HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

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 skills\(^1\), 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

---


\(^2\) 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)
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

Environment Advisory Council for Scotland (HEACS) on the need for a review of heritage legislation in Scotland³.

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.⁴

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

---

³ The Historic Environment Advisory Council for Scotland (HEACS) Report: Whether there is a need to review heritage protection legislation (August 2006). [Link to HEACS report]

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”).

---

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
6 The Historic Scotland website can be accessed at: 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
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
9 More information on National Outcome 12 may be found at 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.
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
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.\(^\text{11}\) HEACS reported in August 2006, recommending a review of heritage protection legislation.\(^\text{12}\) 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.\(^\text{13}\) 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”.\(^\text{14}\)

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

---

\(^{11}\) 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
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 Review.\(^{17}\)

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. 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), 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\textsuperscript{18}. The responses to the consultation on the draft Bill indicated generally strong support for the provisions and the underlying aims of the Bill.\textsuperscript{19} In particular, respondees 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:

\begin{quote}
\textit{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)}
\end{quote}

\begin{quote}
\textit{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)}
\end{quote}

\begin{quote}
\textit{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).}
\end{quote}

\begin{quote}
\textit{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).}
\end{quote}

\begin{quote}
\textit{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).}
\end{quote}

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

\textsuperscript{18} A copy of the consultation document can be found at: \url{http://www.historic-scotland.gov.uk/aclb-bill.pdf} The consultation document was sent to 359 individuals and organisations and attracted 47 formal responses. These can be found at: \url{http://www.historic-scotland.gov.uk/index/about/consultations/consultation-responses-bill.htm}.

\textsuperscript{19} The Analysis Report on the consultation can be found on Historic Scotland’s web site at the following address: \url{http://www.historic-scotland.gov.uk/index/about/consultations/closedconsultations.htm}
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

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

---

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
22 Details of access to grant-funded properties may be found at: 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...
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

---

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
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

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. 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

---

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)

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 projects.
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. 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 Inquires 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

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).
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

POLICY MEMORANDUM


Applications for reproduction should be made in writing to: Information Policy, Office of the Queen’s Printer for Scotland (OQPS), St Clements House, 2-16 Colegate, Norwich NR3 1BQ, or by e-mail to licensing@oqps.gov.uk. OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley