The Historic Environment (Amendment (Scotland) Bill is a technical amending Bill introduced by the Scottish Government on 4 May 2010. The Bill seeks to amend three current Acts.

The Bill is seen by the Scottish Government as an opportunity to address specific gaps and weakness in the current heritage legislation, identified during discussions with stakeholders, including COSLA and the Built Environment Forum Scotland.

This briefing gives an overview of the current listed building and scheduled monument consent systems. It goes on to describe the changes introduced by the Historic Environment (Amendment) (Scotland) Bill and the differences between this Bill and the previous consultation draft.
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EXECUTIVE SUMMARY

BILL

The Historic Environment (Amendment) (Scotland) Bill seeks to amend three pieces of current legislation:

- Historic Buildings and Ancient Monuments Act 1953 (c.49)
- Ancient Monuments and Archaeological Areas Act 1979 (c.46)
- Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9)

The proposed amendments will:

- Clarify the powers of Scottish Ministers in respect of existing rights, including power of entry for inspection.
- Bring the penalties that can be applied in relation to offences under historic environment legislation into line with the penalties that can be applied in relation to other “environmental crimes”, such as those regulated by the Scottish Environment Protection Agency (SEPA) and Scottish Natural Heritage (SNH)
- Bring aspects of the existing historic environment legislation into line with similar provisions in the planning regime
- Create a new statutory duty for Scottish Ministers to compile and maintain inventories of nationally important battlefields and nationally important historic gardens and designated landscapes
- Enable Scottish Ministers to fix at the outset of making a grant the amount they wish to recover in certain circumstances.
HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

Bill briefing

This briefing gives an overview of the current listed building and scheduled monument consent systems. It goes on to describe the changes introduced by the Historic Environment (Amendment) (Scotland) Bill and the differences between this Bill and the previous consultation draft.

Background

The Historic Environment (Amendment) (Scotland) Bill, introduced on 4 May 2010 by the Scottish Government, was consulted on as a draft bill – The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill (Historic Scotland 2009) – between 20 May and 14 August 2009. The Education, Lifelong Learning and Culture Committee was designated lead Committee for the Bill.

The Minister for Culture and External Affairs is taking the lead on this Bill which Scottish Ministers see as providing an opportunity to address specific gaps and weaknesses in the current heritage legislation framework identified during discussions with stakeholders. Scottish Ministers believe it will improve the ability of the regulatory authorities to work with partners (e.g. local authorities and charities) to manage Scotland’s unique historic legacy for the benefit of future generations.

The first discussions with stakeholders, which took place in 2007, followed the publication of a report by the Historic Environment Advisory Council for Scotland (2006) on the need for a review of heritage legislation in Scotland.

The Policy Memorandum (PM), which was published alongside the Bill on 4 May 2010, states that the Bill has been drafted with the intention of avoiding placing significant new burdens or duties on public or private bodies or individuals and that implementation costs are expected to be minimal.

The PM also states that the Bill 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 planning authorities and Historic Scotland, and the managed removal of a duty on local authorities to notify Scottish Ministers of certain casework.

The PM further states that the Bill should be read in the context of Scottish Ministers’ broader ambitions for how Historic Scotland should develop: to become more flexible, more open, more accessible and more outward looking.

The Bill is also intended to help the Scottish Government meet its international commitments under the Council of Europe’s European Convention on the Protection of the Archaeological Heritage (known as the Valletta Convention), which was ratified by the United Kingdom in 2000.
LISTING BUILDINGS

The following section provides background information on listed buildings and explains how the listed building system operates at present.

What is a Listed Building?

Historic Scotland (HS), working on behalf of Scottish Ministers, maintains a list of historic buildings which are deemed worthy of statutory protection from unauthorised alteration, extension or demolition which would affect the building’s character as a building of special architectural or historic interest under the provisions of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. The criteria for determining whether a building is of “special architectural or historic interest” for listing are set out in Annex 2 of the Scottish Historic Environment Policy (SHEP) (Historic Scotland 2009c) and are broadly:

- Age and rarity
- Architectural interest
- Close historical association

The term “building” is very broadly defined in the 1997 Act and can include structures as diverse as bridges, walls, pillar boxes, chimneys, statues, war memorials and mile posts.

In order to be listed, a building need not be functioning for the purpose for which it was originally intended: for example, a disused church may be listed even though it has continued its life as a block of flats or even a pub.

Similarly, a building’s state of repair is not normally a relevant factor in HS’s consideration of its architectural interest or historical association. It only becomes a factor when the building’s condition has devalued the particular architectural or historic interest to the degree that it can no longer be regarded as special.

Any listing applies to the whole building or structure at the address named, including any object or structure fixed to the building and any object or structure within the curtilage of the building which though not fixed to the building forms part of the land and has done so since before 1 July 1948. Listing always covers both the interior and exterior of a building.
Categories of Listed Building

Every listed building is assigned by Historic Scotland to one of three categories according to their relative architectural and historic importance. It is important to note that all categories of listed building provide statutory protection that applies equally to the interior and exterior of listed buildings. The three categories are:

**Category A:** Buildings of national or international importance, either architectural or historic, or fine little-altered examples of some particular period, style or building type.

**Category B:** Buildings of regional or more than local importance, or major examples of some particular period, style or building type which may have been altered.

**Category C(S):** Buildings of local importance, lesser examples of any period, style, or building type, as originally constructed or moderately altered; and simple traditional buildings which group well with others in categories A and B.

**WHAT IS LISTED BUILDING CONSENT?**

The fact that a building is listed does not mean that it can never be altered, extended or even demolished. There is a presumption against demolition of a listed building or other works that adversely affect the special architectural or historic interest of a listed building or its setting. The SHEP sets out criteria to assess the circumstances where demolition of a listed building may be acceptable.

In addition to obtaining planning permission and a building warrant where required, work to the interior and/or exterior of a listed building which would affect its character as a building of special architectural or historic interest also requires listed building consent.

Applications for listed building consent are made to the relevant local authority. The authority will consider an application in the light of the advice in SHEP, other national policy documents and their own policies. The only exception to this is where the local authority itself is the owner of the listed building and wishes to make alterations, in which case the decision is referred to Historic Scotland.

On receipt of an application the local authority will register and advertise the application for 21 days. Once the 21 day period is over, the authority will consider any representations received and make a decision following its usual decision making procedures. The local authority will then decide to grant listed building consent unconditionally, subject to conditions or refuse permission. An applicant can appeal to Scottish Ministers against the imposition of conditions or a refusal of permission. Appeals are considered by a Reporter appointed by Scottish Ministers, who will normally make a decision on behalf of Scottish Ministers. However, Scottish Ministers can choose to determine an appeal instead of a Reporter, in which case the appeal will still be handled up to the decision stage by a Reporter who will compile a report for ministerial consideration. This will normally only happen if the case is of particular significance. The only way to challenge an appeal decision is on a point of law at the Court of Session.

A planning authority may ask Historic Scotland for application-specific advice at any stage during the consent process and must notify Historic Scotland if they intend to grant consent for developments affecting category A or B listed buildings and for all demolitions, regardless of category. Scottish Ministers have the power to direct that notification is not required for specified classes of applications, other than for demolition. Once notified, Historic Scotland must consider whether there are special circumstances – such as the particular importance of the building, the degree of national interest or local concern about the proposals – to recommend...
that the application is called in for decision by Scottish Ministers. These are also handled by a Reporter appointed by Scottish Ministers, in much the same way as an appeal.

Certain listed buildings are exempt from the requirement to obtain listed building consent, these include:

- Buildings which are both listed and scheduled; in these cases proposals require only scheduled monument consent.
- Any ecclesiastical building which is for the time being used for ecclesiastical purposes. However, even in these cases, proposals for total demolition require listed building consent.

There is a voluntary consent arrangement currently in place for churches in ecclesiastical use by certain denominations. This arrangement deals with proposals for works to the external fabric of buildings in ecclesiastical use which, were it not for the exemption, would require listed building consent.

Listed building consent lasts for three years from the date it was granted, unless there is a condition attached to the consent specifying another date by which the works must be complete.

**What Happens if Unauthorised Work is Undertaken on a Listed Building?**

Failure to obtain listed building consent prior to undertaking work to alter, extend or demolish a listed building in a way that would affect its character is an offence which can result in prosecution or an enforcement notice, the consequences of which can include:

**Prosecution:** A person found guilty of an offence can be liable, on summary conviction, to imprisonment for a term not exceeding six months, a fine not exceeding £20,000 or both. Conviction on indictment can result in imprisonment for up to two years, a fine, or both. In considering whether someone is guilty of an offence, the judge will not consider the defendant’s intent, state of mind, motive or knowledge. However, these issues may be relevant to any sentence.

It is a defence to show that:

(a) The works were urgently necessary in the interests of health and safety or the preservation of the building

(b) Health and safety or the preservation of the building could not be secured through works of repair or works affording temporary support or shelter

(c) The works were limited to the minimum immediately necessary

(d) That written notice justifying in detail the carrying out of the works was sent to the local authority as soon as reasonably practicable

**Enforcement Notice:** A listed building enforcement notice can be issued by a local authority where it considers there to be unauthorised works which have been or are being executed to a listed building. An enforcement notice can be served on the land owner, occupier, lessee and any other person with an interest in the land if that interest is materially affected by the notice. An enforcement notice will set out the works that have been carried out that are considered to be unauthorised, describe any remedial steps which must be taken to restore the building to its previous state or, if this is not possible, what works should be undertaken to alleviate the effect of the unauthorised works or bring the building to the state it would have been in if consent had
been complied with. The notice will also set a time-scale within which these steps must be taken. The terms of the notice take effect on a specific date. There is a right of appeal to Scottish Ministers against the issue of an enforcement notice. An appeal must be lodged prior to the enforcement notice taking effect.

Failure to comply with an enforcement notice is an offence. Anyone found guilty of such an offence would, on summary conviction, be liable for a fine of up to £20,000 or an unlimited fine if convicted on indictment.

Interdict: Although not a specific listed building power, a local authority can apply to the Sheriff Court or Court of Session for an interdict where they consider a breach of listed building control has occurred, or is about to occur.

SCHEDULED MONUMENTS

The following section provides background information on scheduled monuments and explains how the scheduled monument process operates at present.

What is a Scheduled Ancient Monument?

A scheduled ancient monument is a monument of national importance that Scottish Ministers have given legal protection under the Ancient Monuments and Archaeological Areas Act 1979. Examples of such monuments include prehistoric burial mounds, Roman camps, medieval castles and World War II defensive sites. The statutory definition of a scheduled ancient monument is very broad and includes:

- Any building, structure or work located above or below the surface of the land, including caves and excavations.
- Any site comprising the remains of any such building, structure or work, or any cave or excavation
- Any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other moveable structure or part thereof which neither constitutes nor forms part of any work which is a monument as described above.
- An any machinery attached to a monument is part of the monument if it could not be detached without being dismantled

The following cannot be scheduled monuments:

- Ecclesiastical buildings that are currently being used for ecclesiastical purposes
- Occupied dwelling houses (except monuments with a resident caretaker)
- Portable objects
- Sites designated under the Protection of Wrecks Act 1973

It is worth noting that while all monuments that have been scheduled can be referred to as “ancient monuments” not all ancient monuments are necessarily scheduled.

Historic Scotland operates an Ancient Monuments Grant scheme which provides financial assistance aimed at preserving and maintaining scheduled ancient monuments. Funds are
limited, so priority is given to monuments of particular interest or importance. Certain monuments are not eligible for these grants, principally:

- Inhabited buildings
- Buildings undergoing restoration with the intention of making them habitable
- Buildings in ecclesiastical use

What is Scheduled Monument Consent?

The fact that a monument has been scheduled does not mean that an owner or occupier can never alter, extend or even demolish it. However, in addition to obtaining planning permission and a building warrant where required, any work that would demolish, destroy, damage, remove, repair, alter or add to a scheduled ancient monument also requires scheduled monument consent. Consent is also required to use a metal detector within a scheduled area. There is a presumption that scheduled monuments will remain as far as possible in the form and condition they have come down to us.

The Scheduled Monument Consent (SMC) process is administered by Historic Scotland on behalf of Scottish Ministers. An applicant must complete an application form and submit it to Historic Scotland with sufficient information to allow a decision to be made. Historic Scotland may ask for further information or arrange a site visit by one of its inspectors prior to reaching a decision. Historic Scotland will then normally issue a provisional view on whether it will grant consent unconditionally, with conditions or refuse consent. Unless there are any objections to this provisional decision, full consent will follow 28 days later. Any objections or representations will be considered prior to making a final decision.

If Historic Scotland is minded to refuse SMC, an applicant can have the case heard by an independent Reporter at a Public Local Inquiry or more informal hearing. The final decision on the Reporter’s recommendations is then taken by Scottish Ministers without the further involvement of Historic Scotland.

Certain classes or types of works do not require consent and these are set out in the Ancient Monuments (Class Consents) (Scotland) Order 1996 (SI 1996/1507). The types of works listed in this Order are deemed to have been granted scheduled monument consent.

Scheduled monument consent lasts for five years from the date it was granted, unless a different period is specified in the consent.

What Happens if Unauthorised Work is Carried out on a Scheduled Ancient Monument?

If a person carries out works to a scheduled ancient monument without consent, or causes or permits such works to be carried out, or fails to comply with conditions attached to consent then they are guilty of an offence. They would be liable to prosecution under the 1979 Act and could be fined up to £10,000.

Where works are carried out without consent, it is a defence to prove that the person took all reasonable precautions and exercised due diligence to avoid or prevent damage to the monument. Where there has been non-compliance with a condition attached to historic monument consent, it is a defence to prove that the person charged with the offence took all reasonable precautions and exercised all due diligence to avoid contravening the condition. It is also a defence for an accused person to prove that they did not know and had no reason to
believe that the monument was within the area affected by the works or that it was a scheduled monument.

ENFORCEMENT NOTICES, STOP NOTICES AND TEMPORARY STOP NOTICES

Enforcement notices and stop notices have been a feature of the Scottish town and country planning systems for decades, while temporary stop notices were introduced by the Planning etc. (Scotland) Act 2006. The Historic Environment (Amendment) (Scotland) Bill seeks to extend the operation of these notices to the scheduled monument system, and to introduce listed building stop notices and temporary stop notices, as described below:

Scheduled Monument Enforcement Notices: under the provisions in the Bill Scottish Ministers will be able to serve a scheduled monument enforcement notice where they consider there has been a breach of the scheduled monument consent regime. An enforcement notice could be served on the land/monument owner, occupier and any other person with an interest in the land/monument if that interest is materially affected by the notice. An enforcement notice will set out any remedial steps which must be taken, or any works which must cease, and a set time-scale within which the steps must be taken, or the works ceased, to ensure that the terms specified in the notice are complied with. The terms of the notice would take effect on a specific date, which must be at least 28 days after the notice was served. If the works were not completed by the required date then Scottish Ministers could choose to carry out the work themselves and recover the costs incurred from the owner or tenant.

There will be a right of appeal to a Sheriff against the issue of an enforcement notice. The terms of the notice would be suspended until a decision on the appeal has been reached. In addition, an enforcement notice would cease to have effect (wholly or partly) if Scottish Ministers granted retrospective permission for the works to which the notice applied.

Failure to comply with a scheduled monument enforcement notice would be an offence. Anyone found guilty of such an offence would, on summary conviction, be liable for a fine of up to £20,000 or an unlimited fine if convicted on indictment.

Scheduled Monument Stop Notices: under the provisions in the Bill where Scottish Ministers consider that a breach of scheduled monument control would have to be dealt with as a matter of urgency, before the expiry of the period of compliance with a scheduled monument enforcement notice, they could issue a stop notice.

A stop notice could be served at the same time as an enforcement notice, or any time after an enforcement notice had been served but has yet to take effect. A stop notice could be served on any person who appears to Scottish Ministers to have an interest in the land/monument or causing the works specified in the enforcement notice to be stopped. A stop notice would set out the works to cease, which would be the same as those set out in the enforcement notice. However, a stop notice need not apply to everything set out in the enforcement notice, i.e. it could relate only to part of the land/monument in question or some of the breaches of control mentioned in the enforcement notice.

A stop notice would come into effect not less than three and no more than 28 days after it had been issued, unless Scottish Ministers considered there were special reasons to justify it taking effect earlier.

There would be no right of appeal to Scottish Ministers against the service of a stop notice, although it could be challenged on a point of law through judicial review. There would be four
situations where the recipient, who must have an interest in the land/monument, of a stop notice could lodge a claim for compensation for specified loss or damage against Scottish Ministers:

- If the stop notice was withdrawn
- If the enforcement notice was withdrawn
- If the enforcement notice was varied in such a way as to exclude the provisions of the stop notice
- If there was a successful appeal against an enforcement notice and a stop notice was also served.

Failure to comply with a stop notice would be an offence. Anyone found guilty of such an offence would, on summary conviction, be liable for a fine of up to £20,000 or an unlimited fine if convicted on indictment.

**Temporary Stop Notices:** Similar to a stop notice but taking immediate effect, Scottish Ministers could issue a temporary stop notice if they considered unauthorised works or works in breach of a condition attached to the consent had been or was being carried out to a scheduled monument and they considered it expedient that the works be stopped immediately. A temporary stop notice would have to prohibit the execution of specified works and set out Scottish Ministers’ reasons for issuing the notice. A temporary stop notice could be served on the person carrying out the works which are the subject of the notice, the land owner, the occupier or anyone with an interest in the land/monument. As well as serving the notice to one or more of these parties the authority would have to affix a copy of the notice on the land/monument to which it applied. The notice would take effect from the time it was displayed on site and could last for a period of up to 28 days, during which time an enforcement notice and associated stop notice could be served.

Failure to comply with a temporary stop notice would be an offence. Anyone found guilty of such an offence would, on summary conviction, be liable for a fine of up to £20,000 or an unlimited fine if convicted on indictment.

As with a stop notice, a person who was subject to a temporary stop notice would be able to claim compensation from Scottish Ministers in certain circumstances, as described below:

- Consent for the works specified in the temporary stop notice was granted on or before the date that the notice was first displayed
- The temporary stop notice was withdrawn by Scottish Ministers.

**Listed Building Stop Notices and Temporary Stop Notices:** The provisions in the Bill relating to listed building stop notices and temporary stop notices are effectively the same as those for scheduled ancient monuments. The key difference being that it is the relevant local authority, as opposed to Scottish Ministers, who is the enforcement authority.

**DIFFERENCES BETWEEN THE DRAFT BILL AND THE BILL AS INTRODUCED**

The draft Bill received 47 responses and Historic Scotland produced an analysis report in January 2010 (Historic Scotland 2010a) which was reissued in a slightly revised version in June 2010 (Historic Scotland 2010b).

There were some differences between the draft Bill and the Bill as introduced, including the Bill title.

**Draft Bill**

Part 1 section 2 and Part 2 section 13 of the draft Bill included amendments to sections 2(2) and 28 of the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act) to include ‘disturbance’. Fourteen of the 17 respondents to the consultation particularly welcomed the inclusion of ‘disturbance’ in the amending Bill. However three of these respondents, together with another three, recommended that ‘disturbance’ should be more clearly defined in the legislation. Scottish Ministers considered these comments and, while they understood there was an issue which deserved further attention, they were persuaded that the approach proposed in consultation was not sufficiently robust. Scottish Ministers are therefore satisfied that the issues identified in relation to the small number of cases can be most effectively and proportionately addressed by promoting closer liaison between Historic Scotland and the Crown Office, in order to ensure that, on the rare occasions when a case does reach the stage of potential prosecution (and Scottish courts were last asked to consider a case under section 2 of the 1979 Act in 1998), both parties have a stronger shared understanding of the evidence required to demonstrate archaeological damage. So the word disturbance in section 2 and the whole of section 13, which also dealt with disturbance, were not included in the Bill as introduced.

Section 4 of the Draft Bill would have repealed some of the defences available to someone charged with an offence, including the ‘defence of ignorance’ as set out in sections 2, 28 and 42 of the 1979 Act. Section 3 of the Bill as introduced now plans to modify the defences so that a lack of knowledge can only be used as a defence if the person can show that they took all reasonable steps to find out whether there was a scheduled monument in the area affected by their works. Respondents to the consultation had asked that instead of removing the defence of ignorance from the 1979 Act the Scottish Government should instead seek to educate the public and land managers on the location and extent of historic environment assets in Scotland.

Section 6 of the Bill as introduced includes a few sections, or provisions within sections, which were not in the equivalent section 7 of the draft Bill (namely, 9H(2), 9I(3)(b), 9K(2)) and a few sections which have been reworded in the Bill as introduced (namely, 9E(4), 9F(1), 9I(1) and (2), 9L(2) and 9M(2)). These provisions deal with temporary stop notices which are explained in more detail earlier in this briefing.

Section 7 of the Bill as introduced is a version of sections 8 and 9 of the draft Bill. Concerns had been raised in the responses to the consultation on these sections of the draft Bill that, for properties in the care of Scottish Ministers, Scottish Ministers were in a privileged position, somehow able to circumvent the system of control set out in the Scottish Historic Environment Policy (SHEP) (Historic Scotland 2009c). Scottish Ministers agreed that these sections were open to misunderstanding and in the Bill as introduced have reworded the section to make it clearer that the intention of this section is to clarify the extent of existing rights rather than extend those rights.

Although five respondents to the draft Bill welcomed section 15, which sought to amend section 54 of the 1979 Act, and clarify the position in Scotland regarding finds from archaeological excavations on scheduled monuments, this amendment was not included in the Bill as introduced. On further consultation, the Government considered the section did what it was designed to do and concluded that section 54 did not require amendment.
Section 25 of the draft Bill, on the liability of owners and their successors for the expenses of urgent works, together with the associated Schedules 4, 5 and 6 in the draft Bill, have been incorporated in section 25 of the Bill as introduced. The twin policy aims of this revised section are to deter owners from neglecting their listed buildings and to encourage local authorities to intervene sooner to carry out essential urgent low cost repairs.

The Bill as introduced

In addition to the aforementioned amendments to sections included in the draft Bill, a number of sections in the Bill as introduced are new and were therefore not formally consulted on as part of the draft Bill.

For example, section 11 seeks to create a new duty for Scottish Ministers to compile and maintain two new statutory inventories, one for battlefields and one for gardens and designed landscapes. However, there is currently a non-statutory inventory for gardens; and Historic Scotland did carry out a consultation on an historic battlefields policy in 2008. The background to this new section is discussed in more detail later in this briefing.

Although section 15 of the Bill as introduced was not formally consulted on, the proposal it contains – to bring the scheduled monument application process into line with the model used in the listed building and the planning legislation – was discussed with a range of organisations and individuals as part of the programme of stakeholder consultation in 2009. The proposal was welcomed by the stakeholders.

Section 20 of the Bill as introduced has been included to help harmonise and streamline the listed building consents process by amending the (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (the 1997 Act).

Section 27 of the Bill as introduced was not in the draft Bill but is required following the passing of the Interpretation and Legislative Reform (Scotland) Act 2010. Section 20 of that Act means that the Crown will be bound by an Act of the Scottish Parliament or a Scottish statutory instrument unless the provision expressly exempts it, which this section of the Bill does.

Section 29 of the Bill as introduced is a new section which seeks to amend section 82 of the 1997 Act in order to extend the existing subordinate legislation-making powers in that Act.

Section 31 of the Bill as introduced gives Scottish Ministers powers to make supplementary, incidental, consequential, transitory, transitional or saving provisions needed to give full effect to any provision of the Bill. This section is included to ensure the purposes of the Bill can be given full effect without the need for further primary legislation.

CHANGES INTRODUCED BY THE BILL

Part 1 Amendment of the Historic Buildings and Ancient Monuments Act 1953

Under the terms of the Historic Buildings and Ancient Monuments Act 1953 (the 1953 Act) Scottish Ministers are empowered to provide grants and loans for the repair or maintenance of historic buildings. 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 building material, in order to conserve original features in buildings of outstanding architectural or historic interest. In 2008/09, around £4.3m was allocated to projects funded under the 1953 Act.
Section 1 of the Bill will amend the grant recovery power in the 1953 Act to enable Scottish Ministers to make it clear that the grant offer can specify the amount recoverable or make provision for calculating the amount recoverable in certain circumstances i.e. if any condition subject to which a grant was made is contravened or not complied with or if the property is sold.

Part 3 Section 26 of the Bill echoes section 1, allowing Scottish Ministers and planning authorities to recover grants by amending the 1997 Act (see below).

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

The provisions in section 4 of the Bill will amend the Ancient Monuments and Archaeological Areas Act 1979 (the 1979 Act) and mean that courts will be required to recognise any financial benefits to the offender when deciding on fines, which can be up to a maximum of £50,000. This is more than the current “statutory maximum” of £10,000 (Criminal Procedure (Scotland) Act 1995 c. 46 section 225(8)). This is because the Scottish Government believes that the current statutory maximum fine is too low in proportion to the financial benefit (often arising from development or development potential) which may accrue from destroying or damaging a protected monument.

This section is also designed to bring the 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).

Section 61 of the 1979 Act concerning the “statutory maximum” had already been repealed, with no substitution, by the Statute Law (Repeals) Act 1993 c. 50.

Section 5 of the Bill will amend and clarify section 6(1) of the 1979 Act regarding the power of entry for inspection making it clear that the provisions in sections 6(1)(a) and (b) merely provide particular instances of when the power can be used.

Section 6 of the Bill will amend section 9 of the 1979 Act and will introduce enforcement powers for Scottish Ministers, with regard to scheduled monuments, namely scheduled monument enforcement notices, temporary stop notices and stop notices. More information on these notices is given earlier in this briefing.

This section of the Bill will also introduce fines for offences for contraventions of enforcement notices, temporary stop notices and stop notices of up to £20,000 (unlimited on indictment).

Provision for compensation, for certain loss or damage due to a stop notices and temporary stop notices, are also given in this section of the Bill.

Historic Scotland expects the guidance on the detailed operation of the provision in this section of the Bill to be ready by Stage 2 of the Bill.

Part 3 sections 22 and 23 echo section 6 with regard to changes to the enforcement notice provisions and the provision of stop notices and temporary stop notices for listed buildings by amending the 1997 Act.

Section 7 of the Bill will amend sections 13 and 15 of the 1979 Act. It will update the provisions on guardianship of monuments, and of the land in the vicinity of monuments, by Scottish Ministers and local authorities. It will clarify the types of events and activities which can take place, for example educational or entertainment events for visitors or private events such as weddings. These amendments are required to regularise existing practices as such activities and events are already commonplace.
In addition section 7(5) will repeal Schedule 3 para 6(1) of the 1979 Act which means that section 13(2) of the 1979 Act would apply to all monuments, whether or not they were in the guardianship of Scottish Ministers or local authorities before or after the Act came into force.

Section 9 of the Bill will reorder the wording of section 24 of the 1979 Act in order to make it clear that the power of Scottish Ministers and local authorities – to defray or contribute towards the cost of preserving, maintaining or managing an ancient monument – would be exercisable without the owner having requested such action. This means that third parties, such as tenants and conservation charities, could in future be offered grants to carry out work.

A new statutory duty for Scottish Ministers to compile and maintain an inventory of gardens and designed landscapes and an inventory of battlefields will be created by Section 11 of the Bill. This will enable Scottish Ministers to update the inventories as and when required without having to amend the regulations each time the inventories are revised.

At present, 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). Its purpose is to identify gardens and designed landscapes of national importance. Inclusion of a site in the inventory means that it receives recognition and a degree of protection through the planning system.

In 2008, Historic Scotland consulted on a historic battlefield policy (Historic Scotland 2008) 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 and through policies of relevant public bodies.

Gardens and designed landscapes are currently afforded some statutory protection under the terms of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 (SSI 2008/432). These Development Management 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 (i.e. one which is included in 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.

The majority of the local authorities in Scotland already maintain a Historic Environment Record (also known as a Sites and Monuments Record or SMR) which contains information on all the known archaeological and historic features in their area (Ritchie and Wordsworth p.2).

Section 12 of the Bill will insert a new section into the 1979 Act to provide a new power of financial assistance to the Scottish Ministers. The proposed new section 45A(1) states that Scottish Ministers may make grants or loans in connection with or with a view to the promotion of the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest. The proposed section 45A(2) states that such grants or loans may be subject to such conditions as the Scottish Ministers think appropriate. The proposed section 45A(3) provides that the total amount of grants and loans which may be made under this section must not exceed £100,000 in any one year period.

Section 14 of the Bill will amend the meaning of “monument” in section 61(7) of the 1979 Act and extend the range of historic environment assets that can be designated under the 1979 Act.
to include “any site comprising any thing, or group of things, that evidences previous human activity” (Historic Scotland 2009a p.22). This will 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 artefact scatters.

Section 15 of the Bill will amend the regulation making powers available to Scottish Ministers in relation to the scheduled monument consent regime in the 1979 Act. 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 recent planning legislation.

Section 16 of the Bill seeks to introduce a power to enable Scottish Ministers to decline to consider a scheduled monument consent application where that application is similar to an application 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.

In addition Part 3 section 20 of the Bill will introduce a similar power to enable local authorities to decline to consider a listed building consent application where that application is similar to an application made within the previous two years. Again, 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. The Scottish Government believes 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 the Scottish Government does recognise that 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.

**Part 3 Modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997**

Section 18 of the Bill will introduce a new power that will enable Scottish Ministers to offer any person a certificate that the Scottish Government does not intend to list the building. This 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. The Scottish Government believes 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.

This section of the draft Bill attracted the largest number of comments from respondents. Of the 29 who offered comment five supported the provision as drafted. However, 24 respondents raised a number of issues. The issues (Historic Scotland 2010b p. 13-14) included:

- The relationship between a certificate not to list and a Building Preservation Notice is not clear
- How might a certificate impact on any subsequent planning permission or listed building consent?
A certificate should carry a statement to the effect that although the building is not listable in relation to the Historic Scotland criteria it may have elements/features worthy of retention and recording and that LAs [local authorities] should be consulted before demolition/alteration is undertaken.

Section 21 of the Bill seeks to remove the automatic right to be heard in connection with listed building applications and appeals under the 1997 Act. This proposed change brings the 1997 Act into 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.

Section 22 of the Bill will amend the 1997 Act to introduce new powers for Scottish Ministers and local authorities to allow a listed building enforcement notice to specify works such as the planning authority or the Scottish Ministers require to be stopped.

Section 23 of the Bill effectively echoes Part 2 section 6 of the Bill and will amend the 1997 Act to give local authorities the power to serve stop notices and temporary stop notices in relation to unauthorised works on a listed building.

It will also amend the 1997 Act so that Scottish Ministers could serve a stop notice either where a planning authority has issued an enforcement notice or where Scottish Ministers themselves have issued the enforcement notice, while making it clear that Scottish Ministers would have to consult the planning authority before issuing such a stop notice.

This section also deals with offences and compensation for loss due to a stop notices and temporary stop notices. More information on stop notices is given earlier in this briefing.

Section 24 of the Bill will introduce a new power which 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 one introduced into the planning regime by section 25 of the Planning etc. (Scotland) Act 2006.

Section 25 of the Bill will amend the 1997 Act 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.

Respondents to the draft Bill raised some issues about this section. Two of the respondents “opposed the proposal on the grounds that it could greatly complicate the sale of any building and that is appeared largely unworkable in practice and that it may result in the abandonment of dilapidated listed buildings” (Historic Scotland 2010b p. 15).

Part 4 General

Section 31 will give Scottish Ministers powers to make secondary legislation, including amending the new Act. A comparable provision was included in the Marine (Scotland) Act 2010.
RESPONSES TO THE CONSULTATION BY THE EDUCATION LIFELONG LEARNING AND CULTURE COMMITTEE

The Education, Lifelong Learning and Culture Committee put out a call for written evidence on the Bill as introduced on 5 July 2010 with a closing date of 20 August.

The Committee had received responses from 20 organisations by 25 August 2010. In general respondents to the Bill have welcomed its provisions and the harmonising elements of the Bill.

SOURCES


Scottish Parliament (2008) Petition PE1176. Petition by Thomas Ewing and Gordon Prestoungrange calling on the Scottish Parliament to urge the Scottish Government to provide a right of appeal against decisions by Scottish Ministers, following advice from Historic Scotland, not to list a historic building and to review the criteria used to list such buildings to ensure that the value which a local community places on local heritage assets is fully reflected and that buildings can be considered for listing even when a planning application affecting them has been submitted. [Online]. Available at: http://www.scottish.parliament.uk/business/petitions/docs/PE1176.htm [Accessed 12 August 2010]


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