

# HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) ACT 2011

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## EXPLANATORY NOTES

### THE ACT – SECTION BY SECTION

#### **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 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.