SUBMISSION FROM THE NATIONAL TRUST FOR SCOTLAND

Introduction

1. The National Trust for Scotland (the Trust) welcomes the opportunity to respond to Stage 1 of the Historic Environment (Amendment) (Scotland) Bill and comment on the principles that underpin it. We also take this opportunity to acknowledge the support the Trust receives through agencies of the Scottish Government which assist it with its work on the conservation of the nation’s cultural and natural heritage assets in its care, particularly here the grant received from Historic Scotland. The Trust contributed to the consultation stage response to the Bill, as previously titled the Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill, through the Built Environment Forum Scotland (BEFS). With it the Trust welcomed much in the Bill to simplify procedures without weakening controls and close some loopholes that could currently allow unacceptable threats to the historic environment.

2. As a major owner of heritage assets the Trust comments on the principles of the Bill as required from the perspective of owners but also from the perspective of the Trust’s role as advocates for the conservation of heritage which its ownership and management of assets informs. Further to the summary we identify principles contained within the Bill and Policy Memorandum and consider in more depth how they impact both on areas of detailed and broader concern and opportunity. The Trust will give oral evidence on 15 September.

Summary

3. In recognition of a principle of natural justice, the Trust calls for the preparation of guidance on appropriate levels of fines and for any such income to be ring fenced to grants for historic environment purposes to give more balance between deterrence and incentive.

4. Many scheduled monuments are “invisible” to the untrained eye. Under sections dealing with the ‘removal of defence of ignorance’ the Trust calls for measures to include information about a scheduled monument to be included under Sasines and that in the case of new or amended scheduling Historic Scotland be required to notify owners. By including information on the Property Register or Sasines, Scottish Ministers would ensure that information on these is openly and readily available to all property owners.

5. Greater clarification is called for about the impacts of decisions on Certificates of Immunity (CoI) from Listing regarding sustainability and listing.
6. Conservation area legislation appears not to have been considered to the same depth as scheduled monuments and listed buildings. The Trust calls for further consideration to be given to simplifying Article 4 Direction procedures together with appropriate safeguards.

7. Whilst we welcome actions to address the anomalies created by the Shimizu (UK) ruling in the Bill in connection with the part demolition of unlisted buildings in a conservation area, the Bill provides no further remedy or assistance to local planning authorities in the instance of unlawful demolition. No action is available under the Act to address this, which the Trust feels is inconsistent with an enhanced enforcement position for listed buildings and scheduled monuments.

8. The change in name of the Bill to Historic Environment gives an impression of a new wider scope rather than the mainly technical nature of amendments to listed building and scheduled monument legislation which is still the main body of its content.

9. The Trust calls for a broader interpretation of the historic environment and how that may be served by a ‘duty of care’ by appropriate public bodies, as in other recent legislation, and by leaving a way open to the consideration of a new designation for ‘Scottish Heritage Areas and/or Sites’.

Overview

10. From the draft Bill and Policy Memorandum we identify the following main principles—
   - Streamlining, simplifying, harmonising and clarifying the legislative approach
   - Raising the level of deterrence
   - Balancing interests
   - Enhancing the ability to value and manage sustainably Scotland’s unique historic environment and enhance it for future generations.

11. Our views remain broadly similar to those expressed through BEFS though with more time we question whether there has been a too narrow assessment of the consequences of the changes proposed and in restricting the consideration of a wider range of options. A broader approach might more fully address the principle of valuing and sustainably managing the historic environment.

12. Aspects of harmonisation with planning law, for example, have already in themselves introduced new decision making burdens which now would not be too greatly extended by the call for a more general duty of care. Similarly exploration of other broader approaches like the proposals outlined in the equivalent but aborted English legislation (referred to in the
case of CoI) for the use of class consents for changes to listed buildings, monuments and other natural heritage aspects of large estates might have been of benefit to larger scale owners of heritage assets and offer incentive to the preparation of management plans to research and justify the need for any proposed changes.

13. Though possibly outside the remit of this Bill, and whilst acknowledging the strengthening of powers, could deterrence yet be balanced by more investigation of fiscal changes, like those investigated by RICS and others\(^1\), to improve financial incentives for owners at times of restricted levels of grant. Their work reviewed a range of tax credits, incentives, exemptions, concessions etc in place of direct aid by government yet showed such measures leading to increased revenues through the positive impacts on heritage conservation and neighbourhood revitalisation. Whilst acknowledging the Scottish Government’s restricted role in decision making over the VAT regime this might be particularly helpful given the imminent rise in VAT rates.

14. Firstly we use the principles, as we identify above, to inform certain detailed aspects of the Bill which could benefit from further refinement. Secondly in questioning whether the objective to avoid adding new regulatory and/or financial burden has constrained too greatly the use of this opportunity we offer ways that a more holistic consideration may be made to enhancing the protection and appreciation of the historic environment.

Evidence

*Part 1 section 4 & Part 3 section 19 – Fines: Increases and duties of courts in determining amount*

15. We support the introduction of a raised level of fine up to £50,000 on summary convictions in both cases of damage to scheduled monuments and/or unauthorised works to listed buildings. We note that reference is made to taking factors into account, principally development benefit, when setting the level of fine. It would be of further benefit to offer guidance on the level of fines appropriate to types of damage in both these areas. Whilst acknowledging possible difficulties, it seems unfortunate that no reference or allowance is made to a monument or building’s intrinsic historic importance as part of the calculation of value.

16. We support the powers set out regarding identification of conditions and levels of grant recovery and the extension to a wider range of bodies to whom grant may be available but note that the overall sums available are not to be increased. In the event of fines being imposed the Trust calls for any such income to be ring fenced to increase the sums available from

\(^1\) ‘A Review of Fiscal Measures to benefit Heritage Conservation’ by RICS et al, 2007—

Section 3 Scheduled ancient monuments and offences - removal of defence of ignorance

17. We note the amendment ‘so that the defence now allows lack of knowledge only to be used in defence where a person can show they took all reasonable steps to find out whether there was a scheduled monument in the area affected by the works’. Whilst we welcome the commitment signalled in the Memorandum that the Scottish Government will undertake steps to ensure that there is further improvement in the quality of information and advice that is available we still have concerns about circumstances where monuments may not be visible or only visible to a person trained in their recognition. We understand there is no legal requirement for either ancient monument or listed building designations to be included under Sasines so unless identified by a solicitor at the time of conveyancing, prospective owners are not always made aware of their presence. We suggest rectifying this could offer to improve knowledge and protection. With regard to new additions or amendments to the schedule we suggest a duty be placed on Historic Scotland to notify the owners in a way similar to the process already adopted by Historic Scotland for listed buildings.

18. Reference is retained to a person’s state of knowledge which deals with intentional and reckless damage, subject to the addition that an offence is committed where a person knows or ought to know that their action affects a protected monument. It would be helpful if the Government could set out the type of persons that it thinks ought to know about scheduled monuments. Whilst this may seem a minor point it is raised as one of clarity in law. We point to proposed change from “damage” to “disturbance” to emphasis the point.

Part 3 section 18 – Certificate that building not intended to be listed

19. We echo BEFS concerns about what the consequences of CoI from listing would be. In the case of a certificate being granted is there an implicit assumption that buildings can be demolished. With consequent loss of materials, their embodied energy and possible implications for land fill this may not represent the sustainable option. When certificates are not given do the buildings involved then become listed. At a BEFS working seminar on this subject, Historic Scotland indicated that the Policy Memorandum would make it clear that if a CoI was refused, the property would be listed automatically. This is not the case, leaving open the unsatisfactory option that a CoI could be refused but the building not listed. Further, whilst acknowledging that the idea of CoIs was introduced in later aborted English legislation, the wording used here is different and as such the evidence about the numbers and resource implications are not comparing like for like.
Part 3 sections 18 to 26 - conservation areas

20. The majority of these sections relate still to powers regarding listed buildings, the one practical implication for conservation areas being the power to recover grant in section 26. The response prepared by BEFS suggested more attention could be given to conservation areas and identified the issue of simplifying and reduce the burdens of preparing Article 4 Directions. We understand a number of approaches were suggested in the consultation process through control by universal conservation area restrictions on permitted development without the need to go through the Article 4 Directions process. This could offer further efficiency and streamline the designation process. Indeed, such a suggestion has appeared in a number of Scottish Government consultations on the new planning system.

21. It would also seem that there are no deterrents in terms of fines for owners who damage or demolish unlisted buildings in conservation areas. The only “power” is to seek the reinstatement of the building or structure through the civil courts but such remedy does not lie within the legislative framework. NTS suggests that this is significant weakness. Often these buildings may play an important role in providing the conservation area context and ‘sense of place’ in which other more prominent and listed buildings may be set. This might be assisted by added backing, as also identified by BEFS, to the preparation by local authorities of conservation area character appraisals and management plans with a simple rewording of section 63 of the Planning (Listed Buildings & Conservation Areas) (Scotland) Act 1997.

Part 3 sections 21 to 24 - stop notices (and compensation)

22. In the interests of balance we support BEFS call for Historic Scotland to look into the issue of compensation for loss due to a Stop Notice including the appropriate circumstances, restrictions on the level of compensation to reasonable loss, liability in the event of stop notices being withdrawn / altered etc.

A broader view of heritage

23. Whilst we do not consider that these principles are necessarily contradictory we wonder whether the latter has acted as too much of a constraint in considering how the historic environment may be considered and on how its importance might be developed and nurtured. The Policy Memorandum makes reference to the work commissioned by HEACS on the importance of the historic environment sector to the Scottish economy estimated at some £2.3 billion representing approximately 2.6% of the Gross Value Added Project per year. This must include substantial contributions to public finances. Whilst recognising the severity of present financial circumstances the opportunities for legislation on the sector are infrequent and long lasting. In recognition of the sectors cultural and economic
significance might the opportunity have been taken to consider the historic environment more holistically (see below) and by introducing powers conditional on economic improvement or by opening the door to later secondary legislation.

24. The Trust’s work is governed by legislative remit which is developed through statements of policy. Its conservation policy from 2003 echoes the Government’s principle in its interpretation of its conservation role as ‘to ensure that change is managed by negotiation so that present and future generations may enjoy the benefits of places or features of significance’\(^2\). The breadth of principle mentioned at several instances in the Policy Memorandum is commended. In the case of the Trust such a perspective has come about through developing an understanding that the historic environment is a broad field which encompasses not only scheduled monuments and listed buildings but also their contents, their settings whether they be gardens, designed landscapes or conservation areas, their wider contexts and sense of place. It also includes their historic and social contexts and processes, their interpretation and promotion through time. These themes are often brought together in statements of significance\(^3\) and set within property management plans to guide future management, maintenance and other opportunities for access, enjoyment and education\(^4\). We identify two ways below in which a more holistic approach to the historic environment might be taken forward.

\textit{Duty of care}

25. In other ways the Policy Memorandum refers to harmonisation with aspects of other recent legislation and similar comparisons may be made with the call to introduce a ‘duty of care’ for appropriate public bodies involved in the care or management of the historic environment. This was raised in the response from BEFS. Whilst much is done in the Bill to protect important ingredients of our heritage that is designated such a duty would help to understand and make explicit the holistic significance of our heritage and so better aid the way we all value, engage and manage Scotland’s unique historic environment.

\textit{Scottish heritage area or site designation}

26. The idea for some broader possibly combined cultural and natural heritage designation has come to our attention from the consultation process but is in essence what the Trust manages and offers already in many circumstances. It seems an idea that might help progress this appreciation

\(^3\) ‘Evaluation of Heritage Significance’ The National Trust for Scotland July 2003—\texttt{http://www.nts.org.uk/conserve/downloads/Heritage_Significance.pdf}
of historical significance discussed. We recognise that above we already call for greater progress with character appraisals for existing area designations like conservation areas and are conscious of the Government’s wish to not introduce at present new regulatory requirements or extra financial burdens. Could the way be left open in the Bill for the use of such a designation in future pending further investigation.

27. Similar designations exist for areas of natural heritage areas for use in a wide range of circumstances. This might cover areas or sites of national significance and as well as monuments and buildings include archaeological sites, gardens, landscapes, infrastructure, battlefields either individually or in combination together with other associations of cultural, social, historic, industrial, craft etc significance. In addition to the Bill’s aims to broaden the scope of bodies that might apply for grant such a designation might help to broaden the area and scope of activities that might be eligible for assistance should funding improve in the future. It does seem as though World Heritage Sites have caught the public’s imagination in understanding and appreciating our past and such an approach for a Scottish version might offer greater resonance with our own historic environment both nationally and locally.

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