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Official Report

EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Wednesday 8 September 2010

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
21st Meeting 2010, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Alasdair Allan (Western Isles) (SNP)
*Claire Baker (Mid Scotland and Fife) (Lab)
*Ken Macintosh (Eastwood) (Lab)
Christina McKelvie (Central Scotland) (SNP)
*Elizabeth Smith (Mid Scotland and Fife) (Con)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Ted Brocklebank (Mid Scotland and Fife) (Con)
Hugh O'Donnell (Central Scotland) (LD)
Cathy Peattie (Falkirk East) (Lab)
Dave Thompson (Highlands and Islands) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Lucy Blackburn (Historic Scotland)
Barbara Cummins (Historic Scotland)
Emma Thomson (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 6

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 8 September 2010

[The Convener *opened the meeting at 10:01*]

Historic Environment (Amendment) (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I open the 21st meeting of the Education, Lifelong Learning and Culture Committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting. We have received apologies from Christina McKelvie, who is unable to join us because of illness, and I believe that Claire Baker will be here shortly.

I welcome everyone back after the summer recess. I hope that you all had a good summer and that you were working hard in your constituencies, not having big long holidays.

Item 1 on our agenda is stage 1 consideration of the Historic Environment (Amendment) (Scotland) Bill. I am pleased to welcome to the meeting a number of Scottish Government officials: Lucy Blackburn, the bill director; Bill McQueen, the bill manager; Barbara Cummins, deputy chief inspector at Historic Scotland; and Emma Thomson, a principal legal officer for the Scottish Government. I understand that Ms Blackburn will make an opening statement on behalf of the officials.

Lucy Blackburn (Historic Scotland): Thank you for the opportunity to make an opening statement, which I will try to keep brief. First, I will say a word about the team. A number of us are based in Historic Scotland, an executive agency of the Scottish Government whose functions include the provision of policy advice to ministers across the historic environment and which, for that reason, is leading on the bill.

Barbara Cummins, our deputy chief inspector, is particularly able to assist in issues concerning relations between local and central Government, the role of the planning system more broadly in protecting the historic environment and all issues around listed building consent. Bill McQueen, the bill manager, has been with the process throughout and is particularly well placed to talk about the bill's evolution, the process leading up to the draft bill's production last year and various provisions in the bill. Emma Thomson, who is a member of the Scottish Government legal directorate, is also with the bill team. Finally, as bill director, I am the senior manager with overall responsibility for the bill process and planning for its implementation.

All that I want to emphasise is the importance that the Scottish ministers attach to Scotland's historic environment, which is intrinsic to our sense of place and our strong cultural identity. It makes, as a number of respondents to your call for submissions have noted, a significant contribution to the economy through, for example, tourism and support of indigenous craft skills, and provides us all with a rich environment in which to live and work. The bill is an opportunity to address specific gaps and weaknesses in the current heritage legislation framework that have been identified in discussions with stakeholders. It is expected to improve the ability of regulatory authorities—which, in practice, means Historic Scotland and the planning authorities—to manage Scotland's unique historic legacy for the benefit of our own and future generations. It is worth emphasising that the bill has been drafted, throughout, with the intention of avoiding placing new duties or burdens on public or private bodies or individuals.

In conclusion, I invite the committee to note that the bill needs to be seen as part of a much wider programme of administrative reform involving particularly our own relations with local government, but also broader reforms in the planning system.

The Convener: Thank you for your comments, Ms Blackburn. The committee has several questions for you relating to various sections of the bill. Can you expand a little on how you envisage the awarding of grants for restoration, particularly of historic homes, working and how you intend to recover that money?

Lucy Blackburn: The existing powers to make grants under the Historic Buildings and Ancient Monuments Act 1953 are dealt with in section 1 of the bill. They cover a scheme that we call the historic building repair grant scheme. Under that scheme, ministers are empowered to make grants to assist with the repair of outstanding historic buildings. In practice, Historic Scotland administers a scheme whereby we advertise for applications, judge those against certain criteria and then provide grants.

We already recover an element of the grant. The thinking behind that is that there should not be private gain at public expense. For example, if we give a grant to a property owner who does the property up and then sells it on, having benefited from the public grant, we are entitled to claim an element of the grant back. At the moment, when we make our grant offer, we explain that we have

that power and that in certain circumstances, the most obvious of which is onward sale, we will recover grant. We usually say that we would expect to recover it at the rate of 100 per cent in the first year and 90 per cent in the second year, with the amount tailing off over 10 years.

The challenge that we face is the fact that we cannot give a cast-iron guarantee to people who receive grant from us that that is precisely what we will do. In many cases, it does not matter at all, but in a number of the cases in which we are involved, the building is done up specifically with the aim of being redeveloped and sold on. That is an entirely respectable outcome. For example, the Anchor Mill flats in Paisley were a successful project on which we worked with the Prince's Trust. The building, which is prominently placed in Paisley, was derelict and the only reason that the trust was able to get involved was the fact that it knew that, once the building had been done up, it could recover some of its costs through the sale of the property. That was a very big project, but the same would be true for some local building preservation trusts that work on a revolving-door principle, whereby they do up a building, sell it on and then use the proceeds to do up another. For them, knowing precisely what our grant recovery intentions are is very valuable. It does not happen in many cases, but in some it is important.

The problem that we have at the moment is that, because of the way in which the law is drafted, we cannot give that guarantee. Technically, that would be fettering ministers' discretion, as a future minister in four or five years' time might not want to go down that path. The bill gives us powers to be much more precise and say exactly how we will undertake grant recovery. As I say, that may not be relevant in many cases, but in some—particularly those in which the onward sale of the building is crucial to the whole plan—it ought to be helpful. Those provisions are mirrored elsewhere in the bill for local government grants just for consistency.

The Convener: That is helpful. It makes sense that the Government would want to recover that public investment. Indeed, it would seem a little irresponsible if it were not to attempt to do so, given the current financial context. However, the Historic Houses Association for Scotland has raised concerns in its written evidence about the possibility of future owners being liable for the recovery of those grants and the buildings having no value. I assume that the Scottish Government has considered that issue. If so, how have you attempted to address those concerns?

Lucy Blackburn: That should not be an issue, as the grant is recovered from the original recipient. The original grant recipient must notify us when they sell the house, and that is the point at which the grant would be recovered. We do not have a contract with the onward buyer, so the HHA's concerns should not come to pass. We perhaps need to go and talk to the HHA further and ensure that it understands where we are coming from. We are comfortable that, as the principle of recovery is long established in legislation, the bill will simply provide us with a little bit more traction about how the provisions can be used in practice.

The Convener: That is helpful. My final question arises from the Scottish Property Federation's concerns that the proposals on recovery could, by impeding the ability of developers to attract funding from a bank or third party, affect the viability of future development proposals. Has the Scottish Government considered that?

Lucy Blackburn: As I said, the grants that we make already include a proviso that we may come in and reclaim the grant. That has not been an obstacle to people making applications and it has not prevented projects from proceeding. What might be happening is that awareness of the fact that we can reclaim grant has not been very high because it has not been relevant to many cases. The principle of grant recovery has long existed and has not impeded the scheme. There is nothing new about a power to come in and recover grant and, indeed, such provisions are quite common. For example, the Heritage Lottery Fund includes in its contracts a provision that, if the building is sold on, the fund would expect to come back and reclaim grant. Again, that has not been a problem for the applications that the fund receives or for projects going forward. We are absolutely comfortable that there is nothing new in the bill that will change the fundamental structure.

Perhaps the powers of recovery have not been an obvious part of the system and the bill has simply drawn attention to them. In the past four or five years, we have recovered about £0.75 million altogether. As a proportion of our grant budget, that is relatively low, but it is still a potentially useful source of income that it is reasonable to pursue.

Margaret Smith (Edinburgh West) (LD): I seek clarification. Does grant recovery not happen very often because the criterion for recovery is that the recipient sells the property and the number of those selling on is quite small, or does Historic Scotland sometimes decide that the amount of money that would be recovered is not worth pursuing? To what extent does that happen?

Lucy Blackburn: Mainly it is that the number of those selling on is quite small, so there are not that many cases in which the requirement bites. In recent years, we have been more diligent in ensuring that we are fully informed and up to

speed on whether properties change hands, so I think that we would look into every case in which that happens. I cannot say for sure in what proportion of cases that we look at we decide that the grant is not worth recovering, but I could provide the committee with more data on that. I have the overall figures for grant recovery to hand, but I am not entirely sure how far discretion is used not to pursue recovery in different cases. However, I think that the reason that grant recovery seldom happens is largely because the turnover is not that great. For example, many of the larger cases that we support are for local authority buildings that will not change ownership.

Ken Macintosh (Eastwood) (Lab): Those who have carried out work that has damaged a scheduled monument or listed building can currently plead that they were ignorant of the fact that the building was scheduled or listed or that they did not know the significance of the building, but the ability to make such a defence will be modified by the bill. First, why is that being changed? Secondly, some of the written submissions have suggested that there is not enough information about all the scheduled monuments and sites of historic importance around Scotland to provide sufficient clarity to property owners. If there is not enough information for owners to be fully aware, are steps being taken to tackle that?

Lucy Blackburn: I will talk about the background to the modification of the defence of ignorance. In 2007 we had discussions with people on the front line and one thing that stuck out about the existing legislation was that, very unusually, those who have damaged a scheduled monument can claim that they did not know that the building was scheduled. We feel that that sends out an immensely unhelpful signal. No parallel defence exists for undertaking unauthorised works on listed buildings. Similarly, in nature and marine legislation, there is no ability to claim a general defence of ignorance.

In the draft bill that was published in May 2009, we proposed to remove the defence of ignorance. A number of people came back—as you mentioned—to say that that was too dramatic a change. There was support for it in the sector, but there was a great deal of concern among groups—particularly those active around archaeological sites—that it was an unhelpful signal in law about the value that is placed on those sites.

10:15

We looked at the draft bill consultation responses and concluded that there was a problem with simply removing the defence of ignorance, mainly because of the issues that you mentioned. For example, scheduled monuments in particular are not always immediately obvious. We looked at what we had in the Ancient Monuments and Archaeological Areas Act 1979 for metal detectors, and what that said was that a person can claim ignorance but must show that they took reasonable steps to identify whether there was a scheduled monument. We then considered the provisions that the draft bill contained on the use of metal detectors and we decided that that was a safer model to follow than simple repeal, so we imported that concept into proposed new section 2 of the 1979 act.

You are right that the question of how we take reasonable steps and the issues around the availability of data remain. We have looked very hard at the issue, because we take seriously those points—which are clearly well made—about creating a new offence and our ability to deal with that. I have several things to say about the availability of information on scheduled monuments. The Historic Scotland website contains an easily accessible map of every scheduled monument that outlines and defines the precise extent of each monument. Also, most scheduled monuments are listed in the register of sasines, so when people take on ownership of a site they should be made aware of the fact that it contains a monument. We have a system of monument wardens who examine scheduled monuments on a regular basis and make contact with owners and occupiers—not every year by any means, but over a cycle of years.

Most important, given the number of changes—not least the one that we are discussing—that affect the 1979 act, we plan under the bill to contact owners of scheduled monuments directly to draw their attention to the changes and in particular to the information that is already available. We have had long discussions with various bodies—not least the Scottish Rural Property and Business Association—about how we can use their membership networks and newsletters and so on to publicise the changes and to identify owners. We can identify most owners; many scheduled monuments are owned by bodies such as the Forestry Commission or the Ministry of Defence, with which it is easy to liaise. However, it will always be harder to locate some of the owners, as well as the day-to-day occupiers and tenants. We expect, under the aegis of the bill, to do a lot of work on contacting owners.

It is worth mentioning e-planning. I think I am right in saying—perhaps my colleague Barbara Cummins can tell me—that the plan is that people will, in a few years' time, be able to use e-planning to identify all the various restrictions that apply to a property. Someone will be able to look at a map of their own property and see information on Scottish Environment Protection Agency or Scottish

Natural Heritage designations, scheduled monuments and listed buildings. It will all be in one place.

We accept that there is work to be done, but we are prepared to do it.

Ken Macintosh: So you are changing the law to provide a level playing field and to synchronise things, rather than because there is a problem with people claiming ignorance and taking advantage of that defence.

Lucy Blackburn: It would be fair to say that we have not prosecuted under that law for a long time.

Ken Macintosh: So people are not using the defence as an easy opt-out.

Lucy Blackburn: It is not coming up at the court level, although it is harder to tell at the level below that. We are never keen to prosecute—we prefer to build a constructive relationship with monument owners. The fact that the provision exists has sometimes been unhelpful in our discussions with owners.

Ken Macintosh: A number of suggestions have been made. You could make it a legal—as opposed to just a nominal—requirement to include listed building or scheduled monument status in the register of sasines. I believe that Historic Scotland currently has a duty to notify the owner if a building is listed; you could place a similar duty on it to notify owners of scheduled monuments.

Lucy Blackburn: We do those things already. When we schedule a new monument, we always register it in the sasines and notify the owner.

Ken Macintosh: With regard to someone's state of knowledge, the bill refers to whether a person

"knew or ought to have known"

that their actions affected a protected monument. Will you define what sort of person ought to know?

Lucy Blackburn: That is a reference to a part of the bill that deals with section 28 of the 1979 act, which was put in place to deal with deliberate damage to monuments. It is not used for owners so much as for cases in which there has been, say, vandalism of a scheduled site that could not be defined as works under the earlier parts of the act. Currently, the law says that a person "knew" that they were damaging. Saying that a person "ought to have known" is a legal drawing out of that, simply to avoid people saying that they were unaware, when they clearly should have been aware when they took their spray paint to this statue or that rock. Trying to define further who those people are would be hard. Given the limited number of times that the provisions will be used, we would worry that that would not make sense as a way forward.

Ken Macintosh: Why did you decide to increase fines from £10,000 to £50,000? There seems to be slight difference in the levels of fines with regard to scheduled monuments and listed buildings—at least the Law Society of Scotland suggests that there may be. It suggests that there is no justification for any differences between the penalties imposed with regard to scheduled monuments or listed buildings and that all penalties should be synchronised. Do you agree with that?

Lucy Blackburn: Yes, absolutely. We have synchronised penalties of £50,000. I think that the society supports us, as we are synchronising. My reading was the same as yours, and I had to go back and look at things to reassure myself. Perhaps we will talk to the society to ensure that we have not missed something. As far as we are aware, we have synchronised.

The original penalties were £10,000 and £20,000, and we wanted to synchronise penalties between the two types of asset, whatever we did. A common penalty for equivalent offences under the nature conservation legislation is £40,000, and £50,000 is the equivalent fine under the Marine (Scotland) Act 2010, which is the most recent legislation. We thought that the benchmark in that act probably made sense, as it is the most relevant legislation. In fact, it specifically includes offences against historic marine assets, so it was the obvious benchmark to go for. Hence, we went for £50,000.

Margaret Smith: I will ask about enforcement notices. The Law Society of Scotland questioned whether the description of works executed

"to land in, on or under"

a scheduled monument is sufficiently wide in scope. For example, neighbouring works outwith the boundary of the scheduled area may have the potential to damage or destroy the scheduled monument. What do you say about that claim? Is new section 9A of the 1979 act broad enough to cover detrimental unauthorised works outwith the scheduled area?

Lucy Blackburn: I ask Barbara Cummins whether she is happy to speak about that.

Barbara Cummins (Historic Scotland): I am. Wide enforcement powers exist in the planning regime anyway. Scheduled monument enforcement action would be specific to the monument and would cover potential damage or harm to it, whereas works outwith the scheduled monument would be covered by normal planning enforcement. Therefore, if a development was unauthorised, there would still be a route through

which to take enforcement action, but it would not be specific to the monument. If something is not within the scheduled area, it would not be appropriate to take scheduled monument enforcement action. Ordinary planning enforcement action would be taken.

Margaret Smith: So the fact that a piece of work on somebody else's property was going to be done alongside a scheduled monument's general area would simply be taken into account in the normal planning process.

Barbara Cummins: For any proposal that has the potential to impact on the setting of a scheduled monument, you must consider the setting. So, in taking enforcement action under planning requirements, you need to consider what the impact of granting planning permission would be. You are taking account of the monument in that respect.

Margaret Smith: Okay. The Scottish Property Federation expressed concern about the introduction of temporary stop notices, as there is no definition of what an urgent threat is. It believes that that could lead to inconsistency in their use. It also asked that notices be accompanied by detailed guidance that says why the notice was issued and detailed steps for how people can appeal. Is there sufficient clarity about when stop notices should be used?

Barbara Cummins: Obviously, there is a parallel in the planning process. Such notices are rarely used. They are a device of last resort to prevent significant harm and damage—I suppose that the loss of a monument, for example, might be one such case. In planning, the details are covered in circulars and advice notes rather than in primary legislation. We intend to do something similar to make clear what is required, what the process is and what people's rights are.

Margaret Smith: Is it your intention to give examples of the kind of works that you are talking about?

Barbara Cummins: It would behove us to do that in order to be helpful.

Alasdair Allan (Western Isles) (SNP): People will probably welcome the move to create an inventory of gardens, designed landscapes and battlefields. Will you say more about the intention behind that, and comment particularly on how such sites will be selected?

Lucy Blackburn: I will talk about the way in which we will look at battlefield sites in particular. In the Scottish historic environment policy we set out how we intend to present the inventory, and work on that is currently under way. We are looking for sites of national importance where we can demonstrate clear evidence that the battle took place there. There are always difficulties in defining exact areas for battlefields, which is the challenge that we face. However, we have engaged closely with specialist advisers to try to scope out the areas that are most easily defensible as being of national importance and that is our starting point. There will not be an enormous number of sites, but there are passionate feelings about the sites that we have. Ministers understand that the current absence of any recognition in the system specific to battlefields has been felt to be a weakness. That is why we are doing what we are around planning. I will ask Barbara Cummins to expand in more detail on precisely how the planning system operates, as that is the main way in which battlefields and gardens will be protected.

Barbara Cummins: We anticipate that battlefields will operate in a similar way to how gardens and designed landscapes operate at the moment. Within the regulations that cover planning, you are obliged to consult on any development that has the potential to affect a garden or designed landscape. That would be equally true of battlefields. The regulations are not yet written because the bill is not yet passed, but we are thinking about them. Historic Scotland has a role in advising local authorities on when a development has the potential to impact in that way. As part of the designation process, we are establishing what is significant about the battlefield and what the features and characters are to which planning authorities will have to have a mind in making their decisions.

Alasdair Allan: Lucy Blackburn said that there are sometimes battles about what constitutes a battlefield. I can think of an example from my constituency where a group of people hotly defended a site as being a mass grave from a battle and another group pointed out that if that were true the same bodies would have been cremated several times over by generations of peat cutters. How do you cope with contested sites when designating battlefields?

Lucy Blackburn: We do our best to work on an evidence base. That is all that you can ever say in such cases. You work on archaeological data and other data depending on the period of the battle and in the end you have to reach a judgment. There is no way round that; there is never an absolutely scientific approach for doing such things and in the end it has to be a matter of judgment and you have to be willing to wear your judgment. The main point is that the judgments that we make about what we put on the register and why it is there are transparent and we make available the evidence on which they are based. That is the main thing that we can offer, so that other people can look at what has been done and judge for themselves whether they feel that it is a

reasonable set of decisions. That is the most that you can ever say in such cases.

Alasdair Allan: Will any of you comment on the obligations that listing on the inventory will create? For example, the one that leaps to mind relates to gardens. What does inclusion on the inventory imply for the maintenance of a garden site?

Lucy Blackburn: Inclusion on the inventory does not carry any obligations for owners to do any particular works or take any action to maintain the garden. All that it does is to register that we are aware that the garden is a nationally important site and that therefore, if there are any planning proposals that might affect it, local authorities must take it into account as a material consideration. It also means that Historic Scotland becomes a statutory consultee in the planning process. The changes in the bill are essentially about making that system knit together in a more efficient manner than it currently does, but it does not change the basic structure, which is a planning process. So inclusion does not place any obligations on owners.

I know that one or two consultees raised concerns that the bill was seeking to place such burdens on people. If you own one of these sites or are carrying out developments near it, you will be, as with any planning material consideration, under an obligation to bear that in mind in your works, but no proactive duty will be placed on, for example, the owner of a garden to do any works to it.

10:30

Claire Baker (Mid Scotland and Fife) (Lab): In light of concerns that were raised in some responses to our consultation about the new power in section 18 to issue certificates of immunity, will any costs be attached to such applications? Secondly, does the application process have any timescale? I understand that there is a timescale for the decision process but no indication of how long the application process will take.

Lucy Blackburn: There will be no cost to applicants. We looked very hard at the issue and concluded that charging for applications is not the right approach. After all, the aim of the provision is to encourage people to come to us and that might not happen if we put a charge on them. The approach is generally consistent with that which is taken in heritage protection; for example, people are not charged for scheduled monument or listed building consents.

The legislation contains no timescales for the application process or for how quickly we will deal with applications, but we are fully committed to issuing guidance that will give people very clear information on how to apply and what happens after. It is not really possible to offer a deadline for how quickly we will issue a certificate—indeed, it would be misleading to suggest that we could do so. I can say, though, that it typically takes between four and six months to list a building. It depends very much on the site. We need to take into account obligations in administrative and policy terms to consult and statutory obligations to consult local authorities and would normally expect most applications to take a few months. That said, we can take less than a month over some cases if it quickly becomes apparent that the building in question falls below the tests for listing.

Nevertheless, we are very committed to scrutinising applications for the certificates in the same way that we would scrutinise any listing proposal to ensure that, if a certificate is issued, anyone with an interest can be fully confident that it has received the same amount of scrutiny as any other case that we would look at. That will take some time.

Claire Baker: The Royal Town Planning Institute in Scotland suggested that the applicant should bear the cost. Is it possible to attach a cost to the process?

Lucy Blackburn: Based on our best estimates, we think that the average cost to Historic Scotland of listing a building is £605 and that the cost of dealing with certificates under section 18 should be very much in the same range. Of course, the total cost to Historic Scotland will depend on the number of applications that we receive. In the financial memorandum, our best estimate for costs is between £12,000 and £18,000, but that will obviously depend on how many people come to us. As I have said, we can give a reasonably secure figure of about £600 for the cost of listing a building.

Claire Baker: The power seems intended to encourage developers to make decisions about which properties should be developed. Concern has been expressed that if an application for a certificate of immunity is not granted, the site will automatically be listed, which is the reverse of the situation that was being sought. Is that right?

Lucy Blackburn: We expect that, under the process, we will receive an application for a building that is not listed at the moment. All the listing tests will be applied, which could well result in the building's being listed. After all, if it passes the tests, we are obliged to list it. As a result, what you have suggested would certainly be the flipside in most cases; in fact, it is hard to imagine a case in which you would not end up with either a certificate or a listing.

Claire Baker: That is why the SPF has raised these concerns. Who is able to apply for the

certificate of immunity? It has been suggested that third parties or other people might be interested in applying for a certificate, given that it could lead to a listing.

Lucy Blackburn: We are very aware of those concerns and, indeed, have continued to discuss them with the SPF, the Law Society of Scotland and the Scottish Rural Property and Business Association. We are aware of the continuing worry about the breadth of who may apply, which we are not managing to assuage through various kinds of reassurance.

The model of any person applying comes from two places. At the moment, any person may apply for a building to be listed, and there is no restriction on who may come to us with a suggestion. Historically, that has always been the case, and that will be an important part of any legislation. We take that as a starting point.

We are conscious that, although the provision in England is different in some respects, it also contains the openness whereby any person may apply. We are not aware that it has been used for reverse tactics.

Having said that, we are conscious that our provision here is different from the English provisions, in that it allows people to come in at an earlier stage in the process. We are continuing to discuss the matter. The advantage of allowing any person to apply is that, although we would expect the owner or occupier to come forward in most cases, there might be times when someone who is considering buying a building, and who might be a key player in preserving that building, could become involved at a very early stage. If we limited who may apply we might lose some valuable cases of the certificate enabling buildings to be kept. It is a difficult issue, but we are continuing to discuss it with a number of the bodies concerned. We recognise that their concerns remain, despite the various discussions that we have held.

Claire Baker: You mentioned a similar scheme in England, which has attracted a relatively small number of applications.

Lucy Blackburn: Yes.

Claire Baker: Are you confident that the proposed scheme will be capable of achieving the desired outcomes? There are quite a few flipsides to how the scheme will operate, and the opposite outcome from what some people are trying to reach might be achieved instead.

Lucy Blackburn: The provisions in England were used, but not on a great scale—the numbers were not high. The English system required a person to wait until they had planning permission before they could apply for a certificate.

As I mentioned, there are some differences, one of which is that we did not follow that model. We felt that one of the reasons why the English system had not taken off was that, by the time that people reached the planning permission stage, they would already have invested heavily in the proposed work. If applications can be made sooner—before considerable investment has been made in plans and development—and if people know at an earlier stage whether they are within or without the listed building consent regime, that is potentially more helpful.

Interestingly, when consideration was being given to how to revise the legislation applying to England, there were plans to move to a model like the one that we have proposed for Scotland. The limitation on when to apply was regarded as a problem. The approach whereby any person can apply was stuck to in the draft UK bill.

We are conscious that the provision is novel and untested. As with anything of this sort, we hope that we have something that will fulfil the intention. It has been used in England up to a point, and that gives us some comfort, but we continue to discuss the issues with the key bodies, particularly the SPF, which is one of our target groups. We would be more comfortable if we could reach a point at which the SPF was more comfortable with how the system was functioning.

Kenneth Gibson (Cunninghame North) (SNP): I wish to discuss briefly the expansion of the definition of “monument”. Should that definition be extended to include any instances in which there is reasonable belief that a site comprises evidence of previous human activity?

Lucy Blackburn: The Law Society of Scotland, in particular, has been making that point. Considering how the law is drafted, there is no easy way of including such a test, at a legal level. The detailed list of what a monument is can be found in the interpretation provisions in section 61 of the 1979 act. That is simply a list of types of monument. Bringing in a reasonable belief test in that context would be quite a departure from how we have dealt with such definitions before. We are not convinced that that is necessary in order to achieve what we need to do.

We are conscious about the concerns over the proposed changes being quite a broad move. The Law Society’s proposals would broaden out the circumstances in which the power could be used and, to our mind, that is not the breadth that we should adopt.

We are fairly confident that those sites that we would wish to tackle are ones for which we could justify the use of the power outright, with the evidence that is provided. With a flint scatter, for example, it can be demonstrated where the flints

are scattered or whatever. Broadly speaking, we do not feel that such a development is needed. The proposal has come in at quite a late stage in the process, and we have not had very long to look at or think about it. The issue was not raised with us previously. Our initial response is that such a change is not necessary.

Kenneth Gibson: The Royal Town Planning Institute calls for an extension of listing definitions to include historic road or footpath surfaces that are currently unprotected. Has any consideration been given to that?

Lucy Blackburn: Again, we have only just received that issue, so I have to be honest and say that we are still considering it. The issue has not been put to us previously. I believe that a road surface that is clearly man made can already be protected, but I will just check with Barbara Cummins that that is correct.

Barbara Cummins: There are protected parts of Roman roads.

Lucy Blackburn: And military roads, too, I think.

Barbara Cummins: Yes.

Lucy Blackburn: However, if the only thing that created a path is footfall, we do not have a provision that would allow us to protect it. Having said that, we are not aware that there are any such paths that require protection, and the matter did not arise in the early stages of the consultation. We have not had an awful lot of time to consider the issue, so we are still doing that. The protection of historic footpaths did not emerge as a key issue in our earlier discussions with stakeholders. I cannot add a great deal to that at this point.

Kenneth Gibson: General Wade's roads and Roman roads seem the obvious ones but, apart from that, I wonder how practical such an extension would be. The same applies to the Law Society's suggestion. Scotland has been inhabited for thousands of years, so we cannot protect every place where someone has lived at some point. There must be a requirement for something to have real historical importance when we are defining a monument. On those suggested expansions, am I right in thinking that there is an issue about practicality as much as anything else?

Lucy Blackburn: Yes. The Ancient Monuments and Archaeological Areas Act 1979 says clearly that for something to be scheduled, it must be "of national importance"—that is the key test. I know that some people have been worried that the expansion of the definition of "monument" under section 14 will mean that we will be able to designate anything that we like, but we will not—it has to be nationally important. We need to be able to demonstrate reasonably that what we are designating is of national importance. That remains a fundamental part of the scheduling system. Ditto for listed buildings, for which there is a tight definition about special architectural or historical interest. I agree that the role of national designation is about the key assets that are of national importance, particularly on the archaeological side.

Footpaths are not an issue that has been raised with us formally. I am not aware that we have had any prior discussion on that. It is a new issue to us and we are not clear where it has come from. We might want to explore with the RTPI what is behind that comment to try to understand what it is about. If the RTPI is aware of cases, there might be answers in the current system. That is as much as we can offer.

Kenneth Gibson: Clearly, any case would have to meet the test of national importance.

Lucy Blackburn: Absolutely.

Elizabeth Smith (Mid Scotland and Fife) (Con): I want to draw attention to a difficult and sometimes slightly controversial issue: the repair and maintenance of deteriorating buildings and the liability for that. The witnesses will be aware that some of the submissions that we received were of slightly different opinions about exactly how that can be resolved. The HHA has made two suggestions, the first of which is that

"Where a building having an economic value is sold recovery should be made out of, and limited to, the net proceeds of sale. The open market value should be independently assessed in such cases."

The second suggestion is that

"The weight of deterrence should be directed towards the neglecting owner, not the potential buyer."

Personally, I think that that is an interesting point. What is your reaction to those suggestions?

Lucy Blackburn: On the issue of how the powers are used, I point out that, when a building is in a state that requires an urgent works notice, one would expect the local authority never to submit that notice in isolation. It would consider the building and the longer-term plan for it. Undoubtedly, the local authority would consider the value of the building and what would happen if it was repaired or not repaired.

In practice, we cannot imagine that a local authority would ever seek to recover more than it could recover. The HHA point is fair in the sense that the local authority can recover only what it can recover. Broadly speaking, if a building gets to the point at which it is worth much less than the cost of repairs, the local authority will probably be in discussion with the owners about what is to happen. There can be buildings for which the

repairs that are needed might be a great deal higher than the building would cost. However, that is not common—it is a very rare occurrence. At that point, the local authority would go into that knowing that the recovery powers would be rather constrained. The local authority would rather talk to the owner about what could happen next to the building and what their plans are.

In legal terms, it is hard to put in tests around this issue. It is much more about giving local authorities the powers to recover, as they already do. There is nothing new here, in the sense that local authorities can already go in and recover.

Elizabeth Smith: Is it not the case—this is certainly the perception of the public and some of the groups that submitted evidence—that when something has been neglected, we should be targeting the person responsible for that neglect, who has caused the problem and who is not necessarily the current owner? Perhaps you could explain which part of the bill would address that.

10:45

Emma Thomson (Scottish Government Legal Directorate): With the notice of liability for the recovery of works, the basic proposition is that the original owner will always be liable. The buck stops with them. The provisions are set up to ensure that if, for whatever reason, that is not possible, we have the option of getting the seller and successive future owners. The provisions are set up so that in the normal conveyancing process, any buyer will be aware of what has happened and will negotiate a reduced purchase price from the original seller. That will probably work out and the purchase price will be reduced. In cases where it is not—and there is no negotiation—the new owner can always go back to a former owner to recover the costs from them.

Elizabeth Smith: Sorry, forgive my ignorance, but will you explain how that happens?

Emma Thomson: The former owner always remains liable in a situation where the normal conveyancing transaction and process have not balanced out on an economic basis. One of the provisions is that the former owner is still liable and the new owner can recover the amount from the original owner.

Elizabeth Smith: Right. It was suggested that a five-year development period was perhaps too short. Will you give your reaction to that, too?

Lucy Blackburn: There is nothing to stop the notice being rolled over, so the person can reapply. The original period is five years, but if nothing has happened in that five years and the authority thinks that it is worth doing so, it can extend the period by taking out a further notice.

Elizabeth Smith: And the onus is on the person who is the owner of the property.

Lucy Blackburn: The original act—the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997—which contains the original powers of recovery from owners, is absolutely about owners. That has always been a principal tenet of recovering costs—it is the owner of the building who is ultimately liable for such works. What the owner does subsequently with the occupier is up to them. As far as we are concerned, the owner is the key contact.

Elizabeth Smith: Do you think that it is a valid concern that the five-year period is too short?

Lucy Blackburn: If there was not a provision to roll it forward, there might be a concern. However, it is possible to go back to the registers and ask for the notice to be refreshed. The bill will require local authorities to be careful not to let the notice expire, because if it expires it is not possible to go back and do that again.

Elizabeth Smith: I want to be clear about that. Is it a local authority's obligation to check that?

Lucy Blackburn: It would be the local authority's obligation, because the local authority is seeking to recover the costs. We would expect that a standard process in such cases would be for the authority to keep things under review and to consider just before the end of the five-year period whether it was worth reregistering with the keeper.

Elizabeth Smith: On a slightly different theme, has the Scottish Government considered using the bill to impose a duty on all public bodies to

"protect, enhance and have special regard to Scotland's historic environment in exercising their duties"?

Lucy Blackburn: We looked very carefully at that, because it has been a key concern from a number of stakeholders. Obviously, it came up in the consultation on the draft bill in May 2009 and we have continued to discuss it with stakeholders over recent months. The key thing to say is that this is about means, not ends. There is no difference between the Government and the bodies that have been commenting on the bill with regard to the commitment to good stewardship by public bodies. We completely agree that the role of public bodies in caring for Scotland's historic environment, whether as the owners of assets or more broadly in their other duties, is very important.

A number of policy statements—the Scottish historic environment policy, planning policies and so on—reiterate the importance that ministers attach to public bodies, not least planning authorities, caring for the historic environment and not just its designated elements, but the wider

elements about which respondents to the committee have expressed concern. The issue is the role of law, or where a legal duty fits in.

Ministers have taken the position that a legal duty is not the most appropriate way of pursuing that agenda. There is a strong degree of consensus that, if we are to encourage public bodies and large and small organisations to take care of assets, it is critical to win over hearts and minds at senior level in those organisations. The work that we have done on joint working agreements, which involves talking in depth and individually to local authorities about how they carry out their functions, and the leadership that we are providing through policy statements, seem to us to be key. We have also spoken to local authorities at senior level as part of the single outcome agreement process.

Again, we have taken the chance to talk about the historic environment not just as a planning issue but more generally, as an asset and benefit to communities. If thought about broadly, it can bring enormous benefit. The value that communities place on their historic environment is about wellbeing, community feeling, health benefits and so on. We are keen to have a broad debate with public bodies about those benefits and to encourage them to see the historic environment as an asset.

Where does a legal duty fit into that machinery? There are people who feel strongly that a legal duty is a necessary part of it, but so far the argument has not been made persuasively enough. We are looking at the impact of imposing a legal duty. We know that it would be controversial and we have received a clear indication that local authorities are not keen on it. We also know that at the moment we are managing to do what we do with a high degree of consensus. When we knock on local authority doors, they are often open to us; we have been pleased with the responses that we have received.

The same applies to the Scottish historic environment policy, which provides a framework within which all public bodies can be accountable to Scottish ministers. The expectation that bodies should produce a five-yearly report on their historic environment assets has gone down smoothly—we have not met great resistance in promulgating it. The concern is that, if a legal duty is imposed, people will start to be much more anxious about compliance issues, the debate will become very different and we may not achieve what we want to achieve. We also need to consider whether a legal duty would make much difference in the end. It is a live debate, and we recognise the strength of feeling that exists.

Elizabeth Smith: My final question relates to an interesting comment that you have just made. My impression is that the principles of the bill have met with reasonable approval across the spectrum but that concerns remain about definitions, clarity and some legal issues. I know that the matter is difficult—as Mr Gibson said, we are dealing with thousands of years of Scottish heritage. Nonetheless, do you accept that there are still a few concerns about tightening up some technicalities and that a bit of extra clarity may be needed in some definitions to ensure that it is clear in law, if necessary, who is responsible for certain duties?

Lucy Blackburn: Ministers will want to look hard at the outstanding issues, because we have been working hard with stakeholders to resolve them. I am sure that ministers will want to look carefully at some unresolved issues, where there may be scope for doing more. In other cases, it may be more difficult to address concerns.

In some areas where further definition is an issue, such as section 14, we have said that we will produce policy statements, which are the framework that has been used under such legislation for many years to provide greater clarity. We are absolutely committed to producing drafts of those statements for stage 2, so that the committee and stakeholders can see what we think the non-statutory picture will look like. That may help people to decide whether they think that there is genuinely still an outstanding need to produce more legal definition. We make that commitment in the policy memorandum and are working hard to ensure that we fulfil it.

The Convener: That concludes the committee's questions to you and the formal part of our deliberations this morning. Thank you for your attendance.

Meeting closed at 10:54.

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