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RESPONSE TO THE ANCIENT MONUMENTS AND LISTED BUILDINGS
(AMENDMENT) (SCOTLAND) DRAFT BILL FROM THE SOCIETY OF
ANTIQUARIES OF SCOTLAND

The Society is grateful for the opportunity to take part in the consultation on this new Bill. Information on the Society is available on our website, but as the senior antiquarian body in Scotland we believe strongly that any amendments to current legislation dealing with our historic environment should only enhance the Government's commitments to the sustainable management, preservation and conservation of our historic environment.

In this light we very much welcome this important draft Bill, which aims to amend issues that the historic environment sector have highlighted as necessarily in need of revision. A positive effect of tightly focused amendments rather than a wholesale revision of legislation is the retention of the two strands of statutory protection afforded to ancient monuments and listed buildings respectively, which we consider reflects important distinctions between these types of heritage asset.

There is much to welcome in this Bill, including:

- Section 4: the removal of the "defence of ignorance"
- Section 16: the revised and more inclusive meaning of "monument" in the 1979 Act
- Sections 7 and 21 to 24: enforcement notices including stop notices and temporary stop notices

We make detailed comments on particular sections of the Bill below, including, as requested, our views on the PRIA and any equalities impact.

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Sections 1, 11, 14, 25 and 26

The Society welcomes the clarification and extension of the framework to provide grants and other financial assistance in relation to the historic environment. The provisions allowing for clarity in the recovery of grants is especially welcome. The Society considers the power to recover expenses for urgent works through a registering a notice of liability in the Land Register of Scotland, or Register of Sasines as appropriate, is proportionate and necessary, although this should be accompanied by improved communication and relationships with owners of protected buildings. This would also be an opportunity to allow urgent works to occupied buildings (repeal or rewording of section 49(4) of the 1997 Act) and extend the framework of grant provision to include financial assistance to Local Authorities with regard to these urgent works (an amendment to sections 69/70 of the 1997 Act). A broader framework of grants and loans should provide for bodies other than NTS and local authorities to procure listed building acquisition grants.

Section 2

The Society is generally in favour of this amendment to introduce the offence of *disturbance*. The Society is aware that Historic Scotland has been advised that this change will help to increase the protection afforded by scheduling when cases come to court, but notes that the definition of disturbed is that a work has affected the “conservation, stability or national importance” of a monument.

A consequence of an offence of *disturbance* to the national importance of a monument may be that works affecting the setting of a monument could be construed as such according to the criteria defined by Annex 1 of SHEP. The Society would support such controls on works surrounding our nationally important heritage, but would highlight concern for the resources available to deal with such a potentially broad definition.

In the interests of consistency it is worth examining the original 1979 Act and this Amendment Bill to ensure the use of the term *disturbance* rather than, or in addition to, *damage* elsewhere. For example, in Section 12 the amendment to section 26 subsection 4(b), the final sentence to read “...land is or may be at risk of imminent disturbance, damage or destruction”.

Section 3

The Society welcomes this insertion to the 1979 Act, but it must be accompanied by clear guidance that such approval is provided following the same strict assessment and consideration as that for Scheduled Monument Consent.

Section 4

The Society is in favour of the amendments to the 1979 Act in respect of defences involving knowledge or belief, but with the caveat that there must be a concerted effort to present all information on historic environment assets, and especially in this case statutorily protected assets, clearly and accessibly in the public domain. This includes, but is not restricted to, the continued investment in and development of PASTMAP

(supporting SHEP sections 1.53c and 1.51) in collaboration with RCAHMS and the Local Authorities and any other body holding relevant historic environment data; we would strongly recommend the improvement of information on historic environment asset location and extents, both digitally to the wider public and on-site for those with protected assets on their land. The Society represents Fellows of all backgrounds and it is possible that this particular area of the Bill could be perceived as one of the more contentious; it is thus incumbent on the Scottish Government to ensure that everything possible is being done to accurately and clearly educate the public about what and where heritage assets are in Scotland.

Section 5

The Society welcomes the increases in fines and the insertion of amendments allowing financial benefit to be considered in their determination.

Section 6

The Society welcomes this clarification.

Section 7

The Society is generally in favour of this provision for enforcement notices to be served to cease works on a monument and restore the monument or land to its former use where required. The provisions to be introduced in sections 9A to O appear to be proportionate and necessary. However, it is not clear from the proposed insertion to section 9 of the 1979 Act on whom the enforcement notice is being served; for example copies are served under 9B(4) and there is mention of “A person on whom a scheduled monument enforcement notice is served...” in 9C(1), but no direct mention earlier of who this person might be. The Society is concerned that this may introduce confusion as to who is ultimately responsible for ensuring the requirements of the notice are carried out?

In section 9E(6) is there a particular reason for this fine being lower than previously increased fines in Section 5?

Section 8

The Society has no comment.

Section 9

The Society would require clear guidance that section 19A(8) includes the requirement to obtain Scheduled Monument or Listed Building Consent, and thus the general protection of the heritage asset is not put at risk in the application of this provision. However, it should be noted that this part, and section 10 of the Bill could be perceived as removing burdens from government (both local and national) that are still in place for other members of the public who own designated sites, thus promoting an unwelcome two tier system of protection.

Section 10

See above.

Section 11

See above.

Section 12

The Society supports this amendment, with the possible inclusion of *disturbance* in section 26(4b) of the 1979 Act as noted in Section 2 above.

Section 13

The Society supports this amendment with the proviso's noted in Section 2 above with regard to the potential interpretation of *disturbance* to the national importance of a monument.

Section 14

The Society wholeheartedly welcomes this amendment to the 1979 Act, and indeed would hope that it could be used to help with the general education required as a result of the introduction of Section 4 of the Bill.

Section 15

The Society welcomes this amendment.

Section 16

The Society very much welcomes the revision of the meaning of monument in the 1979 Act, and believes this will allow better protection to be afforded to the true range of nationally important monuments that are testament to Scotland's past.

Section 17

The Society supports this harmonisation with planning legislation.

Section 18

The Society recognises that the introduction of a "certificate of immunity" to listing is one of the few wholly new provisions to be introduced in this Bill. As such, it considers that more consideration of the implications, process and resources required to carry out this provision are necessary, and the Society is glad to help where possible and would welcome Historic Scotland's offer of a focused sectoral workshop on the topic. However, the Society considers that the introduction of such certificates would be of benefit to the clarity and streamlining of work relating to areas where listing might inadvertently confuse and complicate matters. Such certificates should be introduced only with up-to-date lists and in conjunction with thorough appraisals of any proposed building comparable to the listing process. There are still concerns however, with the process to be followed, and what the status of a building that was refused a certificate might be (would it be listed?); it is also possible that a large number of applications would impact on strategic listing programmes.

Section 19

The Society welcomes these increased fines.

Section 20

The Society welcomes the harmonisation with other areas of the planning system, while noting that this might be seen as another controversial area. It would also be useful to have clear guidance as to how this relates to the provision to allow Local Authorities to determine certain listed building consents.

Section 21-24

The Society welcomes the additional provision of “stop notices” and “temporary stop notices” to the 1997 Act. Again, presumably there is a reason for section 41E(6) level of fine to be lower than other increased levels within this Bill?

Section 25

The proposed insertion to the 1997 Act with regard to liability of owner and successors for expenses of works is, in view of the Society, proportionate and harmonises with similar provisions in terms of building ownership generally. It may be useful to have clear guidance on the application of this provision to the relationship between a particular listing and owner(s) of any parts of that listing.

Section 26

The Society welcomes this amendment to the 1997 Act.

Section 27

No comment

PRIA

While it is noted that this Bill is designed to be a focused amendment of existing legislation, and thus incur minimal cost, there are certain sections, beyond those mentioned in 4.11 of the Bill consultation, which could have unforeseen impacts on resources.

The main one is the introduction of certificates of immunity from listing, and while there is some evidence from elsewhere to suggest minimal impact, it is possible that in Scotland the burden on Historic Scotland might be more than anticipated. It is possible, for example, that during the pre-development phase contractors habitually seek certificates of immunity for all buildings potentially affected by particular works. There is also concern, which the Society supports, that the process should include the same level of assessment of a building as the listing process itself. This would inevitably lead not only to a potential increase on staff time, but also a potential loss of strategic listing priorities.

The revision of the meaning of the term monument, while still requiring to meet certain criteria for statutory protection, will increase the potential number of sites requiring consideration by Historic Scotland staff, and thus a consequent increase in workload and resources. This would also follow for RCAHMS staff and resources, where the initial record of monuments is compiled against which the consideration for statutory protection is made.

Similarly the introduction of the term *disturbance* to a protected monument as an offence may have knock on effects to resources within the bodies dealing with any particular development, depending on the interpretation put on disturbing the national significance of a particular site.

While these issues do not detract from the Society's positive support for the Bill we believe that Government should be fully aware of the potential implications and be committed to fully resourcing these as necessary. We are pleased to see that Historic Scotland has agreed to liaise with small firms if any unforeseen costs or impacts occur as a consequence of this Bill.

Equalities Impact

The Society agrees with Historic Scotland that the Bill provisions are unlikely to have significant equalities impact, as long as provisions are made for those with disabilities, e.g. when serving notices etc.

Provisions for consideration to include within the Bill

While the Society fully understands the overarching policy aims as detailed in 1.23 of the Bill consultation, and keeping in mind specifically that the Bill would not want to introduce "significant burdens or duties", we would highlight the following, in addition to those specified above, that we consider would merit inclusion within the scope of this Amendment legislation:

- 1) A statutory Duty of Care for the historic environment. While perhaps considered a significant burden, in reality this would harmonise the historic environment with the current natural environment legislation, and the duties on government bodies towards sustainability. It would underpin the key principles listed in SHEP section 1.14 and 1.16. The Society is, in collaboration with Archaeology Scotland, collating evidence on the potential impact of such a duty.
- 2) Interim protection of assets under consideration for listing or scheduling. The Society would consider interim protection an essential measure to accompany the introduction of enforcement notices and would provide greater transparency in the process. Interim protection would render historic assets less vulnerable to damage or destruction during the process of listing or scheduling.
- 3) Provisions to halt the damage caused to designated monuments by agricultural class consents. The threat to nationally important monuments below ground from agricultural activity (particularly ploughing) has long been recognised through several studies in Scotland, and the removal of permitted agricultural activities without SMC would do much to address these issues. Although there may be compensation implications for existing scheduled monuments, this should not be the case for those monuments scheduled after the enactment of any such provision, indeed it may instead be possible to consider the removal of permissions only for newly scheduled monuments.
- 4) A statutory duty on local authorities to maintain or have access to a Historic Environment Record/Service. The local authorities play a crucial central role in the

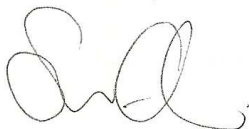
management and protection of the historic environment, especially beyond designated assets, and the records and services they provide are a key tool in historic environment management and protection. This provision would help underpin the relevant sections of SHEP (e.g. sections 1.14, 1.15, 1.16, 1.19a, 1.50 and Note 1.4 on pg55).

- 5) Completion certificates for consent activities. Currently local authorities have little control over the timetabling of consent works to listed buildings once started (Planning etc. (Scotland) Act 2006 sections 20 and 21), leading to resource implications over the timing of visits to assess works being undertaken through a valid consent. Work on buildings currently requires a completion certificate from Building Control, and a similar process for listed building and scheduled monument consent could aid transparency, clarity and efficiency and thus reduce a burden on local authorities.
- 6) Revocation of statutory wording of communications with the public. After discussion with Historic Scotland, the Society would support additional amendments to improve the wording of communications with owners/occupiers and others.
- 7) Enable amendments to register of Gardens and Designed landscapes without parliamentary approval. After discussion with Historic Scotland the Society would support the streamlining of the process of amending the non-statutory lists held by Historic Scotland, such as Gardens and Designed Landscapes and the potential forthcoming Historic Battlefields inventories.
- 8) Ecclesiastical exemptions from listed building consent could be removed by amending section 54 of the 1997 Act.

SUMMARY

In general the Society strongly supports this vitally important Bill, which will enable better sustainable management of our priceless and nationally important heritage assets. It would, however, equally strongly recommend the adoption of the above focused amendments, some of which will help to better protect those non-statutorily protected assets which nevertheless have local, regional or indeed as yet unknown national importance, and which set the context for the understanding of Scotland's past. Throughout the whole process and beyond into what will hopefully be a new legislative context, there should be a presumption towards, and a properly resourced process of, education and transparency on behalf of government and all those involved in the legislative regime. In particular however, there is an opportunity here to increase public knowledge of our enviable historic environment assets.

I also enclose the Respondent Information Form.



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