing the ability of the Scottish ministers and planning authorities to manage in a sustainable way Scotland’s unique historic environment. The bill will support the Scottish Government’s greener strategic objective, and will contribute directly to the meeting of national outcome 12 by providing a much-improved legislative toolkit to help to protect and enhance our built environment for future generations.

The committee considered the evidence that was submitted to it very carefully and produced a thorough and thoughtful report. I will touch on some of the key issues that are discussed in that report.

The bill will enhance the ability of the Government to work with developers and owners by enabling the Scottish ministers to set out in a grant award letter the terms of recovery in the event of a disposal or a breach of a condition of grant. I am pleased to note that the committee concluded that that proposal is sensible and will provide a higher level of certainty to grant recipients.

The proposal in the bill to modify the current defence of ignorance in relation to unauthorised works affecting scheduled monuments will modernise an archaic piece of law and bring the framing of such offences closer to that of other environmental offences.

The committee stressed the importance of the availability of, and access to, information on scheduled monuments for the owners of such sites, and it has asked for an example of the information that we propose to send to all owners, if the bill is enacted. I confirm that a draft
information pack will be with the committee in advance of its stage 2 consideration.

The bill will introduce a system of enforcement notices for scheduled monuments that will harmonise the arrangements for scheduled monuments with those for listed buildings. The bill also includes provisions that will provide for a system of stop notices and temporary stop notices for listed buildings and scheduled monuments that will strengthen protection for designated historic assets and bring it into line with the planning system. I am pleased to note the broad support for those provisions.

The bill will create a duty for the Scottish ministers to compile and maintain two new statutory inventories: an inventory of gardens and designed landscapes, and an inventory of battlefields. The inventories will enable nationally important sites to be identified and recorded on a statutory basis, and they will allow planning authorities to pick up on changes to the inventories immediately. It is important that those provisions will impose no new additional duties or burdens on owners.

The bill will extend the range of historic environment assets that can be scheduled under the Ancient Monuments and Archaeological Areas Act 1979. That provision will allow the Scottish ministers to designate and protect a small number of nationally important sites that are currently afforded no protection, such as, for example, scatters of flint tools that mark sites of early human occupation. Such sites are important but rare; the total number of sites that are likely to be scheduled is around 10.

The bill will introduce a new power that will enable the Scottish ministers to offer any person a certificate that will guarantee that a building will not be listed during the five years from the date of the certificate. The main policy aim of that is to provide certainty for owners and developers who are considering works. It will allow projects to be started with confidence, because crucial decisions about listing have been made at an early stage in the process. The policy is not, as a matter of principle, to exempt buildings from listing, because the listing of a building would be a perfectly proper outcome of the process of considering a building for a certificate of immunity. That should address some of the concerns that have been raised by the Law Society for Scotland. I am pleased to note that the committee supports that proposal.

I am also pleased to note that the committee recognises that our proposals to extend to successor owners the liability for any expenses for urgent works that are carried out by the regulatory authorities will address the situation in which an owner transfers ownership in order to avoid payment.

I want to address some of the points that were made in written evidence from the Built Environment Forum Scotland, which called for the bill to do two things. First, it wants the bill to give all public bodies a responsibility to protect, enhance and have special regard to Scotland's historic environment in exercising their duties. Secondly, it wants the bill to ensure that local authorities have access, and give special regard, to appropriate information and expert advice on the local historic environment.

The Scottish Government's view is that the bill, which is cost neutral, is not the vehicle for such provisions, because both proposals could have significant cost implications. The first duty that is sought by the BEFS would apply to all public bodies, no matter how remote their connection to the historic environment. It would impose a proactive duty to protect and enhance the historic environment, which goes much further than simply having to have regard to, or—to use BEFS's words—"to take cognisance of" it. Such a duty would require additional resources to ensure compliance. Indeed, the duty would be so open-ended that it is difficult to see a point at which a public body could safely stop spending money without fear of non-compliance.

The second proposal is simply not developed enough to be costed accurately. Any legislative duty would give local authorities no alternative but to spend the money that is necessary to bring the current information and expertise up to the standard that would be required by such a duty. However, I acknowledge that information and expertise are important and, to that end, a working group has been set up to examine the issues that are involved and to identify a range of options for improving on the current situation that will take realistic account of the current economic climate.

Ken Macintosh (Eastwood) (Lab): I am pleased that the minister has raised both those points, and I will talk about them later, if I can. On the first point, does she recognise that the Built Environment Forum Scotland is not asking for any new duties? It is simply asking for a restatement of existing duties and for greater emphasis to be put on them; that is, for the duties to be prioritised. It would not be a new burden on local authorities at all.

Fiona Hyslop: That is not how we interpret the proposal, and it is certainly not how local authorities and others have interpreted it. The proposal seems to be for a proactive duty that does not currently exist, although I look forward to hearing Ken Macintosh's contribution on that point.

Our view is that there should be no new statutory controls and duties when better and more proportionate means to bring about improvements to the heritage framework are
available. The Historic Environment (Amendment) (Scotland) Bill is a tightly focused technical amending bill that has been drafted with the intention of avoiding placing significant new burdens or duties on public bodies or individuals, and implementation costs are expected to be low. The bill addresses the specific gaps and weaknesses in the current heritage legislation framework that were identified during extensive discussions with stakeholders, and its provisions will make a good system better and improve the ability of the regulatory authorities to work with partners to manage Scotland’s unique historic legacy.

I look forward to hearing members’ contributions on this important issue. No doubt we will also get a sense of the importance of Scotland’s historic environment from members’ reflections from their constituencies of how such issues have had an effect and may have an effect in the future.

I move,

That the Parliament agrees to the general principles of the Historic Environment (Amendment) (Scotland) Bill.

The Deputy Presiding Officer (Trish Godman): I call Karen Whitefield to speak on behalf of the Education, Lifelong Learning and Culture Committee.

Karen Whitefield (Airdrie and Shotts) (Lab): I am pleased to have the opportunity to speak today on behalf of the Education, Lifelong Learning and Culture Committee in support of the general principles of the Historic Environment (Amendment) (Scotland) Bill.

Scotland has a long, proud and rich cultural history that plays a significant part in the story of the development of the modern world. The preservation of history, whether it is in the form of land, buildings or artefacts, is crucial to Scotland for many reasons. First, and most basic, is the intrinsic historical value of relics. Their existence allows us to enhance our understanding of history, who we are and where we came from. Secondly, many of the buildings and artefacts have great aesthetic value; they are beautiful and deserve to be protected. Thirdly, and not insignificantly, Scotland’s cultural heritage plays a vital part in our tourism industry, so it makes perfect sense for us to protect and invest in that heritage. It is for those reasons that the Education, Lifelong Learning and Culture Committee agrees with the Scottish Government that the bill is necessary.

As members will be aware, the bill is an amending bill that addresses issues that have been highlighted by local and central Government, and follows extensive consultation of Historic Scotland. The key aim of the bill is to harmonise the legislation that covers the environment, scheduled monuments, listed buildings and the marine environment. The bill will amend three existing acts: the Historic Buildings and Ancient Monuments Act 1953, to allow ministers to specify the amount of grant that can be recovered if conditions of grant are breached or a building is sold within 10 years; the Ancient Monuments and Archaeological Areas Act 1979, to amend certain provisions relating to scheduled monuments; and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, to amend provisions on listed buildings.

In total, the committee received 21 submissions as well as two letters from the minister. As might have been expected, there was a clear split in the reaction to the bill between those who use the historic environment and those who primarily seek to conserve and protect it.

Those who use the historic environment were most concerned about amending provisions placing more restrictions and obligations on owners, while those who primarily seek to conserve and to protect were concerned that the bill had missed an opportunity to address broader matters. I will come to those details later. However, on the general point, it is fair to say that members of the committee recognised that, on occasion, there can be a conflict between the interests of those who own and run historic monuments and those who use them. It is also true to say that those interests are often in agreement rather than in conflict.

I come to the specific provisions of the bill. The bill seeks to revise the defence of ignorance for those who are found to have carried out unauthorised works on scheduled monuments. The clear view of the Scottish Government and Historic Scotland is that those who ought to know that a site is a scheduled monument should not be able to use ignorance as a defence. There was a feeling that that defence could be used as an excuse for unsuitable developments.

However, other organisations, such as the National Trust for Scotland and Heads of Planning Scotland, pointed out that there is often a real lack of up-to-date information about the location and status of scheduled monuments. The committee had some sympathy with that point and agreed that, if the provision is implemented, there is a need for improved information systems relating to scheduled monuments. That is why I welcome the minister’s point about information packs being provided to the committee in draft form in advance of stage 2. In response to those concerns, Historic Scotland has confirmed that it intends to list the information and make it more accessible. The organisation has undertaken to write to all owners to outline their responsibilities.
The bill will extend the provision of notices that can enforce action where unauthorised works have been carried out. That will strengthen the options that are available to Historic Scotland in such instances. Those provisions were generally supported, although the Law Society of Scotland raised some concerns about appeals and about the scope of the definition of works executed in, on or under a scheduled monument.

The bill will place the existing inventory of gardens and designed landscapes in legislation and create an inventory of battlefields. Owners and occupiers of those sites expressed concern that inclusion in an inventory would place obligations on land and restrict use. They were also worried that that part of the bill could oblige owners to maintain a site in a particular state. The Historic Houses Association Scotland put that concern rather nicely when it stated:

“We do not want to get to the stage that we have to apply to change the azalea bulbs.”—[Official Report, Education, Lifelong Learning and Culture Committee, 15 September 2010; c 3827.]

I am sure that we would all agree with that. Perhaps it is a matter for an azalea and related species bill that the Government might consider in the future. However, the bill probably gets the balance right. I am pleased that the minister has provided assurances that those concerns were unfounded and that inclusion on the inventories would be relevant only if any planning applications relating to the site were submitted.

Also included in the bill are provisions to extend the definition of monument to include

“any site ... comprising any thing, or group of things, that evidences previous human activity”.

That would cover sites that do not include something that can be defined as a structure or work, such as artefact scatters or archaeological deposits. Some concerns were raised about the form of wording used and that the definition might include too many sites and infringe on existing land use. However, in a letter to the committee, the minister provided strong assurances that

“only sites which are of ‘national importance’ may be scheduled”.

Most people would welcome that confirmation.

The bill proposes a system of certificates to guarantee that a building will not be listed within the next five years—certificates of immunity to list. Those are designed to encourage building development by removing the possibility that the relevant building will be listed during the development process. That proposal attracted the most comment in evidence, especially the provision that anyone can apply for a certificate. Concerns were raised that the process would be used to delay a building development without the owner’s knowledge. The committee noted that it is already open to anyone to suggest that a building can be listed, which can have the same effect as delaying a building development. We therefore concluded that there are no grounds for that concern. We also took the view that some developers might not want to buy a building without such a certificate, and that limiting applications to owners might have the effect of discouraging some building developments.

Although the provisions are not exhaustive, the bill also contains provisions to make it easier for local authorities to recover expenditure on urgent works to listed buildings that are in private hands. That is a technical provision, which basically registers the debt to the property rather than to the owner. There have been instances of owners passing ownership through a series of companies to avoid being liable for such debt. Serious concerns were expressed in relation to the provision. In particular, concerns were raised about the implications of someone buying a property on which such works had previously been carried out, and then inheriting that debt. The Scottish Government made it clear that any debt of that nature would become clear during the normal conveyancing process and would be dealt with in the same way as any other expenses for repairs. That clarification was welcomed by the committee.

Before concluding, I want to thank everyone who gave evidence during stage 1. Their evidence has helped to tighten and focus what was already a fairly well-received bill. I am sure that that was a relief to the minister, who has not always had that kind of experience at the Education, Lifelong Learning and Culture Committee. There was consensus on the matter in the committee.

I would also like to thank the committee clerks for the hard work they have put into preparing the stage 1 report and organising our evidence-taking sessions.

I believe that the bill will significantly improve the protection and development of our cultural and historic environment. I am sure that, as was the case in committee, we can all agree today to support the general principles of the bill.

I look forward to the minister responding to some of the relatively minor concerns that were raised during stage 1.

15:17

Pauline McNeill (Glasgow Kelvin) (Lab): This is a technical bill, but it is also an important and necessary one. The committee has prepared a thorough report, and I congratulate it on that. As Labour’s spokesperson on culture, it falls to me to contribute to this stage 1 debate. However, I am
also the member for the Glasgow Kelvin constituency and, like many members, I have a strong interest in this debate.

No period of Scotland’s past or part of its land is any more or less likely to produce a protected site than another. My constituency has its fair share of historic buildings, such as Garnethill synagogue. It was Scotland’s first purpose-built synagogue and has high-quality stained glass. There are also the Glasgow film theatre, the Grand Central hotel and the King’s theatre. I am sure that each of our constituencies contains similar examples of monuments and architecture that are of historical interest. I should say that I think that Glasgow Kelvin is a little short on battlefields, as far as I know; although there are probably a few battles to come there, their sites will probably not be of the sort that are eligible to be registered.

We can all cite examples of why a duty falls on the state to protect and preserve important historical sites and to ensure that the public have access to them. That is done across the country because we believe that future generations should be able to benefit from the sites. It is our duty to ensure that that happens. That is why I believe that it is important to modernise our legislation, as we are doing.

The bill’s policy memorandum talks about our historic environment being “inspiring and irreplaceable”. That latter word is important because it must be emphasised by legislators that, if we do not protect our historic buildings and sites, we will not be able to replace them.

I care a lot about the Egyptian halls in Union Street, which is a stunning piece of Victorian architecture. Although the work of Alexander “Greek” Thomson, the chief architect to the second city of the empire, is writ large in Glasgow, the attempt to save that great building is in its last throes. I have exchanged correspondence with the minister on the campaign, and we agree that the building must be saved because it is important to Glasgow’s heritage. I pay tribute to Derek Souter and Historic Scotland, on behalf of the Government and Glasgow City Council, for the work that they are doing.

The bill will introduce new provisions, remove barriers to the use of existing powers and assist regulatory and planning authorities to manage the historic environment. As Karen Whitefield said, the bill will amend three existing pieces of legislation: the 1953 act, the 1979 act and the 1997 act. It is intended to harmonise historic environment legislation with environmental protection duties while—crucially—avoiding new financial and regulatory burdens.

I welcome that principle, although careful consideration will be needed as the bill passes through its various stages to ensure that that remains the case. We all know that we face difficult times, and we must get the balance right to ensure that we protect our history in the financial period ahead, which will not necessarily be the best time to make such a case.

Ignorance will no longer be a defence in relation to the protection of a monument, so accurate and up-to-date information is critical. It is about time that that defence was brought into law and its use restricted.

Section 1 of the bill deals with the expansion of ministers’ powers to be more specific on how a grant will be recovered in the event of the sale of the building that it has funded. That seems to be a sensible way to allow flexibility for ministers, which is critical. I have had some experience in my constituency in relation to Crown Terrace, on which the legislation was quite restrictive.

Section 3 deals with the modification of defences in relation to unauthorised work. It is important, as the Government has stated, that all owners of scheduled monuments be aware of their duties, and the Government has committed to bringing that about. Section 6 gives ministers new powers to serve enforcement notices, including stop and temporary stop notices, which are necessary to protect our historic environment.

With regard to section 14, the definition of a monument in the 1979 act has been criticised for the lack of provisions to protect archaeological sites. That was noted by key witnesses and by the Built Environment Forum Scotland, in particular. The new provisions do not mean that sites would be scheduled willy-nilly, but the bill places an emphasis on sites of national importance, and the key test is how the monument contributes to our understanding or appreciation of our past.

The key issue for debate is the application of section 18, which the committee spent quite a bit of time considering. The new provision will introduce a power to issue a certificate that would guarantee that a building would not be listed during the following five years. I agree with the committee that such a development makes sense, but I am pretty sure that more work must be done to ensure that the provision is clear in law and that it will be used. The Law Society of Scotland, in a helpful letter that it circulated to members in advance of today’s debate, states that there seems to be some confusion around that. It seems obvious that the owner or the person with an interest should be able to apply, but we need a debate on what is meant by the wider interest of any person who is able to do that.

Clarity is needed on the existing provisions by which the public at large can apply for a building to be listed. Again, in my constituency, parents were
able to have a local school listed to restrict the nature of the development in a planning application, so that process is certainly being used.

Fiona Hyslop: There is nothing in the bill that would stop that happening in the future. The decision to list should be based on the merits of each case, not on the stage at which the application is made. The parents in the situation that Pauline McNeill describes would have been able to apply for a certificate of immunity, but they would have run the risk that the listing might not have been granted.

The Law Society has raised the concern that the new provision could somehow thwart development, but that may not be the case, as the decision to list would still be based on the merits and demerits of the case itself, and not necessarily on the certificate of immunity.

Pauline McNeill: I agree that the process should not be available to thwart a planning application, but I believe that some thought needs to go into what might be two similar processes. If I have read the bill correctly, consideration of an application for a certificate will also appraise whether the building should be listed, and ministers could conclude in that process that the building should be listed. If they decide that it is not to be listed, the developer gets immunity for five years. The provision is an important and welcome development. I just think that it is an aspect of the bill where the legal process needs to be scrutinised a bit more closely at stage 2.

With those comments, I express my full support for the committee’s report and the bill.

15:25

Ted Brocklebank (Mid Scotland and Fife) (Con): I note that the policy memorandum that accompanies the Historic Environment (Amendment) (Scotland) Bill describes it as “a tightly focused technical amending Bill”.

I am tempted to rechristen it a much ado about nothing bill, but as I never enjoy upsetting the minister, I instead suggest that it is not the major piece of work to overhaul legislation on the historic environment that it could and perhaps should have been.

I agree with Fiona Hyslop that Scotland is hugely fortunate in its historic environment. From the nation’s archaeological cradle, Orkney, to the iconic standing stones of Callanish; from our earliest living places, the earth houses and stone settlements such as Jarlshof and Skara Brae, to the brochs and keeps that are the earliest examples of our rich inheritance of castellated architecture; and including battlefields such as Bannockburn, Flodden, Sheriffmuir, Killiecrankie, Culloden and the rest, we have a rich inheritance indeed. The great thing is that the story of our historic environment is still unfolding. Aerial photography and crop markings regularly reveal unknown Pictish and Roman forts, and ancient coins and remnants of standing stones still surface during ploughing.

When my local plumber was excavating his back garden for a new house extension a few years back, he unearthed a unique collection of axe heads, arrows, swords and jewellery that were in a remarkable state of preservation considering that they had not seen the light of day for 3,000 years. The so-called St Andrews hoard, which is one of Scotland’s most important bronze age discoveries, can now be viewed in the national museum of Scotland.

It is absolutely right that an enlightened and caring society should wish to protect and conserve the best of its historical heritage. To know where we are going, it is important to know where we have come from. Of course, there is also the vital matter of tourism. However, in their enthusiasm to protect and conserve virtually everything, I believe that the bodies that are tasked with overseeing our historic environment have too often retreated to the ivory towers of academia, where common sense seems an alien quality and any who dare to question the edicts that are sent down from on high are caricatured as cultural vandals.

In previous speeches, I have highlighted the decisions that were made on several scheduled monuments and listed buildings as well as Historic Scotland’s apparent inability to dovetail conservation with legitimate local development. From recent meetings that I have had with Historic Scotland, I believe that a welcome wind of change is blowing through the organisation. However, although I agree with George Reid that Historic Scotland and the National Trust for Scotland should both be retained as our lead conservation bodies, I also believe that considerable streamlining of their joint activities is required to make them fit for purpose.

Fiona Hyslop: Does the member acknowledge that George Reid made it clear in his report that he did not see an immediate need for comprehensive historic environment legislation but that, as part of its development, the National Trust for Scotland would need to look at its governance, and that might require legislation?

Ted Brocklebank: Of course, George Reid was tasked with looking only at the National Trust for Scotland. He did not look more widely at the overall situation, so I still maintain that I would have liked the bill to deal with the matters that I mentioned. Instead, we seem to be largely
tinkering at the edges of existing legislation, no matter how important that tinkering is.

I understand that the bill’s provisions are to help the Government to meet its international commitments under the Valletta convention, most of which are uncontentious. However, I want to deal with a few that are likely to raise concerns. In fairness, I think that the Education, Lifelong Learning and Culture Committee also highlighted them in its useful report.

The first relates to changes to the Ancient Monuments and Archaeological Areas Act 1979, from which the defence of ignorance of what defines a monument on the part of an owner is largely removed. Not every farmer who, when ploughing, unearths a cluster of stones necessarily recognises them as the remains of a prehistoric burial cist. If no skeleton is apparent or if the cist has previously been broken up, there could be considerable ambiguity about its status as a monument. Indeed, for us, the bill’s definition of an historic monument itself seems too broad.

Equally, concerns have been raised about the designation of gardens, designed landscapes and battlefields. As the Historic Houses Association Scotland has pointed out, putting together an inventory of battlefields is fraught with difficulties. Culloden, for example, is often described as the last battle fought on British soil but, more than a hundred years later, the so-called battle of the braes was fought between Skye crofters and Government militia. Was that a real battle? How does one define a battle? Is it defined by the number of people killed or its historical importance? Who decides what is important, especially when a designated battlefield might also be a crofter’s vital grazing land? None of those big questions seems to have been answered in the bill.

New powers have also been proposed to allow entry to a monument without the need for consent from the owner where the monument is at risk. The proposed definition of “imminent damage or destruction” seems loose and could well be abused to give unfettered entry to excavate sites without the permission of owners.

Although we broadly agree with the proposal for a certificate of immunity guaranteeing that a building will not be listed for five years from the granting of the certificate, we also believe that there is merit in the Law Society’s argument that the scope of those who may apply for such a certificate should be restricted to owners or occupiers. Extending the scope to “any person” will mean that not only those who are interested in property development in the positive sense but those who are hostile to property development will be able to apply. Restricting certificates to those who are directly involved would provide the necessary degree of certainty in the preparation of development proposals to which the minister alluded.

We on this side of the chamber are less convinced by the provision that listed buildings should carry a notice of liability for urgent works expenses. Such a move seems particularly iniquitous in cases in which an owner of a ruin who has had no say in its listing and no access to public funds to help save it might be prevented from selling it or the land it sits on because of an attached liability notice.

However, as I have said, the bill concerns itself largely with technical changes that, apart from those that I have highlighted, are broadly welcome. Although the major thrust of legislation on our historic environment will clearly have to be left to a more ambitious future bill, we will support this bill’s general principles.

15:32

Margaret Smith (Edinburgh West) (LD): I, too, thank all those who have helped the committee to reach this stage, particularly those who gave evidence. I also want to thank our clerks for their work in preparing the report and the minister and her civil servants. I welcome the minister’s announcement on the information packs; it will certainly be useful to see them in due course.

As we have heard, this amendment bill has received broad support at committee stage and I am pleased to put on record the Liberal Democrats’ support for it. The Historic Environment Advisory Council for Scotland’s 2006 report indicated the need for a review of heritage legislation in Scotland. I am pleased that that has come to fruition and I welcome the bill’s aim to address specific gaps and weaknesses in current legislative provision. As a result, we welcome the proposals on recovery of grants, on recovery of debt, on urgent repairs, on the modification of the defence of ignorance, on extension of notices and on the inventory of battlefields. I am not sure whether the chamber falls into the last category—we shall see.

We should applaud the work that has already been carried out across Scotland by local authorities, Historic Scotland, the NTS, owners and others to preserve our historic sites. I particularly applaud the thousands of volunteers who are involved in the preservation of our historic monuments and environment. As the member who represents Cramond, I pay tribute to the volunteers of the Cramond Heritage Trust who, over the years, have been involved in the discovery, excavation and preservation of the Roman baths and fort, the 18th century village, the iron mills and the marked nut fragments that show...
The importance of the historic environment in Scotland is widely acknowledged, but the scale and nature of the economic benefits that it provides remain poorly understood. In 2009, ECOTEC published a report entitled “Economic Impact of the Historic Environment in Scotland”, which found that the sector contributed in excess of £2.3 billion to Scotland, which represents £4.5 billion of output. The sector’s contribution to the national economy is estimated to be equivalent to 2.6 per cent of Scottish gross value added. The report concluded that our historic environment directly supports around 41,000 full-time equivalent employees, and the benefits that it provides are widely appreciated across Scotland.

In the evidence that it took, the committee saw that the sector is diverse and involves public bodies, private bodies and voluntary organisations working together. Tourism is perhaps the best recognised and most vital source of income for the sector. It is worth noting that a visitor experience survey by VisitScotland showed that 90 per cent of our international visitors spent time at castles, historic houses, palaces and the like. It is undeniable that the sites that we traditionally regard as visitor attractions are a magnet for tourism.

Although there has been widespread support for the bill, there have been some issues of debate. I note the concerns that a number of organisations raised in relation to the extension of the definition of what is a monument. However, as the stage 1 report documents, the committee expects the Scottish Government to act rigorously, having regard to strict criteria, when considering possible sites for designation. We welcome the minister’s reassurance that designation will be limited to areas of national importance.

As members know, the committee heard different views about the issue of statutory duties on councils and other public bodies. I have concerns about the financial implications for local authorities if further statutory duties are placed on them in respect of the historic environment. Many of the authorities that supplied written evidence to us expressed that view. The imposition of such duties would have a significant impact on all local authorities, especially in cities such as Edinburgh, which I represent. We will probably need to return to the issue. I welcome the minister’s indication that a working group has been set up to consider it. The matter needs to be kept under review. However, given the budget constraints that our local authorities face, it is absolutely right at the moment to progress the bill on the basis that it will be cost neutral.

The committee heard different opinions on section 18, which introduces a power for ministers to issue—or not to issue, as the case may be—a certificate that guarantees that a building will not be listed for five years. I agree with the minister that there is a risk in seeking a certificate of immunity, in the same way as there is a risk to communities, owners and others in seeking a listing. It is a question of balance. Applications for listing can be made by anybody, and we agree that it makes sense to balance that power, so that anyone can express a desire to have immunity for five years. We agree that the provisions might give greater certainty to the construction industry, which is valuable. There is also value in ensuring that owners of properties are notified of such applications.
The bill will protect our uniquely Scottish heritage and help to sustain Scotland and its tourism industry. We are pleased to support it.

15:40

Bill Wilson (West of Scotland) (SNP): I have no doubt that one of the pleasures of today’s debate will be members’ recollections of the many and varied historic sites that they have visited in Scotland, coupled, no doubt, with the occasional reference to historic buildings in their constituencies.

We should be careful, however, while acknowledging that we are debating the built environment, not to think of the historic environment as solely the built environment. I say that because evidence of our ancestors’ activities can be seen not just in our buildings, but in our landscape. The heather muir that we see today is not a natural but a semi-natural construct, and ditches, mounds, banks and hedgerows all say much about our past activities. Our forefathers speak to us not just through bricks and mortar, but through scenery.

We are fortunate. Perhaps we do not always appreciate how fortunate we are in having such a wealth of evidence of our ancestors’ activities. My wife’s country has few buildings pre-dating the 1800s, whereas we have thousands. That is an immense connection with the past, which shapes today’s culture, as well as tomorrow’s.

The link between the heritage of our built environment and our living culture is perfectly illustrated by Paisley’s sma’ shot cottages complex—although I do not have time now to explain the history of the weavers, their struggle for fair pay and their sma’ shot thread. Not only does the beautifully restored site offer the people of Renfrewshire the opportunity to see how their ancestors lived, it adds a tangible element to an event that is listed on the intangible cultural heritage project’s website—yes, I am aware of the apparent paradox here, with a tangible element to an event that is listed on the intangible cultural heritage website. Many of the living cultural events that are listed on the website—events that bind communities and give people a sense of identity—are linked to our built heritage. The Kirkintilloch canal festival is another obvious example. Even when there is no explicit connection between constructions and events, the backdrops against which parades, festivals and celebrations take place are crucial. Historic monuments and buildings often form the markers and boundaries around which such events are based.

The importance of such rooted culture cannot be overstated. It provides us with a firm base and the sense of security that we all need. Scotland is profoundly rich in such rooted culture. That is not to say that our culture is better than any other culture—I do not believe that there are superior or inferior cultures. Were I Brazilian, my sense of belonging would no doubt come from Brazilian culture. There is no superior culture, but an appreciation of one’s own culture helps to build an appreciation of others. How can one properly understand and love others if one does not first understand and love oneself?

It is vital that we act to ensure that the cultural wealth of today, which is a gift from our forefathers, is passed on to our children, and that the Scots of tomorrow can still speak the Scots and Gaelic languages, still hear traditional music, still visit the historical sites and walk in countryside that shows its connection with our past.

We are fortunate, but it is easy to be complacent. In the past few hundred years we have lost much. I will give a few examples. In 1100, Inchinnan church was built and gifted to the Knights Templar; in 1800 it was demolished. Hamilton palace was built in the 1600s; in 1929 it was demolished. Paisley town jail was built in the 1800s; in 1970 it was demolished. Those are just a few examples of the thousands of sites that we have lost. Where are all the city walls? Why is Glasgow’s oldest building—in relative terms—so recent? It is vital that we avoid complacency and ensure that all Scotland understands its duty to protect our historic and cultural environment.

I had intended to ask the minister at this point what her views are on the suggestions on the built environment. Instead, I welcome her announcement of a working group.

Given the importance of our historic buildings, how can anybody do other than welcome the enhanced penalties for damaging or destroying them? There are some people in the chamber who have a less enlightened view of crime and punishment, and some might say that those who are accused of damaging an historic building should be tried and punished according to the norms of the era in which it was built. Thus, when someone is charged with damage to a 14th century church, guilt might be determined using ordeal by fire. If damage is done to a baronial hall, clearly trial by combat is the obvious solution. It would, of course, only be reasonable in the circumstances to allow the minister the right to appoint a champion, rather than participate herself—unless she preferred to participate herself, and I would not deny her the opportunity. As for punishment, we have the stock, the gallows and the iron maiden. Sadly, however, I fear that we must forgo such delights—and the fee-paying crowd that they would undoubtedly attract. Nonetheless, I cannot but welcome the increased penalties that are
proposed in the bill. Historic buildings are unique. Once gone, there is no return.

I have one question for the minister, and I would appreciate clarification. Under section 4, courts will be required to recognise any financial benefits to the offender and the maximum fine will be £50,000. What will happen if an individual should obtain financial benefit greater than £50,000 from destroying or damaging an historic site?

I am delighted that we will soon have a register of battlefields in Scotland. No reasonable person can regard our record on the preservation of battlefields as other than lamentable. Before any member of the Opposition seeks to debate the point, let me put one question to the chamber: is there another nation on this earth that would have allowed a battlefield site as significant and unique as Bannockburn to be built upon? When one considers the development of that site, one easily sees that, in the past, insufficient care was taken of Scotland’s historic and cultural heritage.

The principle must surely be that historic buildings are not merely the property of an individual but the inheritance of a nation. We all have rights when it comes to our national heritage. The duty to pass that heritage to the next generation should be paramount and above the right of individuals to dispose of their property as they will.

15:46

Claire Baker (Mid Scotland and Fife) (Lab): I am pleased to speak in this debate on the Historic Environment (Amendment) (Scotland) Bill. As a member of the Education, Lifelong Learning and Culture Committee, I know that we have no shortage of legislation at the moment, as those of us who were in committee last night will confirm.

This afternoon, we are showing the full range of our committee’s responsibilities, and I am pleased to contribute to the debate. Although the bill is largely technical—it amends three acts and introduces some new provisions—its aim is to improve the way in which the historic environment is managed by the regulatory and planning authorities in a way that is both sustainable and secures the historic environment for the enjoyment and benefit of future generations.

Much of the dry description of what the bill does makes it sound fairly uninspiring, but what does our historic environment offer us? For children, it provides a springboard for the imagination and an insight into a world that is dramatically different from the one that they live in. The increasing engagement work that agencies such as Historic Scotland undertake helps to bring that to life for a modern audience.

The historical environment provides us all with an understanding of how Scotland emerged and how Scottish society took shape and left its mark on our landscape. In my own region of Fife, 280 sites and monuments have been designated as being of national importance and are protected under the Ancient Monuments and Archaeological Areas Act 1979. The sites cover all aspects of human occupation of Fife over the past 10,000 years, ranging from Mesolithic hunter-gatherer camps, dated to 7,500 BC, to the Royal Observer Corps bunkers of the cold war.

Many of the remains are a fragile and non-renewable resource, and we must all work together to preserve and enhance them. Fife Council archaeology unit offers information and advice on Fife’s sites and monuments to assist in achieving that goal. Fife also maintains a register—the Fife sites and monuments record—of all known archaeological and historical sites in the region, with the details of approximately 10,000 archaeological sites in the database.

The debate gives us a chance to acknowledge the work of those who provide the guardianship of historic buildings, sites and monuments, preserving them as records of Scotland’s history. That historic environment, which is regionally and nationally significant, adds to our rich culture and tells the story of Scotland and its people to visitors and historians.

However, the bill also recognises and attempts to accommodate—and at times encourage—development and change where it is appropriate. Continuing development is essential, but the greatest care must be taken to ensure that our heritage is preserved and protected. The preservation and study of Scotland’s historic environment is important to our understanding of our predecessors and will be our legacy to future generations.

The three existing pieces of legislation, aided by the addition of this bill, must create a framework whereby decisions are transparent, justified and fair, and achieve the right balance between development and conservation, though those two are not always incompatible.

I will highlight a couple of provisions in the bill. The bill introduces a new power to allow Scottish ministers to issue a certificate of immunity from listing, which will guarantee that a building will not be listed during the following five years. As others have observed, the proposal promoted an interesting discussion at committee and it is a good example of an attempt to try to get the balance right for all interested parties.

The driver for the introduction of certificates of immunity is the need to give certainty to developers or owners who are preparing
proposals for a building or group of buildings. Of course, the outcome of the application for a certificate might be a decision to list, which would also provide certainty for the developer, albeit that it would not be the outcome that they had hoped for.

Some witnesses argued for a restriction on who could apply for a certificate, suggesting that only owners or occupiers of land or buildings should be able to do so. Other people argued that the approach should be consistent with the approach to applications to list, and that anyone should be able to apply for a certificate of immunity. The committee thought that limiting who could apply could exclude potential buyers who were looking for certainty. We were persuaded by the parallel with people who can apply to list. However, as the minister knows, we received representations from the Law Society of Scotland and the Scottish Property Federation, who continued to question the need for such consistency of approach. They argued that applying to list and applying for a certificate of immunity were significantly different, so the right to apply for the latter should be restricted.

Those bodies also expressed concern that there is no time limit for ministerial issue of a certificate of immunity. I pursued the matter in the committee, and although there is no timescale, the minister gave a commitment to issue guidance on the application process, to try to address such concerns. We were told that it typically takes four to six months to list a building, and that there is no obligation on anyone to pursue a certificate of immunity. I welcome what the minister said about those issues during her opening speech. When she sums up, will she say whether further discussions are planned with the people who remain to be convinced?

As the minister said, the Built Environment Forum Scotland argued for a strengthened legislative context and expressed concern about the current and future capacity of local authorities, in particular, to deliver good outcomes for the historic environment. The forum’s concerns are reflected in annex C of the committee’s report, which includes letters that the Finance Committee received. When local authorities were asked to comment on the bill, they said that the discretionary nature of the responsibilities made it difficult to provide an accurate figure. One authority welcomed the flexibility that the additional powers in the bill will provide, but said that it would have to consider carefully on a case-by-case basis whether to use the powers. The minister might want to comment further on the challenge for local authorities of meeting their responsibilities to the historic environment in a tightening economic environment.

I encourage members to support the conclusions of the stage 1 report and I look forward to stage 2.

15:52

Liam McArthur (Orkney) (LD): For the avoidance of doubt, I declare an interest as a member of Historic Scotland. I congratulate Karen Whitefield and her colleagues on the Education, Lifelong Learning and Culture Committee on their work.

It is fair to say that, despite Karen Whitefield’s legitimate comments about conflict between people who own or seek to protect listed buildings and people who seek access to them, there is a high degree of consensus on the bill. That is in no small part due to a rigorous approach to the consultation. As members know, the process that was initiated by the previous Scottish Executive culminated in the former Historic Environment Advisory Council for Scotland’s 2006 report, the recommendations of which were taken forward pragmatically by the current Administration.

I commend that general approach. The experience of the Rural Affairs and Environment Committee, of which I am a member, on the bills that led to the Marine (Scotland) Act 2010 and the Flood Risk Management (Scotland) Act 2009 showed what can be derived from a consensual approach that is achieved through early engagement and rigorous consultation.

The bill’s benefits are well recognised. It is a technical bill and people might want to do something far more wide reaching in future, but it will introduce improvements that will help in the sustainable management of our historic environment. I think that all members can support that. The policy memorandum says:

“Scotland’s historic environment is intrinsic to our sense of place and our strong cultural identity and plays a large role in helping to attract visitors to Scotland. It makes a significant contribution to the economy, for example through tourism and the support of indigenous craft skills, and provides the people of Scotland with a rich environment in which to live and work.”

That is all true. As Margaret Smith said, the Built Environment Forum Scotland suggested that the sector contributes in excess of £2.3 billion to Scotland’s GVA, directly supports 41,000 full-time-equivalent employees and indirectly involves many more thousands of people.

Impressive though those figures are, testifying to the scale of the importance of the sector, they rather underplay the significance of its local impact. My constituency provides a perfect illustration of that. So as not to disappoint Bill Wilson, given what he had to say, I will focus much of the rest of my remarks on that impact,
which highlights the importance of ensuring that the legislative framework is modernised and remains fit for purpose.

The heart of Neolithic Orkney world heritage site is one of four such sites in Scotland, although other sites harbour aspirations and I wish them well. It acts as a magnet for the many thousands of tourists who come to Orkney each year. This week, there has been much talk, certainly among my northerly neighbours, including my party leader, about Shetland's inclusion in the Lonely Planet's top 10 destinations. I warmly congratulate Shetland on that but note that the Lonely Planet continues to highlight the richness of what Orkney has to offer, describing it as "A glittering centrepiece in Scotland's treasure chest of attractions."

Historic Scotland's stewardship of Skara Brae, Maeshowe and other sites in Orkney is a critical factor in helping the islands to maintain and develop the essential quality of the tourism experience. I echo Ted Brocklebank's observations about the approach of Historic Scotland. The sites are also at the heart of Orkney's unrivalled archaeological heritage. They not only attract tourists to the islands, but provide archaeologists from the United Kingdom and across the world with invaluable hands-on experience and a unique opportunity to gain an insight into what life was like 4,000 to 5,000 years ago.

The discovery was made last year of a 5,000-year-old figurine—the only Neolithic carving of a human face to be found in Scotland so far. I am well aware of the impact of the tour of the Westray wife around Orkney in spurring interest in Orkney and what is happening there. Real interest has also been generated by the Ness of Brodgar dig, which took place earlier this year. I had the pleasure of visiting it over the summer. At one stage, it appeared that Neil Oliver and his colleagues from BBC Scotland had taken up permanent residence there. I recall one particularly uncomfortable moment when he asked what I thought had motivated Neolithic man to paint some of the stonework at the site, which was part of an exciting discovery back in July. It is never comfortable to have the limits of one's knowledge so cruelly and publicly exposed. Under pressure, I mumbled something about it acting as a warning to people not to bump their heads on the low ceilings. I am not sure that my less-than-insightful remarks will make it into the programme.

The abundant local resource has enabled Orkney College to develop an archaeological course framework, including PhDs, which has been recognised as truly world class and which will serve the university of the Highlands and Islands well in the future. I was interested in the comments that Ted Brocklebank and Margaret Smith made about the abundance of that resource. It has often been said by farmers in my constituency, with a degree of frustration at times, that they can barely stick a spade in the ground without bumping up against some archaeological artefact or other. I have taken up the issue with Fiona Hyslop's colleague, Richard Lochhead, in the past, and I am somewhat reassured by the comments that she was able to make in her opening remarks.

I note the observations of the Built Environment Forum Scotland, which highlight the need for expert advice in helping communities to protect, manage and appreciate local heritage. It is certainly true that Orkney is well served in that regard, although I realise that that is not necessarily the case nationwide. It is not just advice for those who are involved in the planning process that we need. For our archaeological sites and our historic built environment to be accessible and enjoyed as widely as possible, good interpretation and services such as rangers can be necessary. They help to develop understanding and appreciation not just among tourists, but among locals, who are often guilty of taking for granted what is on their own doorstep.

As the bill makes clear, the key is to ensure the sustainable management of our historic environment. It is an enormously valuable resource, but one whose overexploitation can cause damage that may be long lasting and irretrievable, as Pauline McNeill observed. That can be physical damage or damage to the quality of the tourist experience. I know that that is a concern in Orkney, given the allure of Skara Brae and the other parts of the United Nations Educational, Scientific and Cultural Organization site. We need to take care, and I hope that the bill will help in that regard.

I hope that the bill will also play a part in helping to manage successfully the interrelationship between the particular needs of our historic environment and wider economic considerations and imperatives. It may be unavoidable, at times, that the planning process becomes confrontational. However, better communication, with proactive and pragmatic engagement by Historic Scotland, Scottish Natural Heritage and others with—in the case of Orkney—the renewable energy industry, would help to take some of the heat out of those issues. I accept the fact that this is a technical bill; nevertheless, it is an important one. I look forward to seeing it progress and improve over the months ahead.

16:00

Aileen Campbell (South of Scotland) (SNP): I congratulate my former colleagues on the
Education, Lifelong Learning and Culture Committee on the work that they have undertaken thus far on the bill. I apologise in advance for needing to nip out to a prior meeting after making my speech.

The Parliament referred the bill to the committee not long before I moved to the Rural Affairs and Environment Committee, which meant that, unfortunately, I was unable to take part in any of the deliberations on the bill as introduced. Certainly, taking best care of Scotland’s diverse and hugely important historical environment was never far from the committee’s cultural considerations. I welcome the opportunity the chamber has today to move the bill forward.

It is literally a year and a day since the Scottish Government hosted Scotland’s first ever summit for the historic and built environment. I am sure that the summit helped to inform some of the process that has resulted in the bill that is before us today. We know that the roots of the bill can be found in the discussion paper that the Historic Environment Advisory Council for Scotland produced on the need for a review of existing legislation, which arose from wider discussion on the three main acts that the Government is seeking to build on with the bill. We might call that process the bill’s legislative heritage.

By taking steps to harmonise some of the processes that are involved in protecting scheduled monuments and listed buildings, the bill will help to simplify the bureaucracy for developers, planning authorities and, perhaps most important, the voluntary preservation and historical societies that have an interest in protecting their local heritage. Many voluntary groups in the South of Scotland and, no doubt, across the whole of the country—we have heard about some of them today—want to take more action to preserve and protect much-loved local buildings. However, they often find that they lack the capacity or resources to do so, particularly when they are up against corporate developers or a determined local authority.

I have spoken in the chamber previously about the High mill in Clydesdale. It is a B-listed structure, which Historic Scotland defines as being “of regional or more than local importance, or a major example of some particular period, style or building type which may have been altered.”

In its listing of the building, Historic Scotland states that it was built in 1797 and remains the most complete surviving windmill in Scotland. Sadly, it also remains at risk of collapse, despite a concerted campaign by the Clydesdale mills society.

In recent months, South Lanarkshire Council has undertaken a desk exercise to review options for the mill. The council continues to encounter difficulties in enforcing a compulsory works notice. I am sure that the Clydesdale mills society and others will be interested to learn more about the powers in the bill to allow the Scottish Government to offer further grants for work to be undertaken on an ancient monument even when the owner has not requested such action. The increased scope for awarding grants to a wider range of initiatives that promote understanding of our historic, cultural, architectural, artistic or archaeological heritage is very welcome.

The bill contains provisions to strengthen statutory protection and lower the bar for criminal responsibility in terms of the offence of disturbing a scheduled monument. Historic Scotland lists more than 8,000 scheduled monuments in its register, ranging from mottes and baileys, such as those found on Carnwath golf course and north of Abington, to industrial sites, such as New Lanark and the Wilsontown ironworks. Many of those locations are remote or isolated, and it is difficult to supervise them continually. It is therefore welcome that the bill will make it easier to prosecute anyone who mistreats such sites.

Historic Scotland also holds scheduled properties in care for the Scottish ministers—for example, the Whithorn priory and museum, St Ninian’s chapel and St Ninian’s cave, all of which are in the South of Scotland region. I am sure that interest in the two St Ninian sites will have increased following the recent visit to Scotland of Pope Benedict and the celebration of St Ninian’s day on 16 September. Protecting our historic sites effectively means that, when new opportunities arise to appreciate them or to view their significance from a different perspective, we can do so with confidence. As other members have said, doing so also promotes tourism.

The bill will clarify and extend the grounds on which an area can be designated to include “any site that comprises any thing, or group of things, that evidence previous human activity.”

That means that areas where there may not have been any clearly defined structure can still be protected, such as a site where scattered flint tools have been found. Members may recall that one such site that may benefit from the provisions of the bill is outside of Elsrickle, near Biggar, where the Biggar archaeology group discovered the remains of the oldest human settlement ever discovered in Scotland, which the group excavated with the co-operation of the landowner. The discovery, which was made during the year of homecoming, was a tremendous achievement for the organisation, which is a voluntary group. Members may recall the recent display of the group’s work that I sponsored in the Parliament.
I was interested to hear Karen Whitefield’s comments about concerns that have been raised about that aspect of the bill. Although as a history graduate I am interested in finding out about our past and celebrating our history, I recognise that there are sometimes conflicts when we do so. For example, the archaeological and historical studies at the site of Crawfordjohn primary school have resulted in a delay in information getting to the parents about the future of the school, as the children have been decanted to another local school with no timescale given for the completion of the studies. That uncertainty is worrying for parents, and I hope that a decision on that can be sped up.

However, improving opportunities for designation may also help groups such as Lanark community council, which is currently urgently seeking protection for the old Lanark grammar school building on Albany Drive in the town. Many local residents would wish that historic building to be retained—perhaps adapted for modern use, such as flats, but keeping the building’s façade, which many know and love. Sadly, it appears that South Lanarkshire Council is minded to allow the building to be demolished, and the community council is urgently seeking advice from Historic Scotland on what options for designation may exist. I have written to Historic Scotland to add my support to those efforts.

The bill will clarify and strengthen the protection of Scotland’s historic environment. One of the successes of devolution in the past 11 years has been the opportunity to explore policy areas such as our heritage, refine them, allow greater democratic scrutiny of them, put them at the forefront of our thoughts and rectify past decisions that relegated our history and culture to an afterthought.

I wish the committee all the best for the progression of the bill.

16:06

Ken Macintosh (Eastwood) (Lab): The bill is relatively uncontroversial. It has already received broad support among members of the committee and, as is clear from the debate, members of the Parliament more widely. As Ted Brocklebank pointed out in his speech, the Government’s description of it as “a tightly focused technical amending Bill” did much to give the game away and lower our expectations. However, although it is not the most innovative piece of proposed legislation and despite the fact that we are not engaging in a party-political spat—something that we should probably celebrate with six months to go to an election—none of that detracts from the importance of the subject.

From the remarks that members have made, I know that we are immensely proud of Scotland’s historic environment—our castles, buildings and monuments. Some may be symbolic of less enlightened times but they are all part of our long and rich past and help us to understand our place in the world. We all have our favourites. There are the picturesque, such as Eilean Donan castle on the way up to Skye; the significant, such as the New Lanark mills of David Dale and Robert Owen; and the simply ancient, such as the standing stones at Callanish, which Ted Brocklebank mentioned.

We enjoy those structures for a host of reasons, but we are able to enjoy them at least in part because of the work of people who have gone before us, who did much to protect and preserve them. We are able to enjoy them also because of the legislation that has been put in place to protect those efforts. For the most part, the bill restates those laws and powers. There are notable steps forward. In particular, I highlight and congratulate the minister on the new measures to help in the identification of our battlegrounds and historic gardens.

However, discussion around the bill has illuminated at least a couple of areas of weakness. The Built Environment Forum Scotland, which brings together 21 non-governmental organisations with an interest in this policy area, highlighted two points in particular. The first is the need and opportunity that the bill presents to strengthen the legislative context for existing policy—not, I emphasise, to add any more duties, powers or burdens, but simply to give greater priority to existing duties. The second is the need and opportunity to ensure that planning authorities have access to, and give special regard to, appropriate information and expert advice on the historic environment.

On the latter point, I hope that we all agree that our local authorities and other public bodies should have sufficient access to historical and archaeological expertise and, in particular, local knowledge. At the moment, such expertise lies in the hands of, and is provided by, a very small number of people. In a city the size of Edinburgh, for example, there may be a handful of people who provide advice. In a smaller local authority area, there might be only one officer. The fear is that, with no statutory basis behind public policy in that area, we could easily lose the little resource that exists.

I hope that members recognise that anxiety at a time of seemingly ever greater economic determinism. At a time of falling budgets, when the only thing that matters is the bottom line, most
political energy will go into protecting front-line public services. Experience shows that areas such as culture, music, sport and the historic environment are the most likely to face the axe. If very few people are employed in the historic environment sector already, and if much local knowledge is in the guardianship of very few individuals, the loss of such jobs will leave us ignorant and unable to give sufficient attention and weight to our heritage in decision making. That will be to the detriment of not only future generations. Our environment is crucial to our quality of life. Our wellbeing and our cultural prosperity are even more important to our happiness at a time of cuts.

The Built Environment Forum Scotland highlighted the opportunity that the bill presents to provide for

"a responsibility on all public bodies to protect, enhance and have special regard to Scotland’s historic environment."

Most Education, Lifelong Learning and Culture Committee members were struck by a point that was made by witnesses repeatedly and by the minister—that the vast majority of our historic environment will not be affected by the bill, because it is unlisted, unscheduled and unprotected. The Built Environment Forum Scotland does not want new duties to be introduced or new burdens or new costs to be imposed on our hard-pressed local authorities. It simply asks for a restatement of, and greater priority to be given to, existing duties.

In my opening remarks, I suggested that the bill is not controversial.

Fiona Hyslop: The point is crucial. I re-emphasise that what the BEFS proposes would be an additional duty. If Ken Macintosh says that it is not a duty and that it is covered elsewhere, will he explain where it is covered? He has referred to local authorities, but the duty proposed by the BEFS would apply to public bodies. There is a large number of public bodies, including the health service, the Ministry of Defence—you name it. The point is important. I have established a working group to ensure that the result of what we are trying to achieve can be promoted, but I have concerns about what is put in law.

Ken Macintosh: I appreciate that our local authorities are not looking for extra burdens at this time. Paragraph 1.40 of the Scottish Government’s historic environment policy says:

“It is long-established policy that all government departments should discharge properly their duty of care for heritage assets they own or lease. This means that, for example, the Ministry of Defence has robust policies and procedures in place”.

I will not go on, but a duty of care already exists, and local authorities have several other existing powers and duties. The intention is to promote the attention that is given to the historic environment when decisions on planning and aspects of the built environment are taken.

Fiona Hyslop: Ken Macintosh is right about a duty of care for Government departments, but widening the scope to public bodies is an issue. The technical proposal is for a duty to enhance the historic environment, which is different.

Ken Macintosh: I am not sure whether the minister and I are miles apart on the matter. I am certainly encouraged that room for discussion exists about the wording and about giving greater priority to the issue, because the aim is not to place extra duties on local government.

Another worry, to which Karen Whitefield referred, is about tension between those who want to protect our past and those who want to modernise or develop the environment. I do not believe that everything should be preserved. In fact, the process of development often uncovers artefacts and allows them to be dug up, revealed and displayed.

I reassure members that people who work in the sector are at pains to move away from the language of preservation and from that approach. The idea of heritage as something that cannot be touched is old-fashioned. The Built Environment Forum Scotland talks about using knowledge and information as a way of managing our historic environment. It points out that the bill addresses the few loopholes that might exist in relation to flagship archaeological sites or buildings. The structures that need to be preserved will be preserved. However, the forum believes that a more informed approach would help the vast majority of unscheduled sites and unlisted buildings.

Old buildings that become redundant might become museum pieces, but they are more likely to be demolished, whereas a change of use or purpose might be desirable and possible. Only if we understand the importance and significance of what we look at can we manage that change sensitively. Both points that the BEFS raises—the need to have access to information and the need to behave responsibly with that information—are intertwined.

There are examples of the Scottish Parliament taking a similar approach in recent pieces of legislation. For example, the Nature Conservation (Scotland) Act 2004 introduced a broad duty to ensure biodiversity, and the Marine (Scotland) Act 2010 took a similar approach to the protection of the marine environment.

It is easy to dismiss those who wish to protect our historic environment as nostalgic or romantic. I do not think that that is fair, but even if it were true,
surely there should be room for romance in our lives. There is no doubt that many people share that enthusiasm. Just this week, there was a report about a man in Orkney finding a 5,000-year-old burial plot in his back garden and, last year, some 2,000-year-old gold jewellery was found in Stirlingshire. A large number of people go out every week or every month to look for treasure in fields with their metal detectors. Some, like those on the “Antiques Roadshow”, might be disappointed when they discover that their find is not worth hundreds of thousands of pounds, but I am sure that the treasure that they really seek is our past. The key motivation is to make a find and to experience the joy of discovering the hitherto undiscovered.

Let us give the historic environment its place. As the bill proceeds, let us think about whether we have got the balance right and whether we could and should do more to fulfil our responsibilities.

16:16

Alasdair Allan (Western Isles) (SNP): As a nation that is rightly proud of its heritage and history, Scotland possesses a robust system for the protection and preservation of historic structures and landmarks. Nevertheless, it sometimes needs to be explained to visitors and, indeed, to Scots themselves that Scotland does not have all those historic buildings by mere accident; they are there because, as a nation, we have actively chosen to maintain them.

Ted Brocklebank rightly mentioned the Callanish stones as an example of an outstanding historic structure. The story about the councillor in the 1960s who wanted to knock them down to make room for council houses may well be apocryphal, but it nonetheless eloquently conveys its own warning from our country’s recent architectural and planning history.

Maintaining historic buildings is not a simple matter, and it is certainly not the same as merely preserving ruins. The historic environments in question have often moved beyond their original purposes and evolved into repositories of local and national identity but, in general, they cannot do that very effectively unless they are also given a continuing useful purpose in the community.

One of the most contentious issues is a philosophical one. Should a historic building be preserved in aspic and, if so, at what stage in its history should that happen? The example—which, this time, is not apocryphal—comes to mind of the proposal in regard to a historic building in my constituency that the temporary Perspex sheeting over a broken window should be preserved as “part of the development of the building’s recent history”.

Maintaining historic sites is anything but simple and it needs to be, at least in part, a pragmatic business.

Just as our historic environments have evolved to serve new purposes, the legislation that has been designed to protect and preserve them must evolve as well. We must remain flexible and willing to adapt our approach to suit new developments and realities.

The bill reflects such a practical approach. That much became clear during the evidence that the committee took, and it is reflected in the support for the bill that has been expressed across the political divide. Our consideration of the bill made for some of the more unusual evidence that the committee has heard, which covered subjects as varied as the disputed location of various battlefields, speculation on whether Prince William might get engaged in Fife and the need to preserve the cobblestones in Kelso square. Mercifully, the latter did not become the subject of a paving amendment.

The bill will amend current processes to provide greater protection for Scotland’s historic environments. By targeting weak points and gaps in existing legislation, it will allow Scotland to better safeguard and preserve its heritage while utilising the strengths of existing frameworks and institutions.

One of the great strengths of such an adaptive approach is the minimisation of costs and burdens. The bill will considerably improve our historic environment protection strategy without encumbering public and private stakeholders in the historic environment sector with enormous new financial or logistical burdens. The utilisation of existing frameworks and institutions will mean that such an approach will have minimal financial cost.

The bill will explicitly enable Scottish ministers to recover grants in the event that the specific preconditions of those grants are violated. Such a measure, although not entirely new, will help to ensure that expenditure on historic sites can always be demonstrated to have a public benefit. In a time of cuts to the money that is available to Scotland, that is an important consideration, and the bill exemplifies the taking of a responsible stance towards such public expenditure.

Another important aspect that has been looked at is the need for the bill to be responsive to stakeholders and complementary to other ongoing efforts in the sector. Thanks to the invaluable contributions of interested parties, including the owners of historic homes and gardens and a variety of agencies such as the National Trust for Scotland and Historic Scotland, a bill now exists that is highly responsive to the
concerns and needs of those who seek to preserve Scotland’s historic environments. The bill strengthens and standardises enforcement measures that are intended to protect historic environments, and implementation of the new measures will ensure that historic buildings receive more comprehensive protection. Consultation also allowed the proposed legislation to be drafted in a way that complements existing non-legislative endeavours and brings Scottish policy into harmony with European initiatives on the protection of heritage sites. The bill is constructed in a manner that complements endeavours such as the welcome efforts to make Historic Scotland more accessible and adaptable as an institution. It also makes Scottish policy concordant with Council of Europe initiatives on the designation of archaeological heritage.

By ensuring that the proposed legislation remains complementary to existing work, we are able to ensure that it will form part of a cohesive approach to the preservation of historic environments that gives serious thought to the future. That will ensure the survival of our historic sites for future generations. In the years to come, the new practical considerations might force us to fine-tune our approach again. However, with the bill, we have taken an important practical step.

Our wealth of historic treasures is an irreplaceable asset, but it carries a burden of responsibility. As a country, we neither shirk nor resent that burden; indeed, we proudly accept it. The Historic Environment (Amendment) (Scotland) Bill is our instrument to act on that responsibility, and I commend it to the chamber.

16:22

Ian McKee (Lothians) (SNP): I declare an interest in that I am an occupier and joint owner of a property that is listed as being worthy of statutory protection under the provisions of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

Concern about the historic environment is one of the hallmarks of a civilised society. Indeed, it is appropriate that the debate should be held and the bill introduced in Edinburgh, as part expiation for the gross crimes against our historic environment that have been committed in our capital city during the past 50 years.

Let us consider the fate of George Square, which was one of the most perfect Georgian squares anywhere in the world until it was crudely smashed by the University of Edinburgh, which went against massive public opinion to construct a variety of modern buildings of variable architectural merit, including the ghastly Appleton tower. Let us consider the damage that the same institution did to historic Potterrow, the street on which Nancy McLehose, or Clarinda, the inspiration for “Ae Fond Kiss”, was lodged when she attracted the attention of Robert Burns. Its pleasing architecture and romantic spiral stairways were lost for ever to the demolition ball, to be replaced by cheap, factory-built units, which give the area all the ambience of a deserted factory site.

The University of Edinburgh was not the only vandal that was let loose in this historic city. Let us think of the perfectly serviceable and respectful buildings on the corner of Lawnmarket and George IV Bridge, which housed the Royal Medical Society, among other institutions. They were replaced by the asbestos-ridden, east European-type monstrosity that served as offices for the Parliament and which, in turn, has been demolished.

Let us look at two of Edinburgh’s most public disgraces. In historic and highly visible Princes Street, almost every building that was worth preserving has either been totally swamped by its neighbours or got rid of altogether in exchange for third-rate commercial development. Of particular concern is the magnificent Victorian façade of the New Club, which was demolished to make way for a near-brutalist replacement that makes me shudder every time I pass it.

Then there is the St James centre. Edinburgh citizens of a certain age will remember the well-proportioned St James Square that preceded it, an 18th century delight which, to our eternal shame, was swept away in the name of progress. While I am talking about the city centre, members should not forget that it seemed to be only luck and a degree of planning constipation that prevented Edinburgh from having an inner-city bypass like the M8 through Glasgow—an elevated concrete roadway that was planned to extend around Edinburgh castle and across the Meadows. Edinburgh certainly cannot hold its head high in this respect.

Things have changed, have they not? Edinburgh’s world heritage status under UNESCO means that our city planners have to contend with not only local pressure groups but professional heritage experts from all over the world. Developments such as those proposed for the old Haymarket goods yard and the Caltongate project come under the beady eyes of professional, external scrutineers. It is pleasing to note that UNESCO observers pronounce themselves satisfied that in Edinburgh we now have a planning, development and conservation environment that is world class.

The bill seeks to increase the protection that is given to listed buildings and scheduled monuments, so that—I hope—the rape of George
Square could not happen today. That is good. If I have a concern, it is that we might go too far the other way. Let us take for example the case of the Royal Commonwealth pool, just across the park from where I am speaking. In 1993, it was selected as one of 60 key Scottish monuments of the post-war period, and it was nominated in 2002 by the Architectural Heritage Society of Scotland as one of the most significant modern contributions to Scottish heritage. It is now grade A listed—untouchable, in fact.

However, the fact of the pool’s listing has meant that refurbishment has taken longer and cost many millions more. Its closure for a full two years as a consequence has meant that the only international diving pool in Scotland has been denied to our Olympic hopes for that period of time, Sunderland being the nearest alternative. Even when it reopens, the pool will be unfit for international swimming competitions as it will still have too few lanes and the listing of the building means that it cannot be widened sufficiently to allow more. In the unlikely event that Edinburgh were ever asked again to host the Commonwealth games, the Commonwealth pool could not be used.

We need to ask whether it was more important to maintain a 40-year-old building that was no longer entirely fit for purpose than to spend the money on a new project that would have fulfilled the purpose of the original building at less cost and in less time. Is our built heritage more important than having a facility that is suited to the needs of today? Like Alasdair Allan, I ask that question. Are we sticking things in aspic, and should we move on? Should an international swimming pool be an international swimming pool or an historic monument?

Another example is the potential clash between climate change requirements and the desire to protect our heritage. We spend money exhorting people to double glaze their windows but have prevented the owners of listed buildings from following that course. I am pleased to see in Fiona Hyslop’s response to a recent parliamentary question that some tentative progress has been made in dealing with that issue, but I note that windows can now be replaced by double glazing only if they are not the original ones. If we look around the windows in the new town of Edinburgh, we will see lots and lots of panes. There must be quite a bit of temptation for residents who feel the cold to have a few accidents with their window panes so that they can fulfil the requirements for getting double glazing. Far be it from me to suggest that; I am making a forecast rather than a suggestion.

Overall, I am pleased to welcome the bill, but I look forward to the day when protecting our heritage goes hand in hand with attending to all the other needs of society.

The Deputy Presiding Officer (Alasdair Morgan): We move now to the wind-up speeches. I call Iain Smith.

16:29

Iain Smith (North East Fife) (LD): There are always two concerns to members when we wind up in a debate. One is that everything that we wanted to say has already been said and the other is that the Presiding Officer has not told us how long we have for our speech.

The Deputy Presiding Officer: Six and a half minutes, if it is any help.

Iain Smith: The third is that the time limit turns out to be more than we were expecting.

One of the benefits of having a Parliament in Scotland is that we are sometimes able to pass legislation that would never have reached the timetable for consideration at Westminster. Some of that legislation has been fairly major, such as land reform; some has been more minor, but important nonetheless. The bill is an example of legislation that there would probably never have been time for at Westminster. It is nonetheless an important and worthy piece of legislation. I welcome the opportunity to discuss it today.

I agree with Ted Brocklebank that this is not necessarily the bill that the historic environment needs in the long term. There will be a need for further legislation in future—perhaps in the next parliamentary session or even the one after that—to consider the wider issues of how we protect the historic environment. I will return to that later.

The importance of the historic environment to Scotland has been stated. It contributes more than £2.3 billion to the economy, mainly through tourism, the construction industry and transport. It directly supports more than 40,000 jobs, or 60,000 if we include the spin-off benefits in other sectors. It is estimated to contribute some £1.4 billion in employees’ income. The sector’s contribution to the national economy is estimated to be 2.6 per cent of the Scottish GVA, or gross value added, accounting for an estimated 2.5 per cent of Scotland’s total employment.

Those figures come from the Historic Environment Advisory Council for Scotland’s report on the economic impact of the historic environment of Scotland, which was mentioned earlier, and they are repeated in George Reid’s excellent report on his review of the National Trust for Scotland, “Fit for Purpose”. George Reid’s report raised some important issues beyond those that are immediately necessary to get the National
George Reid raised the issue of whether the appropriate bodies are managing the historic structures in Scotland. There is a need to seriously consider that issue. He highlighted various monuments and ruins, such as Balmerino abbey in my constituency, which is currently managed by the National Trust. He asks whether it would be better managed by Historic Scotland, which has the expertise and craftsmen to better maintain and look after such structures. Issues such as that need to be considered in the round. Perhaps we should be seriously considering having discussions with all the relevant bodies, including Historic Scotland, the National Trust and the national parks and local authorities, to ensure that the right body manages—though not necessarily owns—the properties and scheduled monuments of Scotland.

Fiona Hyslop: That is an important point. I reassure the member that Historic Scotland is in discussions with the National Trust, not least about an exchange of skills. The co-operation that he highlighted is already happening.

Iain Smith: I welcome that point from the minister.

Ted Brocklebank: Does Iain Smith accept that an even more anomalous example of where there should be streamlining between the work of the National Trust and Historic Scotland is at Hill of Tarvit? There are two sites there: Hill of Tarvit, which is managed by the National Trust; and, 100yd away, Scotstarvit tower, which is managed by Historic Scotland. Surely that kind of thing is a nonsense and should be looked at.

Iain Smith: There are opportunities throughout the country for Historic Scotland and the National Trust to consider how they manage properties. Again, it is not about the ownership of the properties but about how they are managed and who runs them on a day-to-day basis. There are other places in Fife where the same issue can be considered.

We need to consider other aspects of the wider historic environment legislation. I found Ian McKee’s contribution extremely interesting because it raised a number of concerns that I share. He mentioned the St James centre. I recollect discussions that I had with a good friend of mine in the past, in which we decided that one of the tools that we may need to add to our historic environment portfolio is a compulsory demolition order to get rid of buildings that are inappropriate for their settings and do nothing to enhance Scotland. Oddly enough, the St James centre was high on the list for such an order.

Ian McKee also said that we need to be sensible about how we apply the rules in relation to those buildings that are scheduled and listed and ensure that we do not stick them in aspic in such a way that they cannot be sensitively and sensibly redeveloped. The buildings at risk register shows that there are many examples across Scotland of buildings that could be brought back into use were there an opportunity to make appropriate alterations to them that, although they might not be entirely to the satisfaction of Historic Scotland, would be in keeping with the way in which a building might normally develop in the course of its life. Buildings have never been built and then left alone. I have just completed a fairly major renovation of my home, so I am aware of the fact that one must continue to renew and refresh buildings. The idea that, once a building is listed, nothing should ever happen to it other than to let it fall down is not appropriate. We need to think carefully about that.

We need to think about the process of how we list buildings, as that process is questionable and not transparent. One has to ask why some buildings are listed. No one in my constituency can figure out why Madras college’s Kilrymont Road buildings have been listed. They are not very attractive buildings. Apparently, they are examples of an architectural type, but that architectural type is one from the 1960s that we should be forgetting, not preserving. The sooner a bulldozer goes to that building and we get a nice, new Madras college, the better, as far as I am concerned.

This is an important piece of legislation, and not one of our more controversial ones. I am happy to support the committee’s report and the bill.

16:36

Elizabeth Smith (Mid Scotland and Fife) (Con): I apologise for having had to leave the chamber for 10 minutes earlier, which caused me to miss a couple of members’ speeches.

This has been an informed and useful debate, and I am pleased to have taken part of it. Earlier, Ted Brocklebank said that some people might be tempted to see the bill as merely a technical, amending instrument rather than as anything of any great import and substance, noting that some might call it a much-ado-about-nothing bill. I dare say that that view is true with regard to some of the aspects of detail, but we must certainly not allow that to be the general reaction. Indeed, it is incumbent on all of us to ensure that it is not.

As many speakers have said, Scotland’s historic environment is a precious part of the fabric of this country. It is one of the most defining aspects of Scotland and can bring enormous social and economic benefit, especially in the form of visitor
income. The minister’s comments about Linlithgow and Dr McKee’s comments about George Square in Edinburgh, which I visited when I was at school, were appropriate. We do not understand how important our historic environment is until something happens to take it away from us.

The bill matters, even if it requires some important amendments and, if Mr Macintosh has anything to do with it, some semantic changes.

Also in the bill’s favour is the minimal cost that is involved, which is a pleasant change from some recent bills and has, I am sure, brought some comfort to the Scottish Government in these difficult economic times. Perhaps that is one reason why there has been no serious opposition to the bill, although I would like to suggest that that is also due to the considerable passion and commitment of those who are involved at the front line, including the hundreds of volunteers to whom Margaret Smith referred who are protecting our historic environment. At stage 1, they made a powerful case for the principles of the bill and its prime objective, which is to preserve and enhance Scotland’s historic environment for future generations. Their comments were extremely balanced and helpful to our deliberations. Perhaps they ensured that the atmosphere in the Education, Lifelong Learning and Culture Committee was less highly politically charged than usual, at least for a short while.

Ted Brocklebank made the point that the organisation of certain bodies that oversee the administration of our historic environment could be streamlined. That point was picked up by several speakers, and I think that there can be no opposition to the view that there is a need to simplify and clarify certain aspects of the management of the historic environment. Iain Smith referred to—

Robin Harper (Lothians) (Green): Will the member give way?

Elizabeth Smith: Of course.

Robin Harper: I thank Elizabeth Smith for giving way. [Laughter.] I had to be very careful to get the name right.

Ted Brocklebank tried to give the chamber the impression that, if George Reid had canvassed opinion on the possibility of a merger between the National Trust and Historic Scotland, he might have come out in favour of that. I declare an interest as a member of the National Trust’s council, and I reassure members that, although the idea was widely discussed by the board, George Reid and the council categorically ruled it out as a way forward for the National Trust—and for Historic Scotland, for that matter.

The Deputy Presiding Officer: Your intervention is approaching a speech, Mr Harper.

Robin Harper: I am sorry. I am asking whether the member is aware of that, and if—

The Deputy Presiding Officer: I call Elizabeth Smith.

Elizabeth Smith: I am glad that you said that, Presiding Officer. I have been called many things today, but I am glad that you got my name right.

I point out to Robin Harper that I do not think that that is what Ted Brocklebank said. Mr Brocklebank and Iain Smith both pointed out the need for some streamlining and clarification of the bodies’ respective roles. I entirely agree with that, and I know that the minister does too.

As members are aware, there has been much debate about the provision on the defence of ignorance in section 3, in particular the possibility that it all but removes that defence. It was good to hear what the minister said in her opening remarks, which gives us some comfort in that regard. There are situations in which genuine human error occurs, and we must be conscious that the problem could be compounded if there continued to be a lack of clarity on what does or does not constitute an historic monument.

We must not get into a situation in which there is a conflict between legislation and common sense, as Alasdair Allan noted when he provided the example of the proposal to preserve the plastic sheeting over a pane of glass. There is an issue with regard to the production of certain inventories; like any taxonomy, they are open to all kinds of interpretation. That point has been illustrated many times this afternoon, so I will not go back over it.

A related point, which arises in section 11, is the attempt to deal with the responsibility, obligations and costs that fall at the doors of the owners. I urge the Scottish Government to provide assurances that there will be no obfuscation or scope for loopholes in that regard.

The power of entry without owners’ consent when a monument is thought to be at risk raises some issues with regard to the definition of what constitutes imminent damage and destruction. Again, the minister’s comments were helpful in that regard. It is important for that to be crystal clear so that we can allay any fears of unrestricted entry to sites without the permission of owners.

There are some concerns but, as the convener of the Education, Lifelong Learning and Culture Committee said, they can, with careful handling, be addressed without hindering the better management of our historic sites. Apart from some wrangles over definitions, liability for care and the structure of appropriate inventories, there is
widespread consensus on the merits of the bill. On that basis, I repeat that the Scottish Conservatives are happy to support its main principles.

16:43

**Pauline McNeill:** It is clear from this debate that we need a legal framework and extended powers and duties for those who are responsible for protecting our historic environment. That combination will allow our country to preserve and protect historic sites, buildings and monuments.

Ted Brocklebank called for stronger action. I am glad that Elizabeth Smith clarified what he meant when he talked about streamlining. I got the impression that it was akin to a merger. I do not have any difficulty with what he actually said, and I support Robin Harper’s view of George Reid’s report.

I am in favour of having more than one body to undertake responsibility for all these matters; it would be bad for us to consider a merger.

**Ted Brocklebank:** For absolute clarification, the record will show that I said I agree with George Reid that the two bodies should continue, but that their functions should perhaps be streamlined in some areas.

**Pauline McNeill:** That is clearer now and I am grateful to Ted Brocklebank for making that point.

Margaret Smith made an excellent point about the number of volunteers, without whom we would have no chance of doing the work that we do in this area. She talked about ancient civilisations that we know about only because of the evidence we uncover. She also made the point that just because a building or monument is not listed or scheduled, that does not mean that it is not important.

Bill Wilson reminded us not to forget the breadth of the subject. Interestingly, he suggested that ancient penalties might go along with ancient monuments. Who says that the SNP is soft on crime? Well, it is not today.

Claire Baker made an excellent point about our children’s imagination, arguing that preserving the past for their future is an important part of our work. Liam McArthur trailed his possible pending appearance on television, depending on the edit, and highlighted the Lonely Planet guide and the amazing attractions on Orkney, which I am sure will do wonders for tourism there. Aileen Campbell talked about the practical issues for those who use buildings that are listed or in conservation areas.

Ken Macintosh, who is a member of the Education, Lifelong Learning and Culture Committee, talked about the weaknesses in the bill. There has to be a continuing debate on the points that were raised in his exchange with the minister about whether the duty on Government departments is a wider duty on public bodies and what it consists of. That is clearly an issue for stage 2.

Alasdair Allan said that it perhaps needs to be explained that Scotland’s collection did not come about by accident and that it exists because of policies and legislation. Most developing countries have similar policies for the same reasons. Having travelled a bit, my view is that the United States is probably the best that I have seen; it turns just about everything into a national park and something of a tourist attraction. Perhaps we can learn lessons from that.

The prize for the person who did not mince his words goes to Dr Ian McKee for an interesting critique of Edinburgh’s built environment. He talked about crimes against the historic environment and about parts of the city that offend him. The Park Circus area of my constituency is of outstanding conservation interest, and everyone is mystified about how the building that was formerly occupied by the Bank of Scotland got there. We clearly did not do everything right in the past.

Conservation has not been addressed very much this afternoon. Will the minister say something about why there is not much about conservation in the bill? Perhaps it is not something that fits, but I want to talk about it for a few moments because it is also an important part of our heritage. If planning authorities, which have an interest in development, had unfettered powers and we did not have a strong Historic Scotland or a set of environmental bodies with powers in the area, we would see many more disastrous planning decisions. Perhaps the minister will elaborate on that.

As for enforcement in relation to listed buildings, I support the range of penalties in the bill, including fixed penalty notices, but I want to mention an issue that I have raised with Historic Scotland. In the west of Glasgow, where there are listed buildings and areas of conservation, we have people who have lived in buildings all their lives who cannot afford to replace their windows. There are already strong enforcement powers that local authorities use to get people to reverse any modernisation of windows. The answer lies in a bit more public information—some exists—about how people can affordably upgrade their buildings and preserve heritage at the same time.

I said in my opening speech that section 18 is the area in which the most work needs to be done. The power it provides needs to be clarified. The existing procedure seems to be informal, but the new procedure seems to be a more formal one under which any person can apply. Having listened to the debate, I think that ministers have
got it right in making it possible for a wider group of people to apply. It is clear that any local community could have an interest and I would not want that to be excluded by any restriction in section 18.

I also wonder whether the two processes—one formal, the other informal—will be conflated in time, as they are essentially looking at the same thing. I seek some clarification in that respect. Finally, is there any timescale for considering certificates of immunity? What criteria will ministers use? I presume that, during this particular time period, Historic Scotland will assess whether a building should be listed.

We have had a good and interesting debate. As we will not revisit the subject in a hurry, we had better get it right while we have the chance and I look forward to stages 2 and 3.

The Deputy Presiding Officer: I call Fiona Hyslop to wind up the debate. If the minister could sit down just before 5 o'clock to allow a business motion to be moved, I would be grateful.

16:50

Fiona Hyslop: I am pleased that we have had the opportunity to debate the Historic Environment (Amendment) (Scotland) Bill today and thank the members who have spoken in a thoughtful and constructive debate. There have been some very good, informed and knowledgeable speeches. I highlight Ian McKee's thoughtful speech and reassure him that under the Scottish heritage environment policy the default position for listing is that the building remains in active use. I think that that is an important element in setting out some of the wider context to this issue.

Members have shown a lot of passion about the contribution that heritage can make to Scotland and its value as a key driver of tourism. The perspectives that we have heard from Renfrewshire, Orkney, Cramond and the Glasgow west end are important in putting in context our reasons for introducing a bill that will help to shore up and support the existing legislation.

A number of interesting issues have been raised in today's debate, not least of which is Bill Wilson's inventive suggestion that those who damage buildings should be punished according to the century in which the building on which the offence is perpetrated was built. Indeed, Historic Scotland might be able raise some revenue by charging people to see those punishments being exacted. [Laughter.] I am not quite sure who my champion would be, but Ted Brocklebank might well step forward if required. I will continue to listen to any constructive arguments on this matter, but I stress again that two of the bill's underlying aims are to avoid placing any new burdens or duties on the public sector, private sector or individuals and to ensure that, in the current economic climate, implementation costs are kept low.

On our proposal to extend the range of historic environment assets that can be scheduled, the committee expressed an expectation that the Scottish Government will act rigorously and have regard to strict criteria in considering possible sites for designation. I can confirm in response that existing legislation sets out that ministers may schedule only sites of "national importance" and the criteria used to determine that are set out in the Scottish historic environment policy.

During its consideration of the bill, the Education Lifelong Learning and Culture Committee received representations against the proposal that any person should be able to apply for a certificate of immunity from listing and I acknowledged those concerns at my appearance before it on 29 September. I thank the committee for considering the arguments for and against limiting the scope of those who may apply for a certificate and note that it is not persuaded that the proposal for applications for a certificate against listing should be restricted to owners and occupiers. Margaret Smith and Claire Baker explained the issues very clearly indeed. The committee recommended that the Scottish Government provide further information on the certificate of immunity application process to give greater assurance to stakeholders. Pauline McNeill also made a specific request in that respect, and I can confirm that I am committed to issuing further information to the committee on the point that she has raised.

I will write to the committee about its recommendation that the Scottish Government give further consideration to the availability of expertise to interpret information on the historic environment. I think that that should address the first of the two issues that Ken Macintosh raised. Finally, I confirm that the Scottish ministers agree with the committee that issues related to the inclusion of ecclesiastical buildings in the listed building consent process should not be covered in this bill.

Bill Wilson asked about the £50,000 limit for fines. The current limit is £10,000; the £50,000 limit is in line with current environmental fines and is the maximum amount for a summary conviction. Fines for convictions on indictment are unlimited, and the gravity of the offence will be a factor in deciding the procedure.

Ted Brocklebank made a number of points about battlefields. He said that the bill offers no test to determine whether a battlefield should be included in the statutory inventory. The test will be whether a site is of national importance, as defined by the criteria that I have outlined. He also raised concerns about agricultural works. I will
explain to him in writing why a class order and exemption will be allowed for lawful disturbance of agricultural land by ploughing for six or 10 years.

Ken Macintosh was right to explore the issues that the BEFS raised. I appreciate the advice that the BEFS has given us. The policy aim of what it proposes is important; at issue is how we get that effect. The member referred to the duty of care that Government departments already have, but that relates only to estates, buildings and assets. The general duty to protect the historic environment that the BEFS proposes relates to all public bodies when they are carrying out their functions. Regardless of whether the distinction is semantic, as has been suggested, or legal, the issue is worth exploring, so that we can address some of the concerns that have been raised.

Ken Macintosh suggested that the duty might be similar to the duty that the Marine (Scotland) Act 2010 imposes. It is not, as that duty is narrowly focused on clearly defined issues relating to the Scottish marine area and, unlike the duty proposed by the BEFS, is limited to the functions for which the act provides. The duty that the BEFS proposes is also not similar to the duty to ensure biodiversity under the Nature Conservation (Scotland) Act 2004. However, it is important that the member has drawn out those issues, which I am happy to explore.

I cannot cover all the points that members have made. Iain Smith referred to the listing of the school buildings on Killymount Road. Ted Brocklebank has raised that point with officials. I reassure them both that Historic Scotland has no recent case history on the issue, but it will contact the site owners and the local authority to explore whether some of the issues of concern can be resolved.

Pauline McNeill expressed concern about why conservation is not part of the debate. Conservation is controlled by planning and development law, but the member is right to say that we must be consistent in how we address both issues. In the bill, we are bringing some symmetry to the application of historical environment legislation and planning legislation. The member makes an important point.

I hope that I have addressed some of the key issues that members have raised. As many members have said, it is important that we recognise that the Government—Historic Scotland is a Government agency—is not the only body that is responsible for and has interests in the historic environment—[Interruption.]

The Deputy Presiding Officer: Order. The level of noise is getting too high. Please keep it down.

Fiona Hyslop: Margaret Smith and others referred to the number of volunteers who look after and support local scheduled monuments and other properties. The private owners who are responsible for many of our buildings must be commended for the work that they do.

I thank all of those who have contributed to this thoughtful and thorough debate on the general principles of the bill. People may not have thought that the bill would generate one of the most interesting debates in the Parliament, but the contributions of Alasdair Allan, Ian McKee and others have shown otherwise. Liam McArthur referred to the Westray wife and the tourism boom that is taking place in Orkney. It is important to recognise that the historic environment is not dry or dull—it evokes a great deal of passion from members, contributes to the economy and provides skills. Ian McKee referred to the provision of double glazing in Edinburgh and the new skills that are needed to ensure that existing buildings can tackle climate change issues.

We should celebrate our rich historic environment. The bill will support many of our other objectives, especially in relation to climate change, and provide regulatory authorities with a much-improved toolkit to help them manage and protect Scotland’s historic environment, for the enjoyment and benefit of current and future generations. I ask members to support the motion and to approve the general principles of the Historic Environment (Amendment) (Scotland) Bill.
I would like to take this opportunity to thank you and the members of the Committee for your hard work in producing a thoughtful and helpful Stage 1 Report on the general principles of the Historic Environment (Amendment) (Scotland) Bill. I would also like to thank you for your contribution to the lively and well informed debate on 4 November.

I am writing to you now to provide the Committee with further practical explanatory material in relation to certain provisions in the Bill. This is in line with commitments set out in the Policy Memorandum and in response to the Committee’s Stage 1 Report which indicated that the Committee would welcome the opportunity to have sight of such material prior to Stage 2. I can also confirm that, if the Bill is enacted, the material in the attached annexes will inform a revision of the Scottish Historic Environment Policy (SHEP) and operational guidance. You may also be interested to note that the information that is provided in relation to Certificates of Immunity (Annex C) addresses some of the points raised in the Law Society’s briefing note to all MSP’s which issued on the morning of the Stage 1 debate on the Bill.

I should also point out that I am keen to ensure that the draft letter to owners and occupiers of scheduled monuments (Annex E) contains information and advice in a format that recipients would find most useful. With this in mind I have asked my officials in Historic Scotland to provide key stakeholders with the opportunity to comment on the draft before it is finalised, if the Bill is enacted, so that their feedback can be taken into account.

The annexes are set out as follows:

- Annex A: Section 2 - Retrospective Scheduled Monument Consent - guidance on the circumstances in which this power might be used (Commitment in Policy Memorandum)

- Annex B: Section 14 - Meaning of Monument – further practical information on the types of monument which the legislation is specifically intended to bring within designation. (Commitment in Policy Memorandum)

- Annex C: Section 18 - Certificates of Immunity – further information on the certificate of immunity application process (Response to Committee Report paragraph 79)

- Annex D: Section 6 – Scheduled Monument Enforcement and stop and temporary stop notices - further practical information on the operation of these notices. (Commitment in Policy Memorandum)
In response to the Committee’s call for written evidence the Royal Town Planning Institute (RTPI) in Scotland called for listing powers to be extended to cover historic road or footpath surfaces. The Stage 1 Report (paragraph 102) noted the Scottish Government’s intention to discuss this issue further with RTPI and asked to be updated on these discussions ahead of Stage 2. I can now report that Historic Scotland officials met with representatives of the RTPI on 10 November and informed Institute colleagues that, under the existing legislation, Scottish Ministers can, and do, list pavements and other road surfaces as long as they meet the listing criteria set out in Annex 2 of the SHEP. It is not clear why the RTPI were of the view that such works could not be designated under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 but are now content with respect to this issue.

The Committee’s Report (paragraph 29) also recommended that the Scottish Government should consider the issue, raised by some stakeholders, that expertise must be available to interpret information on the historic environment. I can confirm that I will write to the Committee separately on this issue and that my comments will be with you in advance of Stage 2.

The Committee may also be interested to note that, as part of the programme of awareness raising associated with the Bill, the Scottish Government has produced an information booklet, in liaison with key stakeholders, called Managing and Protecting our Historic Environment What is Changing? (The Historic Environment (Amendment) (Scotland) Bill Explained. This booklet provides readers with an overview of the existing historic environment protection regime and sets out the changes that will be introduced by the Bill. I have asked my officials to ensure that the Committee is provided with hard copies of the document when these become available. However, the booklet has been published on the Historic Scotland website and can be accessed via the following link: http://www.historic-scotland.gov.uk/index/heritage/environmentbill/documentation.htm

Fiona Hyslop
Minister for Culture and External Affairs
25 November 2010
Section 2 - Retrospective Scheduled Monument Consent

Introduction

- While unauthorised work to a scheduled monument can constitute a criminal offence, section 2(3A) and (3B) of the 1979 Act (introduced by the Bill) enables an application to be made for scheduled monument consent (SMC) after work to a scheduled monument has taken place.

- This new power will allow Scottish Ministers to grant consent for the retention of unauthorised works. This will bring the treatment of scheduled monuments into line with that of listed buildings, paralleling similar provision in section 7(3) of the 1997 Act.

- This provision will be applied in certain limited circumstances and case history estimates there are 10 such cases typically that come to Historic Scotland’s attention each year.

- An application for retrospective SMC must be made in the same way as any other application for SMC but must show clearly which works are retrospective.

- Retrospective SMC, like any SMC application would be assessed by Historic Scotland on behalf of Scottish Ministers. As with all such applications, Historic Scotland will assess each case on its own merits taking into account the relevant legislation, policy and best practice.

Guidance on the circumstances in which retrospective SMC might be used:

- Works acceptable in current form - where works have been carried out without SMC and it is considered consent could be granted.

- Works acceptable subject to conditions to ameliorate the injury - where works have been carried out without SMC and the works could be made acceptable by imposing conditions to remedy any injury the works may have caused to the scheduled monument.

- In certain limited circumstances it may be appropriate and in the best interests of the scheduled monument to retain certain other unauthorised works - for example where reversal of an intervention would be likely to lead to further damage of the monument.

- However, in circumstances where unauthorised work has been carried out which causes damage to the scheduled monument, the submission of a retrospective application shall not preclude enforcement action been taken and/or instituting criminal proceedings.
Section 14 – Meaning of ‘monument’

Introduction

- The Bill extends the range of nationally important historic environment assets that can be designated under the 1979 Act to “any site comprising any thing, or group of things, that evidences previous human activity”.
- It is anticipated that this new provision will be applied in relation to an extremely small number of nationally important sites.
- Provisional estimates on the basis of existing archaeological information suggest there are around 10 nationally important sites, which are currently afforded no protection under the 1979 Act, that would be scheduled as a result of this provision.

Monuments

- ‘Monuments’ are defined in the 1979 Act (section 61(7)) as:
  a. any building, structure or work, whether above or below the surface of the land, and any cave or excavation;
  b. any site comprising the remains of any such building, structure or work or of any cave or excavation; and
  c. any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other moveable structure or part thereof which neither constitutes nor forms part of any work which is a monument as defined within paragraph (a) above.
- The Act further states that the definition of ‘remains’ includes any trace or sign of the previous existence of the thing in question (Section 61(13)).
- The Bill extends the definition of ‘monument’ to include the following:
  d. any site comprising any thing, or group of things, that evidences previous human activity.
- The aim of this amendment is to allow for the protection of nationally important archaeological remains which cannot be described as a ‘building’, ‘structure’ or ‘work’ and are therefore not eligible for scheduling under the 1979 Act.
- In particular, it will allow for the scheduling of coherent groups of artefacts of national importance, commonly termed ‘artefact scatters’. The amendment is important because such artefact scatters are almost the sole surviving evidence for activity during the first 7,500 or so years of human occupation in Scotland.
Below are examples of the possible types of artefact scatter which could be considered for scheduling as a result of this amendment:

- Scatters of stone and flint tools and the debris from their manufacture, which mark the sites of some of the earliest evidence for human occupation in Scotland;

- Nationally important archaeological deposits not associated with other physical remains of a settlement or structures. An example would be midden material rich in artefactual and palaeoenvironmental evidence, especially shell middens, which again are often the only remains of some of the earliest (Mesolithic) evidence for human occupation in Scotland;

- Debris from metalworking (fine or iron) indicative of a significant industrial site of early or later medieval date; or

- Later medieval pottery indicative of a kiln or other significant pottery production site.

*It is important to stress that the remains must form a coherent entity or group to be of national importance.*

This would *exclude*, for example:

- an area which had produced a range of chronologically and functionally diverse artefacts as a result of ploughing or metal detecting, which inhibits characterisation or definition of the importance of the site; or

- palaeoenvironmental deposits within a waterlogged area or peat bog, which may contain information relating to human impact on the landscape but are primarily of natural formation.
Section 18 - Certificates of Immunity (CoI)

Introduction

- The main policy aim of this provision is to provide certainty for owners and developers considering works to a particular building. The policy is not, as a matter of principle, to exempt buildings from listing as the listing of a building would be a perfectly proper outcome of the process of considering a building for a certificate of immunity. The advantage here is that certainty as to whether a building would or would not be listed can be provided at an early stage in the development process so that those involved know the boundaries within which they are operating.
- Indeed, listing does not prevent development – it just means that developers know what their plans have to take into account.

What Is a CoI?

- A CoI is a certificate which will guarantee that a building will not be listed during the five years from the date of the certificate. Anyone can apply for a certificate and there is no fee.

Why are certificates granted?

- The certificate will provide greater certainty to owners and developers preparing proposals for a building or group of buildings without the possibility of an ad hoc later listing proposal interrupting their plans when they are well-advanced. Applicants would be encouraged to consider the potential interest of their building before going to the expense of drafting plans and lodging an application which might otherwise require substantial revision.

- Scottish Ministers are satisfied that a certificate lasting five years will enable developers and owners sufficient time to work up development proposals (this may include purchasing a property, securing funding, applying and negotiating consents) before beginning work which could be subject to a three year planning permission under the Planning etc (Scotland) Act 2006.

- Where consideration of a case leads to the conclusion that a building should be listed, a new list entry will be created in the normal way and a certificate will not be issued.

- CoI prevents a planning authority from serving a Building Preservation Notice on the property during this period.
Annexe C

The application and assessments process

- The CoI application process will be handled by Historic Scotland on behalf of Scottish Ministers and processed the same way as an application for listing. A specific CoI form will be created for applicants and all applications for a certificate will be assessed against the listing criteria set out in Annex 2 of the SHEP (criteria for determining whether a building is of special or historic interest for listing).

- If a building is found to support a case for listing, Historic Scotland will ask an independent third party for their view on the recommendation to list. However, Historic Scotland do not routinely ask for comments on a decision not to list. Therefore, Historic Scotland will not ask third parties to comment on applications for a CoI unless an application for a CoI leads to a building being listed.

- Local authorities and owners (if not the applicant) shall be notified in writing at the same time a CoI is issued.

Timescales

- Historic Scotland will seek to reach a decision on applications for a certificate of immunity within 8 weeks. Decisions to grant a certificate will be made as quickly as possible where the building concerned clearly does not meet the criteria for listing.

- Likewise, where it looks likely that a building might well meet the listing criteria the aim is to issue a rejection of an application for a certificate within the same 8 week period. Thereafter, as the process for a building to be entered on the statutory list involves more detailed preparation and consultation, an actual listing entry will take longer to materialise. But the applicant will have been provided with the certainty which is sought.

- This timescale is an indicator of best practice rather than a requirement due to the possible constraints of a site, notably:
  - the complexity of the site/subject;
  - time needed to get sufficient access to the site if more than one owner; and
  - time taken to get access to specialist material, advice or opinion, as required.

What happens next?

- Historic Scotland shall maintain a publicly searchable register of buildings that have been granted a CoI.
Annexe C

- Historic Scotland will apply the test of reasonableness to any request. Any unduly sizeable request will result in a careful discussion with the owner and will be completed in stages if appropriate.

- Historic Scotland do not intend to issue expiry notifications for CoI. This provision aims to harmonise with planning legislation in which planning authorities do not issue expiry notifications for planning permission or listed building consent. The onus will be on the applicant.

**Additional information**

- Certificates do not secure immunity from the designation of a conservation area. Even if a certificate is granted, consent will still be required for the demolition of the building if it is in a conservation area (Section 66 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997)

- For sites comprising more than one building, some buildings may be listed and others granted a certificate.

- Where a certificate has already been issued it will be possible to apply for a renewal of the original certificate before the five years of the original certificate has expired. Any such application will be subject to the same rigorous assessment procedure as new applications. It cannot be assumed that a certificate will be re-issued automatically in such cases since the circumstance may have changed since the issue of the original certificate particularly if there is new evidence about the building.

- Scottish Ministers are under a legal obligation to list a building if it meets the listing criteria: therefore it makes no practical difference that there is no ‘legal right’ for a person to request a listing.

- In practice, all listing proposals are considered in order to comply with the duty to list buildings of special architectural or historic interest. The Scottish Historic Environment Policy (SHEP) (para 2.23) confirms that any individual can propose a building to be listed and the Historic Scotland booklet ‘Scotland’s Listed Buildings’ has a paragraph on how to propose a building for listing (p. 18)

- It is not anticipated that local authorities would delay or ‘freeze’ their work on a development application if an application for a certificate was made – they do not do so now if they are aware a listing is being considered.
Section 6 – Works affecting scheduled monuments: enforcement (Enforcement notices)

- The Bill introduces enforcement powers for scheduled monuments already available in the context of listed buildings and the planning system.
- Enforcement provides an effective toolkit to allow for the reversal or amelioration of unauthorised works to help safeguard nationally important monuments.
- It is a criminal offence to demolish, alter materially or extend a scheduled monument without consent. The penalty can be a fine of up to £10,000 or up to 2 years imprisonment, or both.

Under what circumstances will a scheduled monument enforcement notice be served?

- Provisional estimates on the basis of case history suggest that Historic Scotland may issue up to 10 notices as a result of this provision.
- Historic Scotland will take a range of factors into account when considering the appropriate mechanism to deal with unauthorised works to scheduled monuments.
- However, a SMEN will only be issued when it is in the best interest of the monument and amelioration of the unauthorised works would only be sought when reasonably practicable or desirable.

Serving a scheduled monument enforcement notice (SMEN)

- SMEN are served on the owner and occupier of the land containing the monument which has been subject to the unauthorised works and on any other party with an interest in the monument; even if the property has changed hands since the unauthorised works were carried out.
- An enforcement notice cannot take effect until at least 28 days after the date on which the notice is served. The notice, which must be served in writing, must specify the alleged contravention and one of the following sets of steps and the period within which the steps required are to be taken.:  
  a. the steps required to restore the building to its former state;  
  b. the steps required to alleviate the effects of the works executed without scheduled monument consent; or  
  c. the steps required to return the monument to the state it would have been in if the terms and conditions of any scheduled monument consent for works had been complied with.
• Scottish Ministers may withdraw a scheduled monument enforcement notice at any time before it takes effect. Notification of withdrawal must immediately be given to every person on whom the notice was served. Withdrawal of a particular notice does not prejudice the right of Scottish Ministers to serve a different one.

• A list containing particulars of any monuments for which a scheduled monument enforcement notice has been served shall be published on Historic Scotland’s website.

• A person on whom a scheduled monument enforcement notice is served may appeal to the sheriff on a number of specific grounds enclosed with the enforcement notice. If an appeal is brought against a SMEN, the notice will not take effect until the appeal has been fully determined or withdrawn. Scottish Ministers are satisfied that referral to a sheriff is a reasonable and appropriate appeal mechanism as the issues that the sheriff will be asked to consider relate to due legal process. Sheriffs will not require detailed specialist knowledge of historic environment issues.

Section 6 – Works affecting scheduled monuments: enforcement (Stop and temporary stop notices)

• Together with enforcement notices, new powers for stop notices and temporary stop notices are intended to introduce a strengthened package of protection for scheduled monuments and bring the regime into line with that for listed buildings and the planning system.

• Currently, if unauthorised works causing damage to a scheduled monument, or works in breach of any condition attached to scheduled monument consent, are found to be underway there is no legal mechanism, other than by way of an interim interdict, to stop them quickly.

• Stop and temporary stop notices can be used in place of interdicts: however, in recent years Historic Scotland has not used this mechanism and it is anticipated that stop notices and temporary stop notices will be used rarely.

Stop notices

• A stop notice must relate to a SMEN and can be served when Scottish Ministers consider it expedient to prohibit the carrying out of the alleged unauthorised works.

• In cases where an appeal against an enforcement notice is brought forward and there are possible delays to the aim of achieving a stop and remediation of unauthorised works, a stop notice is another tool to achieve a ban on works specified in the enforcement notice.
• A stop notice must not come into effect earlier than 3 days after the date when the stop notice is served, unless Scottish Ministers consider that there are special reasons for specifying an earlier date. Failure to comply with a stop notice will be an offence.

• There is no right of appeal against a stop notice.

Temporary stop notices (TSN)

• A TSN may be served even if no enforcement notice has been issued and can be used to immediately stop potentially damaging unauthorised works to a scheduled monument or works in breach of any condition attached to a consent, which if not complied with can cause harm to the environment e.g. breach of an archaeological survey condition.

• TSN does not need to set out the special reasons for it to come into immediate effect, which would be required for a stop notice.

• A TSN can only have effect for a maximum of 28 days to enable the most appropriate enforcement action to be considered and undertaken during this time. Failure to comply with a temporary stop notice will be an offence.

• TSN will only be issued as a last resort when Scottish Ministers are satisfied there is a clear and immediate need for such action.
Dear

Re-notification to all owners of scheduled monuments in Scotland.

Our records show that you own, occupy or manage a scheduled monument or monuments.

I am writing to let you know that the Historic Environment (Amendment) (Scotland) Act 2011 has recently been passed by the Scottish Parliament. This includes some changes to the law relating to scheduled monuments.

This Act amends and updates three pieces of legislation relating to grants, scheduled monuments and listed buildings. Historic Scotland made a commitment to contact owners and occupiers of scheduled monuments and draw their attention to the legal changes introduced by the Act and to the sources of information and advice on the scheduling and scheduled monument consent processes.

A copy of the schedule for your monument can be found at Annex A. A breakdown of the changes to the law on scheduled monuments introduced by the Act and further information is attached at Annex B.

If you no longer own, occupy or manage a scheduled monument or monuments, or you believe our information is inaccurate in any other way, please notify us and we will update our records accordingly.

If you have any queries please do not hesitate to contact Historic Scotland on the above information.

Yours sincerely

[319]
Annex A: Schedule (See attached)

Annex B: Guidance on scheduled monuments and what actions a person might take to check for the existence and location of a scheduled monument.

What are scheduled monuments?

- The Ancient Monuments and Archaeological Areas Act 1979 (the ‘1979 Act’) gives Scottish Ministers the powers to compile and maintain a Schedule of monuments of national importance. Scheduling is the process of adding monuments to this list. There are around 8,150 monuments that are currently scheduled, with more added to the Schedule every year.
- Any person carrying out unauthorised works or allowing unauthorised works to be carried out on a scheduled monument without consent is guilty of an offence.

Keys changes to scheduled monument law introduced by the Historic Environment (Amendment) (Scotland) Act 2011 (the ‘2011 Act’):

Below are some of the key changes to the law relating to scheduled monuments.

- Previously, it was a defence, under the 1979 Act, to prove that unauthorised works to a scheduled monument were carried out in ignorance that it was scheduled or that the scheduled monument was in an area affected by the works. Under the new Act, if unauthorised works are carried out that affect a scheduled monument the defence now allows lack of knowledge only to be used in defence where a person can show they took all reasonable steps to find out whether there was a scheduled monument in the area affected by the works.

- The Act introduces a system for enforcement and remedy where works have been executed on a scheduled monument without the requisite scheduled monument consent. New powers enable Scottish Ministers to serve a scheduled monument enforcement notice that will allow for the reversal or remedy of unauthorised works to a scheduled monument or works in breach of any condition attached to scheduled monument consent, in cases where such remedial works are desirable or reasonably practicable. The Act also includes provisions that will provide for a system of stop notices and temporary stop notices to achieve a more immediate ban on works specified in the enforcement notice. These will effect a halt – immediate in the case of temporary stop notices – to unauthorised works to a scheduled monument and will provide additional powers to prevent irremediable damage to such nationally important monuments through illegal and unauthorised works.

- The Act extends the range of historic environment assets that can be designated as a monument under the 1979 Act by expressly allowing Scottish Ministers to designate “any site comprising any thing, or group of things, that evidences
previous human activity”. The new provision will be applied in relation to an extremely small number of very rare nationally important sites that are currently afforded no protection – for example, scatters of flint tools marking sites of early human occupation.

- The Act increases the maximum level of fines from £10,000 to £50,000 on summary conviction for causing, or permitting to be executed, any unauthorised works to a scheduled monument, or for failure to comply with any condition attached to a scheduled monument consent.

For further information, our booklets ‘A guide to scheduled monuments: a guide for owners, occupiers and managers’ and ‘Metal Detecting Yes or No’ have been updated to reflect the changes in the Act. These can be accessed at [http://www.historic-scotland.gov.uk/guide-to-scheduling.pdf](http://www.historic-scotland.gov.uk/guide-to-scheduling.pdf) and [http://www.historic-scotland.gov.uk/metal_detecting.pdf](http://www.historic-scotland.gov.uk/metal_detecting.pdf).

An education booklet called Managing and Protecting our Historic Environment What is Changing? The Historic Environment (Amendment) (Scotland) Bill Explained has been published. This booklet provides readers with an overview of the existing historic environment protection regime and sets out in detail the changes that will be introduced by the Bill. These can be accessed at [http://www.historic-scotland.gov.uk/historicenvironment.pdf](http://www.historic-scotland.gov.uk/historicenvironment.pdf).

### Availability of information on scheduled monuments

Some scheduled monuments are obvious, such as upstanding prehistoric burial mounds or medieval castles. Others may be inconspicuous or not obvious to the naked eye, such as prehistoric settlements in cultivated areas, which may only be visible from the air as crop-marks. There are several ways to find out about the location and extent of scheduled monuments.

- Information on scheduled monuments is available online from Historic Scotland’s data website: [http://data.historic-scotland.gov.uk](http://data.historic-scotland.gov.uk). Here you can download maps and copies of the legal documentation for each scheduled monument, as well as find out about other types of designation, such as listing. If you do not have access to the web, then you can request this information from Historic Scotland directly.

- Scheduling documents are available to anyone searching the Register of Sasines or the Land Register for the title to a property.

- Historic Scotland also makes its data available on PASTMAP ([www.pastmap.org.uk](http://www.pastmap.org.uk)), a website jointly developed with the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS), where you can search for information on Scotland’s Historic Environment from multiple sources.
Additional guidance for owners of SM

The discovery of archaeological artefacts

In relation to the discovery of archaeological artefacts, whether on a scheduled monument or otherwise, finders must report all finds of portable antiquities (an item of any material – not just precious materials – and normally made or modified more than 100 years ago). Not reporting finds is an offence under the common law of Scotland and under the Civic Government (Scotland) Act 1982. This is because the Crown has prior rights under the Treasure Trove system to all previously owned property that now has no owner. The Code of Practice for Treasure Trove in Scotland also requires finders to report recovered objects to the Treasure Trove unit or take them to a regional or local museum, or to a local authority archaeologist, within one month of initial discovery. The Bill provisions will not alter this position.

Class Consents

Under the Ancient Monuments (Class Consents) (Scotland) Order 1996 (the ‘Class Consents Order’), consent is automatically conferred on certain works affecting scheduled monuments, with no need to obtain specific written scheduled monument consent in each case. Excludes from the consent regime agricultural, horticultural and forestry works, provided these are of the same kind as works previously executed lawfully in the same place any time in the previous 6 years (or 10 years in the case of ploughed land). For example, if ploughing was taking place on the monument in a 10-year period up to the date when the works commence, then similar ploughing may continue without scheduled monument consent. However, not all agricultural activity is automatically covered by class consents. It is important to note that most changes to an earlier agricultural regime (for example, deeper ploughing, sub-soiling or drainage works) would need scheduled monument consent. Conversely, a change of use from ploughing to pasture would not require scheduled monument consent. The Bill provisions will not alter the position in relation to class consents.

Contacts

About scheduled monuments

Please e-mail your enquiries to hs.inspectorate@scotland.gsi.gov.uk or write to us at our address below. It will help us to deal with your query efficiently if you can tell us what local authority a site is in and supply its national grid reference and/or its scheduled name and number.

Historic Scotland Inspectorate
Longmore House
Salisbury House
Edinburgh

Annexe E
EH9 1SH

Tel 0131 668 8770
(management of a site or about the scheduled monument consent process)

Tel 0131 668 8766
(scheduling process)

Tel 0131 668 8716
(grants for archaeological sites and monuments)
SUPPLEMENTARY SCOTTISH GOVERNMENT RESPONSE TO EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE STAGE 1 REPORT ON THE HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

Further to my letter of 25 November I am now writing to you in response to the recommendation set out in paragraph 29 of the Committee’s Stage 1 Report on the Bill which called for the Scottish Government to give further consideration to the issue of “expertise”. I hope you find the following information helpful.

I note that the Committee’s comments were raised in relation to the proposed modifications of defences in the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”) under section 3 of the Bill. As I mentioned in Annex A of my letter to the Committee of 14 October these provisions relate solely to scheduled monuments which are defined in legislation as monuments of “national importance”. With this in mind you may be interested to note that Historic Scotland, acting on behalf of Scottish Ministers, deals with all matters affecting scheduled monuments including the designation and associated consent processes. For example, in relation to designation (scheduling), the selection of monuments and the scheduling process is undertaken by professional staff within Historic Scotland applying the policies, criteria and guidance set by Scottish Ministers. In particular, the criteria for, and guidance on, the determination of ‘national significance’ for scheduling as set out in Annex 1 of the Scottish Historic Environment Policy (SHEP). At present the schedule comprises of 8,151 nationally important monuments.

Once a monument is scheduled the prior consent of Scottish Ministers (scheduled monument consent) is required for most works to a monument, including repairs. As with designation, Historic Scotland staff administers the scheduled monument consent process on behalf of Scottish Ministers. This can include informal pre-application discussions between potential applicants and Historic Scotland area inspectors as well as the assessment of the application for scheduled monument consent. You may be interested to note that in 2009-10 Historic Scotland received 238 applications for scheduled monument consent, none of which were refused, which is an indication that the necessary information and advice is already accessible to people considering works to a scheduled monument.

You may also be interested to note that Historic Scotland also encourages active management of scheduled monuments and the Agency can, and does, help by offering advice to owners and occupiers. For example, Historic Scotland monument wardens visit scheduled sites and their owners on a regular basis. They check the condition of the site, offer advice on monument management and aim to ensure that everyone with a current interest in the site knows about its protection. I can also confirm that Historic Scotland encourages owners and occupiers of scheduled monuments to contact the Agency for advice at any time. It should also be noted that Historic Scotland does not charge for this advice or for applications for scheduled monument consent.
In summary Historic Scotland is the main source of advice and expertise on all matters relating to Scotland’s scheduled monuments. The Scottish Government is also of the view that the level and quality of expertise that currently lies within Historic Scotland enables the Agency to meet its obligations in relation to the identification of nationally important monuments; the provision of advice on the care and management of scheduled monuments; and, the scheduled monument consent process. The Bill will not alter this position.

I would now like to touch on the issue that some stakeholders raised during the Committee’s Stage 1 consideration of the Bill concerning the availability of expertise in relation to the local historic environment. In particular I am aware of the Built Environment Forum Scotland’s (BEFS) call for the introduction of a statutory duty for local authorities to ensure they have access to expert advice for the purposes of exercising their functions in relation to the local historic environment. However, while the Scottish Government acknowledges that this is an important issue it does not agree that the right way to deal with the matter is through placing a new legal duty on local authorities, which could give rise to significant costs. On the contrary Scottish Ministers are of the view that the most appropriate and proportionate way to deal with matters that relate to non-designated local historic environment assets is by providing a policy framework that promulgates and promotes best practice whilst allowing each local authority the flexibility to make the decisions best for them in relation to the management of the local historic environment. The policy that is set out in both the Scottish Historic Environment Policy (SHEP) and the Scottish Planning Policy (SPP) provides this framework of best practice and is, in the view of the Scottish Government, a better model for delivering outcomes in a proportionate and tailored way than through a rigid legislative duty. Indeed the existing policy framework has led to excellent working agreements regarding the care and management of historic environment assets with various public bodies such as the Ministry of Defence.

The Scottish Government is however keen to facilitate improvements in the existing mechanisms and policies that underpin the care and management of the local historic environment when practicable and suitable to do so. Indeed with this in mind you may be interested to note that Historic Scotland established a Reference Group with key stakeholders, including the Convention of Scottish Local Authorities (COSLA), the Built Environment Forum Scotland (BEFS) and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) to manage a short project to provide clear information on the state of local historic environment records (HERs) in Scotland and to identify priorities for future work – taking as a given the tight public spending climate. As part of this process Historic Scotland has commissioned Dr Stephen Carter to undertake a tightly focused research project the specific aims of which may be summarised as follows:

- To provide a snapshot of the value of Scotland’s HERs and their positive contribution to Government across a range of areas;
- To provide a clear and succinct statement of the minimum standards expected of HERs in 2010 and the current position of HERs relative to that;
• To develop a strategic framework for the development of HERs in Scotland over the next ten years, which takes account of the declining availability of public funding for all services and is realistic in that context;
• To identify a range of options for improving on the current situation and implementing the strategic framework, which again takes realistic account of the public funding position; and
• To provide a report on the same.

I hope that this work, which should be completed by late December 2010, will lead to really creative thinking about the scope for better sharing of resources and recommendations on how to get the maximum local value from these records (and indeed, what they should contain) against the backdrop of a very tight public spending round. It is the Government’s view that the creation of a statutory duty would close down flexibility and the opportunity for creative solutions. There are of course challenges here but they are not legal ones.

In conclusion while the Scottish Government agrees that access to appropriate information and advice is important (indeed our policy documents say so) it is the view of the Scottish Government that creating a new legislative duty is not the right way to achieve the outcome wanted. Indeed it is the view of Scottish Ministers that local development control through the planning system, including ensuring access to suitable expertise, is the appropriate and proportionate mechanism for managing assets which are by definition not nationally designated.

Finally, in relation to my letter of 25 November, please note that the second sentence in the 3rd bullet point in Annex D under the heading “section 6 – works affecting scheduled monument enforcement (Enforcement Notices) should read as follows: “The penalty can be a fine of up to £10,000 (which is being increased to £50,000 under section 4 of the Bill) or up to two years imprisonment or both”.

Fiona Hyslop
Minister for Culture and External Affairs
8 December 2010
Historic Environment (Amendment) (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 32 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 6

Fiona Hyslop
1 In section 6, page 9, line 20, leave out second <section> and insert <in sections 6 and>

Fiona Hyslop
2 In section 6, page 13, line 24, at end insert—
   <( ) for the purposes of displaying—
   (i) a site notice,
   (ii) a notice under section 9G(7) in place of a site notice, or
   (iii) a copy of a temporary stop notice, and a statement as to the effect
        of section 9M, under section 9K(4),>

Fiona Hyslop
3 In section 6, page 13, leave out line 27

Fiona Hyslop
4 In section 6, page 13, line 36, at end insert—
   <“site notice” has the meaning given in section 9H(3);”>

Section 15

Fiona Hyslop
5 In section 15, page 18, line 21, leave out from <by> to <entertained> in line 22 and insert <refuse
   to entertain an application for scheduled monument consent>

Fiona Hyslop
6 In section 15, page 18, leave out line 25 and insert—
   <(2) The Scottish Ministers may by regulations—>
Fiona Hyslop

7 In section 15, page 19, line 4, at beginning insert—
   <(2A) Regulations under sub-paragraph (2) may>

Fiona Hyslop

8 In section 15, page 19, line 5, leave out from <“of”> to end of line 6 and insert <“paragraph” insert 
   “or regulations made under it”>.

Section 23

Fiona Hyslop

9 In section 23, page 24, line 23, leave out <section 41E> and insert <in sections 41E and 76>

Fiona Hyslop

10 In section 23, page 28, line 39, at end insert—
   <( ) In subsection (3) of section 66 of that Act (control of demolition in conservation areas), 
   for “41” substitute “41I”.

Fiona Hyslop

11 In section 23, page 29, line 3, at end insert—
   <( ) for the purposes of displaying—
   (i) a site notice,
   (ii) a notice under section 41A(7) in place of a site notice, or
   (iii) a copy of a temporary stop notice, and a statement as to the effect 
   of section 41H, under section 41F(4),

Fiona Hyslop

12 In section 23, page 29, leave out line 6

Fiona Hyslop

13 In section 23, page 29, line 9, at end insert—
   <“site notice” has the meaning given in section 41B(4),>

After section 24

Karen Whitefield

*14 After section 24, insert—
Urgent preservation

Urgent works to preserve unoccupied listed buildings

In section 49 (urgent works to preserve unoccupied listed buildings) of the 1997 Act, in subsection (3), at the end add “and preventative works necessary to limit any deterioration of the building”.

After section 29

Ken Macintosh

After section 29, insert—

<Part>

Duty on the Scottish Ministers to give guidance on the preservation of the historic environment

Duty on the Scottish Ministers to give guidance to public bodies

(1) The Scottish Ministers must give guidance to relevant bodies on how such bodies, in exercising their functions, can contribute to the preservation of the historic environment.

(2) In exercising its functions, a relevant body must have regard to guidance given under subsection (1).

(3) Before giving guidance under subsection (1), the Scottish Ministers must consult, in so far as reasonably practicable, with such persons as the Scottish Ministers consider appropriate.

(4) The Scottish Ministers may vary or revoke guidance given under this section and, where guidance is varied to a substantial extent, subsection (3) applies.

(5) The Scottish Ministers must publish any guidance given under this section.

(6) In this Part, “relevant body” means such public body as may be specified by the Scottish Ministers by order made by statutory instrument.

(7) A statutory instrument containing an order made under subsection (6) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

Ken Macintosh

After section 29, insert—

<Part>

Duty on planning authorities in relation to knowledge, etc. on the historic environment

Duty on planning authorities in relation to knowledge, etc. on the historic environment

(1) A planning authority must, in exercising its functions, have regard to the desirability of securing access to relevant knowledge and expertise on the preservation of the historic environment.

(2) In this Part, “planning authority” is to be construed in accordance with the Town and Country Planning (Scotland) Act 1997 (c.8).
Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Powers of entry**
1, 2, 3, 4, 9, 11, 12, 13

**Powers in relation to scheduled monument consent applications**
5, 6, 7, 8

**Application of stop and temporary stop notices to buildings in conservation areas**
10

**Preservation of unoccupied buildings: urgent works**
14

**Scottish Ministers’ duty to give guidance**
15

**Planning authorities’ duties in relation to knowledge and expertise**
16
Historic Environment (Amendment) (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

Amendment 14 was agreed to (by division: For 4, Against 3, Abstentions 1)

The following amendments were disagreed to (by division)—
15 (For 3, Against 5, Abstentions 0)
16 (For 3, Against 4, Abstentions 1)

Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31 and 32 and the long title were agreed to without amendment.

Sections 6, 15 and 23 were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
On resuming—

**Historic Environment (Amendment) (Scotland) Bill: Stage 2**

**The Convener: Item 2 is stage 2 of the Historic Environment (Amendment) (Scotland) Bill. I am pleased to welcome to the meeting the Minister for Culture and External Affairs, Fiona Hyslop, and her supporting officials.**

Sections 1 to 5 agreed to.

Section 6—Works affecting scheduled monuments: enforcement

**The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 to 4, 9 and 11 to 13.**

**The Minister for Culture and External Affairs (Fiona Hyslop): Amendments 1 to 4, 9 and 11 to 13 are all technical. Amendments 1 to 4 will amend text that section 6 of the bill will insert into the Ancient Monuments and Archaeological Areas Act 1979 that relates to procedural aspects of certain rights of entry to display various enforcement notices. Amendments 9 and 11 to 13 will amend similar text that section 23 of the bill will insert into the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.**

Both sets of amendments do the same thing—they set out in full certain provisions so that it is easier to understand what is being referred to. The current text is technically sufficient, but we thought it preferable to lodge the minor redrafting amendments to bring out the purpose of the relevant right of entry provisions in a more direct and easily understood manner.

I move amendment 1.

Amendment 1 agreed to.

Amendments 2 to 4 moved—[Fiona Hyslop]—and agreed to.

Section 6, as amended, agreed to.

Sections 7 to 14 agreed to.

Section 15—Scheduled monument consent: regulations as respects applications, etc

**The Convener: Amendment 5, in the name of the minister, is grouped with amendments 6 to 8.**

**Fiona Hyslop: Amendments 5 to 8 are technical and respond to a comment that the Subordinate Legislation Committee made in its consideration of the bill. That committee did not go as far as recommending a change, but I concluded that it was preferable to adjust section 15 to take account of its remarks. For members who have served on that committee, it is helpful to know that we sometimes respond positively to its remarks.**

The Subordinate Legislation Committee drew attention to the creation of a power, which section 15(3) will insert, to allow for regulations to introduce the principle that a refusal to entertain an application for scheduled monument consent could be given when the application was not accompanied by an appropriate certificate. The amendments will set out that principle in the bill and ensure that the regulation-making power is confined to administrative detail.

I move amendment 5.

Amendment 5 agreed to.

Amendments 6 to 8 moved—[Fiona Hyslop]—and agreed to.

Section 15, as amended, agreed to.

Sections 16 to 22 agreed to.

Section 23—Stop notices and temporary stop notices

Amendment 9 moved—[Fiona Hyslop]—and agreed to.

**The Convener: Amendment 10, in the name of the minister, is in a group on its own.**

**Fiona Hyslop: Amendment 10 is a minor technical amendment that will ensure that section 66(3) of the 1997 act includes a reference to new sections 41A to 41I of that act, which section 23 of the bill will insert. That will enable stop notices and temporary stop notices to be available as enforcement tools in relation to unlisted buildings in conservation areas. That is consistent with other protection that is afforded to such buildings by virtue of section 66(3) of the 1997 act.**

Due to a numbering sequence in the 1997 act, the provisions were not included when they ought to have been caught. What is involved is therefore a technical redraft.

I move amendment 10.

Amendment 10 agreed to.

Amendments 11 to 13 moved—[Fiona Hyslop]—and agreed to.

Section 23, as amended, agreed to.

Section 24 agreed to.

After section 24
10:45

**The Convener:** Amendment 14, in my name, is in a group on its own.

As members will know, I do not usually lodge amendments, because it is difficult to chair the committee at stage 2 and make arguments for amendments. However, I wanted to do so on this occasion because, as the minister will be aware—although members might not be—we have been in correspondence about an historic monument in my constituency that has generated some casework for me. It is an historic doocot that causes considerable concern to local residents, not because they do not want it but because it is not maintained as well as they think it could be. Concerns were expressed by nearby residents and the local authority has attempted to reach a resolution. However, despite the fact that minor works would help to ensure the long-term maintenance and future of the historic doocot, because it is not in a state of danger the local authority is unable to take any action or to work with the owner to positively encourage them to think about maintenance work that would enhance it.

For that reason, I began to correspond with the minister on the issue and sought advice from the Built Environment Forum Scotland, which kindly helped me with amendment 14. The forum suggested that the amendment would not place an unnecessarily costly burden on local authorities but would enhance their powers and the options that are open to them to engage with owners of uninhabited historic monuments to allow them to take preventive measures. As Archaeology Scotland said in its submission to the committee, it is a bit like a stitch in time—work that is done now prevents much more costly work from being required in future. I am pleased that Archaeology Scotland and the Built Environment Forum Scotland support amendment 14. I seek the support of committee members and, I hope, the minister.

I move amendment 14.

**Ken Macintosh:** I have a question for the minister. The convener raises a clear example from her constituency that highlights a potential problem with the law. Have any other examples been brought to the minister’s attention? It sounds as though such situations could be relatively common. I am aware of disputes over the maintenance of listed buildings and scheduled monuments and of discussion in each case about the powers of local authorities to intervene. I am interested in the minister’s comments on whether the problem that the convener has highlighted illuminates a wider range of problems that we need to address.

**Margaret Smith:** I have a comment and a question. I have had similar experiences in relation to dangerous trees and such things. The commonsense approach would be that a council should be able to deal with things that are deteriorating and are likely to have an impact on residents or the environment. However, surprisingly, on a number of occasions, we find that local authorities do not have the powers that one thinks they have. In fact, sometimes, they do not have the powers that local authorities elsewhere in the United Kingdom have. Therefore, I have sympathy with where the convener is coming from.

My major point is that we should be sure that amendment 14 gives local authorities powers to take action that they decide is required, rather than in any way meaning that they have to take action. At stage 1, we were cognisant of the fact that we do not want to put extra burdens on local authorities at present and that putting extra financial burdens on local authorities could have an impact on the financial memorandum. I seek clarification that the power could be used at the council’s discretion, rather than imposing a burden on them by requiring that they take action.

**Fiona Hyslop:** Amendment 14 might come to be known as the Airdrie doocot amendment. I have tried to explain in my correspondence with Karen Whitefield that powers already exist for local authorities in that regard. The amendment adds words to section 49(3) of the 1997 act. It provides an additional example of the type of urgent works that local authorities can carry out on unoccupied listed buildings under section 49(1) of the act.

As I mentioned in my letter of 31 October to Karen Whitefield on her constituency case regarding the Airdrie doocot, section 49(1) of the 1997 act enables local authorities to undertake any works that they believe are “urgently necessary for the preservation of a listed building”.

The powers are not limited to the point at which extensive problems emerge or the structure is deemed to be dangerous. They can be used by local authorities—and have been, which addresses Ken Macintosh’s question about other examples—to undertake relatively minor works such as cleaning gutters to help to prevent serious damage from occurring in the first place.

However, I recognise that the provisions that exist in section 49(1) of the 1997 act have been interpreted in different ways. That is perhaps why members perceive that local authorities somehow do not think that they have the powers to take action where remedial work is needed to help to preserve a listed building.
I am happy to give the committee an assurance that my officials in Historic Scotland will ensure that examples of the type of work that may be carried out under section 49 are included in future guidance. The powers are there, but local authorities are not necessarily cognisant of the fact that they can use those powers to do exactly the type of work that is needed on the Airdrie doocot. I would be happy to write to North Lanarkshire Council about the Airdrie doocot, to bring to its attention the powers that it has under the existing legislation to carry out the works that Karen Whitefield suggests might be needed. The committee may also wish to know that COSLA opposes amendment 14.

As the suggested initial wording is already covered by the general wording in section 49(1) of the 1997 act, the Scottish Government believes that amendment 14 is unnecessary in law, because what it seeks to do is covered by existing legislation. Given our assurance that we will produce further guidance to ensure that local authorities are aware of their existing powers, I urge the convener to withdraw amendment 14.

**The Convener:** I have mixed views on the issue. I do not doubt in any way the sincerity of your comments, but your letter to me of 31 October has been passed to North Lanarkshire Council, and the council's planning officers do not believe that the law is sufficient to allow them to have the dialogue that is required to allow some initial work to be undertaken.

The work would be of a preventive nature; it would involve cleaning out gutters and taking steps to cut back tree branches that are coming through the historic wall from the open ground on the other side. Those things are not being done.

I am slightly perplexed by COSLA’s view on the issue. It objects to amendment 14 on the basis that it does not believe that the amendment is necessary, but local authorities, and my local council in particular, think that it is. The Built Environment Forum and Archaeology Scotland thought that the bill offered an opportunity to underpin in legislation our attitudes and policy towards the historic environment.

**Ken Macintosh:** The purpose of amendment 15 is to place a duty on Scottish ministers to “give guidance to relevant bodies on how such bodies...can contribute to the preservation of the historic environment.”

As members know, the bill is primarily an amending bill and deals with legislation governing listed buildings, scheduled monuments and so on. However, as we heard in stage 1 evidence, in particular, the majority of the historic environment is not covered by legislation. Many who work in the area—the Built Environment Forum Scotland spoke on behalf of many such organisations and individuals—thought that the bill offered an opportunity to underpin in legislation our attitudes and policy towards the historic environment.

At stage 1, the Built Environment Forum proposed placing a duty on local authorities and other public bodies. However, in these times, all members are especially conscious of the fact that placing additional duties and, potentially, extra
costs on local government is probably inadvisable and would certainly be difficult and burdensome for them, given that they are having to manage cuts.

Amendment 15 is the product of several attempts at an amendment to address the issue. The bill offers us an opportunity. Currently, there is not only a lack of legislation or statutory backing for policy for the whole of the historic environment but concern about the nature of staff in the area and the consistency of implementation of policy towards the built environment and the historic environment across Scotland. In other words, there is a patchy response from local authorities on the issue of whether they should protect, preserve or give priority to their heritage; some do so more than others.

Amendment 15 would result in no additional costs; it has been drafted specifically to ensure that it would have no financial consequences. However, what it proposes would send out a strong message. It would allow the minister to select which authorities and bodies should have regard to the guidance and to draw that guidance up after consultation. The amendment would give statutory backing to the existing policy for the historic Scottish environment and allow the minister and others to bring all local authorities or other bodies up to the same standard and ensure that, in their decision-making processes for planning or otherwise, they have regard to their duties to protect the environment, which is very important for our sense of place and our sense of culture and belonging.

I move amendment 15.

11:00

The Convener: As it appears that no other member wishes to speak on the amendment, I invite the minister to respond to Mr Macintosh’s points.

Fiona Hyslop: Amendment 15 would place a new statutory duty on Scottish ministers to

“give guidance to relevant bodies on how such bodies, in exercising their functions, can contribute to the preservation of the historic environment.”

It would also place a new statutory duty on relevant bodies to have regard to such guidance and would provide for ministers to specify, as Ken Macintosh said, the relevant bodies by statutory instrument.

Some may ask why we oppose the amendment if it does no more than put the Government’s policy on a statutory footing, as I think the mover of the amendment explained. However, the amendment does not reflect the varied and multifaceted approach that our policy framework sets out in aiming to deliver the best outcomes for the historic environment. I do not believe that a flexible policy framework would be enhanced by a rigid and very narrow statutory duty.

Ken Macintosh suggested that the existing guidance and policy statements, which he is trying to back up by putting them on a statutory footing, cover only designated aspects of the historic environment and apply only to Government bodies. However, that is not true, because the undesignated aspects of the historic environment are covered and the policy framework, which is the main framework for policy and guidance in the Scottish historic environment policy, addresses all aspects of the historic environment, and all bodies with responsibility for any aspect of the historic environment are targeted by SHEP. There is therefore a danger that amendment 15 would place an unnecessary new duty on public bodies and introduce more red tape and bureaucracy into the bill, which I acknowledge is not what Ken Macintosh is trying to achieve.

The committee may be interested to note that Scottish ministers currently provide a range of guidance and advice on the management, care, protection and conservation of heritage assets — far broader than just “preservation”, to which the amendment refers — from strategic policy advice to practical technical notes on the management, care and maintenance of different aspects of the historic environment. The extensive guidance that is provided is supplemented in the case of local authorities, for example, by joint-working agreements with Historic Scotland and other agreements with public bodies. There is a suite of measures to ensure that public bodies actively engage in regular discussion and review of their relationship with the historic environment. However, crucially, they also enable public bodies to tailor effective solutions for their circumstances.

The problem with the amendment is that it would encourage a one-size-fits-all approach to the historic environment and encourage public bodies to match their engagement at a lower level than currently exists in many circumstances. I am sure that that was not Ken Macintosh’s intention with the amendment. He spoke about bringing everybody up to a standard. However, there is a danger in the amendment’s approach that our current flexible and effective measures would be hampered by what we regard as a one-dimensional approach.

The amendment would also introduce a regulation culture where none exists. In doing so, it would introduce a limited and narrow view of the relationship that public bodies have with the historic environment. It risks relegating some of the current guidance, good practice and agreements that I have just talked about to a lower
level of importance if they are not issued or agreed under the very narrow framework that the amendment proposes. It also risks hampering progress in areas where public bodies need to engage more with the historic environment.

One of the significant concerns about the drafting of the amendment is that it limits the purpose of the guidance to the preservation of the historic environment. I draw your attention to the wording of the amendment, which clearly mentions both in the title of the new section that it would insert and in subsection (1) “the preservation of the historic environment”.

So much of the care and management that I talked about earlier is to do with more than just preservation. The big challenges that public bodies face are not just about preserving the historic environment but about managing change within it. The amendment is limited because it mentions preservation only. There is more to the relationship with the historic environment than that.

There is a danger that, rather than encouraging better care and management of our historic environment, which I know is Ken Macintosh’s intention, the amendment could set back the progress that has been made in recent years. There is a danger that the repositioning of the historic environment could result in its being seen more as a burden. We are trying hard to ensure that people see it as part and parcel of the economy in the modern day through tourism and other areas. If it is seen as a burden and the duty is just about preservation, that could get in the way of further, more positive activity.

There is also a danger that the relationship with public bodies would become a narrow one that focused on compliance. They might think that, if they comply with the duty, they have done their job. That would be a levelling down rather than bringing everybody up to the same standard. Members might be aware that COSLA is opposed to any duty that could be perceived as a repositioning of the priorities.

I hope that I have explained why we oppose the amendment. I completely understand why Ken Macintosh lodged it and what he is trying to achieve. I just think that it could have unintended consequences and inadvertently cause more of a problem than he might realise.

The Convener: Mr Macintosh, will you wind up the debate on the group and say whether you wish to press or withdraw your amendment?

Ken Macintosh: I thank the minister for her comments. It is clear that there is not huge disagreement, in that we all believe that it is desirable for all public bodies in Scotland and all of us to act in a manner that helps to protect and enhance our historic environment.

I will talk first about the terminology. The reason why I used the term “preservation” as opposed to “protect and enhance” was to reflect the existing legislation. People who work with the historic environment are trying to move away from the term “preservation” because it has the wrong connotations, but the term is used in existing legislation, and I used it to ensure that I was not out of keeping with that.

However, the important point is not the term “preservation” but the guidance that will be introduced. In that sense, I do not think that the term is a drawback. Not only that, managing change is the key to sensitively protecting our historic environment while maintaining its use, or in other words keeping the key aspects of it that are of value and importance to us but continuing to use the buildings or the area that is of concern to local people.

There is a range of Government policy in the area. I agree that, when we aim to have national standards, there is always a danger that we could lower standards rather than increase them. I recognise that danger, but it is a matter for the drafting and the consultation on the guidance.

Currently, there are differences across Scotland. There are those who have a keen regard for the historic environment and others who do not. Some people believe that either an old building is of use or it is redundant and should be demolished to make way for the future. That approach of modernism at all costs is still prevalent in many parts of Scotland.

Statutory guidance would not only promote the importance of the historic environment but enable us, through parliamentary scrutiny, to express our views. There are a number of advantages in having statutory guidance that will not exist if it is just a matter of policy. The dangers that the minister mentioned in her comments about a one-size-fits-all approach and national standards already exist with policy guidance on other matters. It is clear that there is a diversity of standards out there, and the amendment is a method of raising them rather than lowering them.

On that basis, I will press amendment 15 and at least test opinion on the matter.

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
The organisation also says:

"perilously close to meltdown if cutbacks continue."

The organisation also says:

"Although at least the equivalent of two full-time IHBC-level conservation staff is generally recommended by the IHBC for an average planning authority, the Institute's survey identified an average of less than 2 across Scotland’s local authorities. In addition some authorities are already managing local heritage under specially delegated powers even though the IHBC’s scoping survey could not identify skilled conservation practitioners in these locations."

In other words, the situation is already difficult.

All that amendment 16 would do is ensure that local authorities take account of their duty to the historic environment, in particular by employing, or having access to, staff with specialist and skilled knowledge. The amendment would not impose any extra costs on local authorities. I hope that the committee will approve it.

I move amendment 16.

Fiona Hyslop: I suggest to the committee that there are two perspectives and two arguments to consider with respect to amendment 16. One relates to the actual content of the amendment; I will go into that later.

Secondly, there is an issue around whether legislation should be used to tackle problems that are to do with local authority budgets and personnel issues. Ken Macintosh used an argument about protecting jobs and the need to maintain and recruit staff. I might agree with him on that, but there is an issue as to whether legislation should be used—in relation to the historic environment, health or other areas—to provide “a backstop”, to use Mr Macintosh’s term, on what are ostensibly employer-employee relations in the context of budgets and personnel.

11:15

I am also not sure that securing access to knowledge and expertise, even of itself, within the context of the amendment, would necessarily mean that that access would have to be through staff who were employed by that local authority. Amendment 16 could be interpreted to mean a centralised source, but I think that Ken Macintosh is trying to promote protection of people’s jobs, which I understand, although I am not sure that legislation is the right way to do it. That is one of the arguments that the committee might want to consider.

On amendment 16’s content, the committee’s stage 1 report called on the Government to give further consideration to the issue of expertise in relation to interpretation of information on the historic environment. That was an important part of the report. In my response to the committee of 7 December, I said that

“while the Scottish Government acknowledges that this is an important issue it does not agree that the right way to deal with the matter is through placing a new legal duty on local authorities”.

I also said that
"the most appropriate and proportionate way to deal with matters that relate to non-designated local historic environment assets is by providing a policy framework that promulgates and promotes best practice whilst allowing each local authority the flexibility to make the decisions best for them in relation to the management of the local historic environment."

In commenting on the issue of expertise, I also invited the committee to note that Historic Scotland has established a reference group to examine the related issue of historic environment records. The report on historic environment records, to which I referred in my letter to the committee of 7 December, will shortly be with ministers for consideration.

Two of the reasons why I do not agree with amendment 16 are similar to reasons that relate to amendment 15. First, the amendment risks allowing planning authorities to settle for a lower level of engagement than is currently delivered by joint working arrangements, which are backed up by the strong ministerial policy framework. That is not to say that amendment 16 could be improved by making it a more onerous statutory duty, and I can see that Ken Macintosh has tried not to do that. The policy framework is the most suitable way to ensure progress.

There is a similar argument around the use of the term "preservation of the historic environment".

I have rehearsed the argument that one of the biggest challenges, particularly for planning authorities, is not about preservation but about how to manage changes in the historic environment to make sure that we care for it within a modern context.

A new legislative duty is not the right way to achieve the outcome of provision of expertise. COSLA shares that view because it can see that it would distort the priorities of our local authorities, and would probably also superimpose the arguments that I made earlier. Local development control through the planning system and ensuring access to suitable expertise is the appropriate mechanism for managing assets, but not necessarily on a nationally designated basis.

I understand where Ken Macintosh is coming from with amendment 16, and that he has tried to ensure that it has a light touch. However, there are complex issues involved about whether law should be used on personnel and jobs issues. I understand that this is a difficult time for many people, but I ask the committee to reflect on whether that is a principle that it wants to establish as a precedent that could be used in other legislation, not necessarily by this committee but by others.

Ken Macintosh: Again, I thank the minister for her remarks. She said that amendment 16 is about jobs: it is about jobs, but not about individual jobs, important though they are and vulnerable though people will be. It is about the posts and the knowledge that goes with them. In that sense, the amendment is not about individuals but about the idea that local authorities need to pay sufficient attention to the historic environment in their staffing policies or, at least, in their policy planning through access to information. If the local authority does not have the posts in-house, it must ensure that it has access to the knowledge and expertise through voluntary organisations, pooled resources or whatever else.

There is a real danger that the lack of priority or attention given to the area could inadvertently—I am not saying that local authorities will deliberately or consciously turn their backs on the historic environment—allow the historic environment to slip lower down their list of priorities, and the result will be that we will be left with a void in certain areas, which might lose local historic knowledge and expertise that has been built up over many years. That would be a sad thing, and it would have a lot of implications as we develop policy in that area, particularly for any policy on building on the historic environment.

Amendment 16 could be interpreted in a number of ways as being for a centralised resource, but that would not necessarily be the case. In some cases, centralised expertise is a good resource on which to call but, for the most part, the issue is about planning authorities carrying out local duties and having access to local knowledge.

I do not accept the argument about settling for lower levels of engagement. I understand that that might be the case when specific, detailed policy statements are made at national level, but I do not accept that it would be the case under a general duty. Amendment 16 is a way of stressing the importance of the historic environment. I can understand why COSLA might not like it, but it is important that we say, at national level, that the historic environment across the whole of Scotland is a matter of which all local authorities must take account. We impose many other duties on local authorities and we give them many other priorities to which they must have regard. The historic environment should feature on that list, otherwise there is a chance—it has already happened in some places—that it will slip down the list of priorities. I will press amendment 16, not least to test committee opinion.

The Convener: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against
Allan, Alasdair (Western Isles) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
Smith, Margaret (Edinburgh West) (LD)

Abstentions
Smith, Elizabeth (Mid Scotland and Fife) (Con)

The Convener: The result of the division is: For 3, Against 4, Abstentions 1.

Amendment 16 disagreed to.
Sections 30 to 32 agreed to

Long title agreed to.
Historic Environment (Amendment) (Scotland) Bill  
[AS AMENDED AT STAGE 2]

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Historic Environment (Amendment) (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision amending certain aspects of the law relating to ancient monuments and listed buildings, including provision in relation to unauthorised works, powers of enforcement in connection with such works, offences and fines, powers of entry to ancient monuments, the control and management of certain ancient monuments, and liability for the expenses of urgent works on listed buildings; to make provision for the creation of inventories of gardens and designed landscapes and of battlefields; to provide for grants and loans in respect of the development and understanding of matters of historic and other interest; and for connected purposes.

PART 1
AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

1 Recovery of grants for repair, maintenance and upkeep of certain property

(1) Section 4A of the 1953 Act (recovery of grants under section 4) is amended in accordance with this section.

(2) In subsection (3), at the beginning, insert “Subject to subsection (3A) below,”.

(3) After subsection (3) insert—

“(3A) Where a condition referred to in subsection (3) above specifies, or makes provision for calculating, the amount recoverable in the event of a condition being contravened or not complied with, that amount is the amount recoverable under subsection (3) in respect of the contravention or failure to comply with the condition.”.

(4) In subsection (4), at the beginning, insert “Subject to subsection (4A) below,”.

(5) After subsection (4) insert—

“(4A) Where a condition referred to in subsection (3) above specifies, or makes provision for calculating, the amount recoverable in the event of a disposal by the grantee of the relevant interest, that amount is the amount recoverable under subsection (4) above in respect of the disposal.”.
Control of works affecting scheduled monuments

In section 2 of the 1979 Act (control of works affecting scheduled monuments)—

(a) in paragraph (a) of subsection (3), the word “written” is repealed,

(b) after that subsection insert—

“(3A) If—

(a) works to which this section applies have been executed without being authorised under this Part; and

(b) the Scottish Ministers grant consent for the retention of the works,

the works are authorised under this Part of this Act from the grant of the consent.

(3B) References in this Act to scheduled monument consent include consent under subsection (3A) above.”.

Defences

Offences under sections 2, 28 and 42: modification of defences

(1) The 1979 Act is amended in accordance with this section.

(2) In section 2(8), for the words “prove that” substitute “show that, before executing, causing the execution of or, as the case may be, permitting the execution of the works—

(a) he had taken all reasonable steps to find out whether there was a scheduled monument within the area affected by the works, and

(b) the Scottish Ministers grant consent for the retention of the works,

the works are authorised under this Part of this Act from the grant of the consent.

(3) In section 28(1) (offence of damaging certain ancient monuments)—

(a) for the word “lawful” substitute “reasonable”,

(b) after “monument”, where it first occurs, insert “shall be guilty of an offence if the person”,

(c) in paragraph (a), for the words “knowing that it is” substitute “knew or ought to have known that it was”,

(d) in paragraph (b)—

(i) for the word “intending” substitute “intended”,

(ii) for the word “being” substitute “was”,

(e) the words “shall be guilty of an offence” are repealed.

(4) In section 42 (restrictions on use of metal detectors)—

(a) in subsection (6) for the word “prove” substitute “show”,

(b) in subsection (7)—

(i) for the words “prove that he had taken all reasonable precautions” substitute “show that—
(a) he had taken all reasonable steps”,
(ii) for the words “and did not believe that it was” substitute “; and
(b) he did not know and had no reason to believe that that place was a protected place”.

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Fines

4  Fines: increases and duty of court in determining amount

(1) The 1979 Act is amended in accordance with this section.
(2) In section 2 (control of works affecting scheduled monuments)—
(a) in subsection (10) for “the statutory maximum” substitute “£50,000”,
(b) after that subsection insert—
“(10A) In determining the amount of any fine to be imposed on a person under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.”.

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(3) In section 28 (offence of damaging certain ancient monuments)—
(a) in subsection (4) for “the statutory maximum” substitute “£50,000”,
(b) after that subsection, add—
“(5) In determining the amount of any fine to be imposed on a person under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.”.

Powers of entry

5  Powers of entry to inspect condition of scheduled monument

In section 6(1) of the 1979 Act (powers of entry for inspection of scheduled monument with a view to ascertaining its condition), for “and” substitute “; and such power may, in particular, be exercised with a view to ascertaining—”.

Works affecting scheduled monuments: enforcement

6  Works affecting scheduled monuments: enforcement

(1) After section 9 of the 1979 Act insert—

9A  Power to issue scheduled monument enforcement notice

(1) Where it appears to the Scottish Ministers that—
(a) any works have been, or are being, executed to a scheduled monument or to land in, on or under which there is a scheduled monument, and
(b) the works are such as to involve a contravention of section 2(1) or (6),
they may, if they consider it expedient having regard to the effect of the works on the character of the monument as one of national importance, serve a notice under this section (in this Act referred to as a “scheduled monument enforcement notice”).

(2) A scheduled monument enforcement notice must specify the alleged contravention and must (either or both)—

(a) specify any works falling within subsection (1) which the Scottish Ministers require to cease,

(b) require steps falling within subsection (3) and specified in the notice to be taken.

(3) Those steps are—

(a) for restoring the monument or land to its former state,

(b) if the Scottish Ministers consider that restoration to its former state would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider are required to alleviate in a manner acceptable to them the effect of the works which were carried out without scheduled monument consent, or

(c) for bringing the monument or land to the state it would have been in if the conditions of any scheduled monument consent for the works had been complied with.

(4) In considering whether restoration is undesirable under subsection (3)(b), the Scottish Ministers are to have regard to the desirability of preserving—

(a) the national importance of the monument,

(b) its features of historical, architectural, traditional, artistic or archaeological interest.

(5) Where further works of a kind mentioned in subsection (3)(b) have been carried out on a monument or land, scheduled monument consent is treated as having been granted in respect of the works carried out on that monument or land.

9B Scheduled monument enforcement notices: further provisions

(1) A scheduled monument enforcement notice—

(a) must specify the date on which it is to take effect and, subject to section 9C(3), takes effect on that date, and

(b) must specify the period (the “period for compliance”) within which—

(i) any works required to cease must cease,

(ii) any steps required to be taken must be taken,

and may specify different periods for different works or steps.

(2) Where different periods apply to different works or steps, references in this Act to the period for compliance with a scheduled monument enforcement notice, in relation to any works or step, are to the period within which the works are required to cease or the step is required to be taken.
(3) The date specified in the notice under subsection (1)(a) must be at least 28 days after the date on which the notice is served.

(4) A copy of a scheduled monument enforcement notice must be served—

(a) on the owner, the lessee and the occupier of the monument to which it relates and of the land in, on or under which the monument is situated,

(b) on any other person having an interest in the monument or land, being an interest which in the opinion of the Scottish Ministers is materially affected by the notice.

(5) The Scottish Ministers may, at any time—

(a) withdraw a scheduled monument enforcement notice (without prejudice to their power to issue another), or

(b) waive or relax any requirement of such a notice and, in particular, extend the period for compliance.

(6) The Scottish Ministers must, immediately after exercising the powers conferred by subsection (5), give notice of the exercise to every person who has been served with a copy of the scheduled monument enforcement notice or would, if the notice were reissued, be served with a copy of it.

(7) The Scottish Ministers must—

(a) publish by electronic means (as for example by means of the internet) a list containing particulars of any monument in respect of which a scheduled monument enforcement notice has been served, and

(b) on request, provide a copy of a scheduled monument enforcement notice.

9C Appeal against scheduled monument enforcement notice

(1) A person on whom a scheduled monument enforcement notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated may, at any time before the date specified in the notice as the date on which it is to take effect, by summary application appeal to the sheriff on any of the grounds in subsection (2).

(2) Those grounds are—

(a) that the matters alleged to constitute a contravention of section 2(1) or (6) have not occurred,

(b) that those matters (if they occurred) do not constitute such a contravention,

(c) that—

(i) works to the monument or land were urgently necessary in the interests of safety or health,

(ii) it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter, and

(iii) the works carried out were limited to the minimum measures immediately necessary,

(d) that copies of the notice were not served as required by section 9B(4),
(e) that the period for compliance for any works or step falls short of what should reasonably be allowed.

(3) Where an appeal is brought under this section the notice is of no effect until the appeal is withdrawn or finally determined.

(4) In determining an appeal under this section the sheriff may uphold or quash the notice.

(5) The sheriff may uphold a notice despite copies of it not having been served as required by section 9B(4) if satisfied that any person on whom a copy should have been, but was not, served has not been substantially prejudiced by the failure.

9D  Execution of works required by scheduled monument enforcement notice

(1) If any steps specified in the scheduled monument enforcement notice have not been taken within the period for compliance with the notice, the Scottish Ministers may—

   (a) enter on the land in, on or under which the scheduled monument is situated and take those steps, and

   (b) recover from the person who is then the owner or lessee of the monument or land any expenses reasonably incurred by them in doing so.

(2) Where a scheduled monument enforcement notice has been served in respect of a monument—

   (a) any expenses incurred by the owner, lessee or occupier of a monument or the land in, on or under which it is situated for the purpose of complying with it, and

   (b) any sums paid by the owner or lessee of a monument or land under subsection (1) in respect of expenses incurred by the Scottish Ministers in taking steps required by it,

are to be treated as incurred or paid for the use and at the request of the person who carried out the works to which the notice relates.

(3) If on a complaint by the owner of any scheduled monument or land it appears to the sheriff that the occupier of the monument or land is preventing the owner from carrying out work required to be carried out by a scheduled monument enforcement notice, the sheriff may by warrant authorise the owner to enter the land and carry out the work.

(4) If the Scottish Ministers take steps under subsection (1) they may sell any materials removed by them from the monument or land unless those materials are claimed by the owner within 3 days of their removal.

(5) After selling the materials the Scottish Ministers must pay the proceeds to the owner less the expenses recoverable by them from the owner.

(6) Where the Scottish Ministers seek, under subsection (1), to recover any expenses from a person on the basis that the person is the owner of the scheduled monument or land, and the person proves that—
(a) the person is receiving the rent in respect of the monument or land merely as trustee, tutor, curator, factor or agent of some other person, and

(b) the person has not, and since the date of the service of the demand for payment has not had, in the person’s hands on behalf of that other person sufficient money to discharge the whole demand of the Scottish Ministers,

the person’s liability is limited to the total amount of the money which the person has or has had in the person’s hands on behalf of that other person.

(7) If by reason of subsection (6) the Scottish Ministers have not recovered the whole of any such expenses from a trustee, tutor, curator, factor or agent they may recover any unpaid balance from the person on whose behalf the rent is received.

(8) Any person who wilfully obstructs a person acting in the exercise of powers under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**9E Offence where scheduled monument enforcement notice not complied with**

(1) Where, after the end of the period for compliance with a scheduled monument enforcement notice, any works required by the notice to cease have not ceased or any step required by the notice has not been taken, the person who is for the time being owner of the scheduled monument or of the land in, on or under which it is situated is in breach of the notice.

(2) If at any time the owner of the monument or land is in breach of a scheduled monument enforcement notice the owner is guilty of an offence.

(3) An offence under this section may be charged by reference to any day or longer period of time.

(4) A person may, in relation to the same scheduled monument enforcement notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) In proceedings against any person for an offence under this section, it is a defence for the person to show that—

(a) the person did everything the person could be expected to do to secure that all works required by the notice to cease were ceased or that all the steps required by the notice were taken, or

(b) the person was not served with a copy of the notice and was not aware of its existence.

(6) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding £20,000, and

(b) on conviction on indictment, to a fine.

(7) In determining the amount of any fine to be imposed, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.
9F Effect of scheduled monument consent on scheduled monument enforcement notice

(1) If, after the issue of a scheduled monument enforcement notice, consent is granted under section 2(3A)—

(a) for the retention of any work to which the notice relates, or

(b) permitting the retention of works without complying with some condition subject to which a previous scheduled monument consent was granted,

the notice ceases to have effect in so far as such work is or such works are required by the notice to cease, or in so far as it requires steps to be taken involving the works not being retained or, as the case may be, for complying with that condition.

(2) The fact that a scheduled monument enforcement notice has wholly or partly ceased to have effect under subsection (1) does not affect the liability of any person for an offence in respect of a previous failure to comply with it.

9G Stop notices

(1) Subsection (2) applies where the Scottish Ministers consider it expedient that any relevant works should cease before the expiry of the period for compliance with a scheduled monument enforcement notice.

(2) The Scottish Ministers may, when they serve the copy of the scheduled monument enforcement notice or afterwards, serve a notice (in this Act referred to as a “stop notice”) prohibiting the execution of the relevant works to the scheduled monument to which the enforcement notice relates, or to land in, on or under which the monument is situated, or to any part of the monument or land specified in the stop notice.

(3) In this section and sections 9H and 9I, “relevant works” means any works specified in the scheduled monument enforcement notice as works which the Scottish Ministers require to cease and any works carried out as part of, or associated with, such works.

(4) A stop notice may not be served if the scheduled monument enforcement notice has taken effect.

(5) A stop notice must specify the date when it is to come into effect, and that date—

(a) must not be earlier than 3 days after the date when the notice is served, unless the Scottish Ministers consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice, and

(b) must not be later than 28 days from the date when the notice is first served on any person.

(6) A stop notice may be served by the Scottish Ministers on any person who appears to them to have an interest in the monument or the land in, on or under which it is situated or who is executing, or causing to be executed, the relevant works specified in the scheduled monument enforcement notice.
Historic Environment (Amendment) (Scotland) Bill
Part 2—Modifications of the Ancient Monuments and Archaeological Areas Act 1979

(7) The Scottish Ministers may at any time withdraw a stop notice (without prejudice to their power to serve another) by notice which must be—
(a) served on all persons who were served with the stop notice, and
(b) publicised by displaying it for 7 days in place of all or any site notices (within the meaning of section 9H(3)).

9H Stop notices: supplementary provisions

(1) A stop notice ceases to have effect when—
(a) the scheduled monument enforcement notice to which it relates is withdrawn or quashed,
(b) the period for compliance expires, or
(c) notice of the withdrawal of the stop notice is served under section 9G(7), whichever occurs first.

(2) Where a requirement of the scheduled monument enforcement notice to which a stop notice relates is waived or relaxed by virtue of section 9B(5) so that the scheduled monument enforcement notice no longer relates to any relevant works, the stop notice ceases to have effect in relation to those works.

(3) Where a stop notice has been served in respect of a scheduled monument the Scottish Ministers may publicise it by displaying on the land in, on or under which the monument is situated or on the monument (except where doing so might damage it) a notice (in this section and in sections 6 and 9J referred to as a “site notice”)—
(a) stating that a stop notice has been served on a particular person or persons,
(b) indicating its requirements, and
(c) stating that any person contravening it may be prosecuted for an offence under section 9J.

(4) A stop notice is not invalid by reason that a copy of the scheduled monument enforcement notice to which it relates was not served as required by section 9B if it is shown that the Scottish Ministers took all such steps as were reasonably practicable to effect proper service.

9I Compensation for loss due to stop notice

(1) Where a stop notice ceases to have effect a person who, when the notice is first served, has an interest (whether as owner or occupier or otherwise) in the scheduled monument to which the notice relates or the land in, on or under which the monument is situated is entitled to be compensated by the Scottish Ministers in respect of any loss or damage falling within subsection (2).

(2) That is loss or damage directly attributable to—
(a) the prohibition contained in the stop notice, or
(b) in a case within subsection (3)(b), the prohibition of such of the works prohibited by the stop notice as cease to be relevant works.

(3) For the purposes of this section, a stop notice ceases to have effect when—
(a) the scheduled monument enforcement notice is quashed,
(b) a requirement of the scheduled monument enforcement notice is waived or relaxed by virtue of section 9B(5) so that any works the execution of which are prohibited by the stop notice cease to be relevant works,
(c) the scheduled monument enforcement notice is withdrawn by the Scottish Ministers otherwise than in consequence of the grant by them of scheduled monument consent for the works to which the notice relates, or
(d) the stop notice is withdrawn.

(4) The loss or damage in respect of which compensation is payable under this section in respect of a prohibition includes any sum payable in respect of a breach of contract caused by the taking of action necessary to comply with the prohibition.

(5) No compensation is payable under this section—

(a) in respect of the prohibition in a stop notice of any works which, at any time when the notice is in force, are such as to involve a contravention of section 2(1) or (6), or

(b) in the case of a claimant who was required to provide information under section 57 (power to require information as to interests in land) in respect of any loss or damage suffered by the claimant which could have been avoided if the claimant had provided the information or had otherwise co-operated with the Scottish Ministers when responding to the notice.

9J Penalties for contravention of stop notice

(1) A person who contravenes a stop notice after a site notice has been displayed, or after the stop notice has been served on the person, is guilty of an offence.

(2) Contravention of a stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to any day or longer period of time.

(4) A person may, in relation to the same stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—

(a) the stop notice was not served on the accused, and

(b) the accused had no reasonable cause to believe that the works were prohibited by the stop notice.

(6) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding £20,000, and

(b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.
9K Temporary stop notices

(1) Where it appears to the Scottish Ministers that—
   (a) any works have been, or are being, executed to a scheduled monument or to land in, on or under which there is a scheduled monument,
   (b) the works are such as to involve a contravention of section 2(1) or (6), and
   (c) it is expedient that the works are (or any part of the works is) stopped immediately,
   they may, if they consider it expedient to do so having regard to the effect of the works on the character of the monument as one of national importance, issue a temporary stop notice.

(2) The notice must be given in writing and must—
   (a) specify the works in question,
   (b) prohibit execution of the works (or so much of the works as is specified in the notice), and
   (c) set out the Scottish Ministers’ reasons for issuing the notice.

(3) A temporary stop notice may be served on any of the following—
   (a) a person who appears to the Scottish Ministers to be executing, or causing to be executed, the works,
   (b) a person who appears to the Scottish Ministers to have an interest in the scheduled monument or the land in, on or under which the monument is situated (whether as owner or occupier or otherwise).

(4) The Scottish Ministers must display on the land in, on or under which the monument is situated or on the monument (except where doing so might damage it)—
   (a) a copy of the notice, and
   (b) a statement as to the effect of section 9M.

(5) A temporary stop notice has effect from the time a copy of it is first displayed in pursuance of subsection (4).

(6) A temporary stop notice ceases to have effect at the end of the period of 28 days starting on the day the copy notice is so displayed.

(7) But if a shorter period starting on that day is specified in the notice, the notice instead ceases to have effect at the end of that shorter period.

(8) And if the notice is withdrawn by the Scottish Ministers before that period of 28 days (or, as the case may be, that shorter period) expires, the notice ceases to have effect on being so withdrawn.
9L Temporary stop notices: restrictions

(1) A second or subsequent temporary stop notice must not be issued in respect of the same works unless the Scottish Ministers have in the meantime taken some other enforcement action in relation to the contravention of section 2(1) or (6) which is constituted by the works.

(2) In subsection (1), “enforcement action” includes obtaining the grant of an interdict under section 9O.

9M Temporary stop notices: offences

(1) A person who contravenes a temporary stop notice—
   (a) which has been served on the person, or
   (b) a copy of which has been displayed in pursuance of section 9K(4),

is guilty of an offence.

(2) Contravention of a temporary stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to a day or to a longer period of time.

(4) A person may, in relation to the same temporary stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—
   (a) the temporary stop notice was not served on the accused, and
   (b) the accused did not know, and could not reasonably have been expected to know, of its existence.

(6) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to a fine not exceeding £20,000,
   (b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the execution of the works which constituted the offence.

9N Temporary stop notices: compensation

(1) A person who, at the date on which a temporary stop notice is first displayed in pursuance of section 9K(4), has an interest (whether as owner or occupier or otherwise) in the scheduled monument to which the notice relates or the land in, on or under which the monument is situated is entitled to be compensated by the Scottish Ministers in respect of any loss or damage directly attributable to the prohibition effected by that notice.

(2) But subsection (1) applies only if the circumstances are as set out in one or both of the following paragraphs—
(a) the works specified in the notice are authorised by scheduled monument consent granted on or before the date mentioned in that subsection,

(b) the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent as is mentioned in paragraph (a).

(3) Subsections (4) and (5) of section 9I apply to compensation payable under this section as they apply to compensation payable under that section; and for the purpose of that application references in subsection (5) of that section to a stop notice are to be taken to be references to a temporary stop notice.

Interdicts

9O Interdicts restraining unauthorised works on scheduled monuments

(1) Whether or not they have exercised or propose to exercise any of their other powers under this Act, the Scottish Ministers may seek to restrain or prevent any actual or apprehended breach of any of the controls provided by or under this Act on the execution of works affecting scheduled monuments by means of an application for interdict.

(2) On an application under subsection (1) the court may grant such interdict as it thinks appropriate for the purpose of restraining or preventing the breach.

(3) In this section “the court” means the Court of Session or the sheriff.”.

(2) In section 6 of that Act (powers of entry), after subsection (3) insert—

“(3A) Any person duly authorised in writing by the Scottish Ministers may at any reasonable time enter any land—

(a) to ascertain whether a scheduled monument enforcement notice, a stop notice or a temporary stop notice should be served in relation to a scheduled monument in, on or under that or any other land,

(aa) for the purposes of displaying—

(i) a site notice,

(ii) a notice under section 9G(7) in place of a site notice, or

(iii) a copy of a temporary stop notice, and a statement as to the effect of section 9M, under section 9K(4),

(b) to ascertain whether a scheduled monument enforcement notice, a stop notice or a temporary stop notice has been complied with,

(d) to ascertain whether any offence has been, or is being, committed with respect to any scheduled monument in, on or under that or any other land under section 2(1) or (6), 9E, 9J or 9M.”.

(3) In subsection (1) of section 61 of that Act (interpretation), in the appropriate places in alphabetical order insert—

““period for compliance” is to be construed in accordance with section 9B(1) and (2);”;

““scheduled monument enforcement notice” has the meaning given by section 9A(1) of this Act;”;

““site notice” has the meaning given in section 9H(3);”,
“‘stop notice’ has the meaning given in section 9G(2) of this Act;”,
“‘temporary stop notice’ means a notice issued under section 9K(1) of this Act;”.

Monuments and associated land under guardianship

5 7 Control and management of monuments and land under guardianship

(1) The 1979 Act is amended in accordance with this section.

(2) In section 13 (effect of guardianship of ancient monuments)—

(a) after subsection (2) insert—

“(2A) The power conferred by subsection (2) above includes power—

(a) to control the holding of events in or on the monument;
(b) to control and manage such events;
(c) to require payment of a charge in respect of the holding of such events;
(d) to exclude, restrict or otherwise control public access to the monument in connection with such events.”,

(b) after subsection (7) add—

“(8) In subsection (2A) above—

(a) “events” includes functions and any other organised activities;
(b) references to the holding of events, in relation to organised activities, are to be construed as references to the carrying out of such activities.”.

(3) In section 15 (acquisition and guardianship of land in vicinity of an ancient monument)—

(a) in subsection (3), after “and” where it fourth occurs, insert “without prejudice to that generality”,

(b) after that subsection insert—

“(3A) The power of full control and management of land under guardianship conferred by subsection (3) above includes power—

(a) to control the holding of events on associated land;
(b) to control and manage such events;
(c) to require payment of a charge in respect of the holding of such events;
(d) to exclude, restrict or otherwise control public access to associated land in connection with such events.”,

(c) after subsection (4) insert—

“(4A) Subsections (3), (3A) and (4) are subject to any provision to the contrary in the guardianship deed.”,

(d) after subsection (6) add—

“(7) In subsection (3A) above—

(a) “events” includes functions and any other organised activities;
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(b) references to the holding of events, in relation to organised activities, are to be construed as references to the carrying out of such activities.”.

(4) In subsection (1) of section 19 (public access to monuments under public control), after “to” where it first occurs, insert “sections 13(2A) and 15(3A) of this Act and to”.

(5) Paragraph 6(1) of Schedule 3 (transitional provisions) is repealed.

Provision of facilities, etc. at ancient monuments

8 Provision of facilities, etc. at ancient monuments

In section 20 of the 1979 Act (provision of facilities for the public in connection with ancient monuments)—

(a) in subsection (1)—

(i) the words “for or in connection with affording public access” are repealed,

(ii) in paragraph (a) for “to” substitute “in or on”,

(iii) in paragraph (b) for “to” substitute “in or on”,

(b) for subsection (2) substitute—

“(2) In subsection (1), references to a monument include references to any land associated with the monument.

(2A) The facilities and services which may be provided for the public under this section include—

(a) facilities and information or other services for or in connection with affording public access to the monument, and

(b) facilities for the sale of goods and the provision of other services.”.

Financial support in relation to ancient monuments

9 Financial support for preservation etc. of monuments

In section 24 of the 1979 Act (expenditure by the Scottish Ministers or local authority on acquisition and preservation of ancient monuments etc.)—

(a) in subsection (2), for the words from “at” to the end of the subsection substitute—

“(a) at the request of the owner undertake, or assist in, or
defray or contribute towards the cost of,
the preservation, maintenance and management of any ancient monument.”,

and

(b) in subsection (4), for the words from “at” to the end of the subsection substitute—

“(a) at the request of the owner undertake, or assist in, or
defray or contribute towards the cost of,
the preservation, maintenance and management of any ancient monument situated in or in the vicinity of their area.”.
Power of entry where monument at risk

10 Power of entry on land where monument at risk

In section 26 of the 1979 Act (power of entry on land believed to contain ancient monument)—

(a) in subsection (3), at the beginning, insert “Subject to subsection (4) below,”;

(b) after subsection (3) add—

“(4) Subsection (3) does not apply where—

(a) land is, or is to be, excavated in exercise of the power conferred by subsection (2); and

(b) the Scottish Ministers know or have reason to believe that any ancient monument they know or believe to be in, on or under that land is or may be at risk of imminent damage or destruction.”.

Inventories of gardens, designed landscapes and battlefields

11 Inventories of gardens and designed landscapes and of battlefields

After section 32 of the 1979 Act, insert—

“PART 1A

INVENTORIES OF GARDENS AND DESIGNED LANDSCAPES AND OF BATTLEFIELDS

32A Inventory of gardens and designed landscapes

(1) The Scottish Ministers must compile and maintain (in such form as they think fit) an inventory of such gardens and designed landscapes as appear to them to be of national importance.

(2) In subsection (1), references to gardens and designed landscapes are to grounds which have been laid out for artistic effect and, in appropriate cases, include references to any buildings, land, or water on, adjacent, or contiguous to such grounds.

(3) The Scottish Ministers may, from time to time, modify the inventory so as to—

(a) add an entry relating to grounds mentioned in subsection (2);

(b) remove an entry relating to such grounds;

(c) amend an entry relating to such grounds (whether by excluding anything previously included as part of the grounds or adding anything not previously so included, or otherwise).

(4) As soon as reasonably practicable after including any grounds in the inventory in exercise of their duty under subsection (1), or modifying the inventory under subsection (3), the Scottish Ministers must—

(a) inform—

(i) the owner of the grounds;

(ii) (if the owner is not the occupier) the occupier of the grounds; and

(iii) any local authority in whose area the grounds are situated,

of the inclusion or modification; and
(b) where the grounds are so included, or the inventory is modified as mentioned in paragraph (a) or (c) of subsection (3), send to any person or any local authority informed under paragraph (a) of this subsection a copy of the entry or, as the case may be, of the amended entry in the inventory relating to the grounds.

(5) The Scottish Ministers must from time to time publish, in such manner as they think fit, a list of all the gardens and designed landscapes which are for the time being included in the inventory.

32B Inventory of battlefields

(1) The Scottish Ministers must compile and maintain (in such form as they think fit) an inventory of such battlefields as appear to them to be of national importance.

(2) In this section, “battlefield” means—

(a) an area of land over which a battle was fought; or

(b) an area of land on which any significant activities relating to a battle occurred (whether or not the battle was fought over that area).

(3) Subsections (3) to (5) of section 32A apply to an inventory compiled and maintained under subsection (1) of this section as they apply to an inventory compiled and maintained under subsection (1) of that section; and, for the purposes of that application, references to gardens and designed landscapes, and to grounds referred to by those expressions, are to be construed as references to a battlefield.”.

Grants and loans

12 Development and understanding of matters of historic, etc. interest: grants and loans

After section 45 of the 1979 Act insert—

“45A Development and understanding of matters of historic, etc. interest: grants and loans

(1) The Scottish Ministers may make grants or loans for the purpose of defraying in whole or in part any expenditure incurred, or to be incurred—

(a) in or in connection with;

(b) with a view to the promotion of,

the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest.

(2) A grant or loan under this section may be made subject to such conditions (including conditions as to repayment) as the Scottish Ministers consider appropriate.

(3) Without prejudice to any powers of the Scottish Ministers under any enactment (including this Act), the total amount of grants and loans which may be made under this section must not exceed £100,000 in any one year period.”.
Regulations and orders

13 Regulations and orders under the 1979 Act

Before subsection (1) of section 60 of the 1979 Act (regulations and orders) insert—

“(A1) Any power conferred by this Act to make regulations or orders includes power to make such incidental, supplemental, consequential, transitory, transitional or saving provision as the Scottish Ministers consider necessary or expedient.”.

Meaning of “monument”

14 Meaning of “monument” in the 1979 Act

In section 61 (interpretation) of the 1979 Act—

(a) in subsection (7)—

(i) the word “and” immediately following paragraph (b) is repealed,

(ii) after paragraph (c) insert “and

(d) any site (other than one falling within paragraph (b) or (c) above) comprising any thing, or group of things, that evidences previous human activity;”,

(b) in subsection (8), paragraph (b) is repealed.

Scheduled monument consent

15 Scheduled monument consent: applications, etc.

(1) Schedule 1 to the 1979 Act (control of works affecting scheduled monuments) is amended in accordance with subsections (2) and (3).

(2) After paragraph 1(1), insert—

“(1A) The Scottish Ministers may by regulations make provision as to—

(a) the manner in which scheduled monument consent is to be granted;

(b) the form and content of scheduled monument consent.”.

(3) In paragraph 2—

(a) for sub-paragraphs (1) and (2) substitute—

“(1) The Scottish Ministers may refuse to entertain an application for scheduled monument consent unless it is accompanied by a certificate as to the interests in the monument to which the application relates.

(2) The Scottish Ministers may by regulations—

(a) make provision as to the notice of any application for scheduled monument consent to be given to any person (other than the applicant) who, at the beginning of the period of 21 days ending with the date of the application, was the owner of the monument;

(b) make provision for publicising applications for scheduled monument consent;

(c) make provision as to—
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(i) the form and content of certificates such as are mentioned in sub-
paragraph (1) and notices such as are mentioned in paragraph (a);
(ii) service of such notices;
(d) make provision as to such further particulars of the matters to which such
certificates relate as may be prescribed;
(e) require an applicant for scheduled monument consent to certify, in such
form as may be prescribed, or to provide evidence, that any requirements
of the regulations have been satisfied.

(2A) Regulations under sub-paragraph (2) may make different provision for different
classes of case.”;

(b) in sub-paragraph (4), after “paragraph” insert “or regulations made under it”.

(4) In subsection (11) of section 2 of that Act (control of works affecting scheduled
monuments), after “for,” insert “the manner of granting, and the form, content”.

16 Refusal to entertain certain applications for scheduled monument consent
After paragraph 2A of Schedule 1 to the 1979 Act insert—

“2B(1) Where sub-paragraph (2) or (3) applies, the Scottish Ministers may refuse to
entertain an application for scheduled monument consent.

(2) This sub-paragraph applies where—

(a) within the period of 2 years ending with the date the application is
received, the Scottish Ministers have refused a similar application; and

(b) in their opinion there has been no significant change in any material
considerations since the similar application was refused.

(3) This sub-paragraph applies where the application is made at a time when a
similar application is under consideration.

(4) For the purposes of this paragraph, an application for scheduled monument
consent is to be taken to be similar to another such application only if the
scheduled monument and the works to which the applications relate are, in the
opinion of the Scottish Ministers, the same or substantially the same.”.

Inquiries and hearings

17 Application for scheduled monument consent: inquiries and hearings
In paragraph 3(2) of Schedule 1 to the 1979 Act (control of works affecting scheduled
monuments), for “shall” substitute “may”.
PART 3
MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Certificate that building not intended to be listed

18 Certificate that building not intended to be listed

(1) After section 5 of the 1997 Act insert—

“5A Certificate that building not intended to be listed

(1) The Scottish Ministers may, on the application of any person, issue a certificate stating that they do not intend to include a building in a list compiled or approved under section 1.

(2) Where the Scottish Ministers issue a certificate under subsection (1) in respect of a building—

(a) they may not for a period of 5 years from the date of issue exercise in relation to the building any of the powers conferred on them by section 1, and

(b) a planning authority may not for that period—

(i) serve a building preservation notice in relation to the building, or

(ii) affix such a notice under section 4(1).

(3) A person submitting an application to the Scottish Ministers under subsection (1) must, at the same time as submitting it, give notice of the application to the planning authority within whose district the building is situated.”.

(2) In section 76 of that Act (rights of entry), in subsection (1), at the end add “or in connection with an application under section 5A(1)”.

Offences under section 8: fines

19 Offences in relation to unauthorised works and listed building consent: increase in fines

In subsection (4)(a) of section 8 of the 1997 Act (offences), for “£20,000” substitute “£50,000”.

Declining to determine applications for listed building consent

20 Declining to determine an application for listed building consent

(1) After section 10 of the 1997 Act, insert—

“10A Declining to determine an application

(1) A planning authority may decline to determine an application (in this subsection referred to as the “current application”) for listed building consent—

(a) if—
(i) in the period of two years ending with the date on which the current application is received, the Scottish Ministers have refused a similar application referred to them under section 11 or have dismissed an appeal against the refusal of, or an appeal under section 18(2) in respect of, a similar application, and

(ii) in the opinion of the authority there has not, since the Scottish Ministers refused the similar application or dismissed the appeal, been any significant change in any material considerations,

(b) if—

(i) in that period of two years the planning authority have refused more than one similar application,

(ii) there has been no appeal to the Scottish Ministers against either (or as the case may be any) of those refusals, and

(iii) in the opinion of the authority there has not, since the more (or as the case may be most) recent of the refusals, been any significant change in any material considerations,

(c) if—

(i) in that period of two years the planning authority have refused more than one similar application,

(ii) there has been an appeal to the Scottish Ministers against either (or as the case may be any) of those refusals but as at the time the current application is received no such appeal has yet been determined, and

(iii) in the opinion of the authority there has not, since the more (or as the case may be most) recent of the refusals, been any significant change in any material considerations,

(d) if—

(i) in that period of two years there have been appeals under section 18(2) in respect of more than one similar application but as at the time the current application is received no such appeal has yet been determined, and

(ii) in the opinion of the authority there has not, since the more (or as the case may be most) recent of the appeals was made, been any significant change in any material considerations, or

(e) if—

(i) in that period of two years two similar applications have been made to the planning authority,

(ii) the planning authority have refused one of those applications and there has been an appeal under section 18(2) in respect of the other but as at the time the current application is received the appeal under that section has yet to be determined as has the appeal (if any) against the refusal, and
(iii) in the opinion of the authority there has not, since the refusal or since the appeal was made (whichever was the more recent), been any significant change in any material considerations.

(2) For the purposes of this section an application for listed building consent is to be taken to be similar to another such application only if the listed building and the works to which the applications relate are in the opinion of the planning authority the same or substantially the same.”.

(2) In section 18(2) of that Act (right to appeal against decision or failure to take decision)—

(a) for the word “neither” substitute “not”,
(b) the word “nor” after paragraph (a) is repealed,
(c) after that paragraph, insert—

“(aa) given notice to the applicant that they have exercised their power under section 10A to decline to determine the application, or”.

21 Hearings in connection with applications for listed building consent and appeals

In the 1997 Act—

(a) subsection (4) of section 11 (reference of certain applications to the Scottish Ministers) is repealed,
(b) in Schedule 3 (determination of certain appeals by person appointed by the Scottish Ministers), the following are repealed—

(i) in paragraph 2, sub-paragraphs (2) to (4),
(ii) in paragraph 3, sub-paragraphs (4) and (5),
(iii) in paragraph 6(2)(a), the words “by virtue of paragraph 2(4)”.

22 Enforcement notice: requirement to cease works

(1) The 1997 Act is amended in accordance with this section.

(2) In section 34 (power to issue listed building enforcement notice)—

(a) after subsection (1) insert—

“(1A) A listed building enforcement notice shall specify the alleged contravention and shall (either or both)—

(a) specify any works falling within subsection (1) which the authority requires to cease,
(b) require steps falling within subsection (2) and specified in the notice to be taken.”;

(b) in subsection (2), for the words from the beginning to “taken”, substitute “Those steps are”,
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(c) in subsection (5), for the words from “any”, where it first occurs, to the end of that subsection, substitute “—

(i) any works required to cease must cease,
(ii) any steps required to be taken must be taken,

and may specify different periods for different works or steps.”,

(d) after that subsection insert—

“(5A) Where different periods apply to different works or steps, references in this Act to the period for compliance with a listed building enforcement notice, in relation to any works or step, are to the period within which the works are required to cease or the step is required to be taken.

(5B) The date specified in the notice under subsection (5)(a) must be at least 28 days after the date on which the notice is served.”.

(3) In section 35 (appeal against listed building enforcement notice), after subsection (1)(i) insert—

“(ia) that the cessation of any works required by the notice exceeds what is necessary to remedy the contravention of section 8(1) or (2),”.

(4) In section 39 (offence where listed building enforcement notice not complied with)—

(a) in subsection (1), after “taken” where it second occurs, insert “or any works required by the notice to cease have not ceased”,

(b) at the end of paragraph (a) of subsection (4), insert “or that all works required by the notice to cease were ceased.”.

(5) In section 40(1) (effect of listed building consent on listed building enforcement notice), after “as” where it first occurs, insert “such work is or such works are required by the notice to cease, or in so far as”.

23 Stop notices and temporary stop notices

(1) After section 41 of the 1997 Act insert—

“Stop notices

41A Stop notices

(1) Subsection (2) applies where the planning authority consider it expedient that any relevant works should cease before the expiry of the period for compliance with a listed building enforcement notice.

(2) The authority may, when they serve the copy of the listed building enforcement notice or afterwards, serve a notice (in this Act referred to as a “stop notice”) prohibiting the execution of the relevant works to the listed building to which the enforcement notice relates, or to any part of that building specified in the stop notice.

(3) In this section and sections 41B and 41D, “relevant works” means any works specified in the listed building enforcement notice as works which the planning authority require to cease and any works carried out as part of, or associated with, such works.
(4) A stop notice may not be served if the listed building enforcement notice has taken effect.

(5) A stop notice must specify the date when it is to come into effect, and that date—

(a) must not be earlier than 3 days after the date when the notice is served, unless the planning authority consider that there are special reasons for specifying an earlier date and a statement of those reasons is served with the stop notice, and

(b) must not be later than 28 days from the date when the notice is first served on any person.

(6) A stop notice may be served by the planning authority on any person who appears to them to have an interest in the building or who is executing, or causing to be executed, the relevant works specified in the listed building enforcement notice.

(7) The planning authority may at any time withdraw a stop notice (without prejudice to their power to serve another) by notice which must be—

(a) served on all persons who were served with the stop notice, and

(b) publicised by displaying it for 7 days in place of all or any site notices (within the meaning of section 41B(4)).

41B Stop notices: supplementary provisions

(1) A stop notice ceases to have effect when—

(a) the listed building enforcement notice to which it relates is withdrawn or quashed,

(b) the period for compliance expires, or

(c) notice of the withdrawal of the stop notice is served under section 41A(7),

whichever occurs first.

(2) Where the listed building enforcement notice to which a stop notice relates is varied so that it no longer relates to any relevant works, the stop notice ceases to have effect in relation to those works.

(3) The reference in subsection (2) to a listed building enforcement notice being varied includes a reference to—

(a) a requirement of such a notice being waived or relaxed by virtue of section 34(7),

(b) the terms of such a notice being varied on appeal by virtue of section 37(2)(a).

(4) Where a stop notice has been served in respect of any listed building the planning authority may publicise it by displaying on the building a notice (in this section and in sections 41E and 76 referred to as a “site notice”)—

(a) stating that a stop notice has been served on a particular person or persons,
(b) indicating its requirements, and

e) stating that any person contravening it may be prosecuted for an offence under section 41E.

(5) A stop notice is not invalid by reason that a copy of the listed building enforcement notice to which it relates was not served as required by section 34 if it is shown that the planning authority took all such steps as were reasonably practicable to effect proper service.

41C Power of the Scottish Ministers to serve stop notice

(1) If it appears to the Scottish Ministers that it is expedient that a stop notice should be served in respect of any building they may themselves serve such a notice under section 41A.

(2) A stop notice served by the Scottish Ministers has the same effect as if it had been served by the planning authority.

(3) The Scottish Ministers must not serve such a notice without consulting the planning authority.

(4) The provisions of this Act relating to stop notices apply, so far as relevant, to a stop notice served by the Scottish Ministers as they apply to a stop notice served by a planning authority, but with the substitution for any reference to the planning authority of a reference to the Scottish Ministers, and any other necessary modifications.

41D Compensation for loss due to stop notice

(1) Where a stop notice ceases to have effect a person who, when the notice is first served, has an interest (whether as owner or occupier or otherwise) in the building to which the notice relates is entitled to be compensated by the planning authority in respect of any loss or damage falling within subsection (2).

(2) That is loss or damage directly attributable to—

(a) the prohibition contained in the stop notice or,

(b) in a case within subsection (3)(b), the prohibition of such of the works prohibited by the stop notice as cease to be relevant works.

(3) For the purposes of this section, a stop notice ceases to have effect when—

(a) the listed building enforcement notice is quashed on grounds other than those mentioned in paragraph (e) of section 35(1),

(b) the listed building enforcement notice is varied (otherwise than on the grounds mentioned in that paragraph) so that any works the execution of which are prohibited by the stop notice cease to be relevant works,

(c) the listed building enforcement notice is withdrawn by the planning authority otherwise than in consequence of the grant by them of listed building consent for the works to which the notice relates, or

(d) the stop notice is withdrawn.
(4) The reference in subsection (3)(b) to a listed building enforcement notice being varied includes a reference to—

(a) a requirement of such a notice being waived or relaxed by virtue of section 34(7),

(b) the terms of such a notice being varied on appeal by virtue of section 37(2)(a).

(5) A claim for compensation under this section must be made to the planning authority within the prescribed time and in the prescribed manner.

(6) The loss or damage in respect of which compensation is payable under this section in respect of a prohibition includes any sum payable in respect of a breach of contract caused by the taking of action necessary to comply with the prohibition.

(7) No compensation is payable under this section—

(a) in respect of the prohibition in a stop notice of any works which, at any time when the notice is in force, are such as to involve a contravention of section 8(1) or (2), or

(b) in the case of a claimant who was required to provide information under section 272 of the principal Act (power to require information as to interests in land) in respect of any loss or damage suffered by the claimant which could have been avoided if the claimant had provided the information or had otherwise co-operated with the planning authority when responding to the notice.

(8) Except in so far as may be otherwise provided by any regulations made under this Act, any question of disputed compensation under this section is to be referred to and determined by the Lands Tribunal for Scotland.

(9) In relation to the determination of any such question, the provisions of sections 9 (procedure on references under section 8) and 11 (expenses) of the Land Compensation (Scotland) Act 1963 (c.51) apply subject to any necessary modifications and to the provisions of any regulations made under this Act.

41E Penalties for contravention of stop notice

(1) A person who contravenes a stop notice after a site notice has been displayed, or after the stop notice has been served on the person, is guilty of an offence.

(2) Contravention of a stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to any day or longer period of time.

(4) A person may, in relation to the same stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—

(a) the stop notice was not served on the accused, and

(b) the accused had no reasonable cause to believe that the works were prohibited by the stop notice.
(6) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to a fine not exceeding £20,000, and
   (b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the person in consequence of the offence.

**Temporary stop notices**

41F Temporary stop notices

(1) Where it appears to the planning authority that—
   (a) any works have been, or are being, executed to a listed building in their district,
   (b) the works are such as to involve a contravention of section 8(1) or (2), and
   (c) it is expedient that the works are (or any part of the works is) stopped immediately,

   they may, if they consider it expedient to do so having regard to the effect of the works on the character of the building as one of special architectural or historic interest, issue a temporary stop notice.

(2) The notice must be given in writing and must—
   (a) specify the works in question,
   (b) prohibit execution of the works (or so much of the works as is specified in the notice), and
   (c) set out the authority’s reasons for issuing the notice.

(3) A temporary stop notice may be served on any of the following—
   (a) a person who appears to the authority to be executing, or causing to be executed, the works,
   (b) a person who appears to the authority to have an interest in the building (whether as owner or occupier or otherwise).

(4) The authority must display on the building—
   (a) a copy of the notice, and
   (b) a statement as to the effect of section 41H.

(5) A temporary stop notice has effect from the time a copy of it is first displayed in pursuance of subsection (4).

(6) A temporary stop notice ceases to have effect at the end of the period of 28 days starting on the day the copy notice is so displayed.

(7) But if a shorter period starting on that day is specified in the notice, the notice instead ceases to have effect at the end of that shorter period.
(8) And if the notice is withdrawn by the authority before that period of 28 days (or, as the case may be, that shorter period) expires, the notice ceases to have effect on being so withdrawn.

41G Temporary stop notices: restrictions

(1) A temporary stop notice does not prohibit the execution of works (either or both)—
   (a) of such description,
   (b) in such circumstances,

   as may be prescribed.

(2) A second or subsequent temporary stop notice must not be issued in respect of the same works unless the planning authority have in the meantime taken some other enforcement action in relation to the contravention of section 8(1) or (2) which is constituted by the works.

(3) In subsection (2), “enforcement action” includes obtaining the grant of an interdict under section 146(2) of the principal Act (interdicts restraining breaches of planning control).

41H Temporary stop notices: offences

(1) A person who contravenes a temporary stop notice—
   (a) which has been served on the person, or
   (b) a copy of which has been displayed in pursuance of section 41F(4),

   is guilty of an offence.

(2) Contravention of a temporary stop notice includes causing or permitting its contravention.

(3) An offence under this section may be charged by reference to a day or to a longer period of time.

(4) A person may, in relation to the same temporary stop notice, be convicted of more than one offence under this section by reference to different days or different periods.

(5) It is a defence in any proceedings under this section that—
   (a) the temporary stop notice was not served on the accused, and
   (b) the accused did not know, and could not reasonably have been expected to know, of its existence.

(6) A person convicted of an offence under this section is liable—
   (a) on summary conviction, to a fine not exceeding £20,000,
   (b) on conviction on indictment, to a fine.

(7) In determining the amount of the fine, the court is in particular to have regard to any financial benefit which has accrued or appears likely to accrue to the convicted person in consequence of the execution of the works which constituted the offence.
411 Temporary stop notices: compensation

(1) A person who, at the date on which a temporary stop notice is first displayed in pursuance of section 41F(4), has an interest (whether as owner or occupier or otherwise) in the building to which the notice relates is entitled to be compensated by the planning authority in respect of any loss or damage directly attributable to the prohibition effected by that notice.

(2) But subsection (1) applies only if the circumstances are as set out in one or both of the following paragraphs—

(a) the works specified in the notice are authorised by listed building consent granted on or before the date mentioned in that subsection,

(b) the authority withdraws the notice other than following such grant of listed building consent as is mentioned in paragraph (a).

(3) Subsections (5) to (9) of section 41D apply to compensation payable under this section as they apply to compensation payable under that section; and for the purpose of that application the reference in section 41D(7) to a stop notice is to be taken to be a reference to a temporary stop notice.”.

(1A) In subsection (3) of section 66 of that Act (control of demolition in conservation areas), for “41” substitute “41I”.

(2) In section 76 of that Act (rights of entry)—

(a) after subsection (1) insert—

“(1A) Any person duly authorised in writing by the planning authority may, at any reasonable time, enter upon land—

(za) for the purposes of displaying—

(i) a site notice,

(ii) a notice under section 41A(7) in place of a site notice, or

(iii) a copy of a temporary stop notice, and a statement as to the effect of section 41H, under section 41F(4),

(a) to ascertain whether a listed building enforcement notice, a stop notice or a temporary stop notice has been complied with.”,

(b) in subsection (2)(b), after the number “39” insert “, 41E, 41H”.

(3) In subsection (1) of section 81 of that Act (interpretation), after the definition of “prescribed” insert—

“site notice” has the meaning given in section 41B(4),

“stop notice” has the meaning given in section 41A(2),

“temporary stop notice” means a notice issued under section 41F(1),”.

Fixed penalty notices

24 Non-compliance with listed building enforcement notice: fixed penalty notice

After section 39 of the 1997 Act insert—
39A Fixed penalty notice where listed building enforcement notice not complied with

(1) Where a planning authority have reason to believe that, by virtue of subsection (1) of section 39, a person is in breach of a listed building enforcement notice they may, if the conditions in subsection (9) are satisfied, serve on the person a fixed penalty notice as respects that breach.

(2) The fixed penalty notice is to specify (either or both)—

(a) the works specified, under subsection (1A) of section 34, in the listed building enforcement notice which have not ceased,

(b) the step specified, under that subsection, in the listed building enforcement notice which has not been taken.

(3) No more than one fixed penalty notice may be served on a person as respects a breach by the person of a listed building enforcement notice.

(4) For the purposes of this section, a “fixed penalty notice” is a notice offering the person the opportunity of discharging any liability to conviction for an offence under section 39 as respects the breach of the listed building enforcement notice.

(5) The person discharges any such liability by paying to the planning authority, within the relevant period, a penalty of a prescribed amount specified in the fixed penalty notice.

(6) The relevant period mentioned in subsection (5) is the period of 30 days immediately following the day on which the fixed penalty notice is served.

(7) But if payment is made within the first 15 days of the period mentioned in subsection (6) the amount payable is reduced by 25%.

(8) The fixed penalty notice is to identify the period mentioned in subsection (6) and is also to state that if payment is made within the first 15 days of that period the amount payable is reduced by 25%.

(9) The conditions are that the fixed penalty notice—

(a) is served within the period of 6 months which immediately follows the period for compliance with the listed building enforcement notice,

(b) is not served after the person has been charged with an offence under section 39 as respects the breach of the listed building enforcement notice.

(10) During the period mentioned in subsection (6) it is not competent to commence proceedings against the person for an offence under section 39 as respects that breach.

(11) If the amount (or as the case may be the reduced amount) is timeously paid it is not competent to commence proceedings against the person for an offence under section 39 as respects that breach.

(12) A penalty received by a planning authority by virtue of subsection (5) is to accrue to that authority.
(13) In prescribing an amount for the purposes of subsection (5), the Scottish Ministers may make different provision for different cases or different classes of case, including provision for different amounts by reference to previous breaches of listed building enforcement notices relating to the same steps or works.”.

### Urgent preservation

#### 24A Urgent works to preserve unoccupied listed buildings
In section 49 (urgent works to preserve unoccupied listed buildings) of the 1997 Act, in subsection (3), at the end add “and preventative works necessary to limit any deterioration of the building”.

#### Liability of owner and successors for expenses of urgent works

#### 25 Liability of owner and successors for expenses of urgent works

(1) The 1997 Act is amended in accordance with subsections (2) and (3) of this section.

(2) In section 50 (recovery of expenses of works under section 49), after subsection (5) add—

“(6) Where a person to whom notice has been given under subsection (2) ceases, during the 28 day period mentioned in subsection (4), to be the owner of the building, a person may within 28 days of becoming the new owner of the building represent to the Scottish Ministers a matter mentioned in any of paragraphs (a) to (c) of subsection (4); and the Scottish Ministers shall determine to what extent the representations are justified.

(7) Subsection (5) applies to a determination under subsection (6) as it applies to a determination under subsection (4).”.

(3) After that section insert—

“Liability of owner and successors for expenses of works executed under section 49

#### 50A Liability of owner and successors for expenses of works executed under section 49

(1) An owner of a listed building who is liable for expenses under section 50(2) does not, by virtue only of ceasing to be such an owner, cease to be liable for those expenses.

(2) Subject to subsection (3), where a person becomes an owner of a listed building (any such person being referred to in this section as a “new owner”) that person is severally liable with any former owner of the building for any expenses for which the former owner is liable under section 50(2).

(3) A new owner is liable as mentioned in subsection (2) only if the condition mentioned in subsection (4) or subsection (5) is met.

(4) The condition is that—

(a) a notice (a “notice of liability for expenses”) in the form prescribed under section 50G is registered in relation to the building,

(b) the notice was registered at least 14 days before the acquisition date, and
(c) the notice has not expired before the acquisition date.

(5) The condition is that—

(a) a notice of renewal (within the meaning of section 50C) in relation to the building is registered, and

(b) that notice has not expired before the acquisition date.

(6) A notice of liability for expenses is to specify—

(a) the expenses mentioned in subsection (2), and

(b) the works to which the expenses relate.

(7) In this section, “acquisition date” means the date on which the new owner acquired right to the listed building.

(8) Where a new owner of a listed building pays any expenses for which a former owner of the building is liable, the new owner may recover the amount so paid from the former owner.

(9) A person who is entitled to recover an amount under subsection (8) does not, by virtue only of ceasing to be the owner of the listed building, cease to be entitled to recover that amount.

(10) This section applies as respects any expenses for which an owner of a listed building becomes liable on or after the day on which this section comes into force.

50B Notice of liability for expenses: further provision

(1) A notice of liability for expenses—

(a) may be registered only on the application of the Scottish Ministers or a planning authority,

(b) may be registered in respect of expenses of different works executed on a listed building,

(c) expires at the end of the period of 5 years beginning with the date of its registration.

(2) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of liability for expenses submitted for registration is accurate.

50C Notices of renewal

(1) Subsection (2) applies where—

(a) a notice of liability for expenses in relation to a listed building is registered, and

(b) that notice has not expired.

(2) A notice (a “notice of renewal”) in the form prescribed by section 50G specifying the same expenses and works as those specified in the notice of liability for expenses may be registered.
(3) A second or subsequent notice of renewal in respect of the same expenses and works specified in the notice of liability for expenses mentioned in subsection (1) may be registered.

(4) A second or subsequent notice of renewal may not be registered if an earlier notice of renewal has expired.

(5) Where the notice of liability for expenses mentioned in subsection (1) was registered on the application of—
   (a) the Scottish Ministers, a notice of renewal may be registered only on the application of the Scottish Ministers,
   (b) a planning authority, a notice of renewal may be registered only on the application of that authority.

(6) A notice of renewal expires at the end of the period of 5 years beginning with the date of its registration.

(7) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of renewal submitted for registration is accurate.

50D Notice of determination following representations under section 50

(1) Subsections (2) and (3) apply where—
   (a) a notice of liability for expenses (in this section, the “original notice”) in relation to a listed building, or a notice of renewal in relation to the original notice, is registered, and
   (b) the owner of the listed building has made representations to the Scottish Ministers under section 50(4) or (6).

(2) Where the original notice was registered on the application of a planning authority, the authority must, as soon as reasonably practicable after the Scottish Ministers give notice of their determination under section 50(5), apply to register a notice (a “notice of determination”) in the form prescribed under section 50G.

(3) Where the original notice was registered on the application of the Scottish Ministers, the Scottish Ministers must, as soon as reasonably practicable after making their determination under section 50(4) or (6), apply to register a notice of determination.

(4) A notice of determination must specify the amount given by the Scottish Ministers as the amount recoverable in connection with a notice of determination under section 50(5).

(5) Where the amount recoverable (“amount A”) is less than the amount specified as the expenses of the works in the original notice (“amount B”), amount B is, on registration of the notice of determination, to be treated as amount A.

(6) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of determination submitted for registration is accurate.
50E Discharge of notice of liability for expenses and notice of renewal

(1) Subsections (2) and (3) apply where—

(a) a notice of liability for expenses (in this section, the “original notice”) in relation to a listed building, or a notice of renewal in relation to the original notice, is registered, and

(b) any liability for expenses under section 50(2) to which the original notice relates has been fully discharged.

(2) Where the original notice was registered on the application of a planning authority, the authority must apply to register a notice (a “notice of discharge”) in the form prescribed under section 50G stating that liability has been fully discharged.

(3) Where the original notice was registered on the application of the Scottish Ministers, the Scottish Ministers must apply to register a notice of discharge.

(4) On being registered, a notice of discharge—

(a) discharges the notice of liability for expenses, or

(b) where a notice of renewal in relation to the original notice is registered, discharges the notice of renewal.

(5) The Keeper of the Registers of Scotland is not required to investigate or determine whether the information contained in any notice of discharge submitted for registration is accurate.

50F Meaning of “register” in relation to notices

In relation to—

(a) a notice of liability for expenses,

(b) a notice of renewal,

(c) a notice of determination,

(d) a notice of discharge,

“register” means register the information contained in the notice in question in the Land Register of Scotland or, as appropriate, record the notice in question in the Register of Sasines; and “registered” and other related expressions are to be construed accordingly.

50G Power to prescribe forms

(1) The Scottish Ministers may prescribe—

(a) the form of the notices mentioned in subsection (2), and

(b) the information to be contained in such notices (in addition to any required to be contained in them by virtue of any other provision of this Act).

(2) The notices are—

(a) a notice of liability for expenses,

(b) a notice of renewal,
(c) a notice of determination,
(d) a notice of discharge.”.

(4) In section 12 of the Land Registration (Scotland) Act 1979 (c.33), in subsection (3) (which specifies losses for which there is no entitlement to be indemnified by the Keeper under that section), after paragraph (s) add—

“(t) the loss arises in consequence of an inaccuracy in any information contained in—

(i) a notice of liability for expenses registered in pursuance of section 50A of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9);
(ii) a notice of renewal registered in pursuance of section 50C of that Act;
(iii) a notice of determination registered in pursuance of section 50D of that Act; or
(iv) a notice of discharge registered in pursuance of section 50E of that Act.”.

Recovery of grants for preservation of listed buildings, etc.

26 Recovery of grants for preservation etc. of listed buildings and conservation areas

(1) The 1997 Act is amended in accordance with this section.

(2) In section 51 (power of local authority to contribute to the preservation of listed buildings etc.)—

(a) after subsection (5) insert—

“(5A) A contribution under this section by way of grant may be made subject to such conditions as the local authority may determine.”,

(b) in subsection (6), at the beginning insert “Without prejudice to the generality of subsection (5A),”.

(3) In section 52 (recovery of grants under section 51)—

(a) in subsection (1), at the beginning insert “Subject to subsection (1A),”,

(b) after that subsection insert—

“(1A) Where a condition imposed on the making of a grant to which this section applies specifies, or makes provision for calculating, the amount recoverable in the event of a disposal by the grantee of that interest, that amount is the amount recoverable under subsection (1) in respect of the disposal.”,

(c) in subsection (4), at the beginning insert “Subject to subsection (4A),”,

(d) after that subsection insert—

“(4A) Where a condition referred to in subsection (4) specifies, or makes provision for calculating, the amount recoverable in the event of a condition being contravened or not complied with, that amount is the amount recoverable under subsection (4) in respect of the contravention or failure to comply with the condition.”.
(4) In section 70 (recovery of grants under section 69)—

(a) in subsection (4), at the beginning insert “Subject to subsection (4A),”;

(b) after that subsection insert—

“(4A) Where a condition imposed on the making of a grant to which this section applies specifies, or makes provision for calculating, the amount recoverable in the event of a disposal by the grantee of that interest, that amount is the amount recoverable under subsection (4) in respect of the disposal.”;

(c) in subsection (7), at the beginning insert “Subject to subsection (7A),”;

(d) after that subsection insert—

“(7A) Where a condition referred to in subsection (7) specifies, or makes provision for calculating, the amount recoverable in the event of a condition being contravened or not complied with, that amount is the amount recoverable under subsection (7) in respect of the contravention or failure to comply with the condition.”.

Crown application

27 Provisions that do not bind the Crown

In section 73A(2) of the 1997 Act (application to the Crown)—

(a) after paragraph (e) insert—

“(ea) section 41E;

(eb) section 41H;”,

(b) after paragraph (g) insert—

“(ga) section 50A(2);”.

Regulations in connection with inquiries

28 Regulations in connection with inquiries, etc.

(1) In section 79(1) of the 1997 Act (application of certain general provisions of the Town and Country Planning (Scotland) Act 1997), after the reference to section 273 (offences by corporations) insert—

“section 275A (further provision as regards regulations: inquiries, etc.),”.

(2) In subsection (5) of section 9 of the Tribunals and Inquiries Act 1992 (c.53) (procedure in connection with statutory inquiries)—

(a) the words from “an” to the end become paragraph (a) of that subsection,

(b) after that paragraph insert “; or

(b) an inquiry held under paragraph 6 of Schedule 3 to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9).”.
Regulations and orders

29 Regulations and orders under the 1997 Act

(1) Section 82 of the 1997 Act (regulations and orders) is amended in accordance with this section.

(2) In subsection (2)—

(a) the words “shall be exercisable by statutory instrument” become paragraph (a) of that subsection,

(b) after that paragraph insert—

“(b) may be exercised so as to make different provision for different purposes.”.

(3) In subsection (3), at the beginning insert “Subject to subsection (3A),”.

(4) After subsection (3) insert—

“(3A) A statutory instrument containing regulations made under section 39A(5) is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.”.

(5) In subsection (4)—

(a) the words “shall be exercisable by statutory instrument” become paragraph (a) of that subsection,

(b) after that paragraph insert—

“(b) may be exercised so as to make different provision for different purposes.”.

(6) For subsection (6) substitute—

“(6) Any power conferred by this Act to make regulations or orders includes power to make such incidental, supplemental, consequential, transitory, transitional or saving provision as the Scottish Ministers consider necessary or expedient.”.

PART 4

GENERAL

30 Interpretation

In this Act—

“the 1953 Act” means the Historic Buildings and Ancient Monuments Act 1953 (c.49),

“the 1979 Act” means the Ancient Monuments and Archaeological Areas Act 1979 (c.46),

“the 1997 Act” means the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9).


31 Ancillary provision

(1) The Scottish Ministers may by order made by statutory instrument make such supplementary, incidental, consequential, transitory, transitional or saving provision as they consider necessary or expedient for the purposes of, in consequence of or for giving full effect to any provision of this Act.

(2) The provision which can be made under subsection (1) includes provision amending or repealing any enactment (including any enactment comprised in this Act) or any other instrument.

(3) An order under this section may make different provision for different purposes.

(4) Subject to subsection (5), a statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(5) A statutory instrument containing an order under this section which adds to, replaces or omits any part of the text of an Act is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Parliament.

32 Short title and commencement

(1) This Act may be cited as the Historic Environment (Amendment) (Scotland) Act 2010.

(2) The provisions of this Act, except sections 30, 31 and this section, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.

(3) Different days may be appointed under subsection (2) for different purposes.
Historic Environment (Amendment) (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision amending certain aspects of the law relating to ancient monuments and listed buildings, including provision in relation to unauthorised works, powers of enforcement in connection with such works, offences and fines, powers of entry to ancient monuments, the control and management of certain ancient monuments, and liability for the expenses of urgent works on listed buildings; to make provision for the creation of inventories of gardens and designed landscapes and of battlefields; to provide for grants and loans in respect of the development and understanding of matters of historic and other interest; and for connected purposes.

Introduced by: Fiona Hyslop
On: 4 May 2010
Supported by: Bruce Crawford
Bill type: Executive Bill
HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, this revised document is published to accompany the Historic Environment (Amendment) (Scotland) Bill (introduced in the Scottish Parliament on 4 May 2010) as amended at stage 2. The text has been revised to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sideling in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill as amended at Stage 2. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is an amending piece of legislation and its extent and content are formed by a series of amending provisions identified by Historic Scotland and local government, and during the course of discussions with stakeholders during 2007, which followed the publication of a report by the Historic Environment Advisory Council for Scotland on the need for a review of heritage legislation in Scotland. ¹

5. The Bill harmonises aspects of the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and aligns aspects of the historic environment legislation with the planning regime.  .

COMMENTARY ON SECTIONS

The main provisions of the Bill

6. The Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill and a fourth Part which includes provisions on “Interpretation”, “Ancillary provision” and “Short title and commencement”. The principal Acts are:

- the Historic Buildings and Ancient Monuments Act 1953 (“the 1953 Act”);
- the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”); and

THE BILL – SECTION BY SECTION

PART 1 – AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

Section 1 – Recovery of grants for repair, maintenance and upkeep of certain property

7. Section 1 amends section 4A of the 1953 Act which enables the Scottish Ministers to recover grants made under section 4 of that Act. This provision will allow Scottish Ministers to specify, or to set out the terms for calculating, in a grant award letter the amount that would be recoverable when a condition of grant is either contravened or not complied with or in the event that the property is disposed of.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 2 – Control of works affecting scheduled monuments

8. Section 2 amends section 2 of the 1979 Act to provide Scottish Ministers with a specific power to grant consent for the retention of unauthorised works.

Section 3 – Offences under sections 2, 28 and 42: modification of defences

9. Section 3 modifies two defences and one offence in the 1979 Act. The defence in section 2(8) is adjusted so that, in addition to the existing “defence of ignorance”, an accused is also required to establish that he took all reasonable steps to discover whether the area affected by the unauthorised works which he is accused of executing or causing or permitting to be executed, contained a scheduled monument.

10. Section 42(7), which contains a defence in respect of unauthorised use of a metal detector in a protected place (as defined in section 42(2)), is amended to provide for a similar dual element defence to that in section 2(8).

11. Section 3 of the Bill also modifies the offence in section 28(1) of the 1979 Act of damaging or destroying a protected monument without reasonable excuse. The effect of the
change is that for the offence to be committed, it must be established that the accused knew, or ought to have known, that the monument in question was protected (within the meaning of section 28(3)). This is in addition to the element of the offence specified in paragraph (b) of section 28(1) that the damage or destruction was done intentionally or recklessly.

Section 4 – Fines: increases and duty of court in determining amount

12. Section 4 raises the level of fines on summary conviction under section 2 and section 28 of the 1979 Act to £50,000 for offences tried summarily.

13. Subsections (2)(b) and (3)(b) make it a requirement that the court, in determining the amount of the fine to be imposed on a person convicted of an offence under section 2 or 28 of the 1979 Act takes into account the extent of any financial gain that has accrued or is likely to accrue to the offender.

Section 5 – Powers of entry to inspect condition of scheduled monument

14. Section 5 clarifies that paragraphs (a) and (b) of section 6(1) of the 1979 Act merely provide particular instances of how the general power to enter land (as provided under section 6 of the 1979 Act) may be used.

Section 6 – Works affecting scheduled monuments: enforcement

15. Section 6(1) inserts new sections 9A to 9O into the 1979 Act. This establishes enforcement powers for Scottish Ministers to protect scheduled monuments. New sections 9A to 9F allow scheduled monument enforcement notices to be served, new sections 9G to 9N allow stop notices and temporary stop notices to be served and new section 9O makes provision for interdict proceedings to be raised.

New section 9A – Power to issue scheduled monument enforcement notice

16. Subsection (1) allows Scottish Ministers to serve a scheduled monument enforcement notice in respect of unauthorised works carried out to a scheduled monument or to land in, on or under which there is a scheduled monument or a breach of conditions in scheduled monument consent. This section also makes it clear that it is a matter of discretion for the Scottish Ministers to issue such an enforcement notice and that Scottish Ministers are required to have regard to the effects of the works on the character of the monument as one of national importance.

17. Subsections (2) and (3) require a scheduled monument enforcement notice to specify the works that are to cease and/or the steps that must be taken to either restore the monument or land to its former state, alleviate the effects of the unauthorised works or to bring the monument or land into a state fully compatible with the terms of the scheduled monument consent.

18. Subsection (4) sets out that in considering whether restoration would be undesirable, the Scottish Ministers must have regard to the desirability of preserving the national importance of the monument or its features of historical, architectural, traditional, artistic or archaeological interest.
19. Subsection (5) sets out that where further works are carried out under the terms of subsection (3)(b) scheduled monument consent is deemed to have been granted for such works.

**New section 9B – Scheduled monument enforcement notices: further provisions**

20. Subsections (1) to (7) set out detailed procedures (e.g. on content and service) relating to scheduled monument enforcement notices. Subsections (1) to (3) require that the notice must specify the effective date and the time period within which works must cease or steps must be taken (“the period for compliance”) and provide for a minimum 28 day period between service of the notice and the date on which it is to take effect. Subsection (4) sets out the persons on whom a copy of the notice must be served. Subsection (5) provides Scottish Ministers with the power to withdraw an enforcement notice or waive or relax any requirement of such a notice, including extending the period for compliance. Where that power is exercised, subsection (6) requires notification to be given and specifies on whom such notification must be served. Subsection (7) sets out that the Scottish Ministers must keep a list of monuments in respect of which enforcement notices have been served which must be published electronically. Copies of the notices must also be provided on request.

**New section 9C – Appeal against scheduled monument enforcement notice**

21. This section sets out the process and grounds for an appeal against an enforcement notice. In particular, subsection (1) provides for a right of appeal to the sheriff for the person on whom the notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated. An appeal must be made before the date it takes effect under section 9B(1). Subsection (2) sets out the grounds of appeal. Subsection (3) states that the notice is of no effect until the appeal is withdrawn or finally determined. Subsection (4) sets out that a sheriff has the power to determine an appeal against a scheduled monument enforcement notice by upholding or quashing the notice.

**New section 9D – Execution of works required by scheduled monument enforcement notice**

22. Section 9D gives Scottish Ministers power to enter the land in, on or under which the scheduled monument is situated to undertake any works which have not been carried out within the period for compliance with the notice and provides for the recovery of expenses incurred in carrying out such works from the owner or lessee of the monument or land.

23. Subsection (3) provides a power for the sheriff to authorise by warrant an owner of the scheduled monument or land to go on the land and carry out the works where prevented to do so by the occupier.

24. Subsections (4) and (5) allow the removal from the monument or land of materials by the Scottish Ministers and their subsequent sale after a period of 3 days during which they are unclaimed by the owner, requiring any proceeds from such a sale, less expenses, to be paid to the owner. Subsections (6) and (7) limits liability for recovery of expenses from owners receiving rent in respect of the monument or land merely as a trustee, tutor, curator, factor or agent of some other person. If the owner does not have, and had not since the demand for payment from the Scottish Ministers had, sufficient money to discharge the whole demand, his liability for expenses is limited to the amount which he has, or has had, in his hands on behalf of that other person. Where Scottish Ministers have not recovered the whole of any such expenses from an
owner recovery of any unpaid balance from the person on whose behalf the rent is received is allowed.

25. Subsection (8) makes it a criminal offence to wilfully obstruct the Scottish Ministers from carrying out works required by the enforcement notice under the powers available under subsection (1).

New section 9E – Offence where scheduled monument enforcement notice not complied with

26. Section 9E sets out that where an enforcement notice has not been complied with within the period for compliance, the owner for the time being of the monument or of the land in, on or under which it is situated is in breach of the notice and is guilty of an offence and sets out the penalties. It is a defence to show that a person did everything they could be expected to do to ensure compliance with the notice or that they were not served with a copy of the notice and did not know of its existence.

New section 9F – Effect of scheduled monument consent on scheduled monument enforcement notice

27. Section 9F applies where a scheduled monument enforcement notice has been issued, and scheduled monument consent is then granted under new section 2(3A) of the 1979 Act (inserted by section 2 of the Bill) for the retention of works or of works which do not comply with a condition in the original scheduled monument consent. In such cases, the notice ceases to have effect in so far as it requires the works to cease, steps to be taken involving the works not being retained or compliance with that condition.

New section 9G – Stop notices

28. Inserted section 9G gives the Scottish Ministers power to issue a stop notice in relation to unauthorised works to a scheduled monument or to land in, on or under which the monument is situated, or to any part of the monument or land specified in the stop notice.

29. Subsections (1) and (2) set out the circumstances in which Scottish Ministers may issue a stop notice. Subsection (1) requires that the Scottish Ministers must consider it expedient for the works to cease before the expiry of the period for compliance with a scheduled monument enforcement notice. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the scheduled monument enforcement notice has been served but may not be served after the enforcement notice has taken effect.

30. Subsection (3) clarifies that “relevant works” means any works specified in the enforcement notice as works that the Scottish Ministers require to cease and associated works.

31. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the Scottish Ministers consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days after the date, when the notice is served.
32. Subsection (6) sets out that Scottish Ministers may serve the notice on any person who appears to them to have an interest in the monument or the land in, on or under which it is situated or who is executing, or causing to be executed, the relevant works specified in the enforcement notice.

33. Subsection (7) allows Scottish Ministers to withdraw a stop notice at any time by notice which must be served on all persons who were served with the original stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

New section 9H – Stop notices: supplementary provisions

34. Subsection (1) sets out the circumstances in which a stop notice ceases to have effect. Subsection (3) sets out how Scottish Ministers may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

New section 9I – Compensation for loss due to stop notice

35. Subsection (1) sets out that where a stop notice ceases to have effect a person with an interest in the scheduled monument or the land in, on or under which the monument is situated is entitled to compensation in respect of any loss or damage that can be attributed to the matters in subsection (2). Those matters are the prohibition in the stop notice or the prohibition of works which cease to be relevant works due to the waiving or relaxing of a requirement in the scheduled monument enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are where the stop notice is withdrawn or the associated enforcement notice is quashed or withdrawn. Subsection (4) clarifies that any compensation payable includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (5). The compensation provisions in section 9I are caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 9J – Penalties for contravention of stop notice

36. New section 9J sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offence including allowing for conviction for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement on the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

New section 9K – Temporary stop notices

37. New sections 9K to 9N cover the operation of the new system of temporary stop notices. While a stop notice is always issued in relation to a scheduled monument enforcement notice, a temporary stop notice may be issued even if no enforcement notice is in place. In new section 9K (temporary stop notices) subsection (1) sets out the circumstances in which Scottish Ministers may issue temporary stop notices. The Scottish Ministers have to consider that the works are unauthorised or fail to comply with a condition attached to consent and to consider
there is a reason for stopping the works immediately having regard to the effect of the works on the character of the monument as one of national importance.

38. Subsection (2) requires that the notice must be in writing and specify the works which are to stop, prohibit execution of the works and set out Scottish Ministers’ reasons for issuing the notice.

39. Subsection (3) states that notice may be served on a person who either appears to be executing or causing to be executed works and/or a person who has an interest in the scheduled monument or the land in, on or under which the monument is situated.

40. Subsection (4) states that the Scottish Ministers must display a copy of the notice and a statement on the effect of section 9M (relating to offences) on the land in, on or under which the monument is situated or on the monument (except where doing so damages it).

41. Subsections (5) to (7) set out when the notice starts and ceases to have effect. It may have effect for a maximum of 28 days. Subsection (8) provides that if the notice is withdrawn before 28 days the notice ceases to have effect at that point.

New section 9L – Temporary stop notices: restrictions

42. In new section 9L subsections (1) and (2) prohibit the issue of further temporary stop notice unless another enforcement action has been taken e.g. the service of an enforcement notice.

New section 9M – Temporary stop notices: offences

43. In new section 9M, subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.

44. Subsection (5) sets out the statutory defence under this section, which is that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.

45. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

New section 9N – Temporary stop notices: compensation

46. Subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the notice being served. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by scheduled monument consent granted on or before the date the temporary stop notice is first displayed, and/or the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent. Subsection (3) applies subsections (4) and (5) of new section 9I to compensation under this section which provide details of what the compensation may cover and sets out the circumstances when no compensation is payable under
this section. New section 9N will be caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

New section 9O – Interdicts restraining unauthorised works on scheduled monuments

47. New section 9O sets out that whether or not Scottish Ministers have exercised any of their powers under this Act they may restrain or prevent any actual or apprehended breaches of the controls provided by the Act by applying for an interdict.

48. Subsection (2) of section 6 of the Bill gives persons duly authorised by the Scottish Ministers rights of entry in relation to ascertaining whether to serve scheduled monument enforcement notices, stop notices and temporary stop notices and in relation to the service, enforcement and withdrawal of such notices.

Section 7 – Control and management of monuments and land under guardianship

49. Subsection (2)(a) of section 7 inserts a new subsection (2A) into section 13 of the 1979 Act. This new subsection clarifies that the power conferred by section 13(2) of the 1979 Act includes power to control the holding of events; power to control and manage events; power to charge for events and the power to control public access to the monument in connection with such events. Section 7(2)(b) inserts a new subsection (8) in section 13 of the 1979 Act which clarifies that reference to “events” in the new inserted section 2A includes functions and any other organised activity.

50. Subsection (3)(a) amends section 15 of the 1979 Act (acquisition and guardianship of land adjoining or in the vicinity of an ancient monument). This will ensure that the powers in paragraphs (a) and (b) of section 15(3) are exercisable without prejudice to the general power in that section to control and manage land associated with ancient monuments which is under guardianship.

51. Subsection (3)(b) inserts a new subsection (3A) into section 15 of the 1979 Act. This new subsection clarifies that the power conferred by section 15(3) of the 1979 Act includes power to control the holding of events; power to control and manage those events; power to charge for events and the power to control public access to the monument in connection with such events. Section 7(3)(d) inserts a new subsection (7) in section 15 of the 1979 Act which clarifies that reference to “events” in the new inserted subsection (3A) includes functions and any other organised activity.

52. Subsection (3)(c) inserts a new subsection (4A) in section 15 of the 1979 Act. This provides that the powers conferred by subsections (3), (3A) and (4) could not be used in relation to an event or type of event that was contrary to any express provision in the guardianship deed.

53. Subsection (4) of section 7 amends subsection (1) of section 19 of the 1979 Act to ensure that the right of public access to monuments under public control is subject to inserted sections 13(2A) and 15(3A) of the Bill. This gives Scottish Ministers and local authorities the power to control public access to the monument in connection with the holding of the event or function.
54. Section 7(5) repeals paragraph 6(1) of Schedule 3 (transitional provisions) to the 1979 Act. This amendment makes clear that Scottish Ministers may manage properties taken into guardianship before 1979 and those taken into guardianship after the enactment of the 1979 Act in exactly the same way.

Section 8 – Provision of facilities, etc. at ancient monuments

55. Section 8(a) amends section 20 of the 1979 Act to remove the requirement that facilities and information or other services may be provided for the public only in connection with affording public access. Section 8(b) substitutes a new subsection (2) and new subsection (2A) in section 20 of the 1979 Act. These new provisions clarify that any reference to a monument includes references to any land associated with the monument and set out the specific facilities and services that may be provided for the public under section 20 of the 1979 Act. The section applies to monuments owned or under the guardianship of the Scottish Ministers or a local authority and monuments otherwise under the control or management of the Scottish Ministers.

Section 9– Financial support for preservation etc. of monuments

56. Section 9 amends section 24 of the 1979 Act so as to make clear that the power of the Scottish Ministers and local authorities to defray or contribute towards the cost of preserving, maintaining or managing an ancient monument is exercisable without the owner’s having requested such action.

Section 10 – Power of entry on land where monument at risk

57. Section 10 modifies the power in section 26(1) which enables a person authorised by the Scottish Ministers to enter land where an ancient monument is known or believed to be to record matters of archaeological or historical interest. This includes a power to carry out excavations with the consent of anyone who requires to give consent for such excavations. The effect of the amendment is that such consent is not required where the Scottish Ministers know or have reason to believe that any ancient monument is at risk of imminent damage or destruction.

Section 11 – Inventories of gardens and designed landscapes and of battlefields

58. Section 11 inserts new sections 32A and 32B in the 1979 Act which create a new statutory duty for Scottish ministers to compile and maintain an inventory of gardens and designed landscapes and an inventory of battlefields.

New section 32A – Inventory of gardens and designed landscapes

59. Subsection (1) places a new statutory duty on Scottish Ministers to compile and maintain an inventory of gardens and designed landscapes which, in their view, are of national importance.

60. Subsection (2) defines gardens and designed landscapes for the purposes of the new section.

61. Subsection (3) provides Scottish Ministers with the power to add, remove or amend entries in the inventory from time to time.
62. Subsection (4) states that when adding a garden and designed landscape to the inventory or modifying the inventory Scottish Ministers must inform the owner and (when the owner is not the occupier) the occupier of the grounds in question and the local authority in whose area the grounds are situated.

63. Subsection (5) states that Scottish Ministers must from time to time and in a manner they think fit publish a list of the gardens and designed landscapes included in the inventory at the time of publication.

New section 32B – Inventory of battlefields

64. Subsection (1) places a statutory duty on Scottish Ministers to compile and maintain an inventory of battlefields.

65. Subsection (2) defines battlefield for the purposes of the new section.

66. Subsection (3) applies subsections (3) to (5) of new section 32A to an inventory of battlefields compiled under section 32B(1). The effect of this is that the functions of the Scottish Ministers set out in those subsections are also exercisable in respect of the inventory or battlefields.

Section 12 – Development and understanding of matters of historic, etc. interest: grants and loans

67. Section 12 inserts a new section 45A into the 1979 Act to provide a new power of financial assistance to the Scottish Ministers. Subsection (1) states that Scottish Ministers may make grants or loans in connection with or with a view to the promotion of the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest. Subsection (2) of the new section 45A sets out that such grants or loans may be subject to such conditions as the Scottish Ministers think appropriate. Subsection (3) provides that, without prejudice to any powers of the Scottish Ministers under any enactment (including this Act), the total amount of grants and loans which may be made under this section must not exceed £100,000 in any one year period.

Section 13 – Regulations and orders under the 1979 Act

68. Section 13 amends section 60 of the 1979 Act and confirms that any regulation or order making powers conferred by the 1979 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provisions that Scottish Ministers consider necessary or expedient.

Section 14 – Meaning of “monument” in the 1979 Act

69. Section 14 amends the meaning of “monument” in section 61(7) of the 1979 Act (interpretation) and extends the range of historic environment assets that can be designated under the 1979 Act to include “any site comprising any thing, or group of things, that evidences previous human activity”.

10
Section 15 – Scheduled monument consent: regulations as respects applications, etc.

70. Section 15(2) inserts a new sub-paragraph (1A) after paragraph 1(1) of Schedule 1 to the 1979 Act. This enables Scottish Ministers to make regulations as to the form, manner and content of the granting of scheduled monument consent. Section 15(3) amends paragraph 2 of Schedule 1 to the 1979 Act. New sub-paragraph (1) of that paragraph provides that the Scottish Ministers may refuse to entertain an application for scheduled monument consent unless it is accompanied by a certificate as to the interests in the monument to which the application relates. New sub-paragraph (2) of that paragraph enables regulations to be made by the Scottish Ministers to make provision as to the notification and publication of applications for scheduled monument consent, the form and content of certificates and notices and such further particulars of the matters to which such certificates relate.

Section 16 – Refusal to entertain certain applications for scheduled monument consent

71. Section 16 inserts a new paragraph 2B after paragraph 2A of Schedule 1 to the 1979 Act enabling Scottish Ministers to decline to consider a scheduled monument consent application in two situations. The first is where the application is similar to an application that had been made within the previous two years and Ministers consider there has been no significant change in any material considerations since the similar application was refused. The second is where the application is made while a similar application is under consideration by Ministers. Sub-paragraph (4) clarifies that an application for scheduled monument consent is taken to be similar if the scheduled monument and the works are in the opinion of Scottish Ministers the same or substantially the same.

Section 17 – Application for scheduled monument consent: inquiries and hearings

72. Section 17 amends paragraph 3(2) of Schedule 1 to the 1979 Act to replace the requirement to hold a public local inquiry or a hearing before determining whether or not to grant scheduled monument consent with a power to do so.

PART 3 – MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 18 – Certificate that building not intended to be listed

73. Section 18 inserts a new section 5A into the 1997 Act enabling Scottish Ministers to issue a certificate that they do not intend to list a building during the five years from the date of the certificate. Any person can apply for such a certificate.

74. Subsection (2)(b) of section 5A states that for that 5 year period a local planning authority may not serve a building preservation notice in relation to the building or affix such a notice under the terms of section 4(1) of the 1979 Act.

75. Subsection (3) requires that a person applying for a certificate must, at the same time, inform the local planning authority within whose district the building is situated of the application.
Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines

76. Section 19 raises the level of fines on summary conviction under section 8 of the 1997 Act (offences) to £50,000. This relates to a conviction for an offence described in section 6 or 8(2) of the 1997 Act – the carrying out of unauthorised works on a listed building or non-compliance with a condition of listed building consent.

Section 20 – Declining to determine an application for listed building consent

77. Section 20 inserts a new section 10A after section 10 of the 1997 Act enabling planning authorities to decline to determine an application for listed building consent in certain situations. Subsections (1)(a) to (1)(e) set out the specific circumstances where a planning authority may decline to determine an application for listed building consent.

78. Section 10A(2) clarifies that an application for listed building consent is taken to be similar to another such application if the listed building and works to which the applications relate are in the opinion of the planning authority the same or substantially the same.

79. Subsection (2) of section 20 allows for an appeal to be made to the Scottish Ministers where the planning authority have failed to give notice to a person applying for listed building consent that they have declined to determine the application under the power in section 10A.

Section 21 – Hearings in connection with applications for listed building consent and appeals

80. Section 21 removes the requirement to hold a hearing before determining applications and appeals under the 1997 Act. This provision amends the 1997 Act to bring the equivalent processes into line with those in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006. Paragraph (a) repeals subsection (4) of section 11 (reference of certain applications to the Scottish Ministers) of the 1997 Act. Paragraph (b) repeals certain provisions of Schedule 3 to the 1997 Act relating to the determination of certain appeals by persons appointed by the Scottish Ministers and certain appeals by the Scottish Ministers which, but for a direction under paragraph 3(1), would fall to be determined by an appointed person.

Section 22 – Enforcement notice: requirement to cease works

81. Section 22 amends section 34 (power to issue enforcement notice), section 35 (appeal against listed building enforcement notice), section 39 (offence where listed building enforcement notice not complied with) and section 40 (effect of listed building consent on listed building enforcement notice). The amendments allow a listed building enforcement notice to specify any works which the planning authority or the Scottish Ministers require to cease and/or to specify steps which must be taken, and makes the necessary amendments following on from this to the enforcement process.
Section 23 – Stop notices and temporary stop notices

82. Section 23 inserts new sections 41A to 41I into the 1997 Act giving local authorities the power to serve stop notices and temporary stop notices in relation to unauthorised works on a listed building.

New section 41A – Stop notices

83. Subsections (1) and (2) set out the circumstances in which local planning authorities may issue a stop notice. In so doing local planning authorities must consider it expedient for the works to cease before the expiry of the period for compliance with a listed building enforcement notice.

84. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the listed building enforcement notice has been served but may not be served after the listed building enforcement notice has taken effect.

85. Subsection (3) of new section 41A clarifies that “relevant works” refers to the “works” that the local planning authority require to cease under the terms of the enforcement notice together with any associated works.

86. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the planning authority consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days from the date, when the notice is served.

87. Subsection (6) sets out that the local planning authority may serve the notice on any person who appears to them to have an interest in the building or is executing or causing to be executed the relevant works specified in the listed building enforcement notice.

88. Subsection (7) allows local planning authorities to withdraw a stop notice at any time by notice which must be served on all persons who were served with the stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

New section 41B – Stop notices: supplementary provisions

89. New section 41B sets out supplementary provisions relating to stop notices. Subsections (1) and (2) set out the circumstances in which a stop notice ceases to have effect. Subsection (4) sets out how the planning authority may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

New section 41C – Power of the Scottish Ministers to serve stop notice

90. New section 41C allows Scottish Ministers to serve a stop notice under section 41A. It clarifies that notices so served have the same effect as those served by a local planning authority and that provisions of the Act relating to stop notices apply to those served by Scottish Ministers as they apply to those served by the planning authority. Scottish Ministers may serve a stop
notice either where a planning authority have issued an enforcement notice or where Scottish Ministers themselves have issued the enforcement notice.

91. Subsection (3) makes it clear that Scottish Ministers must consult the planning authority before issuing a stop notice.

**New section 41D – Compensation for loss due to stop notice**

92. Subsection (1) sets out that a person with an interest in the building is entitled to compensation in respect of any loss or damage that can be attributed to the prohibition in the stop notice. Compensation is also payable where works prohibited by the stop notice cease to be “relevant works” (within the meaning of section 41A(3)) as a result of a variation of the listed building enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are when the stop notice is withdrawn or the associated enforcement notice is quashed, withdrawn, or varied. Subsection (6) provides that the compensation that may be payable under this section includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (7). Subsection (8) provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

**New section 41E – Penalties for contravention of stop notice**

93. New section 41E sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offences including allowing for conviction to be made for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

94. New sections 41F to 41I cover the operation of the new system of temporary stop notices.

**New section 41F – Temporary stop notices**

95. In new section 41F subsection (1) sets out the circumstances in which planning authorities may issue temporary stop notices. The planning authority has to consider that the works to a listed building are unauthorised or fail to comply with a condition attached to consent and consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the building as one of special architectural or historic interest.

96. Subsection (2) requires a notice to be in writing and to specify the works in question, prohibit execution of the works and set out the planning authority’s reasons for issuing the notice.

97. Subsection (3) states that notice may be served on a person who either appears to be executing, or causing to be executed the works and/or a person who has an interest in the building.
98. Subsection (4) states that the planning authority must display a copy of the notice and a statement on the effect of section 41H (relating to offences) on the building in question.

99. Subsections (5) to (7) sets out when the notice starts and ceases to have effect. It may have effect for a maximum of 28 days.

100. Subsection (8) provides that if the notice is withdrawn before the end of the 28 day period (or specified shorter period), it ceases to have effect at that point.

**New section 41G – Temporary stop notices: restrictions**

101. In new section 41G, subsection (1) enables regulations to be made prescribing types of work the execution of which is not prohibited by a stop notice; and subsection (2) prohibits the issue of further temporary stop notice unless another form of enforcement action has been taken e.g. the service of an enforcement notice.

**New section 41H – Temporary stop notices: offences**

102. In new section 41H subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.

103. Subsection (5) sets out the statutory defences under this section, which are that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.

104. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the activity which constituted the offence.

**New section 41I – Temporary stop notices: compensation**

105. In new section 41I subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the notice being served. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by listed building consent granted on or before the date the temporary stop notice is first displayed and/or the planning authority withdraws the notice other than following such grant of listed building consent. Subsection (3) applies subsections (5) to (9) of new section 41D to compensation under this section. Any question of disputed compensation will be referred to and determined by the Lands Tribunal.

106. Subsection (1A) of section 23 amends section 66 of the 1997 Act, which relates to the control of works affecting unlisted buildings in conservation areas, to provide that sections 41A to 41I of that Act (as inserted by this Bill) apply in relation to such buildings as they apply in relation to listed buildings. This ensures that stop notices and temporary stop notices will be available as enforcement tools in relation to unlisted buildings in conservation areas where subsection (3) of section 66 applies.
107. Subsection (2) of section 23 gives persons duly authorised by a planning authority rights of entry in relation to ascertaining whether to serve listed building enforcement notices, stop notices, and temporary stop notices and in relation to the service, enforcement and withdrawal of such notices.

Section 24 – Non-compliance with listed building enforcement notice: fixed penalty notice

New section 39A – Fixed penalty notice where listed building enforcement notice not complied with

108. Section 24 inserts new section 39A into the 1997 Act. This establishes powers for planning authorities to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice provided the conditions set out in subsection (9) are met. The conditions in subsection (9) are that the fixed penalty notice must be issued within 6 months of the failure to comply with the listed building enforcement notice, and that a fixed penalty notice cannot be issued where a person has already been charged with an offence in respect of the breach of the listed building enforcement notice.

109. Subsections (6) and (7) set out that a person who receives a fixed penalty notice has 30 days to pay the penalty, and that the penalty is reduced by 25% if payment is made within 15 days.

110. Subsection (12) provides that any payment received by a planning authority in respect of a fixed penalty notice is retained by the authority.

111. Subsection (13) allows Scottish Ministers to prescribe in secondary legislation different levels of fine for different cases. This will also allow Ministers to set out in regulations an incremental scale of fines related to previous breaches of listed building enforcement notices relating to the same steps or works.

Section 24A – Urgent works to preserve unoccupied listed buildings

112. Section 24A amends section 49(3) of the 1997 Act to specify, as an additional example of the types of works which may be carried out where works appear to be urgently necessary for the preservation of a listed building, preventative works to limit any deterioration of the building.

Section 25 – Liability of owner and successors for expenses of urgent works

113. Section 25 inserts new sections 50A to 50G into the 1997 Act. These new sections will enable a notice of liability for expenses to be registered in the appropriate property register against a listed building.

New section 50A – Liability of owner and successors for expenses of works executed under section 49

114. New section 50A deals with the apportionment of liability for the expenses of urgently necessary works for the preservation of a listed building when a property is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a property.
Subsection (1) provides that an owner will remain liable for relevant costs after the property has been sold.

115. Subsection (2) deals with the liability of an incoming or “new” owner of a property. A new owner is severally liable with the outgoing owner. If there are further new owners, both or all are bound. This is, however, subject to the provisions of subsection (3) which provides that an incoming owner will be liable for the cost of any urgent works which have been carried out prior to the date on which the new owner becomes the owner of the property only if a notice of liability for expenses has been registered in the property registers (on or before a date 14 days prior to the new owner becoming the owner) and the notice has not expired before that date or that a notice of renewal has been registered and has not expired. Liability for the cost of completed urgent works where no notice has been registered is thus excluded. In other words, if no notice is registered, the purchaser is not liable. Where a notice is registered, then a new owner would be liable for the full amount of the cost of the urgent works as described in the notice.

116. Where the new owner pays any relevant costs, under subsection (8) they may recover the amount paid from a former owner, if the former owner is liable.

New section 50B – Notice of liability for expenses: further provision

117. Subsection (1) of new section 50B sets out who may register a notice of liability for expenses and provides that a notice may be registered in relation to different works executed on a listed building. A notice will expire after 5 years, though it may be renewed.

118. Subsection (2) provides that the Keeper of the Registers of Scotland will not be required to determine whether or not the information contained in a notice of potential liability for expenses is accurate.

New section 50C – Notices of renewal

119. Subsection (1) sets out that a notice of renewal may be registered only when a notice of liability for expenses has been registered and has not expired.

120. Subsection (2) provides Scottish Ministers and planning authorities with the power to register a notice of renewal in a form prescribed under inserted section 50G.

121. Subsection (3) allows for a second or subsequent notice of renewal to be registered in respect of the same expenses and works as specified in the original notice of liability.

122. Subsection 4 sets out that a second or subsequent notice of renewal cannot be registered if a notice of renewal for expenses has expired.

123. Subsection (5) makes it clear that where a notice of liability for expenses has been registered by Scottish Ministers a notice of renewal may be registered only on application of Scottish Ministers. Subsection (5) also makes it clear that where a notice of liability for expenses has been registered by a planning authority a notice of renewal may be registered only on application of that authority.
124. Subsection (6) states that a notice of renewal expires after a period of 5 years.

125. Subsection (7) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of renewal is accurate.

New section 50D – Notice of determination following representations under section 50

126. Subsection (1) makes it clear that subsections (2) and (3) apply only where a notice of liability of expenses or a notice of renewal has been registered and the owner has made representations to the Scottish Ministers under the terms of section 50(4) of the 1997 Act or section 50(6) of the 1997 Act as inserted by section 25(2) of this Bill.

127. Subsection (2) sets out that when a notice of liability has been registered by a planning authority the authority must apply to register a notice of determination in a form prescribed under new section 50G as soon as practicable after the Scottish Ministers have given notice of their determination under the terms of section 50(5).

128. Subsection (3) sets out that when the original notice of liability has been registered by Scottish Ministers they must apply to register a notice of determination as soon as practicable after they have made their determination.

129. Subsection (4) sets out that a notice of determination must specify the amount recoverable in connection with a notice of liability for expenses.

130. Subsection (5) makes it clear that when the amount recoverable as set out in a notice of determination is less than the amount specified as the expenses of the works set out in the original notice of liability the amount specified in the notice of determination is to be treated as the amount recoverable.

131. Subsection (6) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of determination is accurate.

New section 50E – Discharge of notice of liability for expenses and notice of renewal

132. Subsections (1)(a) and (b) clarify that subsections (2) and (3) apply only when a notice of liability for expenses or a notice of renewal have been registered and any liability for expenses under section 50(2) has been fully discharged.

133. Subsection (2) states that when a planning authority has registered the original notice of liability for expenses the authority must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.

134. Subsection (3) states that when Scottish Ministers have registered the original notice of liability for expenses they must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.

135. Subsection (4) confirms that when registered a notice of discharge discharges a notice of liability for expenses or, where applicable, a notice of renewal.
136. Subsection (5) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of discharge is accurate.

**New section 50F – Meaning of “register” in relation to notices**
137. Section 50F defines “register” in relation to a notice of liability for expenses; a notice of renewal; a notice of determination and a notice of discharge as either the Land Register of Scotland or the Register of Sasines.

**New section 50G – Power to prescribe forms**
138. Section 50G gives the Scottish Ministers power to prescribe the forms of notices for liability for expenses, notices of renewal, notices of determination and notices of discharge.

**Section 26 – Recovery of grants for preservation etc. of listed buildings and conservation areas**
139. Section 26 amends sections 52 and 70 of the 1997 Act which enables the Scottish Ministers and planning authorities to recover grants made under sections 51 and 69 of that Act.

140. These new provisions mean that Scottish Ministers and planning authorities can specify in a grant award letter the amount that would be recoverable (or set out the terms for calculating the amount that would be recoverable) when a condition of grant is either contravened or not complied with, or in the event the property is disposed of.

**Section 27 – Provisions that do not bind the Crown**
141. Section 27 amends section 73A of the 1997 Act to ensure that new sections 41E, 41H and 50A(2) do not bind the Crown.

**Section 28 – Regulations in connection with inquiries, etc**
142. Section 79(1) of the 1997 Act applies various provisions of the Town and Country Planning (Scotland) Act 1997 (“the TCPS Act”) for the purposes of the 1997 Act including the power to hold inquires under section 265 of the TCPS Act. Section 52 of the Planning etc. (Scotland) Act 2006 introduced a new section 275A into the TCPS Act which enables the procedure to be followed in such inquires to be set by regulations made by the Scottish Ministers.

143. Section 28(1) of the Bill inserts a reference to the new section 275A into section 79(1) and so will enable such regulations to be made in relation to inquiries held under the 1997 Act.

144. Section 28(2) of the Bill removes the power to make rules under the Tribunals and Inquiries Act 1992 for inquiries held under Schedule 3 to the 1997 Act.
Section 29 – Regulations and orders under the 1997 Act

145. Subsections (2) and (5) amend subsections (2) and (4) of section 82 of the 1997 Act and confirm that the power to make regulations and orders under the 1997 Act may be exercised to make different provisions for different purposes.

146. Subsection (4) inserts a new section 3A into section 82 of the 1979 Act to provide that a statutory instrument containing regulations prescribing the fixed penalty amounts made by virtue of section 39A(5) is subject to affirmative procedure in the Scottish Parliament.

147. Subsection (6) confirms that any regulation making powers conferred by the 1997 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provision that Scottish Ministers consider necessary or expedient.

PART 4 – GENERAL

Section 31 – Ancillary provision

148. Subsection (1) confers powers on the Scottish Ministers enabling them to make supplementary, incidental, consequential, transitory, transitional or saving provision in connection with the Bill where such provision is considered necessary or expedient.

149. Subsection (2) states that the provision which can be made under section 31(1) includes provision to amend or repeal any enactment, including any contained in the Bill, or any other instrument.

150. Subsection (5) provides that any order which adds to, replaces or omits any part of an Act shall be subject to an affirmative resolution procedure in Parliament. Other than this, orders will be subject to negative resolution procedure.

Section 32 – Short title and commencement

151. Subsections (2) and (3) set out the arrangements for commencement of the provisions of the Bill. Sections 30 and 31 commence on Royal Assent. Section 32 comes into force on Royal Assent, and all other provisions are to be commenced by order.
HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

REVISED DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Historic Environment (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is a tightly-focused technical amending Bill that will introduce new provisions and remove barriers to the use of existing powers that will enhance the ability of the Scottish Ministers and planning authorities to manage our historic environment in a sustainable way for the enjoyment and benefit of future generations.

4. The Bill will also contribute to the Government’s central purpose of sustained economic growth by introducing a series of provisions that will enhance the ability of central and local government to manage Scotland’s unique historic environment. The amending Bill will support, in particular, the government’s Greener Objective and will provide the Scottish Ministers and the planning authorities with a much-improved toolkit to help manage, protect and enhance Scotland’s historic environment.

5. The draft Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill. The fourth Part includes provisions on ‘Interpretation’, ‘Ancillary Provision’ and ‘Short title and commencement’. The principal Acts are:
   - The Historic Buildings and Ancient Monuments Act 1953;
   - The Ancient Monuments and Archaeological Areas Act 1979 (‘the 1979 Act’); and,
   - The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (‘the 1997 Act’).
Rationale for subordinate legislation

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Government has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill or the 1979 and 1997 Acts to:
   - the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation;
   - the need to make proper use of valuable Parliamentary time;
   - the likely frequency of amendment;
   - the need to anticipate the unexpected, which might otherwise frustrate the purpose of any provision in primary legislation approved by Parliament; and
   - the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

7. Where subordinate legislation is required to implement Government policy some form of parliamentary procedure may be appropriate. A balance must be struck between the different levels of scrutiny involved in the procedures. In the Bill the balance reflects the view of the Government on the importance of the matter delegated by Parliament.

Delegated powers

8. The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. Some of the powers contained in the Bill are new, whilst others replace or update existing powers in the 1979 and 1997 Acts. The powers conferred in the Bill are mainly either of a technical and procedural nature, or are concerned with matters which require, because of their nature a flexible approach. It is therefore regarded as appropriate that they be dealt with by subordinate legislation.

9. Regulations and orders under the powers described below are mainly subject to negative resolution procedure in the Scottish Parliament. The Government has chosen this procedure where the delegated powers sought are required to prescribe procedural detail or other detail to supplement or update the provisions of the Bill or the 1979 and 1997 Acts. With regard to certain powers, affirmative resolution procedure is considered to be appropriate, as explained below.

10. This memorandum describes the provisions of the Bill which confer power to make subordinate legislation. It sets out:
   - the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
   - why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and,
This document relates to the Historic Environment (Amendment) (Scotland) Bill as amended at Stage 2 (SP Bill 43A)

- the Parliamentary procedure, if any, to which the exercise of the power to make subordinate legislation is to be subject.

PART 1 – AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

11. There are no delegated powers in Part 1 of the Historic Environment (Amendment) (Scotland) Bill.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 6 – Works affecting scheduled monuments: enforcement

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

12. Section 6 of the Bill inserts new section 9A to 9O into the 1979 Act. Inserted sections 9I and 9N make provision as regards compensation in relation to stop notices and temporary stop notices. The application of section 47 of the 1979 Act is extended to these provisions. New sections 9I and 9N therefore represent an extension of the cases in respect of which the existing power in section 47 may be used, rather than directly conferring a new power. Section 47 provides that any claim for compensation under the 1979 Act is to be made in the time and manner prescribed. By virtue of the definition of ‘prescribed’ in section 61(1) of the 1979 Act, this will be by regulations made by the Scottish Ministers. Such regulations are made by statutory instrument subject to negative resolution of the Scottish Parliament (section 60(2) of the 1979 Act).

Reason for taking power

13. This power has been delegated in line with any other claim for compensation under the 1979 Act as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain.

Choice of procedure

14. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure in keeping with other provisions in the 1979 Act dealing with compensation.
Section 13 – Regulations and orders under the 1979 Act

Power conferred on: Scottish Ministers
Power exercisable by: regulations or orders made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

15. Section 13 of the Bill amends section 60 of the 1979 Act and confirms that any power under the 1979 Act to make regulations or orders includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision where this is thought necessary or expedient. This provision does not introduce or confer new powers as such, but builds on existing powers so that a range of different types of provision may be made under them.

Reason for taking power

16. This is a general provision included as part of the updating and modernising of the legislation to put it beyond any doubt that any regulations made under the 1979 Act could include these sorts of provisions. It is in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Choice of procedure

17. Regulations and orders made under the 1979 Act are subject to negative resolution procedure (see section 60(2) of the 1979 Act) except where regulations are made under section 19 of the 1979 Act. This approach on procedure is in line with the approach now taken in most Bills.

Section 15 – Scheduled Monument Consent: regulations as respects applications, etc.

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

18. Section 15(2) inserts paragraph (1A) into Schedule 1 of the 1979 Act allowing Scottish Ministers to make provision in regulations about the manner in which scheduled monument consent is granted and the form and content of such consent. Section 15(3) amends paragraph 2 of Schedule 1 allowing the Scottish Ministers to make provision as to the form and content of certificates as mentioned in sub-paragraph (1), make provision publicising applications for scheduled monument consent and make provision as to the notice to be given of any application for scheduled monument consent and the form and content of such notices. Section 15(3) also allows Scottish Ministers to make provision as to the further particulars of the matters to which such certificates relate and to require an applicant for scheduled monument consent to certify that any requirements of the regulations have been satisfied.
Reason for taking power

19. This will bring the scheduled monument consent application and granting process into line with the model used in the listed building and planning legislation by providing for more flexibility in setting the related administrative detail.

Choice of procedure

20. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

PART 3 – MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 20 – Declining to determine an application for listed building consent – Subsection (2)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

21. Section 20(2) amends section 18(2) of the 1997 Act to allow an appeal to the Scottish Ministers where a planning authority have not given notice that they have exercised their power to decline to determine an application (as introduced into the 1997 Act by section 20(1) within the relevant period or agreed extended period. Section 18(3)(a) of the 1997 Act provides that the relevant period is such period as may be prescribed. Under section 81 of the 1997 Act prescribed means prescribed by regulations which under section 82(3) of the 1997 Act shall be subject to negative resolution procedure. The change to section 18(2) does not create or confer a new power, but merely extends the way the existing power in section 18(3) may be used.

Reason for taking power

22. The power is required since section 20(1) inserts a new section 10A into the 1997 Act allowing planning authorities to decline to determine applications in certain circumstances. The appeal provisions in section 18 of the 1997 Act are extended to include an appeal against the failure to give notice that the authority have declined to determine an application. In line with similar existing appeals the Scottish Ministers can specify the time within which such an appeal must be made.

Choice of procedure

23. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure in line with the procedure applicable in relation to the time period for existing appeals.
Section 23 – Stop notices and temporary stop notices - new section 41D – Compensation for loss due to stop notice - subsection (5)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

24. This provision allows Scottish Ministers to prescribe in regulations how claims for compensation for loss due to a stop notice must be made and the timeframe for such claims.

Reason for taking power

25. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain. This is in line with the provisions relating to compensation in the 1979 Act.

Choice of procedure

26. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 23 – Stop notices and temporary stop notices - new section 41G – Temporary stop notices: restrictions - subsection (1)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

27. Section 23 inserts new section 41G(1) which sets out that a temporary stop notice does not prohibit certain works as may be prescribed by regulations.

Reason for taking power

28. These powers will allow Scottish Ministers to set out in detail which works are exempt from being subject to temporary stop notices, and it is thought that since the types of works will likely change over time this is better set out in regulations than on the face of the Bill.

Choice of procedure

29. The power is subject to negative resolution procedure. Given the detailed and technical nature of these provisions this is thought appropriate.
Section 23 – Stop notices and temporary stop notices: compensation - subsection (3)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
30. Section 41I(3) applies subsections (5) to (9) of section 41D to compensation payable in relation to temporary stop notices as they apply to compensation payable in relation to stop notices under section 41D. This provision allows Scottish Ministers to prescribe in regulations how claims for compensation for loss due to a temporary stop notice must be made and the timeframe for such claims.

Reason for taking power
31. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain. This is in line with the provisions relating to compensation in the 1979 Act.

Choice of procedure
32. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 24 – Amount specified in fixed penalty notices for breach of listed building enforcement notice: procedure

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision
33. This section inserts a new section 39A into the 1997 Act which allows the Scottish Ministers to determine the fixed penalty amount that may be paid when there has been a breach of a listed building enforcement notice.

Reason for taking power
34. What are appropriate fixed penalty amounts are likely to change over time and it is important to have flexibility to revise the amount when necessary. It is therefore appropriate to delegate the power to subordinate legislation.

Choice of procedure
35. As fixed monetary penalties are to be imposed on persons who are believed to have committed an offence, there is likely to be significant stakeholder interest in the level of the fixed
penalty and so it was considered appropriate to require an affirmative resolution of the Parliament. Section 82 of the 1997 Act is therefore amended by section 29(4) of the Bill to insert a new subsection (3A) providing for draft affirmative procedure.

Section 25 – Liability of owner and successors for expenses of urgent works

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

36. Section 25(3) inserts new sections 50A to 50G (liability of owner and successors for expenses of urgent works executed under section 49) into the 1997 Act. Section 50G(1) gives the Scottish Ministers power to prescribe the form of notices specified in that section. These are: a notice of liability for expenses, a notice of renewal, a notice of determination and a notice of discharge.

Reason for taking power

37. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail of the form of notices. Flexibility is required as it is anticipated that the notices will be updated over time.

Choice of procedure

38. As this is an administrative measure it is considered appropriate to apply negative resolution procedure.

Section 28(1) – Regulations in connection with inquiries, etc

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

39. Section 28(1) amends section 79(1) of the 1997 Act so that section 275A of the Town and Country Planning (Scotland) Act applies to the 1997 Act. This provision allows the Scottish Ministers to make regulations to set out both the process for dealing with applications and appeals in listed building cases and how any inquiry in connection with such an application or appeal is to be conducted.

Reason for taking power

40. It is considered appropriate for procedural arrangements in relation to inquiries, hearings etc to be set out in secondary legislation rather than on the face of the Bill.
Choice of procedure

41. As this is a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 29 – Regulations and orders under the 1997 Act

Power conferred on: Scottish Ministers
Power exercisable by: regulations or order made by statutory instrument and order with no Parliamentary procedure
Parliamentary procedure: affirmative/negative resolution of the Scottish Parliament

Provision

42. Section 29(6) amends section 82 of the 1997 Act and confirms that any power under the 1997 Act to make regulations or orders includes power to make such incidental, supplementary, consequential, transitory, transitional or savings provision where this is thought necessary or expedient. This provision does not introduce or confer new powers as such, but builds on existing powers so that a range of different types of provision may be made under them. Section 29(2)(b) and section 29(5)(b) amend section 82 of the 1997 Act to clarify that any power under the 1997 Act to make orders under sections 7(5), 54(5) and 67(7) or regulations under the 1997 Act includes power to make different provision for different purposes.

Reason for taking power

43. These are general provisions included as part of the updating and modernising of the legislation to put it beyond doubt that the specified orders and regulations made under the 1997 Act could include these sorts of provisions. They are in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Choice of procedure

44. Regulations made under the 1997 Act are subject to negative resolution procedure (see section 82(3) of the 1997 Act). Orders are subject either to negative resolution procedure, affirmative procedure or no Parliamentary procedure (see subsections (4) and (5) of section 82 of the 1997 Act and section 24 of the Bill inserting section 39A into the 1997 Act). Nothing in this power alters the fundamental nature of the substantive orders and regulations and therefore does not alter the procedure that should be applied to those regulations or orders.

Section 31 – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative/negative resolution of the Scottish Parliament

Provision

45. Section 31 gives the Scottish Ministers powers by order to make such supplementary incidental, consequential, transitory, transitional or saving provision needed to give full effect to
any provision of this Bill. This includes provisions amending or repealing any other enactment or instrument.

Reason for taking power

46. This is a general provision in standard terms which allows Scottish Ministers to make provision by order to support the full implementation of what is an amending Bill. Any such provision must be considered necessary or expedient for the purposes of, or in consequence of, or for giving full effect to any provision of the Bill. This provision is included to ensure the purposes of the Bill can be given full effect without the need for further primary legislation.

Choice of procedure

47. Orders under section 31 are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of an Act, in which case the order is subject to an affirmative procedure.

48. It is appropriate that where the order changes primary legislation it should be subject to affirmative resolution procedure. This approach on procedure is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 32 – Short title and commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: None

Provision

49. Section 32 gives the Scottish Ministers powers to commence provisions of the Bill by order. Section 32 is exempt from the coverage of this power and will therefore come into force on any Act resulting from the Bill receiving Royal Assent.

Reason for taking power

50. To enable Scottish Ministers to appropriately and flexibly commence the provisions in the Bill.

Choice of procedure

51. The power is subject to no procedure as is typical for commencement powers.
Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

   (a) any-
   
     (i) subordinate legislation laid before the Parliament;
   
     (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;
   
     (iii) Pension or grants motion as described in Rule 8.11A.1;

   and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

   (c) general questions relating to powers to make subordinate legislation; and

   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

   *(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Bob Doris (Deputy Convener)
Helen Eadie
Rhoda Grant
Alex Johnstone
Ian McKee
Elaine Smith
Jamie Stone (Convener)
Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Jake Thomas

Support Manager
Lori Gray
Subordinate Legislation Committee

3rd Report, 2011 (Session 3)

Historic Environment (Amendment) (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 18 January 2011, the Subordinate Legislation Committee considered the delegated powers provisions in the Historic Environment (Amendment) (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a revised memorandum on the delegated powers provisions in the Bill ("the revised DPM")

Delegated Powers Provisions

3. At Stage 1 of the Bill, the Committee reported that it did not need to draw the attention of the Parliament to the powers contained in sections: 6 (inserting sections 9I and 9N of the Ancient Monuments and Archaeological Areas Act 1979); 13, 15(2) and (3), 20(2), 23(1) (inserting sections 41D(5), 41G and 41I(3) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997), section 24 (inserting section 39A(5) of that 1997 Act), section 25 (inserting section 50G of that 1997 Act), sections 28(1), 29(6), 31 and 32.

4. Section 15(3) has been amended at Stage 2 to address a point made by the Committee about the proper operation of that subsection, and the regulations to be made under it. As amended, section 15(3) itself provides that the Scottish Ministers may refuse to entertain an application for scheduled monument consent unless it is accompanied by a certificate as to the interests in the monument to which the application relates. (This is no longer a matter which may be covered in the regulations).

5. **The Committee accordingly reports that it is content with the delegated powers in section 15(3) as amended.**

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1 Revised Delegated Powers Memorandum
Historic Environment Amendment (Scotland) Bill: The Minister for Culture and External Affairs (Fiona Hyslop) moved S3M-7710—That the Parliament agrees that the Historic Environment Amendment (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Historic Environment (Amendment) (Scotland) Bill: Stage 3

The Deputy Presiding Officer (Trish Godman): The next item of business is a debate on motion S3M-7710, in the name of Fiona Hyslop, on the Historic Environment (Amendment) (Scotland) Bill.

14:56

The Minister for Culture and External Affairs (Fiona Hyslop): Before I open the debate, I signify that there is Crown consent to the Historic Environment (Amendment) (Scotland) Bill. For the purposes of rule 9.11 of the standing orders, I advise members that Her Majesty, having been informed of the purport of the bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill.

It gives me great pleasure to present my bill to members for stage 3 scrutiny, and I am very happy to propose that the Parliament should pass it. I thank members of the Education, Lifelong Learning and Culture Committee, the Finance Committee and the Subordinate Legislation Committee for their hard work and careful scrutiny of a very technical bill; MSPs for their comments on it during its passage through the Parliament; and the organisations and individuals who provided oral and written evidence to the committee and briefings for MSPs on the bill’s provisions. The bill deals with complicated technical issues, and I am sure that all members acknowledge the helpful comments and advice that were received from the organisations that contributed to the parliamentary process.

The bill addresses specific gaps and weaknesses in the current heritage legislation framework. Those gaps and weaknesses were identified during extensive discussions with stakeholders in 2007 and in 2009, when a draft bill was subject to a full public consultation. The bill will, for example, harmonise aspects of ancient monuments and listed buildings legislation and historic environment legislation with the planning regime. It will also improve the enforcement toolkit and the ability of regulatory authorities to work with developers.

The bill is the result of a genuine consensual approach to legislation. I take the opportunity to highlight the key role that stakeholders played in helping to shape the bill and refine its provisions as the process progressed through the pre-consultation, consultation and parliamentary phases, and thank the individuals and organisations that contributed to the various working groups and seminars that were set up by Historic Scotland. Those working groups and seminars helped to shape the bill that is before us today. The engagement process that has accompanied consideration of the bill, which the Convention of Scottish Local Authorities described as “a model of stakeholder engagement”, has contributed to the bill’s relatively smooth passage through the Parliament. That is reflected in the level of support and good will that the bill has attracted from all parties since it was introduced on 4 May 2010.

I want to touch on some ways in which the parliamentary process has helped further to refine and improve the bill and elucidate its policy context. When we debated the bill’s general principles at stage 1, I gave a commitment to write to the Education, Lifelong Learning and Culture Committee and MSP colleagues to provide them with further explanatory material about certain provisions in the bill. That was done, and I hope that the committee and MSP colleagues found the information helpful and informative. In my correspondence, I commented on the process associated with issuing retrospective scheduled monument consent; provided practical information on the types of monument that the bill is specifically designed to bring within designation; touched on the certificates of immunity process; and provided details about the operation of scheduled monument enforcement notices and stop notices. I can confirm that the material that I sent to the committee on those issues will inform a revision of the Scottish historic environment policy and Historic Scotland’s operational guidance.

The stage 1 report recommended that the Government should consider the issue, which some stakeholders raised, that expertise must be available to interpret information on the historic environment. I wrote to the Education, Lifelong Learning and Culture Committee on 7 December and noted its comments in relation to the modification of the defences in the Ancient Monuments and Archaeological Areas Act 1979 by section 3 of the bill. In my response, I confirmed that those provisions relate solely to scheduled monuments and invited the committee to note that Historic Scotland, acting on behalf of Scottish ministers, deals with all matters affecting scheduled monuments, including the designation and associated consents processes. I also confirmed that Historic Scotland is the main source of advice and expertise on those matters.

At stage 2, I lodged a number of minor technical amendments that clarified a few of the provisions, and I thank the committee for its support. I also thank the Subordinate Legislation Committee for its useful and careful scrutiny, which led me to
consider some of the changes that were made. I think that I reflected at the time that it was important that we acknowledged the work of the Subordinate Legislation Committee, and, indeed, I moved amendments following its recommendations. The bill has clearly benefited from parliamentary scrutiny, so I thank those who contributed to the process.

In setting the policy framework for the bill, the Scottish Government directed that it should be drafted with the intention of avoiding placing significant new burdens or duties on private bodies or individuals, and that, in the current financial climate, the implementation costs should be kept low. I am happy to note that those overarching policy aims have been met.

Finally, although this is a very technical amending bill, I believe that it will enhance the ability of Scottish ministers and planning authorities to manage sustainably Scotland’s rich historic environment by providing authorities with a much-improved legislative toolkit to help protect and enhance our historic environment for the benefit of future generations.

As we reflected in the stage 1 debate, members have a great deal of passion for and interest in Scotland’s built heritage. I hope that that can be reflected in some members’ speeches, but it is important, in carrying out our legislative duties, to ensure that the enjoyment of our built heritage for years to come is supported by legislation that is fit for purpose and that we progress all our responsibilities effectively. I think that the bill will do that, so I commend it to Parliament.

I move,

That the Parliament agrees that the Historic Environment (Amendment) (Scotland) Bill be passed.

15:02

Des McNulty (Clydebank and Milngavie) (Lab): I lead for Labour in the debate as a substitute for my colleague Pauline McNeill, who unfortunately is ill and sends her apologies. I also apologise, because I cannot stay for the whole debate, as I previously arranged another engagement. I apologise to the Presiding Officer and to other members.

I am interested in the topic, as a former planning minister, former chair of the 1999 festival of architecture and design, and as the founder, I suppose, of the architecture and the built environment cross-party group in the Parliament. The bill addresses some issues that are familiar to me.

In the 1999 festival, we focused not only on modern architecture and design but on Glasgow’s unrivalled architectural history. It was described by John Betjeman as the outstanding mid-to-late-Victorian city, with huge diversity and richness of architectural heritage. Of course, during the period that the great buildings in Glasgow were built, we had a fantastic flourishing of architecture and design excellence, epitomised by the work of Alexander Thomson and Charles Rennie Mackintosh. When we look up in Glasgow, above the shopfronts, and see the fantastic range of design and the variety of invention, it takes the breath away at times. Probably the only city that compares with it—there is a close parallel with when it was built—is Chicago. There are interesting links between Glasgow architecture and Chicago architecture of the period roughly between 1870 and 1910.

One of the centrepieces of the year was the transformation of the derelict former Herald building in Mitchell Lane into an architecture and design centre for Glasgow—the Lighthouse. That is one of many Charles Rennie Mackintosh buildings that have been very well preserved in Glasgow through the activities of Glasgow City Council and the Charles Rennie Mackintosh Society. A considerable amount of work has also been done by Glasgow City Council and Historic Scotland to preserve other buildings in Glasgow, particularly the Egyptian halls by Alexander “Greek” Thomson, the church at Caledonian Road and some of the domestic buildings that Thomson and other architects created.

We were hindered in the process of protecting those buildings by certain circumstances, such as who owned the buildings and the insecurity of providing grants and ensuring that they were used for the correct purposes. One difference that the bill will make is that it will give much greater security to the Scottish Government and organisations such as Glasgow City Council in intervening, awarding grants and ensuring that the money is used appropriately, because it will be possible to charge owners if the money is misused.

In Glasgow, one problem is that owners can take over historic buildings and fail to maintain them and then, when they reach the point of falling down, it all becomes inevitable. Earlier intervention and the use of grants will help the process. Had the bill been in force 10 or 15 years ago, it would have been easier to deal with a number of issues that arose in Glasgow—I am sure that similar issues have arisen elsewhere in Scotland—where, despite the best intentions of the official agencies, they were unable to act as effectively as they would have liked to protect buildings. It will be particularly helpful that when public money is handed over in the form of grants, it will be possible to reclaim it if it is not used correctly.
The bill will systematise the collection and maintenance of inventories and other information about designated landscapes and historic battlefields. In Scotland, we probably have more than our fair share of battlefields—perhaps that reflects our orientation as a people and the nature of our history. I think that everyone agrees that it is important that those landscapes and battlefields are properly identified and protected. We should learn from the excellent work that is done in the United States, where civil war battlefields are well protected as historic sites and information about what happened on them has led to the development of a flourishing tourism industry in areas where the civil war was fought. That has been good not only for the economy, but for people’s knowledge of their history.

Since the Planning etc (Scotland) Act 2006 was enacted, a process of making Scottish statutory instruments to give effect to various aspects of its framework has been followed. I suppose that the bill could be seen as part of the process of drawing out the implications of the 2006 act and applying them in a particular context—in this case, the historic environment.

I am pleased that the importance of the historic environment, as well as the significance of historic buildings, in Scotland has been acknowledged. I am keen on Scottish history and the maintenance of our historic environment, and often the best way to explain it to people is to allow them to see what is left of it for themselves. If we can protect our historic environment and explain it better to people who live here and come here, we will have done something worth while.

I commend the bill, which I believe has the consensual support of all members.

15:08

Ted Brocklebank (Mid Scotland and Fife) (Con): Members might recall that at stage 1 I described this as

"a much ado about nothing bill."—[Official Report, 4 November 2010; c 30071.]  

The fact that no amendments have been lodged indicates that my judgment might not have been far off. However, since it is the mark of any civilised society that it preserves and safeguards its historic heritage, we on this side of the chamber will today support the bill, despite its limited scope. That does not mean that we do not have reservations.

We should continue to be alert to the concerns expressed by the Law Society of Scotland about section 18, which allows "any person" to apply to Scottish ministers for a certificate of immunity that states that a building will not be listed for five years following the issue of the certificate. As the Law Society pointed out, section 18 could have unintended consequences, especially as the scope of those who may apply for a certificate of immunity is to be extended to "any person". Members will know that the section was intended to assist property development, but as worded it could mean developments being frustrated by a hostile party applying for such a certificate.

Fiona Hyslop: I am aware of the Law Society’s interest. The same concerns were raised at stage 1 and considered by the committee, which took the view that there was no pressing need to address them. There always is a risk of somebody objecting to listing. A listing exemption could be granted. What kind of frustration would there be if the objector somehow had the listing granted? It would be counterproductive. I appreciate those concerns, but they have been fully exercised and debated in the committee.

Ted Brocklebank: I accept what the minister says, and I know that the committee looked carefully at section 18 and on balance accepted the current wording, but we shall have to see how it works in practice. If the Law Society’s fears are realised—as I suspect they will be—we should return to the provision at some future date when, I happen to believe, more substantive heritage legislation will be required.

The committee noted concerns in relation to other sections of the bill, some of which Liz Smith and I raised at stage 1. Those included the proposed inventories for gardens and designed landscapes—and battlefields, of course; the extension of the definition of a monument; and the liability of an owner of a listed building for expenses related to urgent work. I am grateful to Historic Scotland for getting back to me after stage 1 to flesh out its thinking on some of those issues.

As a result of that, and because I believe that a more comprehensive historic environment bill is now inevitable, we on the Conservative side of the chamber chose not to lodge amendments but to highlight heritage matters that we believe still need to be addressed.

I make no apology for returning yet again to three listing anomalies in my own region that the bill will do nothing to resolve and which I have raised directly with Historic Scotland. These problems are not unique to the area that I happen to represent.

The first concerns the plight of a farmer near Crail in Fife, whose plans to develop his own land have been stymied for more than a decade because a derelict world war two airfield covers a large part of it. The airfield, HMS Jackdaw, never saw a shot fired in anger—indeed, its last use was as a language school where potential British spies learned Russian during the cold war. In its
wisdom, Historic Scotland slapped an A listing on the whole site, and the argument has rumbled on as to how much of his own land the farmer might be able to develop. The bill will do nothing to help to resolve that situation.

Secondly, there is the case of Crawford priory, which is situated in an overgrown wood near Cupar. This unremarkable Victorian pile carries a B listing and is currently in a ruinous state. Its owner feels that it is well past saving, and the building is currently a hazard to children and others who walk in the wood. Because of the listing, Historic Scotland says that the owner must keep the building safe, while not allowing him to demolish it. However, as Historic Scotland has no funds to make any financial contribution to keeping it safe, the bill will do nothing to help to resolve the owner’s plight.

Finally, Kilrymont Road school building in St Andrews, which is a dreary example of 1960s municipal architecture, is scheduled for demolition when the proposed single-site Madras college goes ahead. By some bizarre quirk of architectural judgment, a pagoda-like edifice that is stuck on the top of that concrete barracks has won B listing, and apparently cannot be torn down. The result is stalemate, and again the current bill will do nothing to help to resolve the situation.

The bill is officially described as a technical tidying-up exercise, and I agree. What is clearly long overdue is legislation that completely updates the planning and listing procedures in relation to our historic environment. To Fiona Hyslop, who has previously indicated that she does not see the need for such legislation, I offer a seasonal and friendly reminder of the bard’s predictive message: minister, it’s coming yet for a’ that.

15:14

**Margaret Smith (Edinburgh West) (LD):** I got so carried away listening to Ted Brocklebank that I did not realise that it was my turn next.

I thank all those who have been involved with the bill, particularly those who gave evidence to us and have continued to contact us about the bill to offer their opinions. The committee clerks deserve our thanks for their efforts in making the bill process run smoothly, and I thank the minister and her civil servants for their efforts and engagement with the committee.

At stage 1, the bill received broad support. At stage 2, only a few amendments were debated. I am pleased to put on record again our support for the bill and the principles that are behind it. Ted Brocklebank is right: it is a technical tidying-up bill. I am sure that each of us could come up with anomalies of the listing system in our constituencies that act against development and are against common sense. Local debate sometimes takes place about why some places have been listed, but that goes beyond what we are debating.

We welcome the bill’s aim to address gaps and weaknesses in current legislation, as highlighted in the Historic Environment Advisory Council for Scotland’s 2006 report, which said that heritage legislation needed to be reviewed. Provisions on the recovery of grants, the recovery of debts, urgent repairs, the modification of the defence of ignorance and the extension of notices are particularly notable and should be of value in helping to preserve the environment for future generations.

I associate myself totally with Des McNulty’s points about Scotland’s battlefields. We welcome the inclusion of an inventory of battlefields in the bill. Those of us who have had the pleasure of seeing the facility at Culloden will have seen exactly what can be done in relation to a battlefield to tell Scotland’s story effectively and will know the value of that. A visitor centre of the complexity and scale of that at Culloden would not be justified for all Scotland’s battlefields, but a story of Scotland’s history can be told at the battlefield sites around the country. That is valuable.

The historic environment is all around us and contributes particularly to the character and value of all our landscapes. It gives us an important understanding of how our landscapes and seascapes have developed and a sense of how people used and travelled across our country.

In Scotland, our sense of history is particularly strong. The environment that is around us provides us with a locally distinctive character. It also provides a wide range of benefits—from the tangible effects of tourism to the less tangible boost that we get from having a sense of place and community. That is why I welcomed Karen Whitefield’s stage 2 amendment 14, which will give local authorities more power to encourage maintenance work to enhance monuments and buildings, even if they are not in danger. The swell of local popular feeling on the doocot in Karen Whitefield’s constituency highlighted well the importance of sites of interest to local people. It matters to people if a piece of local architecture or the built environment is in disrepair and is unloved and uncared for, because that says something about the heart of the community. Karen Whitefield’s amendment was welcome.

Our historic sites sit at the heart of our place making. They act as a catalyst for regeneration and provide an opportunity for people to get involved. I have commented on the role of volunteers. Research that was done in 2006 identified that more than 12,000 people throughout Scotland spend a total of 167,000 hours every
year on helping with our historic environment through their enthusiasm and creativity. I have mentioned before Cramond Heritage Trust in my constituency, which involves a dedicated group of enthusiasts who have done fantastic work over the years on the Roman fort, the iron mills and so on at Cramond. We all have such groups in our constituencies, and we owe them a big vote of thanks.

Amendment 14, which was agreed to at stage 2, will not place financial burdens on local authorities and is welcome. It is also welcome that, despite her initial concerns, the minister has not lodged a stage 3 amendment to overturn the stage 2 position.

During stage 2, Ken Macintosh moved an amendment to place a duty on ministers to give relevant bodies guidance on how those bodies could contribute to preserving the historic environment. I welcome the minister’s comments today about information and guidance that will be given.

“Heritage Counts 2010”, which was published last October, focused on the economic benefits of the historic environment throughout the United Kingdom. Many of its case studies focused on English heritage sites, but some of the figures are interesting. A key finding was that £1 of investment in historic visitor attractions generates £1.60 of additional economic activity. Another finding was that investment in the historic environment attracts businesses: one in four agreed that the environment around them is an important factor in deciding to locate—the same proportion that found access roads important. We should never underestimate the fact that, for many businesses, the historic environment around them is fundamental to their business and to attracting people to the area.

Overall, the historic environment sector is estimated to contribute in excess of £2.3 billion to Scotland. What we are doing today will assist in ensuring that that continues into the future. At a time when we are feeling the pinch—that is certainly the case for many industries and job markets in Scotland—it is noticeable that the tourism industry is one sector that is holding its own. If ever we were to turn our back on the tourism industry, it would be a very bad move in economic terms, never mind anything else. The historic environment plays a crucial part in all of that.

There is no doubt that preserving, enhancing and promoting the historic environment brings tangible benefits and value. Far from the listing and planning system being a barrier to change—which is how we see it at times—if its value is recognised and used imaginatively, the historic environment can open up real opportunities for our communities.

The reforms in the bill will improve heritage protection and create a more efficient system; one that, I hope, will widen public involvement and improve economic opportunities.

15:21

Christopher Harvie (Mid Scotland and Fife) (SNP): Some members who are my age might remember the actor Moultrie Kelsall, the man who got all the gloomy Scots roles that did not go to John Laurie. He was also a pioneer foodie and no mean architectural critic. In the columns of The Scotsman he rounded frequently on those people who were out to look at the environment and say, “There’s an auld hoose. Ding it doon!” At the time, that was no idle threat. My friend Robin Cook, a man of waspish intellect, in referring to a planning convener in Glasgow in the late 1960s, said, “That man’s real ambition is to knock down every listed building in the place.”

John Hume—a name to conjure with in architectural circles—and I made a programme for transmission by the Open University on the industrial archaeology of Glasgow. It was the OU’s first programme in Scotland. Lo and behold, within two years of doing that, most of the industrial archaeology had disappeared.

Behind the technicalities of the bill that we say farewell to today is the issue that the problems that accelerating technical change and ecological demands are posing could all too easily prejudice the future of historical and attractive buildings, unless we can find a use for them and see that they are treated and handled in ways that will enliven the public life of the places in which they are situated.

For instance, in my constituency centre of Kirkcaldy we have the beautiful art nouveau Station hotel, which would make a marvellous Jack Vettriano art gallery. No artist has celebrated the transient lives of hotels more than Kirkcaldy’s best. The building is still shuttered, and perhaps awaits the inevitable visit of a vandal that leads to outright demolition. We also have in Kirkcaldy the merchant’s house, which was restored in 2004 to the tune of £6 million and has yet to receive a tenant. The issue is not only restoration but finding uses for such property.

I am slightly dubious about the logic of the Law Society of Scotland’s briefing on the bill stressing property development. In Edinburgh, we have suffered from quite a lot of property development. I gaze at the hideous shuttered frontage of new St Andrew’s house—if ever Thatcherism had a face in Scotland, by God, that building was it—or at the Appleton tower, which disfigures what remains of
George Square. If the bill can help to prevent the building of what John Betjeman called “rent-collecting slabs”—think of the Caltongate proposals—it will have my heartfelt support.

I will make two further points. First, it is important to balance the conservation of the environment with conservation of the pockets of the people who must live in it. Often, cheap-jack modernisation methods can be applied to buildings: think of the horrible plastic astragals that are inserted into double glazing to try to make it look historical, which do not show up at all, as they do not have anything like the right proportions. Surely we can design a way out of those. On the other hand, a constituent of mine in Kirkcaldy who lives in an unlisted property near a B-listed building cannot get permission from the local council to install any sort of double glazing, even though the listed building does not have the original fittings on its windows. Inevitably, that type of bureaucracy is frustrating to authority and inhabitant alike.

Secondly, Scotland’s historic environment must be a living environment. Some landmarks are fragile—think of the appalling fate of Rosslyn chapel at the hands of Dan Brown—but our historic buildings and sites ought to be accessible to local communities and visitors alike, if their condition allows for it.

Jamie McGrigor (Highlands and Islands) (Con): Will the member take an intervention?

Christopher Harvie: No, I am just about to close.

As meeting halls, community centres and museums, many historic buildings in Scotland can and do draw together communities and root them in their living environment and in history. Just think of what I hope will be 2011’s building of the year—that amazing classical building in the middle of Greenlaw, the town hall, which stands almost within the parish of Hume. In 2011, we will celebrate the tercentenary of sinful Davey. What a magnificent place the town hall would be in which to celebrate the imagination of Scottish architecture. It could act as a sort of temple of humanism, if I may attempt a ghastly pun, in this historic year and remind us of the environment that lies everywhere to our hand in Scotland—an environment that we must and can protect.

The Deputy Presiding Officer: Although speeches should be limited to four minutes, I can give members an extra minute.

15:27

Karen Whitefield (Airdrie and Shotts) (Lab): I welcome the passing of the Historic Environment (Amendment) (Scotland) Bill today. It may not be the most exciting bill to have come before Parliament, but it will have a positive and lasting effect on the built and natural environment.

I thank those who have participated in the legislative scrutiny of the bill, including members of and clerks to the Education, Lifelong Learning and Culture Committee, of which I am convener. I also thank the minister and her civil servants for their efforts in progressing the bill. Finally, I thank the organisations that helped both the Government and the committee to shape the bill, including the Built Environment Forum Scotland, Archaeology Scotland and the Convention of Scottish Local Authorities.

As members are aware—and as other speakers have said—the bill is an amending bill that addresses issues that local and central Government have highlighted, and it follows extensive consultation by Historic Scotland. The bill harmonises the legislation that covers the environment, scheduled monuments and listed buildings. It does so by amending three existing acts: the Historic Buildings and Ancient Monuments Act 1953, to allow ministers to specify the amount of grant that can be recovered if conditions of grant are breached or a building is sold within 10 years; the Ancient Monuments and Archaeological Areas Act 1979, to amend certain provisions relating to scheduled monuments; and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, to amend provisions on listed buildings.

Members will recall that at stage 1 few concerns were raised and that only a handful of amendments were lodged for stage 2. One of the amendments, which has already been spoken about by my colleague Margaret Smith, was lodged by me—rather unusually, for a convener. It related to a doocot, and the minister herself suggested that it will forever be known as the doocot amendment. The idea for it came from representations that I had received from a constituent, who had experienced some difficulty in his attempts to ensure that an historic doocot adjacent to his property was properly maintained by its owner. The local authority has attempted to reach an agreed solution with the property owner, but with no success. The council claims that current legislation does not enable it to undertake works and then re-charge the owner.

My amendment was an attempt to improve the situation—not to force owners of historic monuments or listed buildings to undertake unnecessary work, but to ensure that we step in at a much earlier stage sometimes, before a building falls into such a state of disrepair that it is dangerous. There was some confusion about interpretation of the legislation, and some local authorities felt that further clarity was necessary.
I thank members of the Built Environment Forum Scotland, who provided assistance with the drafting of my amendment, and I also thank Archaeology Scotland, which supported it. I was pleased that a majority of committee members agreed with the amendment. I am particularly pleased that the minister, despite her reservations about the amendment’s being unnecessary, has chosen not to attempt to overturn it at stage 3. My constituents in Cairnhill in Airdrie will be pleased and relieved, and they will be looking forward to having their concerns addressed when the bill becomes an act.

As I stated at stage 1, there are a number of reasons why it is important that we protect and conserve our natural and built environment. First, it is right that we preserve relics and monuments for the value that they provide in understanding our history and our cultural heritage. In addition, many buildings, monuments and other sites possess significant intrinsic beauty and aesthetic merit, and for that reason alone they deserve our protection.

Finally, and further to my previous two points, there is the benefit that our cultural heritage bestows upon the Scottish economy. An illustration of that is provided in the briefing paper from the Built Environment Forum Scotland for today’s debate, which points out that the historic environment sector is estimated to contribute in excess of £2.3 billion to Scotland’s gross value added, the bulk of it coming from tourism expenditure.

I welcome the passing of the bill, which deserves the Parliament’s full support.

15:33

Willie Coffey (Kilmarnock and Loudoun) (SNP): A friend of mine with whom I had lunch today asked me what the Scottish Parliament was talking about this afternoon. I said, “We’re debating the Historic Environment (Amendment) (Scotland) Bill.” He said, “Nothing new there, then.”

As is demonstrated by the absence of amendments at stage 3, the bill has been developed by the Parliament in a consensual manner to address an issue that, although it is fairly technical, has a great impact on the communities that we serve.

The need for a significant refresh and consolidation of law in the area can be seen from the fact that the three principal acts that will be amended by the bill date from 1953, 1979 and 1997. Over the 60 years since the passage of the first of those acts, a great deal has changed in how we view our environment and the threats that face it, and in our approach to dealing with the landmarks that we have created over many centuries.

The consensus around the bill developed before it reached Parliament. It grew out of joint working involving both of the national agencies concerned—Historic Scotland and the Historic Environment Advisory Council for Scotland—as well as Scotland’s local authorities, which bear an increasing level of responsibility for managing all aspects of our environment, including the preservation of Scotland’s historic buildings and places. All those bodies are on the front line when the demands of today’s society and economy clash with the objective of protecting—and, wherever possible, providing access to—Scotland’s rich historic environment. As they discharge their responsibilities, it is right that they have a legislative framework that is clear in its objectives and that properly allocates both the responsibility and the powers that are needed to achieve those objectives.

I will give an example from my constituency of the challenges that those who are working to protect our historic environment face. The King’s theatre—or the ABC cinema, as it is probably known to most people locally—was built in the early part of the 20th century and could hold about 2,000 patrons for a single show. It hosted operas, variety shows and musical extravaganzas, and it invited minors—young people—to attend on Saturday mornings in advance of the showing of a movie. I admit to being one of the kids who turned up with a sword in advance of the “Ivanhoe” movie. The theatre showed some of the early moving pictures and, by 1937, had caught up with changing fashions and so became a cinema, and added a balcony.

Unfortunately, the interior of the building was devastated by fire in 1975, having been converted to a multiplex. It was eventually closed in 1999 and, sadly, remains out of use to this day. The building retains its fine Edwardian baroque frontage—I know because it faces my constituency office. However, despite being a grade B listed building, the old theatre is simply rotting away inside. A fine specimen of a tree now grows out of the frontage and is causing unknown damage. Despite the efforts of East Ayrshire Council, the owner has allowed the tree to continue growing. Therefore, I welcome the fact that part 3 of the bill will strengthen local authorities’ ability to deal with buildings that are simply being allowed to deteriorate, and to recover their expenses. I look forward to the act coming into effect, at which point I will press for the strongest possible action to arrest the decline of that fine old building.

That building also demonstrates the need for flexibility. What exactly would we be preserving?
Much, if not all, of the original interior has already disappeared through fire, redevelopment and neglect. We need a system that is flexible enough to secure the retention of that which is worth retaining, even if that means a degree of modification in the nature of the building’s use or in the restoration techniques or materials that can be used. In recent years, local authorities have been encouraged and supported in taking greater responsibility for the historic environment. I encourage the continuation of that approach as the act is rolled out, in the hope that the old King’s Theatre—or the ABC cinema—in Kilmarnock can find a new purpose befitting its historic importance to the town.

15:37

Karen Gillon (Clydesdale) (Lab): I welcome the opportunity to participate in the debate and I thank the committee for the work that it has done, especially because it worked so well in cooperation with the minister that there is no need for us to discuss amendments at stage 3.

All of us, wherever we represent, appreciate the importance of the historic built environment, whether it be the national icons such as the Borders abbeys, New Lanark and Edinburgh castle or the smaller, more local icons that communities cherish, which tell stories of local history that sometimes have national or even international significance. Historic buildings can provoke strong emotions, either in those who believe that they must be preserved at all costs, or in those who are keen to pull them down.

Having listened to Ted Brocklebank’s speech, I again lament his decision to stand down at the next election. Surely, a member’s bill on listing would have been worth coming back for. Maybe his successor will take on the task. All of us could provide similar examples from our constituencies of the listing system having detrimental effects on development or on communities, but perhaps that is for another day. Maybe nobody will want to take on that little gem.

As other members have done, I congratulate Karen Whitefield on the success of her doocot amendment—as it will now always be known. Many of us can think of examples of historic buildings in our constituencies that are not yet falling down about us or that have not yet reached such a state of wrack and ruin that local authorities are able to intervene, but about which there is real concern that, if steps are not taken, that will happen. Willie Coffey just gave us such an example from his constituency.

Carluke parish historical society, in my constituency, has been trying for many years to get action taken on High mill there, but that has not been an easy task, due to the mill’s having a hostile owner, if I may say that. That is why I welcome the provisions that have been introduced by Karen Whitefield’s amendment, and I hope that we will be able to make some progress as a result of the bill and the amendment.

Communities cherish those kinds of historic buildings, which tell the story of the community, of the people who lived there and made the community what it is, and of the industry that went on there. It is important that we are able to keep those buildings and that they are not only historic sites but are, as Willie Coffey said, capable of being developed and used as something else, so that they can be used by a new generation in appropriate ways.

I welcome the fact that the bill will standardise legislation. It is important that we get things standardised again in this area.

It is important that we have an opportunity to put on record again this Parliament’s support for the historic built environment and to say that it is not just bricks and mortar, but something that tells the story of who we are and where we have come from.

I am proud to represent New Lanark, which tells the story of Scotland’s social history and marks the fact that we no longer send children to work in mills, or anywhere else, at the age of eight. Our social history is part of our historic built environment—we cannot separate the two. If we forget the history of the buildings, we might forget the history of the people who worked and lived in those buildings.

I am thankful that we have taken forward this piece of legislation, because the buildings around us shape and frame the people we are and the country we live in.

I am happy to have been able to participate in the debate and will support the bill at 5 o’clock tonight.

15:42

Ian McKee (Lothians) (SNP): I declare an interest, as I am the occupier and joint owner of a property that is listed as being worthy of statutory protection under the provisions of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

When I spoke at the stage 1 debate last November, I took the opportunity to berate authorities, including the University of Edinburgh, for the architectural vandalism that has defaced our marvellous capital city in the past, and for some of the eyesores that had taken the place of Georgian or Victorian good taste. The subsequent reaction to that contribution was interesting, with
some agreeing whole-heartedly while others, assuming that I was some sort of opponent of modern architecture, said that I wanted to preserve the past in aspic. Indeed, there was a long correspondence in the local newspaper on the subject.

Before going further, I will clarify and correct a misunderstanding that arose at that time. I want to make it clear that my criticism of the University of Edinburgh was of the university of 50 years ago, not the wise and enlightened authorities of today. I need to make that point before I go to the next graduate meeting.

**Jamie McGrigor:** Does the member sympathise with many of my constituents in Acharacle, who will be disappointed that the bill will do nothing to address the issue of Castle Tioram, whose owner has spent 14 years trying to restore a Scottish heirloom of great importance, which is falling into the sea?

**Ian McKee:** I share the member’s concern about Castle Tioram and acknowledge that the bill does not address such matters. However, I support what is in the bill. The issue that Mr McGrigor raises could be the subject of the bill that Ted Brocklebank’s successor might bring to the next session of Parliament.

One of the most difficult tasks that we face in this field is to sort out the wheat from the chaff and decide which buildings can be preserved and which can make way for the architecture of today and tomorrow. In a way, the older a building is, the easier it is to do that, partly because a really old building, by its very survival over the ages, has proved a point and also because tastes have settled. However, it is much more difficult with relatively new buildings.

In the stage 1 debate, I mentioned with distaste what I consider to be the neo-brutalist monstrosity that is the New Club building in Princes Street, which replaced a splendid Victorian building, only to be contradicted by an architect who contends that it is a marvellous example of the genre. He might be right, so if I had any influence in the matter of preservation, I would give way on that point. However, even I cannot be convinced of the merits of slab buildings such as the soon-to-be-demolished New St Andrew’s house or the southern facade of Argyle house in Castle Terrace, which was erected in 1968 and which has been the home of various Government departments. However, others can be convinced and the debate goes on.

It is important that the bill harmonises existing legislation. That is in response not only to consultation, but to the Historic Environment Advisory Council for Scotland’s “Report and recommendations on whether there is a need to review heritage protection legislation in Scotland”. The bill works in harmony with non-legislative steps, such as the growth in partnership working between Historic Scotland and local authorities, and so gives our historic environment increased protection. Among other things, it will lower the bar from damage of scheduled monuments to disturbance of them; bring fines for damage to monuments into line with those for environmental crimes that are regulated by the Scottish Environment Protection Agency and Scottish Natural Heritage; and give ministers greater rights to require the reversal of unauthorised works.

Our historic environment is not just a pleasant facility for those of us who are lucky enough to live in Scotland; it is also one of the most potent attractions for visitors and has been estimated to contribute more than £2.3 billion annually to the national gross value added element of our gross domestic product. The Built Environment Forum Scotland estimates that in 2008, 12,449 volunteers carried out a total of 167,721 hours of work, as Margaret Smith mentioned. That illustrates the enthusiasm that people have for our historic environment. I support the bill and commend it to the Parliament.

15:47

**Alasdair Allan (Western Isles) (SNP):** The lack of stage 3 amendments to the bill is, I am sure, as much a tribute to its perfection as proposed legislation as it is to the unassailable nature of the arguments that were advanced in its favour at stage 1, which I will try not to repeat too tryingly today.

Maintaining historic buildings is not a simple matter and is certainly not the same as merely preserving historic ruins. The need for pragmatism and adaptation is clear, if our built heritage is to have a function in the future. Similarly, the relevant legislation needs to adapt and survive.

I hope that the bill will considerably improve the protection that is given to our built environment in a way that does not place unreasonable burdens on private stakeholders. However, the bill has at its core the concept of public benefit. For instance, it will explicitly enable the Scottish ministers to recover grants in the event that specific preconditions of those grants are violated. That is one of the many examples of how the bill takes a responsible stance on public expenditure.

One innovative aspect of the bill on which I would like to dwell briefly, as other members have done, is the inventory of important Scottish battlefields. There was discussion in the committee and elsewhere about vexed questions of definition and disputed locations of battlefields. I can think of one such dispute in my constituency.
that led ultimately to the comment by one person whom I know that, if the battle had taken place on the site that was suggested, any graves would long since have fallen victim to generations of peat cutting.

Those occasional difficulties of definition aside, however, it must ultimately be a positive step to recognise formally the existence of battle sites that are of national importance. The inventory of battlefields will give formal recognition for the first time to those sites, many of which are central to Scottish history and, in some cases, to our existence as a nation.

We are fortunate that some battlefields, such as the scene of King Robert the Bruce’s victory at Bannockburn during the wars of independence, have a memorial and a visitor centre and are well known to the public. Incidentally, and unsurprisingly, I do not share the well-publicised horror that some members have expressed that schools run school trips to see Bannockburn and are encouraged to do so by the Scottish Government.

However, many battlefields are less well known and have been subject to various changes in land use and to uncontrolled metal detecting, which can raise archaeological as well as ethical questions. An inventory of battlefields will start to address those issues, but in a pragmatic way. If a battlefield has been ploughed or grazed since the day after the battle took place, which most of the ones in Scotland probably have been, there is no suggestion that the bill seeks to get in the way of agricultural activity continuing.

It is clear that there is wide support for the bill. The Built Environment Forum Scotland, for one, has strongly endorsed it, saying that it will go “a significant way” to ensuring consistency between elements of the historic environment legislation and the planning regime, as others have pointed out. The organisation points out that even if Scotland’s built environment did not have an incalculable cultural value, it makes an enormous contribution to our country’s economy.

The bill is a reasonable and sensible means of updating and clarifying in law the protection that, as a country, we rightly extend to our built heritage. In that spirit, I commend it to the chamber.

15:51

Iain Smith (North East Fife) (LD): I am pleased to wind up on behalf of the Liberal Democrats. It is slightly concerning that when I started my research for my speech, one of the first things that happened was that a note from the official reporters during the stage 1 debate fell out of one of my documents. That gives an indication of how often I have looked at them since then.

Nevertheless, it is an important bill, which the policy memorandum describes as

“an amending piece of legislation which consists of a series of provisions identified by central and local government, and during the course of discussion with other stakeholders during 2007, which followed the publication of a report by the Historic Environment Advisory Council for Scotland on the need for a review of heritage legislation in Scotland.”

That report was produced in 2006.

The policy memorandum goes on to say:

“The Bill is designed as a tightly focused technical amending Bill to improve the management and protection of Scotland’s historic environment. It has been drafted with the intention of avoiding placing significant new burdens or duties on public or private bodies or individuals and implementation costs are expected to be minimal.”

In that context, it is understandable why so few amendments were needed at stage 2 and why none was needed at stage 3. The bill has been in gestation for a considerable length of time and will provide very little in the way of additional burdens. I welcome the work that Government ministers and the committee have done to ensure that the bill has got to this stage without the need for significant amendment.

Many things can be said in today’s stage 3 debate that were probably said in the stage 1 debate. I begin by referring to some of the points that my colleague—I say “colleague” in the sense that the region that he represents includes my constituency—

Ted Brocklebank: What about the coalition?

Iain Smith: We are not in coalition up here, Ted.

The situations at Crail airfield, Crawford priory and the Kilrymont Road school building—which particularly irks me—that he referred to are all ones that I could equally well refer to.

Another example that I will mention is the Scottish Fisheries Museum, which hoped to put on the side of its building a wheelhouse that would have overlooked the sea and allowed people to play with some of the navigation equipment and see what was in the Firth of Forth. It was not allowed to do so because the museum is a listed building in a conservation area. That was a piece of nonsense, because it would have been an excellent new facility that would have enhanced the area, but Historic Scotland got in the way.

I well recollect from my previous life as a councillor that when Falkland High Street was due to be repaved, the council was keen to put in some nice granite setts but was told by Historic Scotland that it had to keep the existing rather nasty concrete pavement, which had probably
been put there in the 1960s, because it was a conservation area. I wondered whether it also had to keep the potholes and the other things that it was trying to get rid of. That sort of nonsense gives Historic Scotland a bad name. I hope that the minister and others are working to deal with that.

We need to consider issues that were mentioned during the stage 1 debate, such as how we can put double glazing and improved environmental measures into historic buildings to bring them up to modern standards while preserving their basic characteristics. One of the reasons for listing is that people do not want building redevelopments that are sometimes described as vandalism, but sometimes listing can amount to vandalism in that it can prevent sensitive redevelopment of buildings. Buildings are living creatures that need to be adapted and changed to meet modern needs and uses. On Leith waterfront, buildings that used to be warehouses and bonded stores have been converted into flats, shops and restaurants, thereby breathing new life into that community. Had they been left as historic but empty warehouses, that community would have been dead. Who would want to go to see Leith waterfront if it was a bunch of derelict warehouses? Castle Tioram is another example of where we might need to be a bit more imaginative.

I conclude by mentioning the wider review of environment legislation that will be needed, perhaps during the next parliamentary session. The minister might not be too keen on that, but it was one of the things that was referred to by George Reid in his report for the National Trust for Scotland, “Fit for Purpose” when he said that there was no “immediate need for new NTS legislation” but that

“In several years’ time, however, a new Act of the Scottish Parliament will be necessary to codify the reform process and to address any other issues which NTS then feels appropriate.”

In that, George Reid was referring to some of the wider issues that his report referred to about the need for environmental bodies, such as Historic Scotland, the National Trust for Scotland and the Historic Houses Association for Scotland to work together to help to protect our historic environment. That wider review is necessary and the next Parliament will have to come back to it.

15:55

Elizabeth Smith (Mid Scotland and Fife) (Con): This has been a largely consensual debate on many fronts, which is perhaps not surprising because it would be very hard to argue against the main principles of the bill. It has also been a very interesting debate and, as Ted Brocklebank said, it must continue. The fact that there have been so few amendments is becoming a major debating point, but it does not suggest that parliamentary scrutiny has been any less rigorous. It has been more rigorous, and we should bear that in mind.

The bill was set out as a technical amending bill rather than one of substantial import and substance, but it has encompassed some extremely important points of detail and it has raised important issues about legal interpretation. I will come back to that later.

As many members have said this afternoon, Scotland’s historic environment is the very precious fabric of this country. It is one of the most defining aspects of Scotland and it can bring enormous social and economic benefit, most especially in the form of visitor income. The bill matters even if it will not necessarily hit the headlines in the same way as many other items of parliamentary legislation would.

Of course, the minimal cost involved was also in the bill’s favour. That was a pleasant change as far as the Government was concerned. Perhaps that is one reason why the bill has progressed a little more smoothly than most.

When it comes to the front line in the protection of our historic environment, there are many legal issues. At stage 1, many people made a powerful case for the general principles of the bill and its prime objective, which is to preserve and enhance Scotland’s historic environment for future generations. They made some points of legal detail. The comments were informed, and I pay tribute to the many people who gave us evidence and played a supporting role. Their deliberations were balanced and informative, and the briefings that we have received since have also been helpful.

I note the comments, made by various members, about there being a need for clarification in several areas and perhaps a little need for the streamlining of the administration of our historical environment. That point was picked up by several speakers during today’s debate and by several key stakeholders throughout the earlier stages. There can be no objection about the need for greater clarity, especially when it comes to the interpretation of existing legislation, notwithstanding the current need to make the legislation compatible with the Valletta convention.

For example, at stage 2 there was an interesting debate surrounding amendment 14—the doocot amendment—and what circumstances have to pertain before a local council can or, perhaps more important, should use its powers of intervention. The committee convener raised the
issue following a constituency issue that had questioned what constituted a state of danger. The minister was very clear in her evidence on 15 December 2010 that powers exist to do something about that, but committee members needed to make up their minds about whether they were being used appropriately. That is quite an important issue as we bring the bill to its conclusion. There seemed to be some doubt in the minds of various councils, so there was ambiguity on that point. We should bear that in mind for the future.

Secondly, there was much debate about the defence of ignorance in section 3, particularly the possibility of all but removing the defence. There are genuine situations in which human error can occur. We had to be conscious that the problem could be compounded if a lack of clarity about what constitutes an historic monument continues.

Thirdly, there was the issue of the production of certain inventories. Like any taxonomy, they are open to interpretation—a point made by others in their stage 1 contributions. Although I would argue that difficulty should never be a reason for not doing something that is worth while, we urged caution when it came to section 11, where the bill attempts to deal with responsibilities.

Ted Brocklebank made the point that the jury is still out, not least because of some of the divisions of opinion that exist between the committee and stakeholder groups. Notwithstanding that, we give our full support to the bill.

16:00

Ken Macintosh (Eastwood) (Lab): I shall start by making the point that all my Labour colleagues and, I think, every other speaker has made—we welcome the bill. It is a technical, amending measure that is tightly drawn and, in the Government’s own words, tightly focused, but it will help to harmonise existing legislation, close the odd gap or loophole in the law and clarify the grant recovery process. Perhaps the most significant and welcome addition is the new statutory duty to compile and maintain inventories of battlefields, historic gardens and designed landscapes.

Like others, I thank all those who gave evidence on the bill, our clerks and drafting team, and the minister and her team. Like Karen Whitefield, I give a special mention to the Built Environment Forum Scotland, which gave a lot of its time at stage 2.

I have made it clear from the outset that we welcome and support the bill because I want to use my remarks in closing the debate for Labour to highlight the worries that remain, despite the consensus on the bill. Even after we pass the bill this afternoon, I am not convinced that we will have sent out a strong or clear enough message about the importance of the historic environment or that we will have done enough to challenge the negative attitudes and prejudices that exist.

The bill makes a number of welcome reforms, but it is another Government proposal that comes without a financial resolution. That is a crucial point, because one of the key drivers behind the bill was the desire to ensure that no additional costs are placed on local authorities. This is an incredibly difficult time for all those in charge of public services and budgets. No one here disagrees with the policy intention, but the desire to ensure that the bill came with no added costs established the limits of the bill’s ambition from the outset.

The bill was never going to be anything other than an attempt to tidy up legislation, and to my mind it shies away from tackling any underlying concerns about our historic environment and the protection it should enjoy. Ted Brocklebank outlined the fact that a number of issues are still to be tackled, as did Iain Smith in his closing remarks by quoting George Reid’s comment that we will have to return to the issue. Even Ian McKee, in reply to Jamie McGrigor’s intervention, accepted that the bill does not address some of the problems that face us today. I believe that the bill is worth while and non-contentious but ultimately unambitious, and I argue that we should be doing more to protect and enhance our historic environment.

We are lucky to live in an incredibly accessible historic environment. As many members have emphasised today, our heritage is important to us and, if I may say so, impressive. We have an unrivalled written, visual and archaeological record of our past going back centuries—not in the shape of museum pieces but surrounding us in our everyday lives. In his opening remarks, Des McNulty talked about the diversity and rich architectural heritage of Glasgow, but when I was walking down the Royal Mile this morning to Parliament, with the new town to the north and the closes of the medieval city of Edinburgh running off either side of the street and with Holyrood palace and the remains of Holyrood abbey right beside this iconic building, I found it difficult not to be impressed by that history in the context of a modern, dynamic and purposeful city.

This is a history and environment that draws people to Scotland and is undoubtedly a mainstay of our tourism industry. That point was made by both Karen Whitefield and Ian McKee, who talked about the £2.3 billion that it may contribute to our economy. However, it is also a heritage that matters to those of us who live, work and wish to raise our families here—to know who we are.
Karen Gillon put the point nicely when she said that our historic environment helps to shape and frame the country and people we are.

Having said how impressive I believe our historic environment is, I must admit that, in looking at and taking evidence on the bill, I could not help but be struck once more by the fact that as humans we are simply scratching the surface of the land that we inhabit and inherit. There are ancient structures to see, including medieval castles such as Dirleton castle just down the road and the burial chambers in Orkney, but much more of our past, however majestic in its own day, has already crumbled into decay.

The monuments and historical artefacts of our predecessors that do exist, when uncovered, often call to mind the hollow words of Shelley's Ozymandias:

"Look on my works, ye mighty, and despair!"

We need to consciously choose and act to protect that from the past which we deem important, not for the ego of those who built it, but for our own sake and for future generations.

There are plenty of philistines. We have only to look at our high streets to see that, whatever our intention as expressed in the Parliament, it is not universally shared. I was struck by the number of speakers this afternoon who were able to list the failings and difficulties in our planning system. Ted Brocklebank did that in his opening speech, but so did Professor Harvie, Willie Coffey, Karen Gillon and Jamie McGrigor. They all highlighted the fact that there are difficulties with the listing and planning system as it operates at present. Main streets in Scotland have become bland and homogeneous. They are often indistinguishable from each other. There are examples of that even here, in historic Edinburgh. George Square was alluded to by Dr McKee, but Princes Street is hardly testimony to a commitment to our historic environment.

It is especially worrying that the expertise that is needed to make judgments about what is worth keeping and what is not is in danger of being lost. I will refer to a couple of surveys. The first was done by the Institute of Historic Building Conservation, which is the professional body for conservationists. Its director, Séan O'Reilly, said:

"The current investigation reveals conservation services that are teetering on the edge. The cutbacks that we all see coming, if not carefully directed, will disenfranchise from the democratic planning processes many of the local communities that value and help care for their historic places."

We have heard concerns even more directly from a Government agency. The research by the Historic Environment Advisory Council for Scotland is a couple of years old, but having surveyed local authorities, the council stated:

"the survey and case study interviews showed that the workload focus was on meeting statutory requirements and even this was not at desirable levels, for example: record keeping and monitoring were not as good as they should have been; availability of expert advice was restricted; enforcement activity was very low ... In relation to more proactive activities, the ability of many authorities to work up new projects, seek support funding and intervene to save/improve buildings was limited."

It is a rather worrying time and these are difficult decisions. We get attached to buildings, and judgment is required to make decisions about them, but when public and local authorities are faced with cuts and savings to be made, does anyone think that the archaeology services will be kept or given the same recognition as education or care for the elderly?

On top of the need to make informed choices as to the significance of certain buildings, we were reminded in evidence that the vast majority of our historic environment is not listed, recorded or scheduled. In some cases it has to be unearthed and identified. We seem to be reliant on television shows and bidding wars against other parts of the country to protect even the most high-profile buildings and structures.

To conclude, there are a number of issues that will continue to need our attention, but the bill marks a step forward and it is to be welcomed by everyone in the Parliament.

16:08

**Fiona Hyslop:** I thank members for a lively, informed and interesting debate. Although we send Pauline McNeill our best wishes, I think we benefited from Des McNulty’s experience and his recollections of the experience of Glasgow. He made the point, as did Ted Brocklebank, that whatever criticisms there might be of the scope of the bill, it contains practical measures. Indeed, he reflected that, had those measures been in place 10 or 15 years ago, some of the practical issues that he mentioned would have been addressed.

The debate has been constructive and the discussion has clearly demonstrated the extent to which we all care about the appropriate protection and management of Scotland’s historic environment. I have been struck, as I was at stage 1, by members’ affection, passion and loyalty to their sense of place in their communities, and by how, as MSPs, they seek to promote their areas. That is important. I am happy to note that there is broad support for the bill throughout the chamber and I have enjoyed listening to the comments that colleagues have made.

I want to comment on the information that will be provided about the bill. I reaffirm that the
legislation will be accompanied by an awareness-raising and education programme, which will be taken forward by Historic Scotland. The process has begun. Members might be interested to know that, as part of the programme, the Scottish Government has produced an information booklet in liaison with key stakeholders called “Managing and Protecting our Historic Environment: What is Changing? The Historic Environment (Amendment) (Scotland) Bill Explained.” The booklet provides readers with an overview of the existing historic environment protection regime and sets out the changes that will be introduced by the bill. It can be found on the Historic Scotland website.

We will also target owners and occupiers of scheduled monuments to raise awareness of the bill’s modifications to defences with regard to unauthorised works affecting those monuments, and my officials will consult stakeholders on the most effective and efficient methods for taking all that forward.

However, in closing, I want to address some of the points that have been raised in the debate. Karen Gillon, Margaret Smith and others touched on the central philosophical issue of telling the story of Scotland and the relation between people and a sense of place. Buildings reflect the story of the people in a place and we must ensure that we bring those forms of identity closer together. Indeed, that is one of the reasons why I promoted and chaired a Historic Scotland seminar called “My Home - My Place - My Scotland” that brought together the different people who can tell the story of Scotland through the built environment. If we can mobilise everyone in an area to do that, we can make a big difference.

Ted Brocklebank: As far as philosophy is concerned, does the minister agree with my view that one of the problems with Historic Scotland, particularly in recent years, is that it appears to have been more interested in preserving sculpted ruins than in developing organically some of the buildings that are important in our past? Should that not be looked at more carefully?

Fiona Hyslop: As part of my leadership in this area I have insisted that Historic Scotland looks at how it behaves and what it is doing. I want to reassure the member about its evident approach to some of the areas of interest that members have highlighted. The organisation’s officials are more than happy to meet members of this chamber and local authorities and, indeed, have recently done so in relation to Crail and the St Andrews case. I also reassure Jamie McGrigor that although the case for Castle Tioram has been rejected in the past and although I cannot prejudge the result of any discussions, Historic Scotland has made a fresh approach on the issue and is actively engaging with the owner on a number of solutions. It is important to put that on the record.

As for the need for legislation, I think Iain Smith might be in danger of misinterpreting George Reid’s comments, which were specifically about the governance of the National Trust for Scotland.

The subject of battlefields is very interesting, because the issue there is not just the structures themselves but the fact that they are catalysts for tourism. Indeed, the references to the US civil war and Alasdair Allan’s point about the Western Isles demonstrate what could be delivered in that respect.

I am sure that Karen Gillon is aware of this, but the factors to be taken into account in listing and scheduling decisions are set out in the Scottish historic environment policy document. However, there must be more openness, transparency and understanding in that respect and, indeed, the ability to challenge decisions must exist. It is not that we simply seek to stop things happening, but that we have a better understanding of what is going on.

Karen Gillon: People feel frustrated partly because they do not know what goes on. I realise that a whole process has to be gone through but people are still finding out after the fact or are not finding out in time that a building has been listed. That is leading to frustration. I simply believe that there is more to be done in that process.

Fiona Hyslop: I take the point, which is why, with regard to scheduled monuments, the bill contains a provision to proactively ensure that people who are known are contacted. I believe that that represents a sea change.

I thank the Parliament and my colleagues on the Education, Lifelong Learning and Culture Committee for their invaluable support during the bill’s passage. Moreover, I extend thanks to all the organisations that have made constructive contributions and look forward to including them in continued dialogue to revise SHEP, and to working with them as partners in the bill education programme. We will also consult on the suite of regulations that will be introduced to accompany this bill once enacted.

I want in particular to thank my bill team in Historic Scotland for their hard work throughout the legislative process. The committee has acknowledged their responsiveness to certain issues that were raised during stages 1 and 2.

As I noted in my opening speech, the bill addresses the specific gaps and weaknesses in the current heritage legislation framework that were identified during extensive discussions. It will make a good system better and improve the
regulatory authorities’ ability to work with partners to manage Scotland’s unique historic legacy.

In voting for the bill, we reaffirm our commitment to the appropriate care, protection and management of our rich historic environment for this and future generations. However, we cannot and must not be complacent; we must ensure that we channel our passion for our built environment constructively and always look at how we might improve provision. After all, we are stewards of that process and must take that responsibility seriously.

I ask that members support the motion and approve the Historic Environment (Amendment) (Scotland) Bill.