

Consultation Response

**Consultation Title: ANCIENT MONUMENTS & LISTED BUILDINGS
(AMENDMENT) (SCOTLAND) BILL**

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To: Historic Scotland

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The Scottish Rural Property and Business Association (SRPBA) is a member organisation that uniquely represents the interests of both land managers and land based businesses in rural Scotland. Our membership which numbers around 3,000, covers the majority of owners of listed buildings in rural Scotland, and also owns around two thirds of Scotland's land, on which the majority of our nation's scheduled monuments will be sited. Therefore we believe that the Association is one of the key stakeholders in this area, and welcomes the opportunity to comment on the draft Ancient Monuments & Listed Buildings (Amendment) (Scotland) Bill.

The Association has the following general comments to make:

- The SRPBA supports the Scottish Government's programme to streamline, simplify and clarify the system for protecting and managing the historic environment. However, we do not believe that this clarity and simplification are achieved by this draft Bill, which contains ambiguous terms and potentially complex provisions.
- The SRPBA would suggest that the impact of the proposed legislation has been underestimated. In particular, the provisions relating to certificates of immunity are likely to impact on conveyancing costs.
- The paper does not appear to address the process for awareness raising which will be required in relation to the new provisions and the SRPBA would ask that further clarity is provided on this. In particular, the SRPBA would ask that clarity is provided on the role of Local Authorities in the provision of education and advice to stakeholders on any new legislation.
- The SRPBA is keen to work with Historic Scotland to improve engagement with rural land managers and believes that resources should be focused on this area. We are disappointed that consultation with rural stakeholders was not carried out by Historic Scotland at an early stage. Discussions with organisations such as COSLA have been carried out, but we have real



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concerns that Local Authorities will not interpret the legislation consistently. We are concerned that our input to this legislative process may come at too late a stage to address the issues of concern to our members.

- The application of some of the provisions to scheduled monuments which are located on land let under Agricultural Holdings legislation does not appear to have been fully thought through, with a risk of unintended consequences for landowners. The Association would ask that further consideration be given to rural proofing all the provisions contained within the legislation. Scottish Borders Council has developed a rural proofing tool which the SRPBA heartily endorses.
- Finally, the SRPBA suggests that as well as a change in legislation, a change in culture and philosophy is required within Historic Scotland. There is a need for Historic Scotland to work with stakeholders and act in a way which enables effective management and protection of our historic environment which contributes to the Scottish Government's central purpose of sustained economic growth.
- There must be an understanding that the majority of listed buildings are not still in their original condition but have developed over time as succeeding owners amended and renewed them using the techniques and materials of the time, and this is what makes them so interesting and worthy of listing. In other words the historical development of listed houses took place over time but now the clock must be stopped due to restrictions through listing. This may lead in some cases to the deterioration of the buildings if owners are not provided with adequate financial support.

The SRPBA has a number of concerns regarding issues related to, but not covered by, the draft Bill, such as guidance regarding materials and methods, and conflict between fire regulatory requirements and limitations on work which can be carried out on listed buildings. The SRPBA would welcome further discussions on these issues.

With reference to the specific provisions contained within the draft Bill, the SRPBA has the following comments to make:

Section 1

- The SRPBA wholeheartedly supports the view outlined in paragraph 1.16 that "for listed buildings, the default position is that they remain in active use." The Association suggests that financial assistance to owners of listed buildings must be increased to allow this to happen.
- The Association agrees with the harmonisation detailed within paragraph 1.17, but would like to suggest that there persists a lack of awareness regarding the Scottish Historic Environment Policy amongst both stakeholders and local authorities, and this should be addressed by Historic Scotland.

Section 2

- The SRPBA suggests that further clarity is required to the definition of 'disturbance' contained within Part 2 section 2 of the draft Bill. Historic Scotland has advised that an act



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of omission is not covered by this proposed provision, for example if you did not maintain drainage in a neighbouring field which resulted in flooding of the site of a scheduled monument. The Association would like confirmation in relation to this, preferably by way of clear statutory provision. In addition, consideration must also be given to cross-compliance and requirements under GAEC – if farmers are required to carry out work to comply with GAEC conditions which may have an impact upon the “conservation or stability of the monument” would this constitute disturbance? The SRPBA realises that scheduled monument consent would be required in many cases for drainage works etc but again there would appear to be a lack of awareness amongst the rural sector in relation to this. Farmers acting in good faith to address issues such as soil erosion so as to ensure compliance with GAEC may inadvertently carry out an offence under these new ‘disturbance’ provisions.

- The point raised earlier in this response regarding the application of the provisions to land let under an agricultural tenancy is particularly pertinent in relation to Part 2 Section 2 of the draft Bill. The SRPBA has particular concerns over the interpretation of “permit disturbance” and would welcome further discussion on this. By way of example, if, in terms of an existing agricultural lease, the tenant farmer is required to comply with GAEC or other conditions, that farmer then takes action which disturbs the scheduled monument, might the landlord then be deemed to “permit disturbance.”
- The SRPBA supports the proposals contained within Section 3 to allow Scottish Ministers to grant written consent for the retention of unauthorised works.
- Whilst the SRPBA supports in principle the removal of the defence of ignorance as detailed within Section 4, it would like to reiterate the crucial role that Historic Scotland must play in educating and advising those who may fall foul of this provision. The ever increasing regulation of rural activity places a huge burden on land managers and this must be recognised through the provision of support and advice to the sector. With this in mind, the SRPBA’s strong preference is for the defence of ignorance to be removed from a future specified date, perhaps 10 years after the enactment of any legislation to permit sufficient time for the education process. SRPBA reiterates its willingness to work with Historic Scotland on education.
- The Association is strongly opposed to the proposals in the Section 5, which would increase the level of fines under summary conviction under section 2 and section 28 of the 1979 Act to £50,000. The economic justification given within paragraph 2.9 is no longer valid in today’s climate, and regardless of the climate, the Association does not believe that such a fine is justified, particularly in comparison to other criminal offences which are deemed by most of the public to be more serious, for example other types of vandalism and damage to property as well as deliberate injury to persons.
- With regard to Section 7 the SRPBA would suggest that further clarity is required in relation to the proposed new section 9D, and queries why the word “occupier” has been omitted thus restricting the powers of recovery only to the owner and any lessee. A person who is occupying the land without a lease may well be the person carrying out damage.



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- The issue of notification of temporary stop notices and enforcement notices is also an area that requires further attention – particularly in relation to ancient monuments on tenanted land. The draft legislation states in section 9B(4) that for an enforcement notice, a copy “must be served on”:

- o The owner, the lessee and the occupier of the monument to which it relates....,
- o On any other person having an interest in the monument or land.

The SRPBA believes that this is the correct notification process to ensure that all relevant parties are aware of the serving of the scheduled monument enforcement notice.

However, for the temporary stop notice the provisions state that they may be served on any of the following

- o a person who appears to be executing, or causing to be executed, the works
- o a person who appears to have an interest in the scheduled monument or the land.

The SRPBA does not believe that this is the best approach to take and strongly suggests that it be changed to align with the **duty** to serve a notice in section 9B(4).

- Section 9(D) 3 requires further clarity in relation to the remedy to the owner of a monument or land, where the occupier is preventing the owner from carrying out work required to be carried out by a scheduled monument enforcement order. Should this only apply in cases where the owner has no contractual right of entry?
- Section 11 will introduce powers to enable Scottish Ministers to offer ancient monument grants to a third party to undertake works of preservation, maintenance and management on a scheduled monument. Although the SRPBA supports this in principle, we would suggest that the aims of this provision could be met through existing legislation and the provision of increased financial support to owners. The provision seem to suggest an unwillingness on the part of the owner to carry out such works whereas in many cases the owner is unable to carry out work due to prohibitive costs.
- The SRPBA would like further clarity within the legislation on the term “imminent damage or destruction” contained within section 12. The example given with paragraph 2.22 is entirely valid but there is real concern that the proposed provisions could be used in much wider circumstances, giving unfettered power of entry.
- The SRPBA strongly supports the proposal to provide a new power of financial assistance by way of grant or loan to any organisation or individual involved in promoting the development or understanding of historic, traditional, artistic or archaeological interest and believes that the rural land managers can play a key role in this and therefore would be potential recipients of such financial assistance.
- The SRPBA is totally opposed to the proposal to allow Scottish Ministers to designate “any site comprising any thing, or group of things, that evidences previous human activity” as a monument as contained within section 16. Following discussions with Historic Scotland, the Association understand that this is intended to allow the extension of designation to very limited and valid circumstances, rather than the very wide ranging powers of designation that this provision would actually afford. Therefore the SRPBA suggests that this section be amended to list those circumstances under which such a designation



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- would be made, and also include provisions that would allow Scottish Ministers to add to the list at a later date.
- While the Association understands the rationale behind the provisions contained within section 17, there must also be an understanding that repeated applications can occur due to lack of pre-application engagement. If this provision is brought in, then both Historic Scotland and Local Authorities must ensure that they engage in effective pre-application discussions with the applicant.
 - Section 18 contains proposed new powers which would enable a certificate of immunity from listing to be given which will guarantee that a building will not be listed for 5 years. The SRPBA broadly welcomes this concept but would like further consideration to be given to both the process and the impact of these certificates. The Association will make further comment on the impact in our response to the financial assessment, but would like to stress that the demand for these certificates may lead to a resourcing issue as they may become a required element by many purchasers. In addition, the SRPBA would like clarity on whether or not each individual building would require a separate certificate. If an estate with multiple buildings was being sold and the purchaser required a certificate of immunity as a condition of sale would the seller be required to obtain one for each property? This could impact heavily on the saleability of multiple property estates, particularly those being sold within potential for development.
 - With regard to Section 19, the Association would like to reiterate its opposition to the increase of the level of fine that can be imposed.
 - Section 23 introduces a new power that will enable planning authorities to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice. The SRPBA believes that this is required in order to give weight to the notice but would like further clarity on the process for serving these notices. In addition, as the fixed penalty increases if the breach continues, the notification process will be critical and legislation should provide that Scottish Ministers will have to ensure that notices are served on the relevant people.
 - The SRPBA had initial concerns regarding the proposals contained within Section 25 in relation to the liability of the owner and successors for the expenses of urgent works, but believe that the provisions are necessary to recover costs of works carried out. However, the SRPBA would like further consideration to be given to the need for recovery of costs from someone other than the owner who is responsible for damage to the listed building and indeed for recovery of costs from a tenant of a property rather than an owner. Lodging the liability for expenses with the Land Register will not address either of these cases. The SRPBA understands that the Law Society of Scotland has made representation to Historic Scotland on this issue and would be interested in being involved in further discussions.
 - The SRPBA is supportive of the proposed provisions contained within Section 26 of the draft Bill.

Section 3 Financial Assessment



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- The Association believes that the Financial Assessment does not accurately reflect the potential financial impact of the provisions contained within the draft Bill, particularly in relation to the certificate of immunity which we would suggest will be much more common than the 2 to 3 per year anticipated by Historic Scotland. We believe there will be increased conveyancing costs and also increased costs for the issuing agency.
- Therefore the SRPBA cannot agree with the assertion that “that there may be financial implications for businesses but only for those who contravene the legislation.”
- In relation to rural properties, these may contain a number of scheduled monuments. The consultation document does not fully recognise the potential financial cost to the rural economy.

Section 4 Partial Regulatory Impact Assessment

- The SRPBA would like to reiterate that it does not agree with Historic Scotland’s view that the draft provisions will not have a significant impact on small firms, and questions why Historic Scotland believes that the certificate of immunity will be beneficial for a number of small firms.
- The Association welcomes the commitment within the PRIA that Historic Scotland will undertake a review of the effectiveness of the new legislation within 3 years of it coming into force, and asks that the views of all stakeholders be taken into account during this review. However, the effectiveness will depend to a great extent on meaningful education.