

**HISTORIC SCOTLAND & BUILT ENVIRONMENT FORUM SCOTLAND
ANCIENT MONUMENTS AND LISTED BUILDINGS (AMENDMENT) (SCOTLAND) BILL
CONSULTATION WORKSHOP**

**WORKSHOP REPORT
16 JULY 2009**

1. Introduction

1.1 Simon Gilmour (Director of Society of Antiquaries of Scotland) welcomed all to the workshop and set out the programme for the morning. In particular, it was explained how the break-out workshops would function and that facilitators should report back with 3 to 5 key points to the feedback session, which would be used as the basis for further discussion.

2. Background

2.1 Simon Gilmour introduced Lucy Blackburn (Director of Policy at Historic Scotland), who thanked everyone for attending and wished to note her appreciation for the assistance provided by BEFS in organising this workshop event in partnership with Historic Scotland.

2.2 Some background to the Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill was provided, and it was explained that over the last few years Ministers and those in the sector had been looking at the 'toolkit' for heritage protection. In response to the HEACS Report on *The Need to Review Heritage Legislation in Scotland*, Scottish Ministers concluded they did not wish to have a full review yet wished to address the several gaps and weaknesses within current heritage legislation (December 2006). The Bill was therefore limited in scope. The Bill is intended to impose no new duties and burdens; instead it seeks to provide support for the sector in working better and smarter within its resources.

2.3 The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill is part of a wider programme of modernisation and local authority partnership working, as represented by the Joint Working Agreements and Casework Delegation, currently being taken forward by Historic Scotland.

2.4 However, it was now important for officials, in consultation with as broad a variety of stakeholders as possible, to discover if there are any problems about the drafting and implementation of the Bill. It was felt there was great value in doing so discursively and being able to test ideas at this stage. All noted that the closing date of the public consultation on the Bill was 14 August, however, attendees were urged to keep an open dialogue with the Bill Team throughout the process.

2.5 After the consultation phase, it was anticipated that the 2009/10 legislative programme would be announced in September and the Bill Team would inform stakeholders of news on this nearer the time. If the Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill is announced as part of this programme, it was explained that the timetable for it would involve Introduction in March 2010, with Parliamentary debate and Stage 1 in April/ May 2010, Stage 2 in the Autumn, and Stage 3 in November 2010.

3. General Q & A Session

3.1 Simon Gilmour opened the floor for any general questions before attendees broke out into their smaller workshop groups to discuss the draft provisions in detail.

3.2 The only question raised was regarding whether the Ancient Monuments and Listed Buildings (Amendment) (Scotland), and the limited scope of reform associated with it, was the correct way forward. It was explained that the reasons for taking forward this Bill had been identified and Historic Scotland, as officials to Scottish Ministers, could not comment on this further substantively. However, it was added that in England, where a Bill seeking full review of heritage legislation had not been introduced to Parliament, a high proportion of the issues relating to heritage protection were now being addressed by 'legislative tweaks' such as those proposed in this Bill.

4. Break-out Group Discussions

4.1 Group A (Chair – Jonathan Wordsworth, Archaeology Scotland)

4.1.1 Individual members of the group were asked to introduce themselves and highlight any issues they had with the draft provisions and their potential implementation. All agreed that the Bill was generally welcomed; however, the following concerns were raised with some highlighting points to be added:

Conservation Areas:

- It was felt that there could be a simplification of controls and re-wording of Article 4. Some also felt that local authorities should be encouraged to carry out conservation area appraisals and management plans.

Availability of Grants to Local Authorities:

- Some highlighted that local authorities were deterred from doing urgent works to listed buildings as they believe they have to pay for such work. An extension of the availability of grants to local authorities to underwrite costs of serving and carrying out urgent works would be welcomed.
- It was noted that Section 14 – development and understanding of matters of historic, etc interest: grants and loans – would encompass this. Extending this to cover educational grants was to be explored.

Listed Buildings:

- It was suggested that the word 'deliberate' should be removed from s45 of 1997 Planning Act when applied to owners allowing for listed buildings to fall into terminal disrepair.
- This point would be pursued with SG lawyers, but it was felt that there might be a human rights issue.

Powers of Entry and Owner Responsibility:

- There were concerns raised about the rights of property and landowners regarding section 6 – powers of entry to inspect the condition of scheduled monuments. It was seen as essential that there was a proper process of notification. In particular, if there was no restriction on the level of compensation of reasonable loss it may encourage local authorities to seek access regardless.
- The notion of third party 'responsibility' for conducting 'unauthorised' work or 'disturbing' an ancient monument was highlighted as a concern. 'Ignorance' of land/property owners was also raised as a potential problem.
- It was explained that a programme of information and guidance was to be implemented in parallel with the Bill, and the Bill Team would be very grateful for input

from the SRPBA and others in drafting such a programme and to address issues relating to landowner responsibility.

Definition of Monument:

- This provision was welcomed, but several members wished to clarify if this definition would be carried across into the SHEP and SPP 23 – it was essential that they were joined up. It was confirmed that the SHEP would be revised when the Bill is enacted.
- Although it was believed the new definition of ‘monument’ would clarify officials’ position and a level of consistency, there were concerns that the definition was too broad in some respects. It was suggested that the problems highlighted were operational and that they could be addressed through guidance.

Control of Works Affecting Scheduled Monuments – ‘Disturbance’:

- Several felt the term ‘disturbance’ was not sufficient to cover ‘damage’ to ancient monuments. However, it was explained that there had been lengthy debate with SG lawyers around this issue and, it had been concluded that ‘disturbance’ would allow cases to be pursued more easily, and indeed proved, in court. A level of reasonableness would always be exercised in such cases.

Certificates of Immunity:

- There was a mixed response to this provision. In previous discussions COI were welcomed by developers, but many in the group felt there would be a muted response from the development community with no full-scale reform.
- There was concern COI’s would be used negatively by developers and private consultants as any member of the public could apply for one.
- The potential resource implications for Historic Scotland’s listing team was also raised. Resources currently employed in urgent listing and the listing programme in general might be detrimentally diverted to producing COI’s.
- Some members suggested proposals for legislating to update lists every 5 – 10 years along the lines of the new development planning provisions.
- It was suggested that representatives from the Law Society were involved in this debate as there could be issues relating to conveyancing in the private sector.

4.1.2 The group were asked to raise any issues not currently addressed in the Bill or that were not covered in the previous discussion. A few examples that were currently being explored by the Bill team were highlighted:

- Inventory of Gardens and Designed Landscapes – it was noted that the Bill Team was currently exploring the possibility of amending the 1953 Act to allow Scottish Ministers to update the Inventory of Gardens and Designed Landscapes as and when the Inventory was revised. All supported this proposal.
- Letter of notification of listing - seeking to amend primary legislation to make the wording of the letter less prescriptive. Currently the wording of the letter is prescribed in detail in secondary legislation. All content.
- SMC application form – as above. Revise primary legislation so that the wording of the SMC application form can be changed and updated as and when required. All content.

4.1.3 It was suggested that ecclesiastical exemption should be included in this review of heritage legislation and that transferring its ‘burden’ would not be heavy on local authorities. It was advised that perhaps the issues relating to ecclesiastical exemption could be dealt with through guidance. It was also added this could be a very contentious issue and that the HEACS Report on this was still to be published.

4.1.4 It was stressed that Scottish Ministers supported this Bill on the basis that it would place no new burdens or duties on central government, local government or the private sector and on the basis that the implementation costs would be low. If amendments were brought forward during the progress of the Bill through parliament had a significant impact on the financial and policy scope of the Bill there was a risk that Scottish Ministers would have to review their approach to the Bill.

4.2 Group B (Chair – Tim Howard, Institute of Field Archaeologists)

4.2.1 The facilitator outlined three key questions which would structure the discussion during the break-out session. These were:

- What provisions in the Bill are welcomed or supported?
- What provisions should be removed or amended?
- Are there issues that are missing from the draft Bill?

4.2.2 In general, the group all welcomed and were content with:

- The harmonisation of the Bill with other changes in planning legislation in Scotland
- That radical change had not been favoured over more limited reform which retains what is familiar about the legislation
- The maintenance of dual listing and scheduling processes and consents

4.2.3 The following points were raised concerning the provisions included in the Bill:

Certificates of Immunity:

- It was suggested that had been a muted response from the development community on account of there being no full-scale reform.
- There was concern on behalf of one individual in the group that COI's would be used negatively as a weapon by developers and private consultants to rid themselves of the 'heritage lobby'. A COI should not mean that a building is of no value.
- It was agreed by all that how the provision is implemented and regulated will be paramount to its success. A light touch approach will mean that there is no certainty for users of the system. Advice and education are thus essential.
- There is a potential resource issue for Historic Scotland's listing team although resources currently employed dealing with urgent listing for potential development sites might be usefully redeployed to COI's.
- A number of members agreed that fee charging might be a way to make the provision more operational and practicable. It would also make those applying think carefully about why they were doing so. In this case, it will be important to clarify what service one would get for their fee.
- One individual would have liked to see planning authorities consulted on whether a COI should be issued.
- Some members suggested proposals for legislating to update lists every 5 – 10 years along the lines of the new development planning provisions. Others believed that this is impracticable given the resources available for listing.
- There were mixed feelings about whether amenity societies could help with this process by doing local areas surveys.

Enforcement:

- Most were glad to see provisions brought in line with those in the wider planning system.
- It was agreed that the provisions themselves are not problematic, but the way in which they might be used at operational level.

- One member suggested completion certificates for LBC. It was noted that the evidence base does not currently exist to prove that there is a problem which would merit the potential expense of introducing such a system.
- The group also discussed time limits for LBC. The default is currently 5 years unless otherwise specified by the authority. Some members believed that there may be an argument for reducing this to three years in line with new planning provisions.

4.2.4 The following issues were raised with regard to things not already included in the draft Bill:

Urgent Works Notices:

- All members felt that the current system of urgent works notices for unoccupied buildings should be extended to occupied listed buildings also.
- There may be Human Rights issues associated with entering the interior of private dwellings, but for exteriors it should be considered.

Historic Building Recording:

- It was suggested by one member of the group that there should be a requirement to produce a record of buildings before carrying out works to them.
- The group discussed whether the duty should always fall to RCAHMS as a public agency or whether it should be extended to private bodies and developers responsible for carrying out works.
- There were some concerns about where the line would be drawn in terms of small householder works.
- It was generally agreed that this is an issue for planning or historic environment guidance rather than this legislative Bill process.

Conservation Areas - Article 4 Directions and Area Appraisals:

- Opinion was divided about inclusion of a requirement for all conservation areas to have a suite of article 4 directions in place. Concerns were raised that such restrictions would need to be tailored to the characteristics of the specific area.
- One member pointed out that the Scottish Government are currently reviewing permitted development rights and considering enhancing restrictions in conservation areas.
- One member suggested that it should be a requirement for conservation areas to have appraisals to aid informed decision making. Not everyone was in agreement and it was pointed out that this would have resource implications for local authorities.
- There were mixed views on the subject, but everyone agreed that conservation areas hadn't been explored enough in the draft Bill and there were opportunities for streamlining.

Duty of Care for Public Authorities:

- A couple of members suggested that the Bill should introduce a 'duty of care' for public authorities involved in managing the historic environment along the lines of that in the Nature Conservation Act
- No research has been carried out to assess the value of such a duty and there would likely be financial burdens associated with it.
- Other members of the group were dubious about how such a duty might be quantified or enforced.
- It was suggested by one member that this was outside the scope of the Bill and the group discussed whether it would be possible to extend the sustainability duty introduced in planning legislation to include the historic environment.

Historic Environment Records (HERs):

- It was suggested that there should be a statutory duty for local authorities to maintain Historic Environment Records (HERs). There was not much appetite for this in the room.

Ecclesiastical Exemption:

- One member suggested that the review of legislation should look at the current arrangements for ecclesiastical exemption.
- There was opposition from other members of the group who suggested that this would be an extremely contentious issue.

Right of Appeal in designations:

- Some members of the group asked for clarity on whether a right of appeal against designations had been included.
- It was explained that it had not. This would have had a major resource implication because the right to appeal would have applied to both a decision to list and not to list.
- It was agreed that the omission protects the objectivity of the current system, but that what might be needed is more transparency in terms of the listing and decision making processes.
- It was agreed by most that there was no perceived need for interim protection while listing decisions are being made as there is no evidence base to determine that it has been a problem. Some members held conflicting views on this.

4.3 Group C (Chair – Simon Gilmour, Society of Antiquaries of Scotland)

4.3.1 The group went through the provisions individually and the following comments were noted:

- Section 1 – Recovery of grants, for repair, maintenance and upkeep of certain property: This provision was welcomed.
- Section 2 – Control of works affecting scheduled monuments: This provision was welcomed.
- Section 3 – Works affecting scheduled monuments: consent for works without authority: One member queried whether the prosecuting authority was Historic Scotland if inappropriate work was being undertaken to a scheduled monument.
- Section 4 – Defences involving knowledge or belief to certain offences under the 1979 Act: All were in favour of this amendment.
- Section 5 – Fines: increases and duty of court in determining amount: The group agreed this was largely a deterrent and welcomed it. It was supported as harmonising with the Marine Bill.
- Section 6 – Powers of entry to inspect condition of scheduled monument: The group welcomed this provision and agreed it was a useful clause that could act as a deterrent.
- Section 7 – Works affecting scheduled monuments: enforcement: One member of the group sought clarification of who the Listed Building notice would be served upon, the owner or the person who had carried out the work? The group debated this point. There was disagreement over how to interpret this provision and one member believed the amendment seemed to suggest that the person doing the damage would be prosecuted not the owner. Would an enforcement notice be served upon the

owner or the person who had carried out the work? It was agreed that these issues required clarification.

- Sections 8, 9 & 10 – Monuments under guardianship: This was raised as a potential issue for contention, particularly for the public who may feel that there was one law for the public who own a scheduled monument and another for the government. Others agree that if this was controlled through proper processes then there should not be a problem. Those with a concern were invited to flag this up in more detail in their consultation response as it was an issue taken seriously by Scottish Ministers.
- Section 11 – Financial support for preservation etc. of monuments: This provision was strongly welcomed by the group.
- Section 12 – Power of entry on land where monument at risk: Some members suggested adding the word “disturbance” alongside “damage or destruction” for consistency, since it was being added elsewhere in the Bill. One member queried the power of entry, does it apply simply if there is a belief that there is an ancient monument there? It was agreed that why the word disturbance was not included here would be explored with the SG lawyers.
- Section 13 – Offences of disturbance of certain ancient monuments: The group agreed there was an issue relating to the wording of this amendment which required clarification.
- Section 14 – Development and understanding of matters of historic, etc. interest: grants and loans: This amendment was welcomed.
- Section 15 – Retention of found objects of archaeological or historical interest: This amendment was welcomed.
- Section 16 – Meaning of ‘monument’ in the 1979 Act: This amendment was welcomed. One member suggested background guidelines would be useful to clarify exactly what the term monument covered as there was slight concern that the scope would be extremely wide.
- Section 17 – Refusal to entertain certain applications for scheduled monument consent: This was welcomed.
- Section 18 – Certificate that building not intended to be listed: This amendment was welcomed. However, concerns were raised that this could lead to a large amount of extra work if people automatically applied for a certificate upon buying a new home. Suggestions on how to safeguard against the possibility of thousands of applications a year were welcomed. It was suggested that Ministers could issue guidance notes alongside operational policy. It was queried whether a refusal of certificate automatically meant something would be listed and it was suggested that there could be a third option: yes; no; not at this time. One member raised concerns that a certificate of immunity could be regarded as equivalent to a certificate of demolition. It was suggested that an additional workshop could be useful to further discuss this issue and examine fully the potential implications.
- Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines: All welcomed this provision.

- Section 20 – Hearings in connection with applications for listed building consent and appeals: It was queried whether this meant Listed Building Consent (LBC) appeals would be removed from the normal process and given to local authorities. It was suggested that this should be clarified.
- Section 21 and 22 – Enforcement notice: requirement to cease works and stop notices and temporary stop notices: All welcomed these provisions.
- Section 23 – Non-compliance with listed building enforcement notice: fixed penalty notice: All welcomed this provision.
- Section 24 – Amount specified in fixed penalty notices for breach of listed building enforcement notice: All welcomed this provision.
- Section 25 – Liability of owner and successors for expenses of urgent works: One member requested clarification of the difference between a listed building and a listed entry and queried who was responsible in cases of multiple ownership. It was explained that the owner of the particular part of the building was responsible. Group members were encouraged to put specific concerns into consultation responses.
- Section 26 – Recovery of grants for preservation of listed buildings, etc: All welcomed this provision.
- Section 27 – Regulations in connection with inquiries, etc: All welcomed this provision.

4.3.2 The group were asked if there were any other issues currently not in the Bill that they felt should be included. The following issues were raised:

- A statutory duty of care for the historic environment – could this fit into the Bill?
- Notification of start dates for Listed Building Consent to enable authorities to know when to begin monitoring.
- Length of life of Listed Building Consent – is it indefinite?

5. Final Discussion

5.1 Feedback from Break-out Groups

5.1.1 The following points were reported back to the plenary session with several issues common to all three break-out groups:

- Certificates of Immunity: There were concerns from each group on a variety of issues such as the appeals mechanism, resources implications, and the need to have up to date lists. As a result, it was felt that a follow-up meeting to discuss these issues in detail and to agree on what was required in terms of process.
- Conservation Areas: There were concerns from each group on this, with some suggesting that there should be a simplification of Article 4 and a re-wording of CAMP as well as some raising concerns about permitted development rights. However, a counter-argument suggested such ‘streamlining’ could be an administrative burden on local authorities. As debate revealed there were complex issues here, it was felt further focused discussion was necessary.

- Definition of Monument: Each group welcomed the broadening of the definition, but many felt that there would be potential issues with it being so wide (e.g. palaeo-environmental features could be included within this definition).
- LBC Appeals: One group felt clarification was needed regarding hearings in the LBC Appeals process and how it related to the duty to notify local authorities when applying for LBC.
- Owner Responsibility: In relation to listed building and ancient monuments, some felt the 'responsibility' (i.e. who the notice was served to) of carrying out unauthorised works needed to be clarified. More over, it was agreed in principle that those notices being served on listed buildings should be extended to apply to 'occupied' buildings.
- Ecclesiastical Exemption: All groups raised this issue and the general view was that it should be included in the draft provisions of the Bill.

5.2 Concluding Remarks

5.2.1 As one of the key areas of debate within the workshop groups, the issue of ecclesiastical exemption was returned to for more general discussion. A high proportion of people supported its removal, however, it was explained that it was felt unlikely that Ministers would support this contentious issue. However, Ministers would be looking into it in preparing their response to the forthcoming HEACS Report on Ecclesiastical Heritage in Scotland.

5.2.2 There was broad support for the introduction of completion certificates for listed buildings, however, as they could potentially be a burden on local authorities it was felt that Ministers would have to consider this carefully and do a cost/ benefits analysis. Stakeholders were advised if this wished to pursue this then the most effective way to do so was through COSLA. Indeed it was suggested that particular comments from local authorities relating to this, and the other draft provisions, could be reported to COSLA through the network established by the Bill Team.

5.2.3 Many felt that the historic environment required a statutory duty of care. Although this support was recognised it had been decided that, in terms of sustainability, the best way to achieve such an outcome was by other means rather than primary legislation. For instance, Historic Scotland was seeking a wider dialogue with local authorities and providing an improved level of care for the historic environment through its joint-working agreements. If the desire to have a statutory duty of care was seen as strong across the sector then discussion with the Minister would be sought. It was felt that if this was the case, however, underlying issues would need to be addressed.

5.2.4 Another key issue brought to the wider discussion was that concerning the 'definition of monument'. Even though many welcomed the wider scope that the draft provision provided, several felt that it made the definition too wide. It was explained that this paralleled that of the definition in the Marine Bill and further clarification on how this provision would be implemented and use in operation would be provided in the Policy Memorandum.

5.2.5 It was emphasised that there would be an education programme, pre- and post-enactment to help increase stakeholders' knowledge about the purpose and impact of the provisions. It was anticipated that this would involve a series of further workshops, publications and events.

5.2.6 The discussion was concluded by all agreeing that further meetings on certificates of immunity, conservation areas and the definition of monument should be set-up. Moreover a

workshop to go through the Bill process would also be offered to stakeholders to enable them to become more familiar with it and more engaged.

5.2.7 Finally, Simon Gilmour thank all for attending and their constructive comments.