

THE HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL
ANALYSIS REPORT

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Historic Scotland
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1. Introduction

1.1 This report is the ‘Analysis Report’ called for in the Scottish Government’s good practice guidance on consultation. It analyses and reports on the responses made to the consultation on what is now known as the Historic Environment (Amendment) Scotland Bill (but which was known as the Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill at the time of the consultation). It does not set out Scottish Ministers’ comments on or responses to those suggestions, although in one instance below, we believe that there has been a misunderstanding of the intent of three sections, and take this opportunity to clarify issues. The inclusion of a comment or suggestion in the report does not imply that any contribution is accepted as accurately characterising the actual policy position or operational practice.

1.2 The Bill is an amending piece of legislation and its scope and content are formed by a series of amending provisions identified by Historic Scotland and local government, and during the course of discussions with stakeholders during 2007, which followed the publication of a report by the Historic Environment Advisory Council for Scotland on the need for a review of heritage legislation in Scotland.

1.3 The consultation document invited readers to note that the Bill will contribute to the Scottish Government’s central purpose of sustained economic growth by introducing a series of provisions that will enhance the ability of central and local government to manage Scotland’s unique and irreplaceable historic environment. It was also noted that the Bill will support the Government’s Greener Strategic Objective and will provide the regulatory authorities with a much improved toolkit to help manage, protect and enhance Scotland’s historic environment for future generations.

1.4 The draft Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill and a fourth Part which includes provisions on ‘Interpretation’ and ‘Short title and commencement’. The principal Acts are:

- 1 The Historic Buildings and Ancient Monuments Act 1953 (‘the 1953 Act’)
- 2 The Ancient Monuments and Archaeological Areas Act 1979 (‘the 1979 Act’); and,
- 3 The Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 (‘the 1997 Act’).

1.5 Copies of the Acts can be accessed online at the UK Statute Law Database at the following web address: www.statutelaw.gov.uk

1.6 The overarching aims of the Bill are to improve the management and protection of Scotland’s historic environment by addressing the gaps and weaknesses of the current historic environment legislative framework that were identified during the year-long stakeholder engagement process in 2007; to avoid introducing significant new burdens or duties; and in a challenging economic period to keep the implementation costs low.

1.7 As noted in the consultation document the Bill is a tightly focused technical amending Bill that will introduce new provisions and remove barriers to the use of existing powers and will enhance the ability of the regulatory and planning authorities to manage our historic environment in a sustainable way for the enjoyment and benefit of future generations.

1.8 The consultation document was published on 20 May 2009 and the consultation period closed on 14 August 2009, although submissions were accepted up to 4 September 2009. The document was sent to 359 organisations and individuals. Forty-seven organisations and individuals responded. Respondents are listed in **Annex A** and a breakdown of responses is provided below. In most cases, responses formed the official response of the organisation. Responses from consultees who agreed that their submissions be made public are available at:

<http://www.historic-scotland.gov.uk/index/about/consultations/consultation-responses-bill.htm>

1.9 The consultation document invited comments on the proposed provisions of the Bill, bearing in mind that, in challenging circumstances, the Scottish Government was keen to avoid placing new burdens on owners of assets, businesses and local and central government. In particular the consultation document invited readers' comments on:

- 1 the draft Bill provisions
- 2 the potential financial implications of the Bill;
- 3 the Partial Regulatory Impact Assessment;
- 4 the equalities impact of the Bill.

1.10 It was also noted that while Scottish Ministers would particularly appreciate respondents' views on these key areas all comments and views would be welcomed and would be carefully considered.

Table 1: Responses to consultation by interest group

Respondent Type	Number
Private Individuals	2
Local Authority	16
Heritage Organisation	15
Local/community organisation	1
Private Sector	5
NDPB/Executive Agency	1
Professional Body	3
Religious body	1
Legal Body	1
Other	2
Total	47

1.11 During the consultation period, Historic Scotland ran a series of workshops that considered the Bill provisions in detail. Information on the stakeholder engagement process can be found by following the web link:

<http://www.historic-scotland.gov.uk/index/heritage/environmentbill/stakeholder-engagement.htm>

1.12 The findings of the workshops are not included in this analysis report but they will be used to inform Scottish Ministers' consideration of the issues.

1.13 The responses to the consultation were generally very supportive of the provisions in the draft Bill, though a number of specific issues and concerns were raised. No respondent opposed the draft Bill in principle nor its intention to streamline, simplify and clarify the system for protecting and managing the historic environment.

2. Methodology

2.1 The response data were recorded and summarised on a table which sets out the number of positive and negative responses and other issues raised. A frequency count was made of the overall number of responses by interest group and of the comment on each provision. A qualitative analysis was then carried out using this information. The summarised data relating to each provision was reviewed and key themes identified.

2.2 If a respondent suggested a minor amendment to a particular provision without noting whether they supported or opposed the proposal we have taken the view that such a response should be recorded as a “support with minor amendment”.

2.3 It is important to note that the findings of the report are specific to the responses made to this consultation exercise and cannot reflect the weight or range of views likely to be found within the population as a whole.

3. Breakdown of Responses

3.1 Forty-seven responses, most of which were very detailed, were received. **Table 1** above shows the distribution of responses received.

3.2 The consultation document invited comment on the draft Bill provisions; the potential financial implications of the Bill; the Partial Regulatory Impact Assessment; and the equalities impact of the Bill. Each provision elicited a range of comments ranging from full approval for the provision as drafted; support for the provision with minor amendments suggested to opposition to the provision. A breakdown of responses is provided below.

Table 2: Summary of responses

Section of the Bill	Support Provision	Oppose Provision	Support Provision with minor amendment	Total
Section 1: Recovery of grants, for repair, maintenance and upkeep of certain property	3	0	1	4
Section 2: Control of works affecting scheduled monuments	9	1	6	16
Section 3: Works affecting scheduled monuments: consent for works without authority	8	0	0	8

Section 4: Defences involving knowledge or belief to certain offences under the 1979 Act	13	0	5	18
Section 5: Fines: increases & duty of court in determining amount	13	1	1	15
Section 6: Powers of entry to inspect condition of scheduled monument	7	0	0	7
Section 7: Works affecting scheduled monuments: enforcement	15	0	2	17
Sections 8, 9 & 10: Monuments under guardianship	2	1	4	7
Section 11: Financial support for preservation etc. of monuments	12	0	2	14
Section 12: Power of entry on land where monument at risk	6	0	3	9
Section 13: Offence of disturbance of certain ancient monuments	0	0	2	2
Section 14: Development and understanding of matters of historic, etc. interest: grants and loans	12	0	3	15
Section 15: Retention of found objects of archaeological or historic interest	5	0	0	5
Section 16: Meaning of ‘monument’ in the 1979 Act	8	1 ¹	11	20
Section 17: Refusal to entertain certain applications for scheduled monument consent	7	1	2	10
Section 18: Certificate that building not intended to be listed	5	0	26	31
Section 19: Offences in relation to unauthorised works and listed building consent: increase in fines	15	1	0	16
Section 20: Hearings in connection with applications for listed building consent and appeals	3	0	4	7

¹ This is an amendment to the Analysis Report as published in January 2010 which classified the Scottish Rural Property and Business Association’s comments on section 16 as “support provision with minor amendments”. (See paragraph 5.14 below).

Sections 21 & 22: Enforcement notice: requirement to cease works, stop notices and temporary stop notices	12	0	5	17
Sections 23 and 24: Non-compliance with listed building enforcement notice: fixed penalty notice <u>and</u> Amount specified in fixed penalty notices for breach of listed building enforcement notice: procedure	12	0	5	17
Section 25: Liability of owner and successors for expenses of urgent works	11	2	6	19
Section 26: Recovery of grants for preservation of listed buildings, etc.	7	0	1	8
Section 27: Regulations in connection with inquiries, etc.	0	0	0	0

4. Key Themes

“...In order to be effective, we consider it essential to have in place a regulatory system that is clear consistent and pragmatic. With this in mind, we welcome all of the proposed amendments in the draft Bill”. (Heritage Lottery Fund)

“...Generally the Bill will improve the efficiency and effectiveness of the protection of Scotland’s Historic Environment, without impacting significantly on Local Planning Authorities”. (East Dunbartonshire Council).

“...in general the Society strongly supports this vitally important Bill, which will enable better sustainable management of our priceless and nationally important heritage assets” (The Society of Antiquaries of Scotland).

“...BEFS welcomes this draft Bill which will strengthen the ability to effectively and sustainably manage our heritage. It will simplify processes without weakening controls, and close some loopholes that presently allow unacceptable threats to the historic environment”. (Built Environment Forum Scotland)

4.1 The responses to the consultation on the draft Bill indicated overwhelming support for the provisions and the underlying aims of the Bill. Respondents in particular welcomed the twin aims of harmonising the 1979 and 1997 acts where practicable and aligning historic environment legislation with the planning regime when appropriate. The large majority of the respondents also agreed that in tackling the gaps and weaknesses of the current historic environment protection legislative framework

we would improve the ability of the regulatory authorities to better manage our rich historic environment for the benefit of future generations. Comments included the following:

- 1 The changes proposed in the Bill assist with aligning and modernising heritage legislation with powers available in other legislation. The changes proposed will further aid the protection of the historic built environment and heritage.
- 2 The proposed changes are welcomed in the capacity of increased and more direct forms of protection afforded to scheduled monuments.
- 3 We strongly endorse the aim to simplify processes for those responsible for listed buildings and ancient monuments.

4.2 Many of the respondents suggested minor amendments to a number of the proposals in the draft Bill and these are detailed below in section 5 of this report. However, three provisions attracted a considerable amount of comment: Section 2 – control of works affecting scheduled monuments; Section 16 – meaning of ‘monument’ in the 1979 Act; and, Section 18 – Certificate that building not intended to be listed. A number of concerns and recommendations were expressed by respondents in relation to these three provisions and these may be summarised as follows:

Control of works affecting scheduled monuments

Section 2 of the Bill will amend legislation so that an offence is committed if a scheduled monument is *disturbed* as well as damaged, where such disturbance affects the conservation, stability or national importance of the monument’. There was consensus that Scottish Ministers should clarify what was meant by ‘disturbance’ either in the primary legislation or through secondary legislation and guidance.

Meaning of Monument

Section 16 of the Act will extend the range of historic environment assets that can be designated under the 1979 Act by expressly allowing Scottish Ministers to designate ‘any site comprising any thing, or group of things, that evidence previous human activity’. There was agreement that as currently drafted the provision was too broad and it was recommended that the Scottish Government should clarify what type of monuments might be captured by this extension to the meaning of monument under the 1979 Act.

Certificate that building not intended to be listed

Section 18 of the Bill will introduce a new power that will enable Scottish Ministers to offer any person such a certificate which will guarantee that a building will not be listed during the five years from the date of the certificate. Respondents raised a number of concerns about this provision that may be summarised as follows: concerns that a large number of applications for a Certificate would impact on Historic Scotland’s listing and resurvey programme; lack of clarity on how applications for a Certificate would be assessed; and, a lack of clarity on the relationship between Certificates and Building Preservation Notices.

4.3 The consultation invited comment on the Bill provisions but also noted that all comments and views would be welcomed and carefully considered. In response to this invitation many respondents raised a number of issues that are not addressed in the Bill. The key issues that attracted most support from respondents were as follows: calls for a statutory duty of care for the historic environment for local authorities; statutory duty for local authorities to maintain or have access to Historic Environment Records; and, a strengthening of the legislation relating to Conservation Areas.

4.4 A number of respondents also took the opportunity to note their disappointment with the policy scope of the Bill. Some for example argued that the protection and management of the undesignated historic environment resources was being marginalised; others sought full statutory protection for Gardens and Designed Landscapes and Battlefields; and others expressed disappointment that a more comprehensive review of heritage legislation in Scotland was not being pursued.

4.5 **Table 2**, as noted above, provides a statistical summary of the responses and should be read in conjunction with section 5: Summary of Responses by Provision.

5. Summary of Responses by Provision

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

5.1 Five respondents commented specifically on this provision. Three welcomed the proposal and one in particular noted that the provision would provide owners and developers with greater certainty and clarity and that it would aid the preparation of financial plans and business models for those organisations that operate as revolving fund trusts. While two respondents supported the proposal and appreciated the clarity that it would provide they were also concerned that the provision might have implications for financing listed building projects on the basis that setting out the terms of grant recovery in a grant award letter might not be seen by Banks as a “clear grant” and that that might affect development appraisal.

Part 2 – Modification of the Ancient Monuments and Archaeological Areas Act 1979

Section 2 – Control of works affecting scheduled monuments

5.2 Section 2 of the draft Bill attracted comment from 17 consultees. Fourteen of those offered unequivocal support for this provision noting that they particularly welcomed the inclusion of “disturbance” in the amending Bill. Six respondents (including three of those who indicated support for the measure) pointed out that they would welcome greater clarity on how this amendment to section of the 1979 Act would work in practice. They also recommended that this provision should be accompanied by detailed guidance and that “disturbance” should be more clearly defined in the legislation. As currently drafted the provision could be interpreted as going beyond physical disturbance, which was not the intention.

Section 3 – Works affecting scheduled monuments: consent for works without authority

5.3 All eight respondents who commented on section 3 welcomed the new provision. However, of

those who provided comment one suggested that the provision should be accompanied by clear guidance and another advised that such approval must be provided following the same strict assessment and considerations as that for scheduled monument consent. Another respondent suggested that guidance on what kind of circumstances this power might be used should be provided in subsequent amendments of Scottish Historic Environment Policy (SHEP). One respondent noted that para 2.6 of the consultation document stated that this should only be applied in “certain limited circumstances” and recommended that this proviso might be reflected in the wording of section 3 of the Bill.

Section 4 – Defences involving knowledge or belief to certain offences under the 1979 Act

5.4 Of the 18 respondents who commented on this provision 13 indicated that they fully supported the proposal to remove the ‘defence of ignorance’ from the 1979 Act. One respondent suggested that Scottish Ministers might wish to reconsider their proposal to repeal section 42(7) of the 1979 Act relating to metal detecting. A significant number of respondents suggested that it would be important to educate the public and land managers about what and where heritage assets are in Scotland through a programme of information dissemination and awareness raising. Other issues were raised and recommendations made as follows:

- 1 It will be important to educate the public and land managers about what and where heritage assets are in Scotland through a programme education and awareness raising.
- 2 Recommend that the provision should not be commenced for a number of years to permit sufficient time for the education process.
- 3 There is a need to improve the quality and availability of information on historic environment assets regarding their location and extent (both digitally and on site).

Section 5 – Fines: increases and duty of court in determining amount

5.5 Fifteen respondents commented on this provision, which increases the maximum fine in summary proceedings to £50,000 (on indictment to a higher court the possibility of an unlimited fine or imprisonment already exist). Of those 13 offered unequivocal support for the provision noting that the increased fine would act as an appropriate deterrent to unauthorised works to scheduled monuments and that the level of suggested was not out of keeping with the level of fines in other areas e.g. in relation to wildlife and planning breaches. One respondent queried whether £50,000 was a sufficient deterrent. However, one respondent was opposed to this proposal and suggested that the level of fine proposed was not justified, particularly in comparison to other criminal offences such as other types of vandalism and damage to property as well as deliberate injury to persons.

Section 6 – Powers of entry to inspect condition of scheduled monument

5.6 All of the 7 respondents who commented on this provision welcomed the clarification of section 6(1) of the 1979 Act regarding the powers of Scottish ministers to enter land to inspect the condition of a scheduled monument.

Section 7 – Works affecting scheduled monuments: enforcement

5.7 Seventeen respondents commented on section 7. Of these 15 offered their full support for the

provision as drafted commenting in particular that the introduction of Temporary Stop Notices was an especially worthwhile addition as it would enable quicker and more efficient action against unauthorised works and noting that the enforcement provisions were fully in keeping with the way the planning legislation operates. One respondent suggested that it was not clear from the draft clauses on whom a Stop Notice or Temporary Stop Notice would be served and sought clarification on that point. One respondent raised a number of technical issues relating to the enforcement measures which may be summarised as follows:

- 1 Further clarity is required in relation to the proposed new section D.
- 2 Why has the word “occupier” has been omitted thus restricting the powers of recovery only to the owner and lessee? A person who is occupying the land without a lease may well be the person carrying out damage.
- 3 The issue of notification of temporary stop notices and enforcement notices needs attention – particularly in relation to scheduled monuments on tenanted land – section 9K(3) should be aligned with section 9B(4).
- 4 Section 9D(3) requires 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 Notice. Should this only apply in cases where the owner has no contractual right of entry?

Sections 8, 9, and 10 – Monuments under guardianship

5.8 Sections 8, 9 and 10 of the draft Bill generated comment from 7 consultees. Two fully supported the provisions. A small number of respondents have read these sections as giving rights to Scottish Ministers to take actions at scheduled monuments unavailable to others, and in particular somehow to circumvent the controls in place on scheduled monuments (or listed buildings)².

Section 11 – Financial support for preservation etc. of monuments

5.9 Of the 14 respondents who commented on this provision 12 indicated that they fully supported the proposal. One in particular suggested that this would encourage restoration under heritable leases and so may be attractive to owners who are reluctant to sell un-restored tower houses but who would be keen to enter into lease arrangements. One respondent, while supporting the proposal in principle, argued that the aims of the provision could be met through existing legislation and the provision of increased financial support to owners. Another respondent suggested that greater detail on the availability of money should be provided.

Section 12 – Power of entry on land where monument at risk

5.10 Of the 9 respondents who commented on this provision 6 fully supported the proposal. One suggested that ‘disturbance’ should be added to this clause in the interest of consistency with section 2 of the draft Bill. However, 2 respondents raised some issues as follows:

- 1 Further clarity is required within the legislation on the term “imminent damage or destruction”.

² These sections have been open to misunderstanding and Historic Scotland will look carefully at how it presents these amendments in the Policy Memorandum which accompanies the draft Bill.

The example given in 2.22 is valid but there is real concern that the proposed provisions could be used in much wider circumstances, giving unfettered power of entry to excavate sites.

- 2 The amendment should explicitly be limited to essential investigatory works prior to a decision on scheduling the ancient monument for the preservation of monument and be time limited; otherwise these powers of entry appear very broad and intrusive with the potential for substantial impact on businesses.
- 3 It is noted that issue of compensation of loss as a result of this amendment is covered by section 46 of the 1979 Act but the potential scale of impact on small businesses is high once this facility is enacted.

Section 13 – Offence of disturbance of certain ancient monuments

5.11 Only 2 respondents commented on this section as follows:

- 1 The legislation should define ‘disturbance’.
- 2 It is not clear what section 28 of the 1979 Act adds to section 2 – either section 28 is not necessary or the existing or intended relationship could be made clearer in sections 2 & 13.

Section 14 – Development and understanding of matters of historic, etc. interest: grants and loans

5.12 Of the 15 respondents who commented on this provision 12 fully supported the proposal. The other 3 respondents supported the provisions but also sought further information on who might be able to apply for the grant; clarity on how the new grant power would work in practice; and, how much money would be made available to support this new grant provision.

Section 15 – Retention of found objects of archaeological or historic interest

5.13 The 5 respondents who commented on this provision welcomed the proposal to amend section 54 of the 1979 and the clarification of the position in Scotland regarding finds from archaeological excavations on scheduled monuments.

Section 16 – Meaning of ‘monument’ in the 1979 Act

5.14 Nineteen respondents commented on section 16 of the Bill. Eight fully supported the provision noting that the extension to the definition of monument would allow a more inclusive range of historic assets to be protected by designation. One respondent noted that this provision would be of particular importance with regard to the conservation and management of our earliest sites which are largely represented by scatters of stone tools. Another noted that the provision was in line with the proposed definition of marine historic assets in the Marine (Scotland) Bill. One respondent was totally opposed to the proposal as drafted and suggested that section 16 should be “amended to list those circumstances under which such a designation would be made, and also include provisions that would allow Scottish Ministers to add to the list at a later date”.³ Eleven respondents, while supporting the provision in principle, did make a number of recommendations and raised a number of concerns about the interpretation and application of the new provision as drafted – these may be summarised as follows:

³ This is an amendment to the Analysis Report as published in January 2010. (See footnote 1 under Table 2 above).

- 1 Would welcome guidance on what particular types of sites are envisaged as being included in this new definition. This could be set out in secondary legislation or guidance.
- 2 A very broad definition of monument could result in increased confusion and opaqueness in defining value.
- 3 'Flint scatters' also cover areas of interest rather than specific objects - scheduling may not be a suitable approach to dealing with such places or artefacts.
- 4 Concerns about how this will work in practice e.g. it will be difficult to define a boundary for some of the types of sites mentioned in the policy note describing the new provision.
- 5 Landowners may see this requirement as placing an additional burden on their land.

Section 17 – Refusal to entertain certain applications for scheduled monument consent

5.15 Of the 10 respondents who commented on this provision 7 fully supported the proposed amendment to the 1979 Act. One in particular agreed that some repeat applications for scheduled monument consent were costly and time consuming. One respondent suggested that 5 years may be a more appropriate time limit for similar applications. Another respondent suggested that repeated applications can occur due to lack of pre-application engagement and argued that if this provision were brought in the both Historic Scotland and the local authorities must ensure that they are engaged in effective pre-application discussions with the applicant. One consultee opposed the provision on the grounds that it was too restrictive, pointing out that developers may need to alter plans/proposals to keep their developments on track and to avoid financial penalties. (We believe that this may be a misreading of the current system, which allows for the amendment of existing consents to take account of changed circumstances: we have written to clarify).

Part 3 – Modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Section 18 – Certificate that building not intended to be listed

5.16 This section of the draft Bill attracted the largest number of comments from respondents. Of the 29 who offered comment 5 supported the provision as drafted. However, 24 respondents raised a number of issues as follows:

- 1 A certificate should not be issued without a prior full survey by a building archaeologist.
- 2 A certificate should carry a statement to the effect that although the building is not listable in relation to the Historic Scotland criteria it may have elements/features worthy of retention and recording and that LAs should be consulted before demolition/alteration is undertaken.
- 3 Processing applications for certificates could impact negatively on the listing/resurvey programme.
- 4 There must be a process to allow for a review of a Certificate should new evidence come to light.
- 5 Applicants could be charged for this service.
- 6 The certificate should be for three years rather than five years.
- 7 Limit applications for Certificates to owners rather than speculative developers [i.e. someone with a legitimate interest in the building].
- 8 Scottish Ministers must consult the local planning authorities.
- 9 Certificates should only be issued with up-to-date lists.
- 10 Applications should be adequately assessed before a Certificate is issued.

- 11 What would happen if an application for a Certificate were refused – would the building be listed?
- 12 There is a need for guidance on the process envisaged.
- 13 Consider introducing a similar provision for ancient monuments.
- 14 Local planning authorities must be informed of any Certificates issued.
- 15 Will this new power override/relax current policy of not normally listing during a live planning application?
- 16 Will there be an appeal process?
- 17 One Local Authority noted that it required a developer to undertake a historic buildings appraisal by a qualified building archaeologist. If a Certificate had been granted could such a condition still apply?
- 18 How might a Certificate impact on any subsequent planning permission or listed building consent?
- 19 Two respondents raised their concern that this new power could be used as a land valuation gambit.
- 20 Applications should be advertised on a public register.
- 21 The relationship between a Certificate not to list and a Building Preservation Notice is not clear.

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

5.17 Of the 16 respondents who commented on this provision, which raises the maximum fine in summary proceedings to £50,000 (there is already provision in legislation for an unlimited fine on indictment). Fifteen fully supported the proposed amendment. Some of those noted that an increase in the fine would act as a deterrent to those undertaking unauthorised work to a listed building. One respondent suggested that £50,000 was too low to act as a deterrent. One respondent opposed the provision on the basis that the level of fine proposed was not justified, particularly in comparison to other criminal offences such as other types of vandalism and damage to property as well as deliberate injury to persons.

Section 20 – Hearings in connection with applications for listed building consent and appeals

5.18 Of the 7 respondents who commented on this provision 3 fully supported the proposal and welcomed the harmonisation with the planning regime. One respondent asked for further information while four respondents raised a number of issues:

- 1 It was not clear if this meant that listed building consent appeal cases might be referred to a local review body rather than to Scottish Ministers for consideration.
- 2 Ministers should ensure that hearings are as rigorous as the current appeals procedure.
- 3 Need clear guidance as to how this relates to the provision to allow local authorities to determine certain listed building consents.

Sections 21 and 22 – Enforcement notice: requirement to cease works and stop notices and temporary stop notices

5.19 Seventeen respondents commented on sections 21 and 22. Twelve fully supported the provision noting that Stop Notices and Temporary Stop Notices would be positive tools in preventing damage to listed buildings. Another noted that the additions to the listed building enforcement regime would provide an effective method of ensuring that potentially damaging works to the character and

appearance of listed buildings are stopped at the earliest possible time. One respondent welcomed the introduction of temporary stop notices but expressed concern that the Bill allows for a person served with a stop notice (in conjunction with an enforcement notice) which is subsequently quashed, withdrawn or varied so as to change the works concerned to be compensated by the Planning Authority for any loss or damage attributable to the actions required by the notice and that this loss will include any loss due to breach of contract. Five respondents raised a number of issues relating to Stop Notices and Temporary Stop Notices as follows:

- 1 There is a need for Scottish Ministers to look into the issue of compensation for loss due to a Stop Notice (e.g. restriction on the level of compensation to reasonable loss, liability in the event of stop notices being withdrawn/altered).
- 2 Scottish Ministers should introduce checks and balances against statutory notices being issued overzealously or unreasonably.
- 3 Introduce appeal to a third party.
- 4 Why is the level of fine 41E(6) lower than other fines increased in the Bill?

Section 23 – Non-compliance with listed building enforcement notice: fixed penalty notice and Section 24 – Amount specified in fixed penalty notices for breach of listed building enforcement notice: procedure

5.20 Of the 17 respondents who commented on this proposed amendment 12 fully supported the provision as drafted. One in particular noted that this would be a significantly more effective and viable incentive to compliance than prosecution. However, 5 other respondents, while agreeing with the proposal in principle, raised some issues:

- 1 Fines should be ring-fenced to assist in positive heritage management elsewhere in the local authority.
- 2 With no clear avenue to take action against the non-payment of a fixed penalty notice, the usefulness of such a notice is undermined. This has been identified as a key weakness in the new powers introduced via the 2006 PA – it is disappointing to see same weakness replicated re LBC enforcement notices.
- 3 Further clarification on the process for serving these notices is required.
- 4 Legislation should provide that Scottish Ministers ensure that notices are served on the relevant people.

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

5.21 Of the 19 respondents who commented on this provision 11 fully supported the proposed amendment with one in particular noting that this was “appropriate, proportionate and necessary”. Two opposed the proposal on the grounds that it could greatly complicate the sale of any building and that it appeared largely unworkable in practice and that it may result in the abandonment of dilapidated listed buildings. Six respondents supported the provision in principle but raised the following issues:

- 1 Consideration should 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.

- 2 It is disappointing to note that the notice expires at the end of five years. It would be beneficial if this burden were preserved until such expenses have been removed.
- 3 Confirmation is sought that the placing of this burden against property will accrue interest at an appropriate rate.
- 4 Clear guidance on the application of this provision is required.
- 5 May prevent buildings being sold and may add to number of listed buildings which lie empty and deteriorating.
- 6 Committee hopes that policies and procedures will be put in place to ensure that the right of recovery of funds will be administered fairly with the preservation of the building having priority over recovery of funds when the position is assessed under section 50 of the 97 Act. (Scottish Churches Committee)
- 7 Inconsistent as there is no similar provision for Scheduled Monuments.
- 8 There is a need to define what is meant by “acquisition date”.
- 9 Clarity required on who should bear the cost of registering/recording a Discharge of the Notice.

Section 26 – Recovery of grants for preservation of listed buildings, etc.

5.22 Eight respondents commented on this provision – all supported the proposal although one, while they appreciated the added clarity this would provide, was slightly concerned that claw back might affect development appraisal and effect security.

Section 27 – Regulations in connection with inquiries, etc.

5.23 Three respondents commented on this provision. One offered full support and 2 sought clarification on how, if at all, this provision related to the new system of delegation and local review in the planning regime.

Schedule – Form of notices

5.24 Three respondents commented on the schedule to the Bill. Two welcomed the forms as set out in the schedule and one sought further information before commenting.

Section 3

Financial Assessment

5.25 Of the 14 respondents who commented on the financial assessment 8 agreed with the Scottish Government’s initial assessment of the financial implications of the Bill provisions. One in particular agreed that the proposed amendments were likely to introduce additional financial costs only for those who contravened the legislation – all the local authorities who commented on the financial assessment agreed that the Bill would have no financial implications for local authorities. However, 6 respondents did raise a number of concerns about the potential financial impact of the Bill:

- 1 The changes set out in section 16 could have financial implications for those that manage the land concerned.
- 2 Concerns that the potential benefits of the new powers will not be fully realised if their use is

- 3 The financial assessment does not accurately reflect the potential financial impact of the provisions – particularly in relation to certificates of immunity. There will be increased conveyancing costs and increased costs for the issuing agency. Certificates of immunity will be much more common than the 2-3 per year anticipated by Historic Scotland.
- 4 Cannot agree with the assertion that “there may be financial implications for businesses but only for those who contravene the legislation”.
- 5 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.
- 6 Considers this section to be weak – in our opinion Historic Scotland staff are already under considerable pressure and adding greater technical work to their workload will only serve to slow down the process.
- 7 The risk of a compensation claim for contractual losses may limit the usefulness of the new powers.
- 8 The listing of a building has the result of imposing many new financial obligations on owners to which the Bill will add.
- 9 Section 25 introduces a new liability for new owners.
- 10 Section on the private sector could be extended to encompass the range of owners of designated assets or additional sectors added.

Partial Regulatory Impact Assessment

5.26 Of the 5 respondents who commented on the partial Regulatory Impact Assessment one agreed fully with the Scottish Government’s initial assessment of the impact of the new legislation on regulation. However, 4 respondents raised a number of issues:

- 1 Do not agree with the Scottish Ministers’ view that the draft provisions will not have a significant impact on small firms, and question why Scottish Ministers believe that the Certificates of Immunity will be beneficial for a number of small firms.
- 2 Welcome the commitment to review the legislation.
- 3 Burden of Certificates of Immunity on Historic Scotland may be more than anticipated.
- 4 Proposed changes to the Definition of Monument 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 record of monuments is compiled against which the consideration for statutory protection is made.
- 5 “Disturbance” may have a knock on effect on resources within the bodies dealing with any particular development depending on the interpretation put on disturbing the national significance of a particular site.

Equalities Impact Assessment

5.27 Only one respondent commented on the Scottish Government’s initial assessment of the equalities impact of the provisions in the draft Bill and noted that “the Bill provisions are unlikely to have significant impact as long as provisions are made for those with disabilities e.g. when serving notices etc”.

6. Other Issues

6.1 The consultation invited readers' comments on the draft Bill provisions; the potential financial implications of the Bill; the Partial Regulatory Impact Assessment; and the equalities impact of the Bill. However, the consultation document also made it clear that all comments and views would be welcomed and carefully considered. Many of those who commented on the Bill provisions therefore also took the opportunity to raise other issues that were not addressed in the Bill. These are set out below:

A Statutory Duty of Care for the Historic Environment

6.2 Eight respondents suggested that the Scottish Ministers should consider placing a statutory duty of care for the historic environment and made the following points in support of their case:

- 1 A Statutory Duty of Care is essential to ensure that government and those in receipt of government aid do not neglect their responsibility to protect and sustainably manage the historic environment.
- 2 This would follow the precedent of the duty to plan for biodiversity introduced by the Nature Conservation (Scotland) Act 2004.
- 3 Such a duty would reflect the statement in the revised SHEP that "the sustainable management of the historic environment is an integral part of the wider management of resources". It would underpin key principles listed in SHEP 1.14 and 1.16
- 4 In line with Government's commitment to sustainable development.
- 5 The Bill makes much of the comparison between cultural and nature conservation and it is fitting that the Bill should include a duty of care for the historic environment".
- 6 This would harmonise the historic with the current natural environment legislation, and the duty on government bodies towards sustainability.
- 7 It may be argued that a duty of care for the historic environment is already effectively encompassed within the 'sustainability' duties imposed upon authorities e.g. s.36(A1)(c) of the Climate Change (Scotland) Act and s.1(5) Local Government (Scotland) Act.

A Statutory Duty to maintain and have access to a Historic Environment Record

6.3 Eight respondents recommended that the Bill should include provision to introduce a statutory duty for local authorities to maintain or have access to a Historic Environment Record(HERs)/Sites and Monuments Record (SMRs). The following arguments were put forward in support of this proposal:

- 1 HERs and the services they provide are key tools re management and protection of historic environment.
- 2 This would help underpin relevant sections of SHEP.
- 3 This would not be a burden as all local authorities now have in place arrangements for access to SMRs/HERs.
- 4 This would help local authorities in many areas of their work.
- 5 Having statutory SMR/HERs would greatly help towards achieving standards for the provisions and maintenance of such services and would provide stability for the future.

A strengthening of legislation governing development in Conservation Areas

6.4 Ten respondents called for a strengthening of the legislation governing development in Conservation Areas. The following issues were raised:

- 1 There is a need to simplify control on development in Conservation Areas e.g. through universal conservation area restrictions on permitted development thereby reducing the burden on local authorities to prepare Article 4 Directions. Allow local authorities to remove Permitted Development Rights in Conservation Areas without the need to go through current Article 4 Directions
- 2 Introduce a simpler method for local authorities to withdraw permitted development rights in conservation areas where appropriate.
- 3 Local authorities should be required or encouraged to carry out Conservation Area appraisals and to produce management plans [within 5 years of designation].
- 4 Remove “unoccupied” from section 68 of the 97 Act.
- 5 Section 68 of 97 Act should apply to local authorities as with section 49.
- 6 Amend section 66 of the 97 Act to clarify position re partial demolition in Conservation Areas.
- 7 Bill should clarify Conservation Area policy re how conservation areas are identified and defined, with appropriate checks and balances.
- 8 Conservation Area designation and management process should be strengthened to offer greater protection to archaeological deposits and material within built structures [this could be done through more detailed guidance].

Interim protection for heritage assets under consideration for designation

6.5 Ten respondents suggested that there was a need to introduce some form of ‘interim protection’ for historic assets under consideration for designation. The following points were raised:

- 1 This would make historic assets less vulnerable to damage or destruction during the process of designation.
- 2 This would parallel a similar process for Special Protection Areas when there is a candidate SPA.
- 3 There are examples of buildings that have been demolished or significantly altered by owners as a means of preventing listing.
- 4 An essential measure to accompany the introduction of enforcement notices and would provide greater transparency ion the process.

Class Consents

6.6 Six respondents recommended that agricultural class consents for scheduled monuments should be removed or reformed to minimize the threat to monuments from agricultural activity. Three of the respondents suggested that this would not be a new burden if applied only to new designations. One consultee suggested that Scottish Ministers should be encouraged to broaden the range of works which could be carried out under Class III – this would reduce administrative burden on Historic Scotland and would mirror listed building consent delegations to local authorities.

Notification of ‘start of works’ and Completion Certificates for Listed Building Consent Works

6.7 Eight respondents advocated the introduction of a system of ‘notification of start of works’ and ‘completion certificates’ for all listed building consent related works. It was suggested that such a move would harmonise listed building consent with other areas of the building process and could potentially reduce a monitoring burden on the local authorities.

Urgent works to occupied buildings

6.8 Four consultees recommended that section 49 of the 1997 Act should be amended to allow urgent works to an ‘occupied’ as well as an ‘unoccupied’ listed building. It was also suggested that the current legislation was unduly limiting and raised the legal spectre of the definition of “occupied”, especially if applied to non-residential buildings.

Underwrite costs of urgent works

6.9 Seven respondents argued that Bill should include a provision to enable Scottish Ministers to provide grants to local authorities to cover/underwrite the costs of serving an Urgent Works Notice. Some consultees suggested that local authorities use the cost of serving notices as a reason for not doing so. They also argued that this would enable local authorities to make application for support, thereby increasing the likelihood of action.

Extend number of organisations that can apply for building acquisition grant

6.10 Five respondents advanced the proposal that the 1953 Act should be amended to provide Scottish Ministers with powers to make building acquisition grants available to Building Preservation Trusts and other similar organisations rather limiting the power to support for the National Trust for Scotland and local authorities.

Archaeology Areas

6.11 Two organisations called for strengthened provision for designation of areas of archaeological and historic landscape significance while acknowledging that it could be pursued by means of other policies and guidance if not through the current Bill.

Listing consultation

6.12 Two consultees indicated that there was now some doubt as to whether local government officers can be considered to be “persons or bodies of persons” under the terms of section 1(3) of the 1997 Act. If this were the case any list that had not been consulted upon since 1997 might be *ultra vires*. It was suggested that the simplest solution would be to delete section 1(3) in its entirety.

Ecclesiastical Exemption

6.13 Six respondents suggested that Scottish Ministers should review the ecclesiastical exemption in the context of the amending Bill. The following points were made in support of this proposal:

- 1 There is a strong case to remove ecclesiastical exemptions, given the general failure of religious bodies to have robust conservation review bodies in place. This would simplify the process of dealing with changes to listed buildings and would not constitute a heavy additional burden on local authority resources.
- 2 This would bring historic places of worship within the listed building management system.
- 3 The exemption is anomalous and should be at least discussed and tested in parliament.

Area Designation

6.14 Two respondents suggested that a new area based historic environment designation should be introduced 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. It was suggested that this could be linked 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. It was also suggested that it would be possible to introduce the statutory provision much in the same way as a Housing Action Area as per the Housing Act – this could be used to supersede the current Town Scheme (s.71&72 of the 1997 Act) and enable investment to be targeted to areas that might not be defined as a town. It was also suggested that Scottish Ministers could also introduce initiatives such as a Historic Improvement District (mirroring Part 9 of the Planning etc (Scotland) Act 2009).

Duty on Police

6.15 One respondent recommended that there should be a statutory duty on police to keep up-to-date lists of designated sites – and officers should be made aware of their duty to protect those sites.

Remove word “deliberate” from section 45 of the 1997 Act

6.16 Five respondents recommended that the word ‘deliberate’ should be removed from section 45 of the 1997 Act when applied to owners that allow listed buildings to fall into disrepair for the purposes of justifying its demolition. It was argued that such an amendment would make it easier for minimum compensation to be awarded and thereby provide a better deterrent to owner neglect.

Protection for artefacts

6.17 Three consultees suggested that it should be an offence to remove any artefacts from scheduled monuments.

Statutory local designations

6.18 Four consultees suggested that Scottish Ministers might wish to consider using the amending Bill as an appropriate vehicle to introduce a new power for local authorities to be able to designate buildings of local interest on a local list with associated legal protection. It was noted that a similar practice exists in England. However 2 of the respondents acknowledged that this could cause confusion re what is “listed” and what is not “listed” and suggested that it might be possible to achieve

similar aims through development plan policies. Perhaps greater clarity in a new SHEP.

Rural Issues

6.19 One respondent suggested that the application of some of the provisions to scheduled monuments which are located on land let under Agricultural Holdings legislation did not appear to have been fully thought through, with a risk of unintended consequences for the landowners. It was also suggested that further consideration should be given to rural proofing all the provisions contained within the legislation and it was noted that Scottish Borders Council had developed a rural proofing tool which might prove helpful in the context of the amending Bill.

Appeal against scheduling

6.20 One respondent suggested that there should be a statutory mechanism to allow for an appeal against a decision to schedule an ancient monument.

Greater transparency re listing and scheduling

6.21 One consultee called for greater transparency with regard to consultation, designation, notification and explanation but acknowledged that such matters may be better addressed by the development of policy and practice rather than through primary legislation.

Ecclesiastical Buildings

6.22 One respondent expressed disappointment that none of the proposals would go towards addressing their concerns about the future of the built heritage and, in particular, ecclesiastical buildings caused by a lack of finance for their protection. Pragmatically, to secure the preservation of the more significant examples of Church buildings and continue them in use as such, either additional finance will require to be made available by way of grant-aid or current listing policies substantially reviewed.

Historic Building recording

6.23 Two respondents suggested that legislation should make clear who is responsible to request historic building recording prior to listed building works being carried out.

Local Reviews

6.24 One consultee noted that the Planning etc. (Scotland) Act 2006 introduced new provisions for the determination of planning applications for 'local' developments including schemes of delegation and local reviews. They suggested that Scottish Ministers might wish to consider if similar provisions would be appropriate for applications for listed building and conservation area consents. This would further bring historic environment legislation in line with the planning regime.

Curtilage and heritage impact statement

6.25 One respondent noted that the Town and Country Planning (Development Management

Procedures) (Scotland) Regulations 2008 introduced a statutory requirement for design statements to accompany planning applications for developments within the curtilage of a Category A listed building. The consultee suggested that this requirement should apply to developments within the curtilage of all listed buildings, although it acknowledged that such an amendment may not be possible through this Bill. The consultee also reported that they would support a statutory requirement for Heritage Impact Statements to accompany applications for listed building consent.

Forewarn Owners

6.26 One respondent recommended that there should be a process to forewarn owners that their building is about to be listed.

Update to lists

6.27 One respondent suggested that the Bill could be an opportunity to address the problem that local authorities do not have up to date lists of listed buildings and recommended that there should be a review of lists every 10 years. If provisions requiring that lists are kept up to date are not included in the Bill, this needs to be addressed in some other way. Getting the listings process right should also help create certainty for developments – and minimise potential problems with Certificate that building not intended to be listed.

Application of Statutory Repair Notice to Scheduled Monuments

6.28 Two respondents recommended that the 1979 Act should be amended to enable Scottish Ministers to serve a Statutory Repair Order on scheduled monuments indicating that it would be helpful to have a wider range of tools available in dealing with neglect and repairs issues.

Inventory of Gardens and Designed Landscapes

6.29 Two consultees suggested that there was a need to provide a statutory basis for the regulation of development affecting an Inventory landscape. The current arrangements are inadequate and only require a planning authority to consult Scottish Ministers if a development is considered to have an impact on an Inventory site. It was suggested that there were 3 ways to address this issue:

- 1 introduce new legislation affording statutory protection for Inventory sites akin to CA designation;
- 2 introduce a new process whereby the inclusion of a landscape onto the Inventory results in its designation as a CA in terms of section 61 of the 97 Act;
- 3 Introduce a new area based designation (Cultural Heritage Area) etc.

Certificates of Immunity from scheduling

6.30 One respondent suggested that the new provisions relating to *Certificate that building not intended to be listed* should be extended to cover above ground ancient monuments.

7. Conclusion

7.1 The Consultation on the Bill generated a wide ranging and complex debate about heritage protection legislation in Scotland and the Bill provisions. Although there was broad support for the Bill as drafted a number of respondents made suggestions for minor amendment to some of the provisions and others raised a number of issues that are not addressed in the Bill. The Bill Team has consequently written to many people who responded to the consultation, to seek clarification of or more information on points, or to request evidence of a need for certain provisions. We have also held workshops and meetings with individual bodies to discuss particular issues. The consultation responses and the follow-up work will be used to inform Ministers' consideration of the final shape of the Bill.

List of Respondents

Aberdeenshire Council
ALGAO: Scotland
Angus Council
The Archaeology Forum
Archaeology Scotland
Architectural Heritage Society of Scotland
Ballater and Crathie Community Council
British Waterways
Built Environment Forum Scotland
City of Edinburgh Council
Clan Macrae Society
Dumfries and Galloway Council
Dundee City Council
East Ayrshire Council
East Dunbartonshire Council
East Lothian Council
Falkirk District Council
Glasgow City Council
Heritage Lottery Fund
Highland Council
Historic Houses Association
Institute for Archaeologists
Institute of Historic Building Conservation
Joint Nautical Archaeology Policy Committee
The Law Society of Scotland
Loch Lomond and the Trossachs National Park Authority
Museums Galleries Scotland
The National Council for Metal Detecting
NHS Lothian
North Ayrshire Council
North Lanarkshire Council
Perth and Kinross Council
The Prince's Regeneration Trust
Royal Institution of Chartered Surveyors
Scottish Castles Association
The Scottish Churches Committee
Scottish Civic Trust
Scottish Environment Protection Agency
Scottish Natural Heritage
Scottish Property Federation
Scottish Rural Property and Business Association Limited
Shetland's Island Council
Society of Antiquaries of Scotland
Stirling Council
The Theatres Trust
Two Individuals