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Dear Sirs

The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill

The Planning Law Sub-Committee of the Law Society of Scotland (the Sub-Committee) welcomes the opportunity to comment upon the terms of the draft Bill before further progress and should like to respond as follows:-

Preamble

The Sub-Committee generally welcomes the continued drive towards synchronisation and harmonisation of legislation and procedures in related areas of control.

The Sub-Committee noted that consideration was given to root and branch reform of the legislation for the historic environment, but the outcome of that consideration was that improvement and patching were sufficient. The Sub-Committee broadly agrees. The provisions for Ancient Monuments were generally sound, but required to be brought up to date, including better provision for enforcement where damage was occurring or threatened. The equivalent tried and testing planning measures have been used as a model, and again, the Sub-Committee broadly approves this approach.

The Sub-Committee notes that the Scottish Government is keen to avoid additional unnecessary burdens on economic interests in times of pressure.

In the Sub-Committee's experience, such economic interests are best assisted by absolute clarity and predictable effects in terms of the legislation and such interests are not assisted by any ambiguity or complexity. These can be more unhelpful than a new measure which provides for clear and predictable control of an issue.

The Sub-Committee has the following specific comments with regard to the Bill.

PART 1 - AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953,

Section 1 – Recovery of grants for repair, maintenance and upkeep of certain property

These are consequential amendments to Section 4A of the Historic Buildings and Ancient Monuments Act 1953, but appear, however, to be convoluted in their terms. The Sub-Committee questions whether they are necessary.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 2 – Control of Work affecting Scheduled Monuments

The Sub-Committee would suggest that the word “and” should be inserted between “Scheduled Monuments” and “affecting” where occurring in the new sub-section (aa). As it reads at present, it suggests that “disturbance” is insufficient by itself. The Sub-Committee suggests that there should be scope for enforcement action where disturbance is happening, but the effect of the disturbance is as yet unmeasured.

Section 7 – Works affecting Scheduled Monuments: Enforcement

The Sub-Committee notes that Section 7 inserts new sections 9A to 9F into the 1979 Act.

The Sub-Committee would question whether the definitions of proposed threats are sufficiently wide in scope. By way of example, neighbouring works outwith the boundary of the scheduled area may still have the potential to damage or destroy the scheduled monument. Such a situation may occur where there is a danger either of flooding, or of drainage of a waterlogged area, where fragile remains are preserved. In the proposed new section 9A(4) the two paragraphs A and B are divided by the word “or”. The Sub-Committee suggest that the word “and” is more appropriate as sub-section 4 at present appears to construe alternative, mutually exclusive reasons.

New Section 9C: Appeal against Scheduled Monument Enforcement Notice

The Sub-Committee notes that appeals against enforcement notices are to the Sheriff.

The Sub-Committee has no particular concern with regard to this, although it is important to highlight that appeals to the Sheriff on the subject matter are relatively untried. The closest equivalent would be appeals to the Sheriff against various measures arising from environmental protection legislation and the release of information. These remain rare, and accordingly untested.

The Sub-Committee questions why it is felt necessary to provide a new off-shoot of appeals to the Sheriff. The Sub-Committee suggests that relevant expertise and detailed knowledge of national and international policy for scheduled Ancient Monuments lies with the Scottish Government Directorate of Planning and Environmental Appeals. There may be cost and spend advantages in such a review process, based on existing procedures, on the basis that Article 6 issues can be resolved. The Sub-Committee questions why it was felt necessary to direct such appeals to the Sheriff and, if there are Article 6 concerns, what shape those concerns took. The Sub-Committee also questions whether arguments that would allow an appeal to the Court of Session on a point of law could not be said to meet the concerns in relation to compliance of Article 6 as well here as elsewhere.

The Sub-Committee also notes that the powers of the Sheriff are relatively restricted, and do not include a power to amend a notice, if he or she considers that a minor amendment would be appropriate. Given the importance of the notice in protecting an irreplaceable national resource, it is suggested that consideration is given to enabling the Sheriff to rectify any defect of the notice, or to modify its terms.

New Section 9D – Execution of Works required by Scheduled Monument Enforcement Notice

The Sub-Committee questions why the word “occupier” is omitted from Section 9D(1)9(b) restricting the powers of recovery only to the owner and any lessee. A person occupying land, without a lease may well be a person who may damage an ancient monument.

Section 9D(3) provides for a remedy available to the owner of a monument or land, where the occupier is being obstructed. Again, this supports the argument above that the occupier should be a person potentially liable for any damage. However, it is suggested that this measure requires clarification. It should be made express in terms of this section that this is intended to be a self standing summary application for an order available to an owner unable to comply and that it need not require to be raised in the context of an appeal, or any other measure.

It is suggested that the measure should be available only where the owner of the land has no contractual right of entry. If the owner has such a contractual right, then he should be required to use it, to avoid the necessity of a potentially defended action in the Sheriff Court, with consequential delay, and consequential damage. Such an action should only be available to the owner where he or she has no other resource against the occupier.

New Section 9E – Offence where Scheduled Monument Enforcement Notice not complied with

The Sub-Committee notes that the fines are relatively restricted, and suggest that consideration is given to bringing the penalties into line with those imposed with regard to environmental legislation.

The Sub-Committee suggests that it is quite appropriate for the offences of non-compliance with an enforcement notice to reflect similar penalties elsewhere such as in planning enforcement.

The Sub-Committee makes the same comments with regard to Section 9J – Penalties for Contravention of Stock Notice and Section 9M – Temporary Stock Notices: Offences.

Section 13 – Offence of disturbance of certain Ancient Monuments

The Sub-Committee suggests that the word “disturbance” would benefit from a statutory definition. Is it, for example to be regarded as disturbance if someone parks a moveable advertisement trolley on an earth work?

Section 16 – Meaning of “monument” in the 1979 Act

The Sub-Committee broadly welcomes the extension of the definition of “monument”. However, the Sub-Committee suggest that it may be appropriate to confer on Ministers the power to act where Ministers hold a reasonable belief that the site is likely to compromise anything or group of things that evidences previous human activity. Given progress in archaeological research and techniques and the ephemeral nature of the evidence, it is possible that whether or not a site evidences human activity may be unclear for a certain period. The Sub-Committee suggests that a reasonable belief that a site is likely to comprise important evidence could well be sufficient for Ministers to take legitimate action.

PART 3 - MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 18 - Certificate that building not intended to be listed

While the Sub-Committee broadly welcomes the concept of a certificate that the building is not intended to be listed, and notes that the Scottish Government proceeds on the basis that it has worked in a satisfactory manner in England, the Sub-Committee suggests that these measures are inadequate to cover the situation where the process of development reveals important historic build fabric, or other new information which changes the previously reached view.

In this regard, it would be helpful to have some confirmation as to what preliminary procedures are envisaged before a certificate is granted.

The Sub-Committee suggests that consideration is given to conditions being imposed on the certificate, to the effect that the certificate may be withdrawn should new evidence emerge.

Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines

The Sub-Committee suggests that there is no real justification for any differences between the penalties imposed and the content of scheduled monuments or of listed buildings, and suggests that all penalties be synchronised.

Section 25 – Liability of owner and successors for expenses of urgent works

Section 50A – Liability of owner and successors for expenses of works executed under Section 49

The Society has responded to Section 25 under separate cover. The Sub-Committee suggests, however that the recovery of expenses from persons who have been responsible for carrying out damaging works should be on the basis that they are jointly and severally liable for any debt. It may well be quite difficult for the enforcing authority to establish who was primarily responsible, where, particularly in a commercial situation, there may be a considerable mixture of owners and occupiers. It is suggested that it would be expedient for the public purse where expenses to be covered on a joint and several basis from all potentially liable persons, leaving them with a right of relief among themselves.

I trust that these comments are sufficient for your purposes.

Should you require any further information, please do not hesitate to contact me.

Yours sincerely

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