Historic Environment Scotland Bill

The Law Society of Scotland’s response
April 2014
Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society Committees which are made up of solicitors and non-solicitors and ensure we benefit from the knowledge and expertise from both within and outwith the solicitor profession.

The Society welcomes the opportunity to respond to the Scottish Parliament's Education and Culture Committee’s call for written evidence with regard to the Historic Environment Scotland Bill and should like to provide the following comments.

General Comments

The Society’s Planning Law Sub Committee has met with the Scottish Government’s Historic Environment Policy Unit to discuss the introduction of this Bill and the accompanying Strategy.

This provided us with an opportunity to consider certain aspects of the Bill in relation to the planning system.

The Society is grateful for having been afforded this opportunity by the Scottish Government’s Historic Environment Policy Unit and is keen to assist further in this regard.

We note that no specific provision is made to allow Historic Environment Scotland to apply for charitable status as this is not necessary. The Policy Memorandum makes clear that this ultimately will be a matter for the Board. However, it is noted in paragraph 56 of the Policy Memorandum that the intention is to dis-apply section 7 of the Charities and Trustee Investment (Scotland) Act 2005 which we understand is intended to facilitate the process of such registration accompanying the Bill.
We are aware that other bodies working in the sector are concerned about this issue and the possible “competition” for charitable funds. We are also aware therefore that there are significant demands on charitable funds so understand why there might be such concerns (without specifically commenting on whether or not these concerns are justified).

We are however concerned about the different roles the new body will have and whether these will result in conflicts of interest or conflicts in functions. The Policy Memorandum properly and fairly acknowledges this as an issue but one to be addressed by appropriate processes.

However, Historic Environment Scotland (possibly with charitable status) is to carry out the functions of Historic Scotland and Scottish Ministers and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) (subject to certain exceptions) and be responsible for investigating and caring for the historic environment, and managing collections and in doing so has specific functions. In addition, it may support and assist others exercising functions in respect of the historic environment including providing financial support and assistance. Powers are given to enter onto land to inspect akin to powers available to planning authorities (and obstruction of the exercise of these powers will result in a criminal offence). The new body will also have powers in relation to statutory processes including scheduling and listing. As noted above it is intended to dis-apply section 7 of the Charities and Trustee Investment (Scotland) Act 2005 to permit the Scottish Government to exercise the indicated degree of control in respect the new organisation even if it has charitable status.

We accept that the decision about charitable status ultimately is one for the new board. Meantime, we question the extent to which it is appropriate for Historic Environment Scotland to fulfil functions which are essentially statutory as a charity.

Of more significance as far as we are concerned is the risk of conflict arising from the functions to be carried out by the new body. For example, listing of a building may be of significance in respect of the availability of grants and other financial issues. Issues may arise about the role of Historic Environment Scotland in that process if at the same time it is making grants or indeed potentially seeking grants as a charity. We are concerned about
the issues that may arise and whether it is sufficient to suggest these can be dealt with by appropriate processes.

With reference to the Scottish Parliament’s Education and Culture Committee’s call for written evidence, the Society’s Planning Law Sub Committee should like to respond to the questions contained therein.

Question 1: How will the creation of Historic Environment Scotland held to improve the overall management and promotion of Scotland’s historic environment? Will it help to make Scotland’s historic environment more attractive to communities, families and tourists?

We welcome the proposed establishment of Historic Environment Scotland under the non-departmental public body model as this enables functions previously exercised by Scottish Ministers and RCAHMS to be exercised by an independent body.

We note that Historic Environment Scotland will put into effect Scotland’s Historic Environment Strategy which we also welcome.

At this point, we consider it somewhat premature to comment on whether Historic Environment Scotland will improve the attractiveness of Scotland’s historic environment.

Question 2: Are the functions proposed for Historic Environment Scotland the correct ones or are there any omissions? Are the outcomes expected of the new body ambitious enough or could they be strengthened?

We note that in terms of Section 2(2) of the Bill which outlines the particular functions of Historic Environment Scotland that there is no function which promotes the maintenance of the historic environment. We therefore suggested that “promoting the maintenance of the historic environment” should be included as a particular function at Section 2(2) of the Bill.

While we note that it could be argued that “maintenance” may already be incorporated under Section 2(2)(d) of the Bill, “protecting and managing the historic environment”, we
consider that this particular function relates to the designation and regulatory function of Historic Environment Scotland.

We further note the particular function at Section 2(2)(e) of the Bill, “conserving and enhancing the Historic Environment”. This may of course include aspects of maintenance but given the importance of maintenance and the role of Historic Environment Scotland, we consider that there should be a separate and distinct particular function.

With further reference to Section 2(2)(e) of the Bill, we consider “conserving” and “enhancing”, to be potentially mutually exclusive and therefore suggest that the function should be “conserving or “enhancing” the Historic Environment.

We also raise concerns regarding the “vires” of Historic Environment Scotland where it may decide not to object to the demolition of a listed building in circumstances where that has become a measure of last resort and the policy tests contained in SHEP (para 3.44) have been met. Under the current arrangements Historic Scotland could decide not to object if the strict policy tests were met. That would not seem to apply to Historic Environment Scotland who may be bound in terms of its functions under Section 2(2) which all point to conservation and enhancement.

We also have wider concerns in regard to the extent that Historic Environment Scotland’s functions in terms of Section 2 of the Bill are qualified by the other functions and duties under the Bill (e.g in relation to Listed buildings and Conservation). This may point to future difficulties in Historic Environment Scotland having flexibility in its decision–making. The need for this flexibility and to have regard to other factors including those of a social or economic nature appear to have been recognised the Natural Heritage (Scotland) Act 1991 that established Scottish Natural Heritage (SNH) but not in this Bill. That Act also places a duty on SNH to have regard to sustainability.

We note that references are made to the “historic environment” and that this is an undefined term.
Also, this may cause difficulties in the listing of buildings where that power is exercised not because of the historic interest of the building, but because of its special architectural interest.

Separately, we support the right of appeal against listing at Schedule 2, Part 5 and Schedule 3, Part 4 of the Bill as referred to in Sections 14 and 15, but would observe that these appeals to Scottish Ministers are not available for existing listed buildings.

A right of appeal to Scottish Ministers is also not available in relation to a determination of an application by Historic Environment Scotland under Section 5A of the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 in terms of a certificate that a building is not intended to be listed. In terms of consistency it would have been important to have included this.

The additional benefit that is conferred under section 21 of the Bill which enables an object or structure to be excluded from the definition of listed building is not available for existing listed buildings.

In circumstances where an object or structure fixed to a building or forming part of the land within the curtilage of a listed building since before 1 July 1948, the provisions at Section 21 will also not be available to existing listed buildings.

It would also be helpful to have defined the meaning of “curtilage” in the bill. This can be a particularly difficult area in terms of establishing the extent of the curtilage of a listed building. It is of course important because any object or structure not fixed to the listed building but which forms part of the land and was present within the “curtilage” of a listed building before 1 July 1948 is listed.

**Question 3: Does the Bill establish a clear and appropriate relationship between Historic Environment Scotland and all other public and private bodies with an interest in Scotland's historic environment?**
We refer to our comments above and welcome Historic Environment Scotland’s independence from Government.

We note, however, that Historic Environment Scotland, in terms of Section 2(8) of the Bill, must have regard to any relevant policy or strategy published by Scottish Ministers. It therefore remains unclear to us what the relationship between Historic Environment Scotland and Scottish Ministers will be in circumstances where Scottish Ministers exercise their function to call in a Listed Building Consent Application and/or a Planning Application for their own determination.

**Question 4:** In what ways will the Bill help you/your organisation to better manage and promote Scotland’s historic environment?

We have no comment. We believe that other organisations are better placed to comment.

**Question 5:** Are there any areas of the Bill that you consider could be strengthened or improved?

We refer to our comments at 1 and 2 above.

**Question 6:** Do you consider that the Bill’s Policy Memorandum adequately sets out: the Bill’s policy objectives; whether alternative ways of meeting the objectives were considered; the consultation undertaken on the objectives; the Bill’s effects on equal opportunities, human rights, island communities, local government and sustainable development?

We refer to our comments at 1 and 2 above and have no further comment.

**Question 7:** The Scottish Government’s newly published historic environment strategy also seeks to improve enjoyment and understanding of Scotland’s historic environment. The Committee does not wish to repeat the extensive consultation
undertaken on the strategy, but would welcome your views on whether it and the Bill together:

- establish clearly who is responsible and accountable for delivering the strategy;
- will involve appropriately all those public and private bodies with a role in improving the historic environment;
- lead to demonstrably better access to, and enjoyment and management of, the historic environment.

The Scottish Government’s Historic Environment Strategy for Scotland has been published in advance of the Bill being passed by the Scottish Parliament.

That Strategy cannot therefore allocate particular responsibilities to Historic Environment Scotland.

While there is clearly merit in the publication of a high level overarching policy document, we believe that it would be helpful for this to be republished with specific reference to Historic Environment Scotland and the role of Historic Environment Scotland once the Bill has been passed by the Scottish Parliament.

It may of course be the case that Historic Environment Scotland would wish to comment on this policy for which it has a statutory obligation in the exercise of its functions in terms of Section 2(5)(f) of the Bill. We believe that that would be important as, in terms of Section 2(8) of the Bill, Historic Environment Scotland must have regard to any relevant policy or strategy published by Scottish Ministers.
For further information and alternative formats, please contact:

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