

# **HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. The Act is an amending piece of legislation and its extent and content are formed by a series of amending provisions identified by Historic Scotland and local government, and during the course of discussions with stakeholders during 2007, which followed the publication of a report by the Historic Environment Advisory Council for Scotland on the need for a review of heritage legislation in Scotland.<sup>1</sup>
4. The Act harmonises aspects of the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and aligns aspects of the historic environment legislation with the planning regime.

### **COMMENTARY ON SECTIONS**

#### *The main provisions of the Act*

5. The Act is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Act and a fourth Part which includes provisions on “Interpretation”, “Ancillary provision” and “Short title and commencement”. The principal Acts are:
  - the Historic Buildings and Ancient Monuments Act 1953 (“the 1953 Act”);
  - the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”); and
  - the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”).

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<sup>1</sup> The Historic Environment Advisory Council for Scotland (HEACS) Report: *Whether there is a need to review heritage protection legislation (August 2006)*. <http://www.heacs.org.uk/documents/2006/heritageprotection.pdf>

## **THE ACT – SECTION BY SECTION**

### **Part 1 – Amendment of the Historic Buildings and Ancient Monuments Act 1953**

#### ***Section 1 – Recovery of grants for repair, maintenance and upkeep of certain property***

6. **Section 1** amends section 4A of the 1953 Act which enables the Scottish Ministers to recover grants made under section 4 of that Act. This provision will allow Scottish Ministers to specify, or to set out the terms for calculating, in a grant award letter the amount that would be recoverable when a condition of grant is either contravened or not complied with or in the event that the property is disposed of.

### **Part 2 – Modifications of the Ancient Monuments and Archaeological Areas Act 1979**

#### ***Section 2 – Control of works affecting scheduled monuments***

7. **Section 2** amends section 2 of the 1979 Act to provide Scottish Ministers with a specific power to grant consent for the retention of unauthorised works.

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

8. **Section 3** modifies two defences and one offence in the 1979 Act. The defence in section 2(8) is adjusted so that, in addition to the existing “defence of ignorance”, an accused is also required to establish that he took all reasonable steps to discover whether the area affected by the unauthorised works which he is accused of executing or causing or permitting to be executed, contained a scheduled monument.
9. **Section 42(7)**, which contains a defence in respect of unauthorised use of a metal detector in a protected place (as defined in section 42(2)), is amended to provide for a similar dual element defence to that in section 2(8).
10. **Section 3** of the Act also modifies the offence in section 28(1) of the 1979 Act of damaging or destroying a protected monument without reasonable excuse. The effect of the change is that for the offence to be committed, it must be established that the accused knew, or ought to have known, that the monument in question was protected (within the meaning of section 28(3)). This is in addition to the element of the offence specified in paragraph (b) of section 28(1) that the damage or destruction was done intentionally or recklessly.

#### ***Section 4 – Fines: increases and duty of court in determining amount***

11. **Section 4** raises the level of fines on summary conviction under section 2 and section 28 of the 1979 Act to £50,000 for offences tried summarily.
12. Subsections (2)(b) and (3)(b) make it a requirement that the court, in determining the amount of the fine to be imposed on a person convicted of an offence under section 2 or 28 of the 1979 Act takes into account the extent of any financial gain that has accrued or is likely to accrue to the offender.

#### ***Section 5 – Powers of entry to inspect condition of scheduled monument***

13. **Section 5** clarifies that paragraphs (a) and (b) of section 6(1) of the 1979 Act merely provide particular instances of how the general power to enter land (as provided under section 6 of the 1979 Act) may be used.

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

14. Section 6(1) inserts new sections 9A to 9O into the 1979 Act. This establishes enforcement powers for Scottish Ministers to protect scheduled monuments. New

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Act 2011 (asp 3) which received Royal Assent on 23 February 2011*

sections 9A to 9F allow scheduled monument enforcement notices to be served, new sections 9G to 9N allow stop notices and temporary stop notices to be served and new section 9O makes provision for interdict proceedings to be raised.

**New section 9A – Power to issue scheduled monument enforcement notice**

15. Subsection (1) allows Scottish Ministers to serve a scheduled monument enforcement notice in respect of unauthorised works carried out to a scheduled monument or to land in, on or under which there is a scheduled monument, or in respect of a breach of conditions in scheduled monument consent. This subsection also makes it clear that it is a matter of discretion for the Scottish Ministers to issue such an enforcement notice and that Scottish Ministers are required to have regard to the effects of the works on the character of the monument as one of national importance.
16. Subsections (2) and (3) require a scheduled monument enforcement notice to specify the works that are to cease and/or the steps that must be taken to either restore the monument or land to its former state, alleviate the effects of the unauthorised works or to bring the monument or land into a state fully compatible with the terms of the scheduled monument consent.
17. Subsection (4) sets out that in considering whether restoration would be undesirable, the Scottish Ministers must have regard to the desirability of preserving the national importance of the monument or its features of historical, architectural, traditional, artistic or archaeological interest.
18. Subsection (5) sets out that where further works are carried out under the terms of subsection (3)(b) scheduled monument consent is deemed to have been granted for such works.

**New section 9B – Scheduled monument enforcement notices: further provisions**

19. Subsections (1) to (7) set out detailed procedures (e.g. on content and service) relating to scheduled monument enforcement notices. Subsections (1) to (3) require that the notice must specify the effective date and the time period within which works must cease or steps must be taken (“the period for compliance”) and provide for a minimum 28 day period between service of the notice and the date on which it is to take effect. Subsection (4) sets out the persons on whom a copy of the notice must be served. Subsection (5) provides Scottish Ministers with the power to withdraw an enforcement notice or waive or relax any requirement of such a notice, including extending the period for compliance. Where that power is exercised, subsection (6) requires notification to be given and specifies on whom such notification must be served. Subsection (7) sets out that the Scottish Ministers must keep a list of monuments in respect of which enforcement notices have been served which must be published electronically. Copies of the notices must also be provided on request.

**New section 9C – Appeal against scheduled monument enforcement notice**

20. This section sets out the process and grounds for an appeal against an enforcement notice. In particular, subsection (1) provides for a right of appeal to the sheriff for the person on whom the notice is served or any other person having an interest in the monument to which it relates or the land in, on or under which it is situated. An appeal must be made before the date it takes effect under section 9B(1). Subsection (2) sets out the grounds of appeal. Subsection (3) states that the notice is of no effect until the appeal is withdrawn or finally determined. Subsection (4) sets out that a sheriff has the power to determine an appeal against a scheduled monument enforcement notice by upholding or quashing the notice.

**New section 9D – Execution of works required by scheduled monument enforcement notice**

21. Section 9D gives Scottish Ministers power to enter the land in, on or under which the scheduled monument is situated to undertake any works which have not been carried out within the period for compliance with the notice and provides for the recovery of expenses incurred in carrying out such works from the owner or lessee of the monument or land.
22. Subsection (3) provides a power for the sheriff to authorise by warrant an owner of the scheduled monument or land to go on the land and carry out the works where prevented to do so by the occupier.
23. Subsections (4) and (5) allow the removal from the monument or land of materials by the Scottish Ministers and their subsequent sale after a period of 3 days during which they are unclaimed by the owner, requiring any proceeds from such a sale, less expenses, to be paid to the owner. Subsections (6) and (7) limit liability for recovery of expenses from owners receiving rent in respect of the monument or land merely as a trustee, tutor, curator, factor or agent of some other person. If the owner does not have, and had not since the demand for payment from the Scottish Ministers had, sufficient money to discharge the whole demand, his liability for expenses is limited to the amount which he has, or has had, in his hands on behalf of that other person. Where Scottish Ministers have not recovered the whole of any such expenses from an owner recovery of any unpaid balance from the person on whose behalf the rent is received is allowed.
24. Subsection (8) makes it a criminal offence to wilfully obstruct the Scottish Ministers from carrying out works required by the enforcement notice under the powers available under subsection (1).

**New section 9E – Offence where scheduled monument enforcement notice not complied with**

25. Section 9E sets out that where an enforcement notice has not been complied with within the period for compliance, the owner for the time being of the monument or of the land in, on or under which it is situated is in breach of the notice and is guilty of an offence and sets out the penalties. It is a defence to show that a person did everything they could be expected to do to ensure compliance with the notice or that they were not served with a copy of the notice and did not know of its existence.

**New section 9F – Effect of scheduled monument consent on scheduled monument enforcement notice**

26. Section 9F applies where a scheduled monument enforcement notice has been issued, and scheduled monument consent is then granted under new section 2(3A) of the 1979 Act (inserted by section 2 of the Act) for the retention of works or of works which do not comply with a condition in the original scheduled monument consent. In such cases, the notice ceases to have effect in so far as it requires the works to cease, steps to be taken involving the works not being retained or compliance with that condition.

**New section 9G – Stop notices**

27. Inserted section 9G gives the Scottish Ministers power to issue a stop notice in relation to unauthorised works to a scheduled monument or to land in, on or under which the monument is situated, or to any part of the monument or land specified in the stop notice.
28. Subsections (1) and (2) set out the circumstances in which Scottish Ministers may issue a stop notice. Subsection (1) requires that the Scottish Ministers must consider it expedient for the works to cease before the expiry of the period for compliance with a scheduled monument enforcement notice. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a

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stop notice may be served at the same time as or after a copy of the scheduled monument enforcement notice has been served but may not be served after the enforcement notice has taken effect.

29. Subsection (3) clarifies that “relevant works” means any works specified in the enforcement notice as works that the Scottish Ministers require to cease and associated works.
30. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the Scottish Ministers consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days after the date, when the notice is served.
31. Subsection (6) sets out that Scottish Ministers may serve the notice on any person who appears to them to have an interest in the monument or the land in, on or under which it is situated or who is executing, or causing to be executed, the relevant works specified in the enforcement notice.
32. Subsection (7) allows Scottish Ministers to withdraw a stop notice at any time by notice which must be served on all persons who were served with the original stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

**New section 9H – Stop notices: supplementary provisions**

33. Subsection (1) sets out the circumstances in which a stop notice ceases to have effect. Subsection (3) sets out how Scottish Ministers may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

**New section 9I – Compensation for loss due to stop notice**

34. Subsection (1) sets out that where a stop notice ceases to have effect a person with an interest in the scheduled monument or the land in, on or under which the monument is situated is entitled to compensation in respect of any loss or damage that can be attributed to the matters in subsection (2). Those matters are the prohibition in the stop notice or the prohibition of works which cease to be relevant works due to the waiving or relaxing of a requirement in the scheduled monument enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are where the stop notice is withdrawn or the associated enforcement notice is quashed or withdrawn. Subsection (4) clarifies that any compensation payable includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (5). The compensation provisions in section 9I are caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

**New section 9J – Penalties for contravention of stop notice**

35. New section 9J sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offence including allowing for conviction for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement on the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

### **New section 9K – Temporary stop notices**

36. New sections 9K to 9N cover the operation of the new system of temporary stop notices. While a stop notice is always issued in relation to a scheduled monument enforcement notice, a temporary stop notice may be issued even if no enforcement notice is in place. In new section 9K (temporary stop notices) subsection (1) sets out the circumstances in which Scottish Ministers may issue temporary stop notices. The Scottish Ministers have to consider that the works are unauthorised or fail to comply with a condition attached to consent and to consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the monument as one of national importance.
37. Subsection (2) requires that the notice must be in writing and specify the works which are to stop, prohibit execution of the works and set out Scottish Ministers' reasons for issuing the notice.
38. Subsection (3) states that notice may be served on a person who either appears to be executing or causing to be executed works and/or a person who has an interest in the scheduled monument or the land in, on or under which the monument is situated.
39. Subsection (4) states that the Scottish Ministers must display a copy of the notice and a statement on the effect of section 9M (relating to offences) on the land in, on or under which the monument is situated or on the monument (except where doing so damages it).
40. Subsections (5) to (7) set out when the notice starts and ceases to have effect. It has effect for a period of 28 days beginning with the day it is displayed under subsection (4), although a shorter period may be specified in the notice. Subsection (8) provides that if the notice is withdrawn before 28 days (or any shorter period specified) the notice ceases to have effect at that point.

### **New section 9L – Temporary stop notices: restrictions**

41. In new section 9L subsections (1) and (2) prohibit the issue of further temporary stop notices unless another enforcement action has been taken e.g. the service of an enforcement notice.

### **New section 9M – Temporary stop notices: offences**

42. In new section 9M, subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.
43. Subsection (5) sets out the statutory defence under this section, which is that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.
44. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

### **New section 9N – Temporary stop notices: compensation**

45. Subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the notice being served. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by scheduled monument consent granted on or before the date the temporary stop notice is first displayed, and/or the Scottish Ministers withdraw the notice other than following such grant of scheduled monument consent. Subsection (3) applies subsections (4) and (5) of new section 9I to compensation under this

section which provide details of what the compensation may cover and sets out the circumstances when no compensation is payable under this section. New section 9N will be caught by section 47 of the 1979 Act which provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

### **New section 9O – Interdicts restraining unauthorised works on scheduled monuments**

46. New section 9O sets out that whether or not Scottish Ministers have exercised any of their powers under this Act they may restrain or prevent any actual or apprehended breaches of the controls provided by the Act by applying for an interdict.
47. Subsection (2) of section 6 of the Act amends section 6 of the 1979 Act to give persons duly authorised by the Scottish Ministers rights of entry to ascertain whether a scheduled monument enforcement notice, stop notice or temporary stop notice should be served or has been complied with, or whether offences in relation to a scheduled monument under specified provisions of the 1979 Act have been committed.

### ***Section 7 – Control and management of monuments and land under guardianship***

48. Subsection (2)(a) of section 7 inserts a new subsection (2A) into section 13 of the 1979 Act. This new subsection clarifies that the power conferred by section 13(2) of the 1979 Act includes power to control the holding of events; power to control and manage events; power to charge for events and the power to control public access to the monument in connection with such events. Section 7(2)(b) inserts a new subsection (8) in section 13 of the 1979 Act which clarifies that reference to “events” in the new inserted subsection (2A) includes functions and any other organised activity.
49. Subsection (3)(a) amends section 15 of the 1979 Act (acquisition and guardianship of land adjoining or in the vicinity of an ancient monument). This will ensure that the powers in paragraphs (a) and (b) of section 15(3) are exercisable without prejudice to the general power in that section to control and manage land associated with ancient monuments which is under guardianship.
50. Subsection (3)(b) inserts a new subsection (3A) into section 15 of the 1979 Act. This new subsection clarifies that the power conferred by section 15(3) of the 1979 Act includes power to control the holding of events; power to control and manage those events; power to charge for events and the power to control public access to the monument in connection with such events. Section 7(3)(d) inserts a new subsection (7) in section 15 of the 1979 Act which clarifies that reference to “events” in the new inserted subsection (3A) includes functions and any other organised activity.
51. Subsection (3)(c) inserts a new subsection (4A) in section 15 of the 1979 Act. This provides that the powers conferred by subsections (3), (3A) and (4) could not be used in relation to an event or type of event that was contrary to any express provision in the guardianship deed.
52. Subsection (4) of section 7 amends subsection (1) of section 19 of the 1979 Act to ensure that the right of public access to monuments under public control is subject to inserted sections 13(2A) and 15(3A) of the Act. This gives Scottish Ministers and local authorities the power to control public access to the monument in connection with the holding of the event or function.
53. **Section 7(5)** repeals paragraph 6(1) of Schedule 3 (transitional provisions) to the 1979 Act. This amendment makes clear that Scottish Ministers may manage properties taken into guardianship before 1979 and those taken into guardianship after the enactment of the 1979 Act in exactly the same way.

***Section 8 – Provision of facilities, etc. at ancient monuments***

54. **Section 8(a)** amends section 20 of the 1979 Act to remove the requirement that facilities and information or other services may be provided for the public only in connection with affording public access. Section 8(b) substitutes a new subsection (2) and new subsection (2A) in section 20 of the 1979 Act. These new provisions clarify that any reference to a monument includes references to any land associated with the monument and set out the specific facilities and services that may be provided for the public under section 20 of the 1979 Act. The section applies to monuments owned or under the guardianship of the Scottish Ministers or a local authority and monuments otherwise under the control or management of the Scottish Ministers.

***Section 9 – Financial support for preservation etc. of monuments***

55. **Section 9** amends section 24 of the 1979 Act so as to make clear that the power of the Scottish Ministers and local authorities to defray or contribute towards the cost of preserving, maintaining or managing an ancient monument is exercisable without the owner's having requested such action.

***Section 10 – Power of entry on land where monument at risk***

56. **Section 10** modifies the power in section 26(1) of the 1979 Act which enables a person authorised by the Scottish Ministers to enter land where an ancient monument is known or believed to be to record matters of archaeological or historical interest. This includes a power to carry out excavations with the consent of anyone who requires to give consent for such excavations. The effect of the amendment is that such consent is not required where the Scottish Ministers know or have reason to believe that any ancient monument is at risk of imminent damage or destruction.

***Section 11 – Inventories of gardens and designed landscapes and of battlefields***

57. **Section 11** inserts new sections 32A and 32B in the 1979 Act which create a new statutory duty for Scottish ministers to compile and maintain an inventory of gardens and designed landscapes and an inventory of battlefields.

**New section 32A – Inventory of gardens and designed landscapes**

58. Subsection (1) places a new statutory duty on Scottish Ministers to compile and maintain an inventory of gardens and designed landscapes which, in their view, are of national importance.
59. Subsection (2) defines gardens and designed landscapes for the purposes of the new section.
60. Subsection (3) provides Scottish Ministers with the power to add, remove or amend entries in the inventory from time to time.
61. Subsection (4) states that when adding a garden and designed landscape to the inventory or modifying the inventory Scottish Ministers must inform the owner and (when the owner is not the occupier) the occupier of the grounds in question and the local authority in whose area the grounds are situated.
62. Subsection (5) states that Scottish Ministers must from time to time and in a manner they think fit publish a list of the gardens and designed landscapes included in the inventory at the time of publication.

**New section 32B – Inventory of battlefields**

63. Subsection (1) places a statutory duty on Scottish Ministers to compile and maintain an inventory of battlefields.

64. Subsection (2) defines battlefield for the purposes of the new section.
65. Subsection (3) applies subsections (3) to (5) of new section 32A to an inventory of battlefields compiled under section 32B(1). The effect of this is that the functions of the Scottish Ministers set out in those subsections are also exercisable in respect of the inventory or battlefields.

***Section 12 – Development and understanding of matters of historic, etc. interest: grants and loans***

66. **Section 12** inserts a new section 45A into the 1979 Act to provide a new power of financial assistance to the Scottish Ministers. Subsection (1) states that Scottish Ministers may make grants or loans in connection with or with a view to the promotion of the development or understanding of matters of historic, architectural, traditional, artistic or archaeological interest. Subsection (2) of the new section 45A sets out that such grants or loans may be subject to such conditions as the Scottish Ministers think appropriate. Subsection (3) provides that, without prejudice to any powers of the Scottish Ministers under any enactment (including this Act), the total amount of grants and loans which may be made under this section must not exceed £100,000 in any one year period.

***Section 13 – Regulations and orders under the 1979 Act***

67. **Section 13** amends section 60 of the 1979 Act and confirms that any regulation or order making powers conferred by the 1979 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provisions that Scottish Ministers consider necessary or expedient.

***Section 14 – Meaning of “monument” in the 1979 Act***

68. **Section 14** amends the meaning of “monument” in section 61(7) of the 1979 Act (interpretation) and extends the range of historic environment assets that can be designated under the 1979 Act to include “any site comprising any thing, or group of things, that evidences previous human activity”.

***Section 15 – Scheduled monument consent: regulations as respects applications, etc.***

69. **Section 15(2)** inserts a new sub-paragraph (1A) after paragraph 1(1) of Schedule 1 to the 1979 Act. This enables Scottish Ministers to make regulations as to the form, manner and content of the granting of scheduled monument consent. Section 15(3) amends paragraph 2 of Schedule 1 to the 1979 Act. New sub-paragraph (1) of that paragraph provides that the Scottish Ministers may refuse to entertain an application for scheduled monument consent unless it is accompanied by a certificate as to the interests in the monument to which the application relates. New sub-paragraph (2) of that paragraph enables regulations to be made by the Scottish Ministers to make provision as to the notification and publication of applications for scheduled monument consent, the form and content of certificates and notices and such further particulars of the matters to which such certificates relate.

***Section 16 – Refusal to entertain certain applications for scheduled monument consent***

70. **Section 16** inserts a new paragraph 2B after paragraph 2A of Schedule 1 to the 1979 Act enabling Scottish Ministers to decline to consider a scheduled monument consent application in two situations. The first is where the application is similar to an application that had been made within the previous two years and Ministers consider there has been no significant change in any material considerations since the similar application was refused. The second is where the application is made while a similar application is under consideration by Ministers. Sub-paragraph (4) clarifies

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that an application for scheduled monument consent is taken to be similar if the scheduled monument and the works are in the opinion of Scottish Ministers the same or substantially the same.

### ***Section 17 – Application for scheduled monument consent: inquiries and hearings***

71. **Section 17** amends paragraph 3(2) of Schedule 1 to the 1979 Act to replace the requirement to hold a public local inquiry or a hearing before determining whether or not to grant scheduled monument consent with a power to do so.

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

### ***Section 18 – Certificate that building not intended to be listed***

72. **Section 18** inserts a new section 5A into the 1997 Act enabling Scottish Ministers to issue a certificate that they do not intend to list a building during the five years from the date of the certificate. Any person can apply for such a certificate.
73. Subsection (2)(b) of section 5A states that for that 5 year period a local planning authority may not serve a building preservation notice in relation to the building or affix such a notice under the terms of section 4(1) of the 1979 Act.
74. Subsection (3) requires that a person applying for a certificate must, at the same time, inform the local planning authority within whose district the building is situated of the application.

### ***Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines***

75. **Section 19** raises the level of fines on summary conviction under section 8 of the 1997 Act (offences) to £50,000. This relates to a conviction for an offence described in section 6 or 8(2) of the 1997 Act – the carrying out of unauthorised works on a listed building or non-compliance with a condition of listed building consent.

### ***Section 20 – Declining to determine an application for listed building consent***

76. **Section 20** inserts a new section 10A after section 10 of the 1997 Act enabling planning authorities to decline to determine an application for listed building consent in certain situations. Subsections (1)(a) to (1)(e) set out the specific circumstances where a planning authority may decline to determine an application for listed building consent.
77. Section 10A(2) clarifies that an application for listed building consent is taken to be similar to another such application if the listed building and works to which the applications relate are in the opinion of the planning authority the same or substantially the same.
78. Subsection (2) of section 20 allows for an appeal to be made to the Scottish Ministers where the planning authority have failed to give notice to a person applying for listed building consent that they have declined to determine the application under the power in section 10A.

### ***Section 21 – Hearings in connection with applications for listed building consent and appeals***

79. **Section 21** removes the requirement to hold a hearing before determining applications and appeals under the 1997 Act. This provision amends the 1997 Act to bring the equivalent processes into line with those in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006. Paragraph (a) repeals subsection (4) of section 11 (reference of certain applications to the Scottish Ministers) of the 1997 Act. Paragraph (b) repeals certain provisions of Schedule 3 to the 1997 Act

relating to the determination of certain appeals by persons appointed by the Scottish Ministers and certain appeals by the Scottish Ministers which, but for a direction under paragraph 3(1), would fall to be determined by an appointed person.

### ***Section 22 – Enforcement notice: requirement to cease works***

80. **Section 22** amends section 34 (power to issue enforcement notice), section 35 (appeal against listed building enforcement notice), section 39 (offence where listed building enforcement notice not complied with) and section 40 (effect of listed building consent on listed building enforcement notice). The amendments allow a listed building enforcement notice to specify any works which the planning authority or the Scottish Ministers require to cease and/or to specify steps which must be taken, and makes the necessary amendments following on from this to the enforcement process.

### ***Section 23 – Stop notices and temporary stop notices***

81. **Section 23** inserts new sections 41A to 41I into the 1997 Act giving local authorities the power to serve stop notices and temporary stop notices in relation to unauthorised works on a listed building.

#### **New section 41A – Stop notices**

82. Subsections (1) and (2) set out the circumstances in which local planning authorities may issue a stop notice. In so doing local planning authorities must consider it expedient for the works to cease before the expiry of the period for compliance with a listed building enforcement notice.
83. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the listed building enforcement notice has been served but may not be served after the listed building enforcement notice has taken effect.
84. Subsection (3) of new section 41A clarifies that “relevant works” refers to the “works” that the local planning authority require to cease under the terms of the enforcement notice together with any associated works.
85. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the planning authority consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days from the date, when the notice is served.
86. Subsection (6) sets out that the local planning authority may serve the notice on any person who appears to them to have an interest in the building or is executing or causing to be executed the relevant works specified in the listed building enforcement notice.
87. Subsection (7) allows local planning authorities to withdraw a stop notice at any time by notice which must be served on all persons who were served with the stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

#### **New section 41B – Stop notices: supplementary provisions**

88. New section 41B sets out supplementary provisions relating to stop notices. Subsections (1) and (2) set out the circumstances in which a stop notice ceases to have effect. Subsection (4) sets out how the planning authority may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

#### **New section 41C – Power of the Scottish Ministers to serve stop notice**

89. New section 41C allows Scottish Ministers to serve a stop notice under section 41A. It clarifies that notices so served have the same effect as those served by a local planning

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authority and that provisions of the Act relating to stop notices apply to those served by Scottish Ministers as they apply to those served by the planning authority. Scottish Ministers may serve a stop notice either where a planning authority have issued an enforcement notice or where Scottish Ministers themselves have issued the enforcement notice.

90. Subsection (3) makes it clear that Scottish Ministers must consult the planning authority before issuing a stop notice.

**New section 41D – Compensation for loss due to stop notice**

91. Subsection (1) sets out that a person with an interest in the building is entitled to compensation in respect of any loss or damage that can be attributed to the prohibition in the stop notice. Compensation is also payable where works prohibited by the stop notice cease to be “relevant works” (within the meaning of section 41A(3)) as a result of a variation of the listed building enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are when the stop notice is withdrawn or the associated enforcement notice is quashed, withdrawn, or varied. Subsection (6) provides that the compensation that may be payable under this section includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (7). Subsection (8) provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

**New section 41E – Penalties for contravention of stop notice**

92. New section 41E sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offences including allowing for conviction to be made for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

**New section 41F – Temporary stop notices**

93. New sections 41F to 41I cover the operation of the new system of temporary stop notices.
94. In new section 41F subsection (1) sets out the circumstances in which planning authorities may issue temporary stop notices. The planning authority has to consider that the works to a listed building are unauthorised or fail to comply with a condition attached to consent and consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the building as one of special architectural or historic interest.
95. Subsection (2) requires a notice to be in writing and to specify the works in question, prohibit execution of the works and set out the planning authority’s reasons for issuing the notice.
96. Subsection (3) states that notice may be served on a person who either appears to be executing, or causing to be executed the works and/or a person who has an interest in the building.
97. Subsection (4) states that the planning authority must display a copy of the notice and a statement on the effect of section 41H (relating to offences) on the building in question.
98. Subsections (5) to (7) sets out when the notice starts and ceases to have effect. It may have effect for a maximum of 28 days.

99. Subsection (8) provides that if the notice is withdrawn before the end of the 28 day period (or specified shorter period), it ceases to have effect at that point.

#### **New section 41G – Temporary stop notices: restrictions**

100. In new section 41G, subsection (1) enables regulations to be made prescribing types of work the execution of which is not prohibited by a stop notice; and subsection (2) prohibits the issue of further temporary stop notice unless another form of enforcement action has been taken e.g. the service of an enforcement notice.

#### **New section 41H – Temporary stop notices: offences**

101. In new section 41H subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.
102. Subsection (5) sets out the statutory defences under this section, which are that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.
103. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the activity which constituted the offence.

#### **New section 41I – Temporary stop notices: compensation**

104. In new section 41I subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the prohibition in the notice. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by listed building consent granted on or before the date the temporary stop notice is first displayed and/or the planning authority withdraws the notice other than following such grant of listed building consent. Subsection (3) applies subsections (5) to (9) of new section 41D to compensation under this section. Any question of disputed compensation will be referred to and determined by the Lands Tribunal.
105. Subsection (2) of section 23 amends section 66 of the 1997 Act, which relates to the control of works affecting unlisted buildings in conservation areas, to provide that sections 41A to 41I of that Act (as inserted by this Act) apply in relation to such buildings as they apply in relation to listed buildings. This ensures that stop notices and temporary stop notices will be available as enforcement tools in relation to unlisted buildings in conservation areas where subsection (3) of section 66 applies.
106. Subsection (3) of section 23 amends section 76 of the 1997 Act to give persons duly authorised by a planning authority rights of entry for certain purposes. The purposes are to enable such persons to ascertain whether a listed building enforcement notice, stop notice or temporary stop notice has been complied with, or whether any offence in relation to any building under new sections 41E or 41H of the 1997 Act has been committed. The subsection also confers rights of entry in connection with the display of certain notices under the Act.

#### ***Section 24 – Non-compliance with listed building enforcement notice: fixed penalty notice***

#### **New section 39A – Fixed penalty notice where listed building enforcement notice not complied with**

107. *Section 24* inserts new section 39A into the 1997 Act. This establishes powers for planning authorities to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice provided the

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conditions set out in subsection (9) are met. The conditions in subsection (9) are that the fixed penalty notice must be issued within 6 months of the failure to comply with the listed building enforcement notice, and that a fixed penalty notice cannot be issued where a person has already been charged with an offence in respect of the breach of the listed building enforcement notice.

108. Subsections (6) and (7) set out that a person who receives a fixed penalty notice has 30 days to pay the penalty, and that the penalty is reduced by 25% if payment is made within 15 days.
109. Subsection (12) provides that any payment received by a planning authority in respect of a fixed penalty notice is retained by the authority.
110. Subsection (13) allows Scottish Ministers to prescribe in secondary legislation different levels of fine for different cases. This will also allow Ministers to set out in regulations an incremental scale of fines related to previous breaches of listed building enforcement notices relating to the same steps or works.

***Section 25 – Urgent works to preserve unoccupied listed buildings***

111. **Section 25** amends section 49(3) of the 1997 Act to specify, as an additional example of the types of works which may be carried out where works appear to be urgently necessary for the preservation of a listed building, preventative works to limit any deterioration of the building.

***Section 26 – Liability of owner and successors for expenses of urgent works***

112. **Section 26** inserts new sections 50A to 50G into the 1997 Act. These new sections will enable a notice of liability for expenses to be registered in the appropriate property register against a listed building.

**New section 50A – Liability of owner and successors for expenses of works executed under **section 49****

113. New section 50A deals with the apportionment of liability for the expenses of urgently necessary works for the preservation of a listed building when a property is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a property. Subsection (1) provides that an owner will remain liable for relevant costs after the property has been sold.
114. Subsection (2) deals with the liability of an incoming or “new” owner of a property. A new owner is severally liable with the outgoing owner. If there are further new owners, both or all are bound. This is, however, subject to the provisions of subsection (3) which provides that an incoming owner will be liable for the cost of any urgent works which have been carried out prior to the date on which the new owner becomes the owner of the property only if a notice of liability for expenses has been registered in the property registers (on or before a date 14 days prior to the new owner becoming the owner) and the notice has not expired before that date or that a notice of renewal has been registered and has not expired. Liability for the cost of completed urgent works where no notice has been registered is thus excluded. In other words, if no notice is registered, the purchaser is not liable. Where a notice is registered, then a new owner would be liable for the full amount of the cost of the urgent works as described in the notice.
115. Where the new owner pays any relevant costs, under subsection (8) they may recover the amount paid from a former owner, if the former owner is liable.

**New section 50B – Notice of liability for expenses: further provision**

116. Subsection (1) of new section 50B sets out who may register a notice of liability for expenses and provides that a notice may be registered in relation to different works

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executed on a listed building. A notice will expire after 5 years, though it may be renewed.

117. Subsection (2) provides that the Keeper of the Registers of Scotland will not be required to determine whether or not the information contained in a notice of potential liability for expenses is accurate.

**New section 50C – Notices of renewal**

118. Subsection (1) sets out that a notice of renewal may be registered only when a notice of liability for expenses has been registered and has not expired.
119. Subsection (2) provides Scottish Ministers and planning authorities with the power to register a notice of renewal in a form prescribed under inserted section 50G.
120. Subsection (3) allows for a second or subsequent notice of renewal to be registered in respect of the same expenses and works as specified in the original notice of liability.
121. Subsection (4) sets out that a second or subsequent notice of renewal cannot be registered if a notice of renewal for expenses has expired.
122. Subsection (5) makes it clear that where a notice of liability for expenses has been registered by Scottish Ministers a notice of renewal may be registered only on application of Scottish Ministers. Subsection (5) also makes it clear that where a notice of liability for expenses has been registered by a planning authority a notice of renewal may be registered only on application of that authority.
123. Subsection (6) states that a notice of renewal expires after a period of 5 years.
124. Subsection (7) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of renewal is accurate.

**New section 50D – Notice of determination following representations under section 50**

125. Subsection (1) makes it clear that subsections (2) and (3) apply only where a notice of liability of expenses or a notice of renewal has been registered and the owner has made representations to the Scottish Ministers under the terms of section 50(4) of the 1997 Act or section 50(6) of the 1997 Act as inserted by section 26(2) of this Act.
126. Subsection (2) sets out that when a notice of liability has been registered by a planning authority the authority must apply to register a notice of determination in a form prescribed under new section 50G as soon as practicable after the Scottish Ministers have given notice of their determination under the terms of section 50(5).
127. Subsection (3) sets out that when the original notice of liability has been registered by Scottish Ministers they must apply to register a notice of determination as soon as practicable after they have made their determination.
128. Subsection (4) sets out that a notice of determination must specify the amount recoverable in connection with a notice of liability for expenses.
129. Subsection (5) makes it clear that when the amount recoverable as set out in a notice of determination is less than the amount specified as the expenses of the works set out in the original notice of liability the amount specified in the notice of determination is to be treated as the amount recoverable.
130. Subsection (6) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of determination is accurate.

**New section 50E – Discharge of notice of liability for expenses and notice of renewal**

131. Subsections (1)(a) and (b) clarify that subsections (2) and (3) apply only when a notice of liability for expenses or a notice of renewal have been registered and any liability for expenses under section 50(2) has been fully discharged.
132. Subsection (2) states that when a planning authority has registered the original notice of liability for expenses the authority must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.
133. Subsection (3) states that when Scottish Ministers have registered the original notice of liability for expenses they must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.
134. Subsection (4) confirms that, when registered, a notice of discharge discharges a notice of liability for expenses or, where applicable, a notice of renewal.
135. Subsection (5) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of discharge is accurate.

**New section 50F – Meaning of “register” in relation to notices**

136. Section 50F defines what is meant to ‘register’ a notice of liability for expenses, a notice of renewal, a notice of determination and a notice of discharge. For the purposes of the 1997 Act, ‘registration’ is effected when the information in the notice is registered in the Land Registers of Scotland, or where appropriate, where the notice itself is recorded in the Register of Sasines.

**New section 50G – Power to prescribe forms**

137. Section 50G gives the Scottish Ministers power to prescribe the forms of notices for liability for expenses, notices of renewal, notices of determination and notices of discharge.

***Section 27 – Recovery of grants for preservation etc. of listed buildings and conservation areas***

138. **Section 27** amends sections 52 and 70 of the 1997 Act which enable the Scottish Ministers and planning authorities to recover grants made under sections 51 and 69 of that Act. Section 51 is also amended (by subsection (2)) to enable planning authorities to impose conditions in grants.
139. These new provisions mean that Scottish Ministers and planning authorities can specify in a grant award letter the amount that would be recoverable (or set out the terms for calculating the amount that would be recoverable) when a condition of grant is either contravened or not complied with, or in the event the property is disposed of.

***Section 28 – Provisions that do not bind the Crown***

140. **Section 28** amends section 73A of the 1997 Act to ensure that new sections 41E, 41H and 50A(2) do not bind the Crown.

***Section 29 – Regulations in connection with inquiries, etc***

141. Section 79(1) of the 1997 Act applies various provisions of the Town and Country Planning (Scotland) Act 1997 (“the TCPS Act”) for the purposes of the 1997 Act including the power to hold inquiries under section 265 of the TCPS Act. Section 52 of the Planning etc. (Scotland) Act 2006 introduced a new section 275A into the TCPS Act which enables the procedure to be followed in such inquiries to be set by regulations made by the Scottish Ministers.

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142. [Section 29\(1\)](#) of the Act inserts a reference to the new section 275A into section 79(1) and so will enable such regulations to be made in relation to inquiries held under the 1997 Act.
143. [Section 29\(2\)](#) of the Act removes the power to make rules under the Tribunals and Inquiries Act 1992 for inquiries held under Schedule 3 to the 1997 Act.

***Section 30 – Regulations and orders under the 1997 Act***

144. Subsections (2) and (5) amend subsections (2) and (4) of section 82 of the 1997 Act and confirm that the power to make regulations and orders under the 1997 Act may be exercised to make different provisions for different purposes.
145. Subsection (4) inserts a new section 3A into section 82 of the 1979 Act to provide that a statutory instrument containing regulations prescribing the fixed penalty amounts made by virtue of section 39A(5) is subject to affirmative procedure in the Scottish Parliament.
146. Subsection (6) confirms that any regulation or order making powers conferred by the 1997 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provision that Scottish Ministers consider necessary or expedient.

**Part 4 – General**

***Section 32 – Ancillary provision***

147. Subsection (1) confers powers on the Scottish Ministers enabling them to make supplementary, incidental, consequential, transitory, transitional or saving provision in connection with the Act where such provision is considered necessary or expedient.
148. Subsection (2) states that the provision which can be made under subsection (1) includes provision to amend or repeal any enactment, including any contained in the Act, or any other instrument.
149. Subsection (5) provides that any order which adds to, replaces or omits any part of an Act shall be subject to an affirmative resolution procedure in Parliament. Other than this, orders will be subject to negative resolution procedure.

***Section 33 – Short title and commencement***

150. Subsections (2) and (3) set out the arrangements for commencement of the provisions of the Act. Sections 31, 32 and 33 commence on Royal Assent. All other provisions are to be commenced by order.

**PARLIAMENTARY HISTORY**

151. The following table sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings. It also shows the dates on which the Committee Reports and other papers relating to the Bill were published, and references to those reports and other papers.

<b>Introduction</b>	
Bill as introduced – 4 May 2010	<a href="#">SP Bill 43</a>
<b>Stage 1</b>	
<b>(a) Education, Lifelong Learning and Culture Committee</b>	

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21 <sup>st</sup> Meeting 2010, 8 September 2010	Official Report of 21st ELLC Committee meeting
22 <sup>nd</sup> Meeting 2010, 15 September 2010	Official Report of 22nd ELLC Committee meeting
23 <sup>rd</sup> Meeting 2010, 22 September 2010	Official Report of 23rd ELLC Committee meeting
24 <sup>th</sup> Meeting 2010, 29 September 2010	Official Report of 24th ELLC Committee meeting
8 <sup>th</sup> Report 2010 – Stage 1 Report to Parliament	ELLC Committee Stage 1 Report
<b>(b) Finance Committee</b>	
16 <sup>th</sup> Meeting 2010, 15 June 2010	Official Report of 16th Finance Committee meeting
<b>(c) Subordinate Legislation</b>	
19 <sup>th</sup> Meeting 2010, 8 June 2010	Official Report of 19th Subordinate Legislation Committee meeting
38 <sup>th</sup> Report 2010, 23 June 2010	Official Report of the 38th Subordinate Legislation Committee meeting
<b>(d) Consideration by the Parliament</b>	
Stage 1 Debate – 4 November 2010	Official Report of Stage 1 Debate
<b>Stage 2</b>	
<b>(a) Education, Lifelong Learning and Culture Committee</b>	
34 <sup>th</sup> Meeting 2010, 15 December 2010	Official Report of ELLC Committee Stage 2 consideration - 15th December 2010
<b>After Stage 2</b>	
<b>Subordinate Legislation Committee</b>	
3 <sup>rd</sup> Report 2011, 19 January 2011	Subordinate Legislation Committee Report
<b>Stage 3</b>	
<b>Consideration by the Parliament</b>	
Stage 3 Debate – 20 January 2011	Official Report of Stage 3 debate
Bill as Passed	SP Bill 43
	An 'As Passed' version of the Bill was not produced for Stage 3 as no amendments were lodged.
<b>Royal Assent</b>	
23 February 2011	Historic Environment (Amendment) (Scotland) Act 2011