SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

1. The Planning Law Sub-Committee of the Law Society of Scotland (The Sub-Committee) welcomes the opportunity to comment upon the general principles of the Historic Environment (Amendment) (Scotland) Bill as introduced into the Scottish Parliament on 4 May 2010 and should like to respond to the Scottish Parliament’s Education, Lifelong Learning and Culture Committee’s call for written evidence upon the general principles of the Bill in the following terms.

General comments

2. The Sub-Committee met with Historic Scotland’s Policy Team in August 2009 and responded to Historic Scotland’s Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill on 17 August 2009 (the Draft Bill) The Sub-Committee met again with Historic Scotland’s Policy Team on 17 August 2010 in order to discuss and debate the general principles of this Bill, and in particular Section 18 of the Bill which attracted the largest number of comments from respondents to the Historic Scotland consultation on the draft Bill. The Sub-Committee’s comments are detailed below, but in essence the scope of those entitled to apply for a certificate that Scottish Ministers do not intend to list should be narrowed from “any person” to the owner, lessee or occupier of the land and buildings to which the application relates.

3. As stated in its general comments upon the terms of the draft Bill last year, the Sub-Committee generally welcomes the continued drive towards synchronisation and harmonisation of legislation and procedures in related areas of control and notes that the Scottish Government is keen to avoid additional unnecessary burdens on economic interests in times of pressure. The Sub-Committee reiterates its view that economic interests are best assisted by absolute clarity and predictable effects in terms of legislation and ambiguity or complexity is unhelpful.

4. The Sub-Committee notes the background to the Bill and its policy aims and acknowledges that the Bill consists of a number of tightly focused amendments to the three pieces of primary legislation namely the Historic Buildings and Ancient Monuments Act 1953, the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and retains the core of the current system with its separate regimes for the process of scheduling monuments of national importance, listing buildings of special architectural or historic interest and the individual consent processes for each.
5. The Sub-Committee is generally supportive of the Bill and is of the view that it is sensible to retain these separate legal frameworks for scheduled ancient monuments and listed buildings.

Specific comments

Part one - amendment of the Historic Buildings and Ancient Monuments Act 1953

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

6. The Sub-Committee notes that Section 1 of the Bill is in identical terms to Section 1 of the draft Bill as referred to above and reiterates its comments made in terms of its response to Historic Scotland’s policy team on 17 August 2009 in that these are consequential amendments to Section 4A of the 1953 Act. These consequential amendments appear convoluted in their terms and the Sub-Committee therefore questions their necessity.

Part two – modifications of the ancient monuments and Archaeological Areas Act 1979

Section 6 - Works affecting scheduled monuments: enforcement

7. The Sub-Committee notes Section 6 inserts new Sections 9A to 9O into the 1979 Act.

8. The Sub-Committee reiterates its concerns previously stated in respect of its response to the draft Bill in August 2009.

9. The Sub-Committee questions whether the works executed in on or under a scheduled monument are sufficiently wide in scope. For example, neighbouring works outwith the boundary of the scheduled area may still have the potential to damage or destroy the scheduled monument. Such a situation may occur where there is a danger either of flooding, or of drainage of a waterlogged area or where fragile remains are preserved.

10. In Section 9A(4) the two sub-paragraphs (a) and (b) should have the word “and” inserted as a division between the two sub-paragraphs. The Sub-Committee notes that the word “or” has been deleted from the draft Bill but suggests that subsection 4 still appears to construe alternative, mutually exclusive reasons.

Section 9C - Appeal against scheduled monument enforcement notice

11. The Sub-Committee notes that appeals against enforcement notices are to the sheriff. The Sub-Committee has no particular concern with regard to this method of appeal but highlights that appeals to the sheriff on this subject matter are relatively untried, the closest equivalent being appeals to the sheriff against various measures arising from environmental
protection legislation and the release of information. Such appeals remain rare and accordingly untested.

12. The Sub-Committee continues to question why it was felt necessary to provide a new offshoot of appeals to the sheriff and suggests that relevant expertise and detailed knowledge of national and international policy with regard to scheduled ancient monuments lies with the Scottish Government’s Directorate of Planning and Environmental Appeals.

13. The Sub-Committee does note from the terms of paragraph 58 of the Policy Memorandum that Scottish Ministers are, however, satisfied that such a referral to the sheriff is a reasonable and appropriate appeal mechanism as it is the Scottish Ministers’ view that the issue which sheriffs will be asked to consider relate to due legal process and sheriffs will not require detailed specialist knowledge of historic environment issues.

14. In any event, the Sub-Committee notes that the powers of the sheriff in determining the appeal under Section 9C(4) are to either uphold or quash the notice are restricted and there is no power to amend the notice if the sheriff considers that a minor amendment to the notice would be appropriate. Given the importance of the notice in protecting an irreplaceable national resource, the Sub-Committee suggests that such consideration is given to enabling the sheriff to rectify any defect of the notice or to modify its terms.

15. The Sub-Committee notes from the terms of Paragraph 13 of the Environmental Liability (Scotland) Regulations 2009 that an operator may appeal to the sheriff on questions of fact and law if aggrieved by a requirement imposed by a competent authority and the sheriff can, in terms of Paragraph 13(4), confirm the competent authority’s decision, quash the decision, remit the decision or make such other order.

16. The Sub-Committee respectively suggests that, on the basis that an appeal to the sheriff is considered appropriate in this instance, the provisions at Paragraph 13 should be reflected in the Bill in order that the sheriff can determine matters of fact and law and has a wider remit with regard to disposal.

Section 9D - Execution of works required by scheduled monument enforcement notice

17. The Sub-Committee reiterates its comments in terms of its response to the draft Bill and accordingly questions why the word “occupier” is omitted from Section 9D(1)(b) restricting the powers of recovery only in respect of the owner or lessee. A person occupying land without a lease may well be a person who damages an ancient monument.

18. Section 9D(3) provides for a remedy available to the owner of a monument or land, where the occupier is being obstructed. This
supports the argument that the occupier should be a person potentially liable for any damage. However, it is suggested that this measure requires clarification. It should be made express in terms of the section that this is intended to be a self standing summary application for an order available to an owner unable to comply and that it need not require to be raised in the context of an appeal, or any other measure. It is suggested that the measure should be available only where the owner of the land has no contractual right of entry. If the owner has such a contractual right, then he should be required to use it in order to avoid the necessity of a potentially defended action in the sheriff court with consequential delay and consequential damage. Such an action should only be available to the owner where he or she has no other remedy against the occupier.

Section 16 - Meaning of “monument” in the 1979 Act
19. The Sub-Committee welcomes the extension of the definition of “monument” but suggests that it may be more appropriate to confer on Scottish Ministers the power to act where Scottish Ministers hold a reasonable belief that the site is likely to compromise any thing or group of things that evidences previous human activity. Given progress in archaeological research and techniques and the ephemeral nature of the evidence, it is possible that whether or not a site evidences human activity may be unclear for a certain period. The Sub-Committee suggests that a reasonable belief that a site is likely to comprise important evidence could well be sufficient for Scottish Ministers to take legitimate action.

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

Section 18 - Certificate that building not intended to be listed
20. The Sub-Committee has a number of concerns with regard to buildings being listed by Scottish Ministers and the issue of certificates that buildings are not intended to be listed which are as follows.

21. The listing of a building by Scottish Ministers can have adverse economic consequences for the development of a building where that development materially affects its character as a building of special architectural or historic interest. The effect of listing means that in addition to planning permission, listed building consents will be required for any works to the building that materially affect its character as a listed building. Obtaining listed building consent is a different process from obtaining planning permission and one where the policy guidance is very much weighted against the granting of consent for any proposal which is considered to be harmful to the aesthetics or significance of the building. Listing also imposes further statutory duties as in granting planning permission for a proposal which affects a listed building or its setting or a planning authority (or Scottish Ministers) must have special regard to the desirability of preserving the building or its setting or any features of
special architectural or historic interest it possesses (Section 59 of the 1997 Act refers), when carrying out any of their planning functions.

22. The scope of listing extends protection to (1) both the exterior and interior of a listed building and (2) any man-made object or structure fixed to a listed building or present within the curtilage of a listed building if it has been present since 1 July 1948.

23. Existing arrangements allow Scottish Ministers to undertake “spot listing”. Reference is made in the updated SHEP policy that—

“While a decision to list will be taken on the merits of the case, a building will not normally be listed once a planning application in respect of it has been submitted, granted or while works which have received planning permission are underway. Similarly, a building would generally not be listed in the course of an appeal period or current appeal against refusal of planning permission.”

24. These policy statements are not, however, expressed in such terms as could be reasonably relied upon in any property transaction. The Sub-Committee seeks clarification on whether it is the Scottish Government’s intention to delete or modify this policy when the provisions of Section 18 are in force.

25. The Sub-Committee is concerned that the Bill does not introduce any statutory right of objection on the merits to the listing of a building although the Sub-Committee fully understands that in certain circumstances Historic Scotland on behalf of Scottish Ministers will as a matter of courtesy undertake a degree of consultation and will consider representations to the effect that a building does not merit listing.

26. The Sub-Committee believes, however, that there should be a statutory right on an owner or interested person to be consulted on a proposal to list a building and that there should be in addition a right of objection to a proposal to list a building together with a right to a hearing or inquiry in order to determine unresolved issues. Such a right would be consistent with other orders or proposals under the Town and Country Planning (Scotland) Act 1997 where development rights are restricted. The Sub-Committee does not consider that the lack of this right is sufficiently compensated by the proposed immunity certificate procedure in terms of Section 18 of the Bill.

27. If protection of the building during this period is a concern, consideration could be given to an interim safeguard being provided through extending the existing offences for carrying out works to a listed building without consent to include works to a building which is the subject of a pre-listing notice of intention to list.
28. The Sub-Committee is also of the view that Part Three of the Bill does not address the difficulties which arise at present as to the extent and scope of the listing of a building when it is listed. The current process is not “map based”, but rather the property is identified by way of a short written description (usually a postal address) with further information which is considered to be information of no legal significance to the listing. In practice, this causes difficulties on the scope of what actually is listed as the modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 expressly provides that any object or structure fixed to the building or situated within the curtilage of a building since 1 July 1948 shall be treated as part of the building and accordingly protected.

29. In the absence of a map based system of listing, a practical difficulty arises with regard to establishing the extent of the curtilage of a listed building and there is no statutory process for establishing this. The term curtilage broadly includes any land or building used for the comfortable enjoyment of the building although it need not be enclosed. The practical consequences are that even although not referred to in the written description in the “list”, stables, mews blocks and garden walls are examples of what may be included as listed buildings, regardless of the fact that these properties may have passed into separate legal ownership since listing.

30. The Sub-Committee notes that the definition of the curtilage has been subject to judicial interpretation and Historic Scotland has previously set out four “tests” that should be applied in their Memorandum of Guidance on Listed Buildings and Conservation Areas published in 1998 and now withdrawn. These tests are summarised as follows—

- At the date of the listing were the two buildings in the same ownership?
- Were the structures built before 1 July 1948?
- Is the building functionally related to the listed building?
- Are the buildings divided by any modern road that would re-define the relationship between the buildings?

31. It is the Sub-Committee’s view that such practical difficulties could be removed altogether by Scottish Ministers simply adopting a map based system of listing which identifies the extent of the curtilage and the existence of any particular objects or structures to which the listing is intended to apply. This would improve the efficiency of the system and it is considered that in contemplating the listing of a building these matters will have been thoroughly considered by Historic Scotland in any event. Such a proposal would simply be documenting in a more complete way, an existing process.
32. The Sub-Committee, with particular reference to Section 18 of the Bill notes that “any person” can apply to Scottish Ministers for a certificate for a building not to be listed for a period of five years. Following the issue of the certificate, planning authorities may not serve a building preservation notice in respect of the building during this time. The Sub-Committee notes in terms of Paragraph 93 of the Policy Memorandum, that this Section of the Bill attracted the largest number of comments from respondents to the consultation on the draft Bill and that issues such as the adequacy of resources to handle applications, clarity on the basis of assessment and relationship with Building Preservation Notices and whether the five year period is too long were raised.

33. The Sub-Committee is in general supportive of this provision and notes that a similar provision exists in England and Wales in terms of Section 6 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and that such applications are generally known as “certificates of immunity” although usage is low.

34. In contrast to the Bill, which envisages an application at any time, under Section 6 of the 1990 Act applying to England and Wales, the application can only be made after planning permission has been applied for or has been granted. The decision to award immunity follows an assessment by English Heritage and if immunity is refused, the building will normally be listed.

35. The Sub-Committee accordingly has a number of concerns with regard to the arrangements proposed under the Bill, its main concern being that an application for a certificate can be made by “any person”.

36. This provision as set out in the new Section 5A to the 1997 Act as inserted by Section 18 would enable parties who are potentially hostile to change or development to make an application for a certificate in order to frustrate a property development proposal. The Sub-Committee accordingly considers that this right should be restricted to the owner, lessee or the occupier of the land and buildings to which the application relates. Further, there is no requirement under the proposed arrangements for the owners, lessee or the occupier to be notified that an application has been made. That means that such an application, although relevant to a property development, would not necessarily be indentified during the early stage of the due diligence exercise ordinarily undertaken by those contemplating development. The Sub-Committee believes that there must be a duty of notification placed on the planning authority to notify the owners, lessee or the occupier as the case may be (i.e whichever one of these is not the applicant) of an application.

37. The Sub-Committee is also concerned that there is no time limit within which a certificate should be issued and no right of appeal against the
Scottish Ministers’ decision to refuse the certificate and presumably to list the property.

38. The Sub-Committee considers that a period of two to four months, reflecting existing planning rules should be sufficient to issue such a certificate and if it is not determined within that timeframe it should be deemed to have been granted. Provision could be made for extension by agreement.

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

39. The Sub-Committee suggests that there is no justification for any difference between penalties imposed with regard to scheduled monuments or listed buildings and suggests that all penalties should be synchronised.

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

40. It is noted that under Section 49 of the 1997 Act, both the planning authority and Scottish Ministers have the power to carry out works urgently necessary for the preservation of a listed building having given seven days notice to the owner and, in terms of Section 50 thereof, the costs can be recovered from the owner, but only upon raising a payment action and enforcing the payment decree in the normal manner.

41. The Sub-Committee notes that, in terms of the proposed new Section 50A as inserted by Section 25 of the Bill, the owner of a listed building liable for expenses will remain liable after the sale of a building severally with the new owner, but only if a notice of liability for expenses is registered at least 14 days before the acquisition date and the notice has not expired before the acquisition date. The Sub-Committee notes that in terms of Section 50A(7) the acquisition date is defined as the date on which the new owner acquired right to the listed building.

42. The Sub-Committee notes that these provisions are in almost identical terms to the provisions regarding notices for potential liability for costs contained in Section 12 of the Tenement (Scotland) Act 2004 although such notices are not in fact applicable where the work is being carried out by the local authority and could be secured by Charging Order. Primary liability therefore remains with the original owner and the new owner can recover the costs from the previous owner.

43. Such a notice unless renewed in terms of the new Section 50C, expires at the end of the period of five years beginning with the date of its registration in terms of Section 50B(1)(c). The Society notes that there is a three year period as outlined in the 2004 Act and the Bill also contains provisions that require the planning authority or Scottish Ministers when the debt is met to register a discharge of the notice in terms of Section 50E of the Bill. The Sub-Committee presumes that the planning authority will cover the cost of doing so. It appears that on the
expiry of the notice, liability of the new owner ceases, although the previous owner could still be pursued by the new owner.

44. The Sub-Committee highlights a practical difficulty with regard to definition of acquisition date as this may be construed to be either the date on which the title is either registered or recorded or the date of conclusion of missives. The Sub-Committee further highlights that those acting for purchasers of listed buildings will require to check the position before settlement by way of Form 10/12 and the missives of sale will require to be amended in order to make appropriate provision (generally retention from the price) for situations where a notice has been disclosed.

45. The Sub-Committee also highlights that the new notice of liability for expenses does not rank prior to all other securities, unlike the Charging Order and that its purpose would appear to be simply to alert the new owner of a listed building to potential liability.

Law Society of Scotland
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