LETTER FROM THE MINISTER FOR CULTURE AND EXTERNAL AFFAIRS, DATED 28 SEPTEMBER 2010

1. As this Historic Environment (Amendment) (Scotland) Bill has many technical aspects I thought it would be helpful ahead of my appearance tomorrow to provide clarification on some of the issues raised in the Stage 1 evidence session.

2. I hope this is helpful background and reference information to assist the committee in completing its stage 1 report.

Section 1: Recovery of Grants (amends s4A of the 1953 Act)

3. Some earlier evidence to the Committee suggested that powers to recover grant under the Historic Building Repair (HBR) grants scheme, were new. While it has since been clarified that the powers of recovery are already contained in the 1953 Act, a few other points have been made where it may be helpful to offer clarification.

Access requirements on grant recipients
4. One witness might have been understood to say that the requirement on grant recipients is always for full public access.

5. As the guidance notes provided to applicants - and published on the Historic Scotland website - explain, the level of access required is in fact determined case by case and depends on the circumstances of the case and the size of the grant. Public access is normally required, but may be waived in some cases: most commonly, because a building is in domestic use. In some cases, no internal access is required. Where appropriate, access may be purely by appointment only. Historic Scotland would not insist in a level of access which itself demanded further works or other expenditure (eg for fire safety or disability access) on the part of the grantee. The Historic Scotland website lists all those grant cases where access is part of the agreement and sets out the terms for that access in each case.

Need for a review of grant conditions
6. Some witnesses suggested that the grant conditions were in need of review, in terms of transparency and simplicity. While the Scottish Government is always open to specific suggestions for practical improvements to its grant schemes, it may be helpful to clarify that the HBR grant scheme was fully reviewed in 2004-05, including a formal public consultation. Following that, the scheme was extensively modernised and detail about all aspects of the scheme, including all the documentation for applicants, is on the HS website.
Section 11: Inventory of gardens and designed landscapes and battlefields (new provision)

Requirements on owners
7. It may be helpful to reinforce the point that inclusion on the current inventory of gardens and designed landscapes places no additional requirements on owners to seek consent for works. One witness raised the issue of bulb planting, for example: we cannot easily imagine a context in which this would be affected. Only where an owner, or other person, wishes to undertake works which would anyway require planning permission does inclusion on the inventory become relevant. At that point, the local authority is required to consult Historic Scotland. The impact on the site and its setting would be a “material consideration” in determining planning application.

8. The movement of the Inventory onto a statutory footing, proposed in the Bill, does not change this.

Impact of new battlefields inventory
9. Some witnesses have expressed concern that this new inventory will include large areas where the link to a past battle is unclear. The Scottish Historic Environment Policy (SHEP, published July 2009) sets out that “To be included in the inventory a site must be of national importance and be capable of definition on a modern map. Where nationally important sites cannot be adequately mapped, they will not be included on the Inventory” (para 2.70). Annex 5 of the SHEP sets out in greater detail the criteria by which sites will be considered for the Inventory.

10. Witnesses also expressed concern that the inclusion of an area on the battlefield inventory could interfere with normal land management practices. Exactly as for gardens, the intention is that inclusion on the inventory will only become relevant where works are being contemplated which would anyway require planning permission. This will require a change to the consultation requirements under subordinate legislation dealing with planning procedures.

Section 14: Meaning of monument (amends section 61 of the 1979 Act)

Scope for new monuments
11. One witness suggested that the addition of “any site … that evidences previous human occupation” could take in a wide variety of sites evidencing recent activity, including the residue of any event of “national interest” and gave 2 examples [signs of previous activity at Bellahouston Park after papal visit; hypothetically, the spot in a field where a royal marriage proposal takes place].
12. Section 1(3) of the 1979 Act sets out that only sites which are of “national importance” may be scheduled (there is no “national interest” test). The criteria Ministers - in practice Historic Scotland - use to determine what is of national importance are set out in the SHEP, at Annex 1 and were subject to public consultation in 2006. The underlying theme of the criteria is how the monument contributes to the understanding or appreciation of the past. Against that background, neither of the specific examples suggested would be contemplated for scheduling, even with the proposed change in the law.

Limits on agricultural practice
13. A particular concern was expressed that the scheduling of a site could interfere with the established agricultural practice on that land, specifically ploughing. This would not happen. Under section 3 of the 1979 Act, Ministers may make a “class consents order”, which specifically exempts certain practices from requiring scheduled monument consent. The Order currently in place dates from 1996, and excludes from the consent regime agricultural, horticultural and forestry works, provided these are of the same kind as works previously executed lawfully in the same place any time in the previous 6 years (or 10 years in the case of ploughed land). The exemptions are qualified: in the case of ploughed land any works must not be likely to disturb the soil more deeply than previously executed lawful ploughing.

Section 25: Liability of owners and successors for urgent works (amends s50 of the 1997 Act)

5 year limit
14. Several witnesses have suggested that the notice of liability - the mechanism by which the cost of urgent works can be placed against the building rather than the original owner - should be open-ended. For the avoidance of doubt, the notice of liability is potentially indefinite, provided that it is renewed by the local authority every 5 years: section 50C of the Bill (“Notices of Renewal”) deals specifically with the process by which the notice may be renewed and there is no limit on the number of times this may be done. The provision follows the model in the Tenements (Scotland) Act 2004. An authority will need to keep track of when notices are due for renewal, as they must be renewed before expiry, and will have to bear whatever administrative costs this process requires.

Point of intervention
15. Some evidence to the Committee suggested that urgent works powers are only usable once a building is in an advanced state of deterioration and therefore add little to powers under other legislation, such as building control.
16. Section 49 of the 1997 Act simply enables local authorities to undertake any works they believe are urgently necessary for the preservation of the building and not limited to the point where extensive problems emerge. For example, we understand they have been successfully used to allow authorities to undertake relatively minor works - such as the removal of plants from guttering etc - before a building becomes seriously damaged by water ingress. Such works can be a very effective means of preventing serious damage occurring in the first place. At that early stage, other powers, such as those in building control, would not necessarily be available.

**Interim protection (not included in the Bill, but raised by some witnesses as a potential area the Bill could address)**

17. One witness was concerned that there was no protection for a building while it is being considered for designation. It may be worth highlighting that section 3 of the 1997 Act already allows local authorities to issue a building preservation notice against any unlisted building they believe is at threat. Section 3(1) states:

**Temporary listing: building preservation notices**

(1) If it appears to a planning authority that a building in their district which is not a listed building—
(a) is of special architectural or historic interest, and
(b) is in danger of demolition or of alteration in such a way as to affect its character as a building of such interest,
they may serve on the owner, lessee and occupier of the building a notice (in this Act referred to as a “building preservation notice”).

18. When the issue of extending the availability of interim protection was raised in the consultation on the draft Bill, further evidence of the need was sought from the body which raised it. It was only able to come up with one named relevant case, some years ago, in England. It was not clear how it was envisaged that a more universal form of interim protection would work without having a significant practical impact on a large number of properties, in particular during area-based or thematic surveys, during which a wide range of buildings may be given some consideration.

**Ecclesiastical exemption (not included in the Bill, but raised by some witnesses as a potential area the Bill could address)**

19. Witnesses on 22 September were unsure about the origins of the ecclesiastical exemption and its basis in law. It may be helpful to clarify that ecclesiastical buildings are exempt from requiring to seek listed building consent under section 54 of the 1997 Act, though the origins of this exemption lie in UK legislation from 1913. That said, the independence of the Church of Scotland from the state, enshrined in the Church of Scotland Act 1921, is also potentially relevant here.
The exemption applies to any ecclesiastical building which is for the time being used for ecclesiastical purposes and applies to all faith groups. The exemption does not apply to a building used wholly or mainly as a residence for a minister of religion.

20. One witness suggested the exemption only applies to interiors. The exemption in law applies to the whole of the building. There is however a voluntary scheme in place under which those denominations which have signed-up to the scheme agree to seek consent for proposed changes to the exteriors of churches in their ownership, as if the normal listed building consent regime applied.

21. We would expect that any change to the current exemption would be regarded as a very significant change by ecclesiastical bodies, and would also have significant resource implications for local authorities and owners.

Listing of pavements (not included in the Bill, but raised by one witness as a potential area the Bill could address)

22. One witness suggested there was a live issue with the ability to list pavements. The case of Kelso, to which the witness from the RTPI referred, appears to have been current sometime before 1993. Historic Scotland officials are not aware of this issue having been raised more recently. Officials would be happy to discuss this issue further with the RTPI.

Frequency of data collection (not included in the Bill, but raised as a potential area the Bill could address)

23. The witness from the Heads of Planning regretted that the Historic Environment Audit is not an annual exercise and the Committee sought clarification as to whether there was any case for putting a requirement on the government for annual data collection.

24. It may be helpful as background to explain that the Audit was established by the previous administration in response to a report by then Historic Environment Advisory Council for Scotland. It was developed in partnership with a Steering Group including a number of key stakeholders, including the Heads of Planning. The range of data to be collected and the frequency of collection were agreed with the Steering Group.

25. The Group strongly agreed that a three-yearly cycle of collection offered the best value for money for the public purse. The Group agreed that the value in this data was in identifying trends, and felt that the speed of change in this area meant that year-on-year collection was likely to reveal relatively little in terms of trends and not justify its cost of collection. The Group took into account that publication on this cycle would make it easier to draw on a variety of existing data collection exercise and limit the amount of new data whose collection was required
specifically for the Audit. The three year cycle has also enabled the work of managing the data gathering and collation to be easily managed in-house by Historic Scotland at minimal cost.

26. The baseline data for the Audit was published in 2007 and was very positively received. The first full audit report is due for publication next month.

Fiona Hyslop MSP
Minister for Culture and External Affairs
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