LETTER FROM THE MINISTER FOR CULTURE AND EXTERNAL AFFAIRS,
DATED 14 OCTOBER 2010

1. I would like to thank the Committee for inviting me to speak about the Historic Environment (Amendment) (Scotland) Bill on 29 September. I hope you found the session useful.

2. Having reflected further on the session I thought it might be helpful to provide the Committee with a short note which both clarifies and supplements some of the more technical aspects of my evidence of 29 September (see annexes A and B).

3. I would also like to take this opportunity to re-emphasise a point made about the policy aims underpinning the proposal to introduce a system of certificates of immunity from listing (under section 18 of the Bill) which the Committee took a particular interest in. As noted during the Committee session, the main policy aim here is to provide certainty for owners and developers considering works to a particular building. In other words the policy is not, as a matter of principle, to exempt buildings from listing as the listing of a building would be a perfectly proper outcome of the process of considering a building for a certificate of immunity. The advantage here is that certainty as to whether a building would or would not be listed can be provided at an early stage in the development process so that those involved know the boundaries within which they are operating.

4. I hope you and the other members of the Committee find this information helpful and that it will assist you in preparing the Stage 1 report.

ANNEXE A

Section 3 – Offences under sections 2, 28 and 42: modification of defences

Clarification on availability of and access to information

5. The potential loss of an unqualified defence of ignorance from the 1979 Act has led to a number of queries about the availability of and access to information on historic environment assets. In some instances it seems to me that the distinction between the availability of, and ease of access to, information on designated historic assets as compared with undesignated sites has been missed.

6. The proposed amendments in section 3 of the Bill relate solely to scheduled monuments which are defined in the legislation as monuments of ‘national importance’. There are several ways to find out about scheduled monuments.
7. Information on scheduled monuments is available online from Historic Scotland’s data website: http://data.historic-scotland.gov.uk. Here you can download maps and copies of the legal documentation for each scheduled monument, as well as find out about other types of designation, such as listing. If you do not have access to the web then you can request this information from Historic Scotland.

8. Scheduling documents are available to anyone searching the Register of Sasines or the Land Register for the title to a property.

9. Historic Scotland also makes its data available on PASTMAP (www.pastmap.og.uk), a website jointly developed with the Royal Commission on the Ancient and Historic Monuments of Scotland (RCAHMS), where you can search for information on Scotland’s Historic Environment from multiple sources.

10. I would also like to reaffirm that there will be a programme of education and information dissemination targeted at owners about the location of scheduled monuments if the Bill is passed ie Historic Scotland, acting on behalf of Scottish Ministers, will re-notify all owners of scheduled monuments and as part of that process will draw to their attention to the legal changes introduced by the Bill.

**Section 6 – Works affecting scheduled monuments: enforcement**

**Point of clarification**

11. In responding to a point about the enforcement provisions in the Bill I referred to harmonisation across the different Acts and I thought that the Committee might welcome further clarification on this issue. The draft powers in the Bill that will enable Scottish Ministers to serve a scheduled monument enforcement notice (SMEN) harmonises the Ancient Monuments and Archaeological Areas Act 1979 with the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 where a similar power already exists in relation to listed buildings. The introduction of a system of ‘stop notices’ and ‘temporary stop notices’ for both scheduled monuments and listed buildings under the Bill (sections 6 and 23) mirrors similar powers in the planning regime. Collectively, these provisions reflect one of the overarching policy aims of the Bill which is to align aspects of the listing and scheduling systems whenever possible and to align historic environment legislation with the planning regime when practicable to do so.
Section 11 – Inventories of gardens and designed landscapes and of battlefields

Point of clarification

12. In responding to a query relating to battlefields, I also included information on how a related procedure (known as the “class consents order”) works. The Committee’s question was about how works on battlefields would be managed. I should confirm this will be done purely through the planning system. The specific rules around ploughing which I mentioned are by contrast a feature of the scheduled monument consent system. However, it is probably useful for the Committee to be aware of how the “class consents” work.

13. Under section 3 of the Ancient Monuments and Archaeological Areas Act 1979, 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 six 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.

Issues out with the Bill

Costs associated with a duty of care for the historic environment – supplementary information

14. In addition to the concerns I expressed about placing a new statutory duty on public bodies when there are more effective and proportionate ways to encourage them to manage historic environment assets in a sustainable way, the Committee did ask about the potential cost implications of such a duty. While it is very difficult to cost such a duty as so much depends on the exact framing of the provision there are a number of factors that give rise to considerable concern on my part about the potential financial implications of such a duty. Firstly, the Built Environment Forum Scotland’s (BEFS) proposal applies to every public body (whether its functions impact on the historic environment or not). Secondly, any duty framed in terms of “taking the Historic environment into account when exercising functions” would potentially have a much greater impact on say, the NHS or the MOD than the current Scottish Historic Environment Policy framework, which focuses attention of public organisations on good stewardship of the assets in their ownership or use. Thirdly, the ‘historic environment’ is a very broad term – it embraces large parts of our older settlements as well as many rural locations – any duty to “have regard to it” would have much more day to day impact on public bodies than anything done for the marine
environment say and we assume that public bodies would have to look at how they complied with such a duty once enacted every time they exercised any of their functions, however remote the connection to the historic environment.

15. There are two established definitions of the ‘historic environment’. The first is found in the Scottish Historic Environment Policy (SHEP) which sets out Scottish Ministers’ strategic policies for the care and management of the historic environment and the second is set out in the Scottish Planning Policy (SPP) which is the statement of the Scottish Government’s policy on nationally important land use planning matters. Both definitions are attached at Annexe B for reference.

Point of clarification

16. In commenting on the BEFS’s proposal regarding the introduction of a statutory ‘duty of care’ I may have given the impression that there was no general duty in the Marine (Scotland) Act 2010. That is not the case as a general duty is set out in section 3 of that Act.

17. However, that duty is narrowly focussed on the clearly defined “Scottish marine area” and is limited to functions contained in that Act.

18. In contrast, the combination of the wide ranging nature of the historic environment (evidenced by the broad definitions in SHEP and SPP) and the significantly wider set of functions to which the BEFS’s proposal applies, would embrace so much of Scotland that the day to day impact on public bodies of any such duty would be of a completely different order. Indeed, it would be so vague and wide ranging as to make its practical application difficult to envisage.

ANNEXE B

Working Definitions of ‘Historic Environment’

19. Scottish Historic Environment Policy (Chapter 1, paragraph 1.2)—

“Our whole environment, whether rural or urban, on land or under water, has a historic dimension that contributes to its quality and character. It has been shaped by human and natural processes over thousands of years. This is most obvious in our built heritage: ancient monuments; archaeological sites and landscapes; historic buildings; townscapes; parks; gardens and designed landscapes; and our marine heritage, for example in the form of historic shipwrecks or underwater landscapes once dry land.
We can see it in the patterns of our landscape – the layout of fields and roads, and the remains of a wide range of past human activities.

Importantly it also includes our buildings erected before 1919. Although the majority of older buildings are not listed, most provide flexible and often spacious domestic and non-domestic accommodation. A huge investment of money, energy and materials went into these buildings – it would be poor stewardship of this inheritance to neglect it.

The context or setting in which specific historic features sit and the patterns of past use are part of our historic environment. The historical, artistic, literary, linguistic, and scenic associations of places and landscapes are some of the less tangible elements of the historic environment. These elements make a fundamental contribution to our sense of place and cultural identity”.

20. Scottish Planning Policy (paragraph 111)—

“The historic environment includes ancient monuments, archaeological sites and landscapes, historic buildings, townscapes, parks, gardens and designed landscapes and other features. It comprises both statutory and non-statutory designations. The location of historic features in the landscape and the patterns of past use are part of the historic environment. In most cases, the historic environment (excluding archaeology) can accommodate change which is informed and sensitively managed, and can be adapted to accommodate new uses whilst retaining its special character. However, in some cases the importance of the heritage asset is such that change may be difficult or may not be possible. Decisions should be based on a clear understanding of the importance of the heritage assets. Planning authorities should support the best viable use that is compatible with the fabric, setting and character of the historic environment. The aim should be to find a new economic use that is viable over the long term with minimum impact on the special architectural and historic interest of the building or area”.

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14 October 2010