



Consultation Comments:

The Ancient Monuments and Listed
Buildings (Amendment) Bill

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12 August 2009

Dear Sirs

The Ancient Monuments and Listed Buildings (Amendment) Scotland Bill - Comments from the Scottish Civic Trust

Thank you for affording the Scottish Civic Trust the opportunity to comment on this draft amending Bill.

In overall terms, the Trust welcomes the provisions proposed in The Ancient Monuments and Listed Buildings (Amendment) Scotland Bill (the "Bill"), with only a few specific concerns.

Full details of our comments can be found in the enclosed set of tables which should be read in conjunction with the letter. These address the main parts of the Bill, and also suggest additional amendments not included but which are considered to be in the spirit of the proposals. SCT also make a number of suggestions for more significant changes that would require a more fundamental change to legislation for consideration and debate.

Specifically, the Trust welcomes the harmonising proposals contained in the Bill, making sure that arrangements across heritage and planning legislation are consistent. We also welcome the introduction of Stop Orders and Temporary Stop Orders for listed buildings and scheduled monuments. We note that some positive changes such as the introduction of time limits to listed building consent lie in the new planning Act and is therefore not included here.

Specific areas of concern include:

- Certificate of Immunity from Listing – whilst SCT can understand the support for this proposal from certain sectors, there are a number of considerable questions with regard to its operation and placement within

wider legislative processes as to make us not support its inclusion. Additional work, including an articulation of consultative processes is required before these should be advanced. Specifically, the proposed period should also be reduced from 5 years to 3, with perhaps provision made for properties that have received planning/listed building consent after the granting of a Certificate.

- The Trust does not support the proposed special provisions for Monuments in Guardianship (s.8-10) as this introduces a two-tier regulatory regime – one for government and another for everyone else. Consistency and transparency are crucial in any proposed amendments to legislation.
- We have concerns with regard to the proposed new meaning of “monument” under the Ancient Monuments and Archaeological Areas Act. The proposed definition is too broad in its range and could therefore result in confusion as to what could be scheduled and what couldn't. It is our view that this underlines a more fundamental issue with the legislation that needs to be addressed.
- The Trust has concerns with regard to changes to the appeal provisions. The main concern is the lack of clarity in how these amendments will relate to the provisions in the Planning Etc (Scotland) Act 2006 and especially the use of Local Review Bodies to consider historic environment applications. We have serious concerns about the use of LRBs to review any listed building application.
- Whilst supporting Fixed Penalty Notices for noncompliance with listed building enforcement notice, we have reserves about the money once received. It is our view that there should be provision made to ring-fence such fines to assist in aspects of heritage management. In other words, the money received should not be treated as general income by a planning authority.

The Trust also offers in its comments suggestions for additional amendments which it thinks are consistent with the aims of the Bill.

Finally, whilst we acknowledge that it lies outside the boundaries set by the Minister for this review, the Trust believes strongly that a new statutory Duty of Care for the historic environment imposed on Public and Quasi-Public bodies would go significantly towards improving the effective management of our cultural heritage. It does not matter how comprehensive or forward-looking a piece of legislation is, if a regulatory authority can choose, with impunity, not to implement or enforce it.

The Trust would be delighted to discuss any aspect of these comments if desired.

Yours sincerely

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Comments from the Scottish Civic Trust on **The Ancient Monuments and Listed Buildings (Amendment)(Scotland) Bill**

August 2009

Abbreviations of note:

PLBCAA – Planning (Listed Buildings & Conservation Areas)(Scotland) Act 1997

AM&AAA – Ancient Monuments & Archaeological Areas Act 1979

T&CPSA – Town and Country Planning (Scotland) Act 1997

PESA - Planning etc (Scotland) Act 2006

LB – Listed Building

CA – Conservation Area

SM – Scheduled Monument

TABLE ONE:

Part one – amendment to 1953 Act

section	Item	Comment
1	Recovery of grants	SUPPORT. Some issues about the implications for financing Listed Building projects as offer of grant might not be seen by Banks as a “clear” grant – ie clawback might affect development appraisal and affect security. Against this, we appreciate the added clarity that this provides.

TABLE TWO:

Part two – modifications to Ancient Monuments and Archaeological Areas Act 1979

Section	item	comment
2	Control of works affecting SM – amending to include “disturbed” as well as “damaged” as an offence.	SUPPORT. This is as much a response to case law as it is anything else. Easier to prove disturbance than damage, and we acknowledge the benefits in doing so.
3	Works affecting SM: consent for works without authority	SUPPORT. Harmonises with PLBCA Act and new planning act. May be appropriate to retain some authorised works as unpicking them might cause more damage, etc. This also allows Scottish Ministers to grant SMC for unauthorised works, which is reasonable.
4	Defences involving knowledge	SUPPORT. This removes the defence of “ignorance” from Act in causing damage to a scheduled monument.
5	Fines – increase in level	SUPPORT. SCT welcomes the increase of fines up to £50,000 from the current £20,000 limit.
6	Powers of entry to inspect condition of SM	Welcome. This harmonises procedures with PLBCAA.
7	Works affecting SM: Enforcement	Welcome. This proposal harmonises enforcement procedures with PLBCAA and the new planning regime. It allows Scottish Ministers to serve enforcement notice requiring unauthorised works or beaches of condition requiring repair or amelioration.
7	Introduction of Stop Orders and Temporary Stop Orders	SUPPORT. This harmonises current provisions within planning system and applies them to archaeological matters. These will allow Scottish Ministers to halt – immediately in terms of TSOs – unauthorised works.

8-10	Monuments in Guardianship	<p>NOT SUPPORT (in part)</p> <p>SCT has some concerns with this section of the draft Bill. The proposals will allow Scottish Ministers to provide a range of facilities and services for public at properties in <u>their</u> guardianship. The concern is that this will create a two-tier level of Scheduled Monuments as monuments NOT in Guardianship would need to go through the full Scheduled Monument Consent process rather than benefit from these proposals. SCT believes that there should be equity in statutory process regardless of ownership.</p> <p>SCT welcomes the explicit powers to offer Scheduled Monument grants to third parties to undertake works of preservation, maintenance and management.</p> <p>We also welcome the new power of access to allow an authorised person to enter land to carry out essential investigatory works where they know or have some knowledge that Scheduled Monument is at risk of imminent damage or disturbance.</p> <p>We also welcome new power of financial assistance by way of grant or loan to be made available to any organisation or individual involved in promoting the development or understanding of historic, architectural, traditional, artistic or archaeological interest.</p>
15	Retention of found objects	<p>WELCOME.</p> <p>This provision is in addition to the current Treasure Trove laws. It clarifies “found objects” around Scheduled Monuments.</p>
16	Meaning of Monument – 1979 Act	<p>CONCERN.</p> <p>Whilst we support the idea of establishing a statutory definition of monument, this proposal allows Scottish Ministers to designate any site comprising any thing or group of things that evidences previous human activity (eg flint scatters, food remains, etc).</p> <p>We acknowledge that archaeological organisations might welcome this, but it does raise issues of practical use as the scheduling of a site imposes very significant constraints on land management practices. A very broad definition of monument could result in increased confusion and opaqueness in defining value. Some of the aspects (such as</p>

		flint scatters also cover <i>areas</i> of interest rather than specific objects, and SCT believes that scheduling may not be a suitable approach to dealing with such places or artifacts.
17	Refusal to entertain application for SMC	SUPPORT. Harmonising with planning legislation. Can refuse to consider if a previous application for SMC had been refused in the last 2 years.

TABLE THREE:

Part three – Modifications to Planning (Listed Buildings & Conservation Areas)(Scotland) Act 1997

section	item	Comments
18	Certificate of Immunity from listing	<p>CONCERNS.</p> <p>This proposal allows Scottish Ministers to offer any person a guarantee that the building will not be listed for 5 years from the date of issue of the certificate. We appreciate that there will be support for this, especially from the development industry. However, there is sufficient lack of clarity in the proposals to raise justifiable concerns.</p> <p>Some of these issues are:</p> <ul style="list-style-type: none"> • 5 years is too long a period – suggest a period of 3 years which normalises with new period of consent for planning and LBC applications. • Granting a Certificate to “Any person” is too broad in scope. SCT believes that the process needs to ensure that it is only someone with a justifiable interest in the building who can apply for such a certificate. • There is also concern that Certificate of Immunity could be used as a land valuation gambit (ie to demonstrate a “cleared” site for the purposes of marketing land). As such, there should be a clause to this effect. • There is no defined process for issuing a Certificate. The assumption is that Historic Scotland will react to an application from “any person”, and consider it from that point. Applications for CoI should be considered in the public domain, and should be advertised on a public register (such as a planning authorities e-planning site or perhaps a new bespoke Historic Scotland

		<p>“consents” website.</p> <ul style="list-style-type: none"> • Refusal to grant a certificate– what happens if certificate is refused? Does the property automatically become listed (and there is some justification for this)? Would there be an appeal process or is it does it go straight to Judicial Review? • The relationship between the Col and a Building Preservation Notice is unclear and needs to be considered carefully. <p>SCT believes that until such time as the full process is made clear, this proposal should not advance in the draft Bill.</p>
19	Offences in relation to unauthorised works – Increase in level of Fines	<p>Welcome.</p> <p>Harmonises with new provisions suggested elsewhere.</p>
20	Hearings in connection with applications for LBC	<p>CONCERN</p> <p>Removes right to be heard in connection with applications and appeals under 1997 Act. Processes to be brought into line with T&CP(S) Act 1997 and provisions of Planning etc (Scotland) Act 2006.</p> <p>Significant issue – would this mean that LBC applications determined under Delegated Powers would go to a Local Review Body rather than Scottish Ministers? If so, SCT has very real concerns with this proposals. If not, then we have no objections to the proposals.</p>
21 & 22	Enforcement notices – introduction of Stop Order and Temporary Stop Order	<p>SUPPORT.</p> <p>A Stop Notice would prohibits work to a Listed Building and require all activity to stop. A Stop Order needs to be served before a LB Enforcement Notice comes into effect and can only be served once an enforcement notice has been given. A Temporary Stop Notice lasts for 28 days, comes into immediate effect and does not require an enforcement notice to be served first. Together, these will be positive tools in preventing damage to listed buildings.</p> <p>Comment - SCT welcomes the harmonising of such Orders with the new Planning Act.</p>

23 & 24	Fixed penalty notice - noncompliance with LB Enforcement Notice	<p>SUPPORT with comments.</p> <p>This harmonises with new planning arrangements contained in the Planning Etc (Scotland) Act 2006. However, one significant issue is what happens to the fines once implemented? Will money be used for Listed Building purposes (eg supporting a local grant scheme) or simply absorbed by local authority as general funds?</p> <p>Comment – SCT supports the introduction of a fixed penalty notice but believes that such fines should be ring-fenced to assist in positive heritage management elsewhere in the local authority.</p>
25	Liability of owner and successors for expenses for urgent works	<p>SUPPORT.</p> <p>This welcome addition allows notice of liability to be registered in an appropriate property register. At moment can only pursue person who owned property at the time of notification. This means that any new owner would become liable as well, meaning that avoidance by property transfer (eg between companies or family members) cannot be used as means of avoiding liability. Specific guidance for planning authorities on Urgent Works Notices would be welcome.</p>
26	Recovery of grants for preservation of LB	<p>Limited CONCERNS</p> <p>see section 1 of 1953 Act above.</p>
27	Regulations on connection with inquiries	<p>QUERY</p> <p>As commented upon in section 20 above, it is unclear if these regulations will introduce all of the provisions of the Planning etc (Scotland) Act, especially in this context the Local Review Body, into the listed building arena.</p>
Schedule 44	Form of Notice	<p>Welcome.</p> <p>This sets out the form of notices of determination, discharge and liability for expenses in relation to s.25 regarding liability of owner and successors for expenses for urgent works</p>

TABLE FOUR:

Other issues not in Bill but in the spirit of the amending legislation

SCT Ref No.	Item	Issues and comment
1	Inventory of Gardens and Designed Landscapes	<p>Introduction of enabling power to allow Inventory to be updated and maintained in a more streamlined manner.</p> <p>Issue – currently, the GDO procedures require the entire Inventory to be notified if there is a single amendment or addition. It is thought to be cumbersome and doesn't allow the effective management of the list.</p> <p>Comment – Welcome.</p>
2	List of Buildings of Special Architectural or Historic Interest - consultation	<p>The PLBCA requires Historic Scotland, in s.1(3) “before compiling or approving, with or without modifications, any list under this section or amending any such list the Secretary of State shall consult such persons or bodies of persons as appear to him appropriate as having special knowledge of, or interest in, buildings of architectural or historic interest” [SCT emphasis].</p> <p>Issue – past practice considered consultation with the planning authority as adequate to meet this test, but there is now some doubt as to whether local government officers can be considered to be “persons or bodies of persons”. As such, any list item that has not been consulted upon since 1997 might be <i>ultra vires</i>.</p> <p>Comment – The simplest solution is to delete section 1(3) in its entirety.</p>
3	Letter of Notification of Listing	<p>Current procedures require Historic Scotland to notify the local authority, who would then write to the owner stating that their property has been listed.</p> <p>Issues – Current HS practice has them write directly in the first instance, outlining the activity and process of listing, and generally keeping owners informed of progress and allowing them to comment. It therefore seems unnecessary and bureaucratic for the LPA to write once listed given past contact with HS. HS should be the Notifying Body.</p>

		<p>Comment – Amend s. 2(2)b of the PLBCA Act to read “the planning authority, or Scottish Ministers as the case may be, shall serve a notice in the prescribed form on every owner, lessee and occupier of the building, stating that the building has been included in, or excluded from, the list” (bold italics proposed additional wording).</p> <p>Reason - makes better use of administrative resources and eliminates potential for confusion and duplication.</p>
4	Conservation Area Controls – Article 4 Directions	<p>Current procedures for regulating development that benefits from PDR is for the establishment of an Article 4 Direction. The process is disjointed from the designation process, as LPAs are responsible for designating CAs, but the Scottish Government need to approve the Article 4. There is an opportunity to streamline this, by introducing new powers for LPAs to do this directly</p> <p>Issue – new legislative powers to allow LPAs to remove PDR in Conservation Areas without need to go through current Article 4 Directions. This will increase efficiency, remove unnecessary administrative processes and streamline the designation process.</p> <p>Comment – Revise s.63 of the PLBCAA (Proposals for Preservation and Enhancement of Conservation Areas) to include allow planning authorities to words to the effect of “It shall be the duty of a planning authority to formulate and publish, from time to time, proposals for the preservation and enhancement of any parts of their district which are conservation areas, including proposals for the regulation of development afforded permitted development rights under the GPDO”. [SCT wording and emphasis]</p>
5	Urgent Work Notices (s.50)	<p>Legislative provision of grants to LPAs to cover/underwrite costs of serving UWN.</p> <p>Issue – some LPAs use the cost of serving notices as a reason for not doing so. This would enable them to make application for support, thereby increasing the likelihood of action. Dependent on resources from HS.</p> <p>Comment – Introduce a subsection 6 on section 50, allowing Scottish Ministers to make grants towards the costs of Urgent Works. Alternatively, section 51(1) could be amended to become “A local authority or Scottish Ministers may contribute towards the expenses incurred or to be incurred in the repair or maintenance” or words to that</p>

		effect.
6	Urgent Works (s.49)	<p>This section covers urgent works to preserve <u>unoccupied</u> buildings.</p> <p>Issue - Whilst this remains welcome, it assumes that only unoccupied buildings might need attention. This seems unduly limiting, and raises the legal spectre of the definition of “occupied”, especially if applied to non-residential buildings.</p> <p>Comment – The word “unoccupied” should be removed from the statute.</p>
7	S.63 of PLBCAA Conservation Area proposals	<p>Proposals for preservation and enhancement of conservation areas: “(1) It shall be the duty of a planning authority to formulate and publish, from time to time, proposals for the preservation and enhancement of any parts of their district which are conservation areas. “</p> <p>Issue – Change this to a statutory duty to prepare <u>Conservation Area Appraisals and Management Plans</u>. Amend to cover best practice</p> <p>Comment – Support formal recognition of appraisals and management plans.</p>
8	s. 68 of PLBCAA Urgent works to preserve unoccupied buildings in conservation areas	<p>s. 68 states “If it appears to the Secretary of State that the preservation of a building in a conservation area is important for maintaining the character or appearance of that area, he may direct that section 49 shall apply to it as it applies to listed buildings”</p> <p>Issue – There are 2 specific issues with this section.</p> <ul style="list-style-type: none"> • As with item 6 above, the inclusion of only “unoccupied” buildings does not address the reality of the problem, and should be amended with the deletion of the word “unoccupied”. • Experience shows that Scottish Ministers through Historic Scotland do not take as active an interest Conservation Areas as with other designated parts of the historic environment, leaving their management largely up to local authorities. As such, it is inconsistent that only Scottish Ministers can direct that s.49 applies (to unlisted buildings in a conservation area), and not the planning authority. This should be amended to state, “if it appears to the Secretary of State or the planning authority that.....” [SCT addition].

		Comment – amend as suggested above.
9	Protection of building between period it is considered for listing and when it is listed.	<p>Creation of statutory “precautionary” listing process. There is a similar process for Special Protection Areas – when there is a “candidate SPA”, the processes for managing it (in this case, LBC) are applied.</p> <p>Issue – whilst interesting, the very serious challenge is to identify when a building is considered for listing, and how you communicate this.</p> <p>Comment – SCT would welcome such a provision, as there are examples of buildings that have been demolished or significantly altered by owners as a means of preventing listing. However, it is hard to see how this would work in practice.</p>
10	Local Listing	<p>Creation of an opportunity for the LPA to “list” buildings deemed to be local importance. Similar practice exists in England.</p> <p>Issues – currently, it is possible to achieve similar through development plan policies (eg protection given to items on an SMR/HER). As such, this is more of a policy and practice issue than a legislative one? Also experience in England is that a “local” list is not afforded statutory protection under the PLBCAA 1990 – this creates public confusion as to what is and is not listed, and how it is to be protected and managed.</p> <p>Comment – mostly a policy issue. Perhaps greater clarity in a new SHEP (Development Planning and the historic environment) might be way forward.</p>
11	Building Acquisition Grants	<p>Under the 1953 Act, Scottish Ministers can make grants available to local authorities and the National Trust for Scotland for the acquisition of listed buildings. Although not commonly used, they can be a helpful resource.</p> <p>Issue – things have changed considerably since 1953 with many other organisations involved in listed building repair. Firstly, the act should be amended to include National Park Authorities as well as local authorities (harmonising); and consideration should be given to allowing BPTs to access acquisition funds.</p> <p>Comment – support widening definition of who can access grant.</p>

12	Application of Statutory Repair Order to Scheduled Monuments	<p>The Building (Scotland) Act allows for authorities to serve a Statutory Repair Notice to address building defects. This could be extended to include SMs.</p> <p>Issue – there are other statutory provisions for addressing building repair outside the main heritage Acts. The AM&AA Act is especially limiting in its approach to these. Proposals in the draft Bill will go some way to addressing this, but some evidence shows having a wider range of tools available to a local authority in dealing with neglect and repair issues is helpful.</p> <p>Comment – minor amendment to AM&AA Act to enable SRO to be served on scheduled monuments. Support.</p>
13	Application for minimum compensation for Compulsory Acquisition (s. 45 of PLBCAA)	<p>s.45 states a planning authority can advance this if they intend to compulsory purchase a LB and if they “are satisfied that the building has been <u>deliberately</u> allowed to fall into disrepair for the purpose of justifying its demolition and the development or redevelopment of the site or any adjoining site, they may make a direction for minimum compensation.”</p> <p>Issue – it is a significant legal test to prove a <u>deliberate act of neglect</u>. In supporting this, it is noted that the enforcement regime proposed in this draft Bill for addressing unauthorised impacts to scheduled monuments is to include a widening of the definition to cover “disturbance” as well as damage (per the AM&AAA). This precedent supports the opening up of s.45 as suggested here.</p> <p>Comment – SCT recommends the deletion of the word “deliberately” from this section. Also suggest replacing phrase “<i>for the purpose of justifying....</i>” to “<i>with a purpose of justifying...</i>” This would enable a planning authority greater scope to utilize this statutory provision.</p>

TABLE FIVE:

Issues not in the Bill and considered outside the scope of amending legislation which nevertheless are considered important legislative issues

SCT ref no.	Item	Issues and Comments
	Inventory of Gardens and Designed Landscapes – statutory protection	<p>The need to provide a statutory basis for the regulation of development affecting an Inventory Landscape.</p> <p>Issue – notwithstanding the support for the streamlining of enabling powers noted in item 1 above, the current provisions for managing development is largely inadequate and only requires a planning authority to consult Scottish Ministers if a development is considered to have an impact on an Inventory site (Article 15 of the GDO). There are 3 possible approaches to addressing this issue:</p> <ol style="list-style-type: none"> 1. Introduce new legislation affording statutory protection for Inventory sites akin to Conservation area designation; 2. Introduce a new process whereby the inclusion of a landscape onto the Inventory results in its designation as a Conservation Area per s.61 of the PLBCAA (Scottish Minister designation); 3. Introduce a new area-based designation (Cultural Heritage Area) which would subsume Conservation Areas and include Inventory Sites and other such areas (including battlefields, etc). This would require significant legislative reform. <p>Comment – SCT believes that there is a need to better management Inventory sites on a statutory level.</p>
	Cultural Heritage Areas (+ linkages to Natural Heritage Areas)	<p>Introduction of a new area-based historic environment designation that would replace Conservation Areas as a designation and allow for other areas such as Gardens and Designed Landscapes, battlefields, areas of archaeological significance, etc to be formally designated.</p> <p>Could also link into the Natural Heritage Area Designation under the Wildlife and Countryside Act. Section 264 of the T&CP(S) Act 1997 provides the planning framework and states:</p> <p>“1) Every planning authority shall compile and make available for inspection free of charge at reasonable hours and at a convenient place a list containing such particulars</p>

		<p>as the Secretary of State may determine of any area in their district which has been designated as a Natural Heritage Area under section 6 of the [1991 c. 28.] Natural Heritage (Scotland) Act 1991.</p> <p>(2) Where any area is for the time being designated as a Natural Heritage Area, <i>special attention shall be paid to the desirability of preserving or enhancing its character or appearance in the exercise, with respect to any land in that area, of any powers under the planning Acts.</i> [SCT emphasis].</p> <p>Note that the duties for planning authorities for national heritage areas are almost identical to the duties for conservation areas (s.64 of the PLBCAA) thereby providing an thoughtful opportunity to integrate cultural and natural designations.</p>
	Heritage Actions Areas	<p>Following from the above, it would be possible to introduce the statutory provision, much in the same way as a Housing Action Area per the Housing Act, for a Heritage Action Area. This could be used to supercede the current Town Scheme (s.71 & 72 of the PLBCAA) and enable investment to be targeted to areas that might not be defined as a “town” (there is an underlying assumption that a conservation area is an “urban” designation).</p> <p>Could also introduce initiatives such as a Historic Environment Improvement District (mirroring Part 9 of the Planning Etc (Scotland) Act 2009 – Business Improvement Districts).</p>
	Statutory Duty of Care for the Historic Environment	<p>Whilst SCT appreciates that it is the intention of the Scottish Government not to introduce any new statutory duties with the Amendment Bill, it is generally viewed that a Duty of Care for Public and Quasi-Public bodies with regard to the historic environment would be a very positive and progressive provision. There is a precedent for this (eg duty to plan for biodiversity).</p>



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Working to Improve and Promote Scotland's Built Environment

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