



HISTORIC ENVIRONMENT
ADVISORY COUNCIL
for SCOTLAND

**Report and recommendations on
whether there is a need to review
heritage protection legislation in
Scotland**

Presented to Patricia Ferguson MSP
Minister for Tourism, Culture and Sport
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Report and recommendations on whether there is a need to review heritage protection legislation in Scotland

Foreword

This report, which is submitted by HEACS to the Minister for Tourism, Culture and Sport, addresses the question whether there is a need to review heritage protection legislation in Scotland.

In approaching this question, HEACS met with a number of expert witnesses and considered a great deal of written evidence. Two seminars were jointly arranged with BEFS (Built Environment Forum Scotland). HEACS is grateful to the many organisations and individuals who gave evidence or assisted in other ways, and is especially grateful to those external members serving on the working group which was established to consider the question.

This report should be read in conjunction with the HEACS report on the role of local authorities in conserving the historic environment.

EXECUTIVE SUMMARY

This report, which is submitted by HEACS to the Minister for Tourism, Culture and Sport, addresses the question whether there is a need to review heritage protection legislation in Scotland.

The report concentrates on the main pieces of historic environment legislation, along with associated guidance and policy statements. These are examined in the context of the historical development of the legislative system since 1882, the significant numbers of designated assets in Scotland, the Scottish Executive programme for modernising the planning system, and the Heritage Protection Review in England.

In assessing the current legislative system, HEACS is conscious of the lack of information on the state of the historic environment in Scotland which would enable a thorough assessment to be made. However, HEACS has been presented with a significant body of evidence relating to the strengths and shortcomings of the current legislation. The latter include not only a long list of proposals which would, it is claimed, enable the system to work better and increase its effectiveness, but also several major shortcomings including, for instance, the lack of statutory protection for historic gardens and designed landscapes, battlefields, and historic or cultural areas.

Not all of the concerns which have been expressed to HEACS relate directly to the legislation: some are perhaps more about resource issues, skills shortages, or even operational difficulties.

However, it is clear that, while the legislation does have important strengths, some of its shortcomings are of a fundamental nature. The legislation has grown piecemeal,

reflecting its disparate origins, and has reached the stage where it is complex and difficult to understand. The emphasis of the current legislation towards protection, allied to its complexity, lack of consistency, and compartmentalisation, does not fully allow the historic environment to be properly valued, nor enable its sustainable management. Current legislation, which is largely geared towards the designation of individual sites, does not enable the historic environment to be viewed as a whole.

HEACS considers that the protection of the historic environment should not be decoupled from the Scottish Executive's policy for modernising the planning system. There is a need for more efficient decision-making, for increased participation, and for greater openness.

The report recommends that Scottish Ministers should undertake a review of heritage protection legislation. HEACS considers that the legislation should not only continue to afford protection for the historic environment but also enable its potential to be realised through the effective management of change. The historic environment is recognised as making a significant contribution to sustainable economic growth, the building of confident communities, and the promotion of social and economic regeneration.

A review of the legislation should be based on a presumption that current levels of protection afforded to heritage assets, from the nationally to the locally significant, would not be diminished in any way. A review would, however, provide an opportunity to identify and examine the many shortcomings of existing legislation that have been identified, and propose possible remedies.

In considering these, HEACS advocates strongly that a review should include consideration of the introduction a new designation for the protection for historic or cultural areas for which new legislation would be required, and for which there appears to be strong support in the historic environment sector. A review should consider the benefits of establishing a single designation regime and a unified consent regime, and also explore the most appropriate levels for decision-making.

Any review must recognise that changes to the primary legislation should only form one element in a package of proposals. HEACS acknowledges there are, for instance, issues to be addressed around the deliverability of any proposals, including resource implications, especially for local authorities, and capacity building.

Local authorities have significant responsibilities and powers under the legislation: this report should be read in conjunction with the HEACS Report on the role of local authorities.

INTRODUCTION

1 The report is submitted by HEACS, the Historic Environment Advisory Council for Scotland, which provides Scottish Ministers with strategic advice on issues affecting the historic environment and was established in 2003.

2 The report covers one of the five priority issues which the Minister for Tourism, Culture and Sport asked Council for advice on during its first term of three years. The Minister asked HEACS to consider whether there is a need to review heritage protection legislation in Scotland. In making this request the Minister stated that:

It is many years since the last review of the legislative provision for the protection of the historic environment in Scotland and the Scottish Parliament has not yet considered any built heritage legislation. A review of heritage protection legislation is currently underway in England and Wales. This review, and any changes ensuing from it, and the fact that Scotland shares some heritage protection legislation with England and Wales, will no doubt prompt calls for a review of the legislation in Scotland.

3 In this report the historic environment is taken to include the:

“tangible built heritage of all periods: 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. The historic environment encompasses the context or setting in which these features sit, and the patterns of past use in landscapes and within the soil, and in our towns, villages and streets. It also has less

tangible aspects recognised as the historical, artistic, literary, linguistic and scenic associations of places and landscapes.” *SHEP1 Scotland’s Historic Environment* (2006 draft)

Possible options

4 In considering the question of whether there is a need for a review, HEACS has given careful consideration to the scope of the legislation and its effectiveness. From the evidence which HEACS has gathered and examined, it is clear that the current legislation has considerable virtues and strengths. However, a significant number of shortcomings have been identified. Some fall into the category of minor improvements, others are of a much more fundamental nature. While there are a number of possible options which might be recommended to Scottish Ministers, HEACS has identified three main options for consideration. These are:

Option 1: there is no need for a review. However, Scottish Ministers should identify and address minor shortcomings in the legislation incrementally as the opportunity arises.

Option 2: Scottish Ministers should not only identify, and address, minor shortcomings, but should introduce provisions to deal with major issues requiring a legislative solution.

Option 3: Scottish Ministers should set in train a review of heritage protection legislation with a view to introducing new historic environment legislation.

5 The report concludes that the status quo is not an option and favours Option 3; it recommends to Scottish Ministers that a review should be undertaken of the legislation relating to the protection of the historic environment.

THE LEGISLATION IN SCOTLAND

Purposes of current historic environment legislation

6 HEACS identifies the purposes of heritage, or historic environment, protection legislation as:

- enabling the identification or selection of assets – including buildings, monuments or areas - which should be preserved for the benefit of present and future generations;
- providing protection to those assets through consent systems; and
- enabling financial assistance to be provided.

7 The legislation protects the public's interest in what is mostly private property. In looking after the public's interest, it allocates various responsibilities and powers to Scottish Ministers (usually exercised on their behalf by Historic Scotland, an executive agency of the Scottish Executive), and to local authorities (for the latter, see the HEACS Report on the role of local authorities).

The current legislation relating to the historic environment in Scotland

8 The report relates to the main pieces of heritage protection legislation and, by implication, associated secondary legislation. HEACS recognises that other legislation and regulations can have a significant impact on the historic environment, particularly the management of change.

9 The main pieces of legislation relating to the protection of the historic environment are as follows:

- The *Ancient Monuments and Archaeological Areas Act 1979* which protects ancient monuments through scheduling and scheduled monument consent procedures;
- The *Town and Country Planning (Scotland) Act 1997* which sets out the planning powers of Scottish Ministers and local authorities; and
- The *Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997* which provides protection for buildings of special architectural or historic interest and conservation areas.

Other primary legislation is noted below.

10 Relevant secondary legislation is as follows:

- *Town and Country Planning (General Development Procedure) (Scotland) Order 1992* (as amended);
- *Town and Country Planning (General Permitted Development) (Scotland) Order 1992*; and the
- *Ancient Monuments (Class Consents) Order (Scotland) 1996*.

11 There are also a number of policy statements and guidance documents which, although not belonging to the body of legislation, are of considerable significance in the management of change and may be so in a legal context. Of particular importance are:

- *National Planning Policy Guideline NPPG 5 Archaeology and Planning and Planning Advice Note PAN 42 Archaeology – the Planning Process and Scheduled Monument Procedures* which provide guidance on the role of the

planning system in identifying, protecting and recording archaeological remains;

- *NPPG 18 Planning and the Historic Environment* which sets out the Scottish Executive's planning policies in relation to the historic environment with a view to its protection, conservation and enhancement; and
- *PAN 71 Conservation Area Management*.

12 The series of Scottish Historic Environment Policy (SHEP) statements in the course of publication by Historic Scotland will be of considerable importance. SHEP I will provide an overarching policy statement for the historic environment and is intended to be a material consideration in the statutory planning, Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) processes. *The Memorandum of Guidance on Listed Buildings and Conservation Areas* 1998 and *The Stirling Charter* are also currently of relevance.

13 In addition, there is a good deal of related legislation which either bears directly on heritage protection or has an indirect impact. Particular attention is drawn to:

- *Historic Buildings & Ancient Monuments Act 1953* which provides for the making of grants by Scottish Ministers for the repair and maintenance of "buildings of outstanding historic or architectural interest";
- *Protection of Wrecks Act 1973* which provides powers to designate historic wreck sites in UK territorial waters as restricted areas; and
- *Protection of Military Remains Act 1986* which extends similar protection to military vessels and aircraft in the UK.

14 European legislation, as transposed, provides the basis for Environmental Impact

Assessment and Strategic Environmental Impact Assessment.

15 Mention can also be made of the *National Heritage (Scotland) Act 1985*, *Environmental Protection Act 1990*, *National Heritage Act 2002*, and the *Local Government in Scotland Act 2003*. There is a range of Acts which recognise the importance of archaeological remains including, for instance, the *Electricity Act 1989*. The impact of the *New Roads and Street Works Act*, the *Disability Discrimination Act*, the *Fire Regulations*, and the *Building Regulations* may also be considerable. It is recognised that such legislation can have a significant impact on the historic environment, particularly the management of change.

16 There are various UNESCO conventions on 'cultural property' which impact on heritage protection. The *World Heritage Convention 1972* which covers the designation of World Heritage Sites is of particular relevance. There are also various European Conventions of relevance, including for instance, the *Convention on the Protection of the Archaeological Heritage* (the 'Valetta Convention'), and the *European Landscape Convention*.

The main pieces of legislation in their historical context

17 The beginnings of legislative protection for the historic environment have their origins in the nineteenth century. The concern at the impact of restoration work on ancient structures, and a desire to preserve authentic remains of the past for the future espoused by William Morris in setting up the Society for the Protection of Ancient Buildings in 1877, prompted the passing of the *Ancient Monument Protection Act* in 1882. This Act, and subsequent legislation (1913, 1931, 1953 and 1979), were mainly concerned with the protection of ancient monuments. The idea of protecting buildings more or less in daily use was a later introduction: its origins lie in the

Town and Country Planning Act 1932. The Town and Country Planning (Scotland) Act 1947 introduced the compilation of lists of buildings of architectural or historic interest. Financial assistance for building repair grants was included in the Historic Buildings & Ancient Monuments Act 1953. Conservation areas were introduced by the Civic Amenities Act 1967.

The Ancient Monuments and Archaeological Areas Act 1979

18 The 1979 Act built on measures to protect ancient monuments dating back to the Ancient Monuments Protection Act 1882, as noted above. Through this the concept of scheduling was introduced, and the principal Act became the Ancient Monuments Act of 1913 as subsequently amended. As well as consolidating previous measures, the 1979 Act also introduced new powers, particularly in view of the need to provide for rescue archaeology. While it is often referred to as an amending and consolidating piece of legislation, the Act introduced some far-reaching changes in heritage protection.

19 It is widely acknowledged that the primary purpose of the Act is to preserve monuments of national importance: the procedures introduced for controlling works affecting scheduled monuments assume the overriding importance of preservation.

Town and Country Planning (Scotland) Act 1997 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

20 The primary legislation governing planning in Scotland, including listed building control, was the Town and Country Planning (Scotland) Act 1972. In 1997 this Act, as amended, was replaced by a number of Acts including the Town and Country Planning (Scotland) Act

1997 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

21 The broad purpose of this legislation is to enable the preservation of buildings of architectural or historic interest through active use. The principle is enshrined in NPPG 18: “Central to the Government’s approach is the need to secure preservation whilst accommodating and remaining responsive to present day needs.” Conservation area protection attempts to extend the concept of preservation by introducing the precept of enhancement, or positive change.

Differences between Scotland and England

22 Historic environment legislation for England and Scotland is broadly the same. The 1979 Act is a UK Act: the only difference is that Part 2 of the Act, dealing with areas of archaeological importance, was never introduced in Scotland. There are differences in practice and procedure relating to ancient monuments. There are some differences in scheduling practice, for instance, in terms of the length of documentation. However, there appears to be little difference in the way that scheduled ancient monument consent is handled.

23 The provisions for Scotland in the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 largely replicate those for England and Wales in the Planning (Listed Buildings and Conservation Areas) Act 1990. The overall disposition of responsibilities between central government and local authorities in England and Scotland is broadly similar. There are differences in practice and procedure. There are, for instance, differences in the way in which the grading/categories of listed buildings are applied which have implications for the handling of listed building consent. Scottish

Ministers (Historic Scotland) see more applications for listed building consent as a proportion of the total number. Historic Scotland expends a great deal of effort in offering advice to local authorities.

24 There are broad differences between England and Scotland at the level of central government. In Scotland formal policy responsibility for the historic environment lies with Historic Scotland, which is an executive agency of the Scottish Executive. Historic Scotland plays a significant role in the designation of heritage assets and also administers some of the various control systems. In England, these roles are undertaken by the Department for Culture, Media and Sport and English Heritage, which acts as the Government's statutory adviser on the historic environment. Unlike Historic Scotland, however, English Heritage is a Non Departmental Public Body. The planning system plays a critical role in the protection of the historic environment: in Scotland, planning policy and the administration of certain elements of the control systems is the responsibility of the Scottish Executive;

in England it is the responsibility of the Department for Communities and Local Government.

25 There also appear to be infrastructural differences between English and Scottish local authorities: conservation teams, reflecting complementary professional skills, are more common in England. As the HEACS Report on the role of local authorities emphasises, there is currently a lack of documented information on levels of expertise available to local authorities in Scotland.

The impact of devolution

26 The historic environment is a devolved matter. Powers which were made available to the Secretary of State for Scotland were transferred to Scottish Ministers. The Scottish Executive may legislate on any devolved policy area. For areas still covered by an Act passed by the Westminster Parliament, the Scottish Executive could dissociate from the sections of the Act which related to Scotland and draft its own legislation.

CONTEXT FOR CONSIDERING WHETHER THERE IS A NEED TO REVIEW THE LEGISLATION

The Scottish historic environment

27 Scotland contains a rich and varied historic environment. It contains many historic monuments, buildings and areas which are of national importance: some have been recognised as of international importance. It also contains a great number of sites and buildings of regional or local importance which may have significant value to local communities.

28 Scotland's historic environment makes a strong contribution to peoples' sense of place and sense of history. It is also of considerable economic importance, playing an important role in Scotland's attractiveness as a place to live and work, or as a visitor destination. The historic environment has made, and has the capacity to make, a significant contribution to wider objectives, including sustainable development and regeneration.

29 The approximate numbers of designated heritage assets in Scotland are as follows:

- 8,000 scheduled ancient monuments;
- 47,000 listed buildings;
- 650 conservation areas; and
- 346 designed landscapes.

The number of listed buildings may well be significantly higher as many entries on the list contain more than one building. In addition, there are protected wreck sites, military remains, and currently four World Heritage Sites.

30 Designation will continue to be a dynamic process. It is accepted that there are significant numbers of monuments, buildings and sites which have not yet been designated.

It is also accepted that what is judged to be of international, national, regional, or local importance, is subject to constant revision as our understanding increases, and will continue to be by future generations. Furthermore, new buildings of potential architectural or historic interest are being built and there will be more recent buildings which should, in due course, be considered for designation.

Modernising the planning system in Scotland

31 A crucial element in the context for considering whether there is a need to review the legislation is provided by the Scottish Executive's programme to modernise the planning system. Under the Partnership Agreement, the Scottish Executive is committed to improving the planning system by strengthening the involvement of communities; speeding up decisions; reflecting local views better; and allowing quicker investment decisions. The White Paper, *Modernising the Planning System, and the Planning etc. (Scotland) Bill* set out a package of reforms to modernise the planning system.

32 The White Paper and Bill set out some of the concerns about the current planning system: "Many users of the system have complained that it is over-bureaucratic, slow to respond to commercial and economic needs and unpredictable in its outcomes. Community and voluntary groups, and the general public, often see the planning system as complex, intimidating, unresponsive to environmental or social concerns and lacking in transparency." The Scottish Executive has acknowledged that while some of the criticisms may have been overstated, there have been significant failings in the system.

33 The Scottish Executive has set out to create a planning system which is:

- fit for purpose: decision making should take place at the appropriate level and thereby achieve the right balance between local and central decision making;
- efficient: through being based on relevant and up-to-date development plans which will facilitate rather than obstruct development. The system should give value for money and give applicants and local people certainty and predictability;
- inclusive: enable greater involvement of local people, particularly during the production of development plans. The proposals recognise “the right to better information, more certainty that people’s views will be taken into account, more transparency and fairness and more equality.”
- sustainable: environmental considerations should be integrated into the system.

34 The Scottish Executive’s aims in modernising planning are to “ensure that the system will facilitate rather than obstruct high quality appropriate development; protect the country’s historic and natural environment and provide the basis for sustainable economic growth.” In keeping with the new approach, the term ‘development control’ is to be replaced by ‘development management’.

35 In line with commitments made through the Partnership Agreement, the White Paper stated that the Scottish Executive intends to update the provisions in the planning legislation which dealt with the protection of the historic environment. The White Paper also recognised that advantage might be gained in combining elements of the various consent mechanisms.

The Heritage Protection Review in England

36 As recognised in the Minister’s letter to HEACS, the other main context is provided by the review of heritage protection legislation in England. The Government’s proposals include both short term measures and a longer term package of measures requiring primary legislation. A White Paper is expected.

37 The Government’s proposals in England may be traced back to the heritage sector report *Power of Place*, which raised the issue of the regulatory system and set the context. The Government’s response, *The Historic Environment: A Force for Our Future*, articulated a new vision for the historic environment. After an extensive consultation, a package of proposals was set out in a consultation paper published in 2003, *Protecting our historic environment: Making the system work better*. The paper set out four major areas for improvement, quoted here in full:

Simplifying The protection systems are complex. New protections have been added in a piecemeal fashion. Few people have a grasp of all parts of the legislation. There are overlaps. Unsurprisingly there are inconsistencies in interpretation.

Openness Processes are often inaccessible, even secretive. The reasons for designating a particular site or building are not clear. There is little encouragement to owners to feel involved. Restrictions are placed on owners of protected assets, which sometimes serve to alienate them rather than to engage their enthusiasm for looking after their properties. Opportunities for positive dialogue, community involvement and good planning can be lost.

Flexibility The present systems require individual designations for each structure and individual consents for each alteration. Where there are complex sites, such as a large military establishment or a housing estate, this is laborious. There are lessons from the more flexible regimes for managing the natural environment which have not fully fed through into heritage protection.

Rigour In 1970 there were some 90,000 listed buildings and an unknown number of scheduled monuments. There are now about half a million. This is a rich inheritance but a huge stock to manage. Looking ahead we know that only some 3% of the total of listed buildings are from the twentieth century yet about 80% of the nation's stock is post-1900. The system must be robust to conserve the best and to continue to take on board changes in what people value without devaluing the currency.

38 The purpose of the English review is not to undercut the protections which have been built up over time. The aim is to “reform the system to make it simpler, more flexible, more transparent and more accountable.” Existing levels of protection will be maintained, while historic environment assets will be better understood and better managed.

39 The longer-term package included the following proposals:

- the creation of a single unified Register of Historic Sites and Buildings,

- statutory right of appeal to the Minister for owners against the decision to designate or not to designate;
- a consent process based on an integrated designation regime, unifying listed building consent and scheduled monument consent, and administered by local authorities;
- the establishment of Heritage Partnership Agreements or optional statutory management agreements for more complex sites that form an alternative to the system of individual specific consents; and
- Government will require local authorities to establish and maintain Historic Environment Records or have access to one.

40 The Welsh Assembly Government issued a consultation paper in 2003, *Protection of Historical Assets in Wales: A Consultation Paper*, seeking views on the legislation governing the protection of the historic environment in Wales. The National Assembly for Wales is still considering the issue.

41 In Northern Ireland an independent review of the environmental governance arrangements is underway. The review's terms of reference suggests that the report will not cover the legislation.

COMMENTARY ON CURRENT HERITAGE PROTECTION LEGISLATION IN SCOTLAND

42 No previous assessment has been made of heritage protection legislation in Scotland as a whole. Little information exists on the state of the historic environment which would enable a thorough assessment to be made, not only of the overall effectiveness of the legislation, but also whether it is fit-for-purpose and comprehensible to layperson or professional alike.

43 Various suggestions for amending the legislation protecting the historic environment were set out in the Scottish Office Green Paper *Protecting the Built Heritage* published in 1996. The *Options for Change* report of 2003 commissioned by the Scottish Executive on possible measures to be included in a planning bill also identified a number of proposals relating to historic environment legislation. A number of suggestions were also put forward in responses to the consultation on Modernising the Planning System in 2005.

44 In gathering evidence HEACS has been presented with a significant number of what may be considered to be, in very broad terms, shortcomings or areas where the legislation could be improved. These have come from a range of interested parties including practitioners, local authority officers, developers, NGOs, voluntary sector and amenity bodies. HEACS also considered a good deal of written evidence.

45 A number of the issues are considered below. HEACS does not claim that these represent a comprehensive list, or that all are of equal importance or priority.

Scheduled Ancient Monuments

46 Under the 1979 Act the sole legal criterion for inclusion in the schedule is that a monument is of 'national importance'. What

constitutes national importance and how it should be determined are not specified. As concepts of national importance are subject to change and modification, it is appropriate that the legislation is not too prescriptive. The definition of what may constitute a monument is, properly, very wide. Scottish Ministers' current policy on scheduling is set out in *SHEP 2: Scheduling: protecting Scotland's nationally important monuments*.

47 The Act provides a number of strong measures to protect monuments, essentially based on the aim of preservation. However, several improvements have been suggested for increasing its effectiveness. These include: the introduction of a power to schedule at short notice; making it an offence to remove finds from scheduled ancient monuments without permission (at present only finds located using a metal detector are dealt with under the legislation); making responsibility for Repairs Notices and the fines for damage and 'personal gain' the same as for listed buildings; and removing the plea of ignorance in defence of unauthorised works. It has also been suggested that there should be a right of appeal against a proposal by Scottish Ministers to schedule a site.

48 In terms of secondary legislation, concerns have also been expressed as to the operation of the class consents system and the inconsistencies in, and insufficient protection afforded by, the provisions covering Permitted Development Rights.

49 The introduction of grading for scheduled ancient monuments is a more contentious suggestion. It must be recognised that there can be difficulties in assessing sites as many can include unknown or hidden archaeology. Also, some monuments will have greater importance than others, even in national terms. A site can be recognised for

its importance but its full significance might not be able to be fully assessed from its appearance alone. This suggestion should be given proper consideration as it is consistent with other forms of designation.

50 A related proposal is for the provision of statutory protection for locally important archaeology. It is pointed out that while Scottish Ministers only have a responsibility to protect nationally important sites, local authorities are not responsible for unscheduled monuments, except through the planning system. Those advocating this point out that some of what is termed local archaeology is potentially of national importance but has not yet been scheduled.

51 Other suggestions include the introduction of statutory protection for palaeoenvironmental deposits or artefact scatters, though there are doubts whether this would be practicable. It has also been submitted that provision should be made for ensuring adequate protection for the setting of scheduled ancient monuments.

52 The delegation of scheduled monument consent to local authorities to bring it more in line with listed building consent procedures should be considered. One suggestion would be to treat scheduled ancient monuments in the same way as Category A-listed buildings: local authorities would be required to refer any consents they were minded to grant to Scottish Ministers (through Historic Scotland) and a call-in power would be reserved to the Scottish Executive. This would enable a one-stop approach to be adopted, and a more co-ordinated approach to cases requiring both planning and scheduled monument consent.

Listed buildings

53 Scottish Ministers are required by the current legislation to compile lists of ‘buildings of special architectural or historic interest’. The scope of the Act is very wide and what is included in the list is left to Ministers’ discretion. A wide range of buildings may be listed under the legislation and over the last 30 years there has been a welcome broadening out of the concept of heritage.

54 Scottish Ministers may determine the structure and broad content of list descriptions, although there may be some tension between the desirability of a brief statement of significance and legal advice on the need for accuracy and fullness. The methodology by which early list descriptions were prepared is no longer relevant. A long-term systematic resurvey was commenced in the late 1970s but progress, however, has not been as good as had been anticipated. As the Review of Historic Scotland pointed out, earlier lists are now a generation old and do not reflect modern understanding, scholarship, and appreciation of buildings.

55 A number of concerns have been expressed with regard to the listing process itself. These include the desirability for Historic Scotland to take more account of external advice. It has also been suggested that, while designation procedures have become more consultative, there should be a right of appeal against a proposal by Historic Scotland to list. Concerns have been expressed as to the need to improve the definition of the extent of listing, particularly the identification of curtilage which may include land in separate ownership.

56 The listed building consent system gave rise to a variety of concerns, some of which are not directly related to the provisions of legislation. It has been suggested that it would be worth examining for instance, the performance of local authorities in dealing with delegated applications concerning Category C(S)-listed buildings, and why authorities appear unwilling to utilise Building Preservation Notices. Much of the current evidence is largely anecdotal.

57 A number of improvements to the legislation have been suggested. These include:

- the introduction of a requirement for completion certificates and powers to issue stop notices;
- making listed building consent time-limited, and implementable only once;
- giving Scottish Ministers the power to serve Building Preservation Notices;
- enabling Repairs Notices to be secured on the property rather than charged against the owner;
- increasing the penalties for offences under the legislation including unauthorised works;
- giving the Memorandum of Guidance on Listed Buildings and Conservation Areas the enhanced status of a PAN (Planning Advice Note); and
- updating the Town and Country Planning (Listed Buildings and Conservation Areas) Regulations 1987.

58 Concern has also been expressed about the quality of applications for planning and listed building consent and the desirability of a power to reject those which were insufficiently detailed, or do not meet minimum standards/information. It has also been argued that heritage impact statements should be required to accompany applications, placing the onus

on the developer to justify proposed levels of intervention. It may be noted here that similar concerns apply to applications for scheduled monument consent, particularly where the proposals are likely to result in descheduling. There is a need for guidance in this area.

59 The introduction of charging for listed building consent applications has been suggested as a means of helping to support specialist posts and raise the status of listed building consents. On the other hand, there was a view that owners of listed buildings should not face additional burdens.

60 The exemption which provides that, while ecclesiastical buildings in use are subject to planning permission, being outwith the scope of listed building and conservation area control has long been considered to be an anomaly, particularly by conservation interests. The main Christian denominations have entered into a voluntary scheme which deals with proposals which might affect the exteriors of churches. It is recognised that there are legal complexities surrounding the issue, and there may be a case for ensuring that denominations taking part in the voluntary scheme have effective internal control and monitoring systems. The case for the exemption should be reviewed.

61 Attention has been drawn to the need to address frictions between different legislative regimes, especially between heritage protection legislation and the Building Regulations. Particular concerns relate to the impact of Dangerous Building Notices and the demolition of important historic buildings with no apparent attention being paid to the retention of the historic fabric.

Conservation areas

62 The designation of conservation areas is primarily a local authority function. It is suggested that most conservation areas do not have robust control mechanisms in place, for instance, no Article 4 Directions, and are

suffering from incremental damage to their character and appearance. It is understood that Article 4 Directions can be very time consuming to prepare and justify.

63 The 1997 Act places a duty on planning authorities to formulate and publish proposals for the development and enhancement of conservation areas. This is very loosely defined and has not been embraced for the majority of designated areas. Commitment to the positive management of conservation areas has been variable, and the need for local authorities to appraise the character of their conservation areas is regarded as an essential first step to positive, rather than purely restrictive, development management.

64 One particular weakness in the legislation is the phrase ‘protect or enhance’ which, under a ruling of the courts, has come to mean ‘to do no harm’. It is, for instance, possible that development that may harm the character of a particular (unlisted) building within a conservation area, may have a neutral effect on the character of the area as a whole, where that character has already been eroded by similar developments, such as modern replacement windows. The interpretation which has been arrived at would seem to be contrary to the original intentions of the legislation.

65 The following additional comments have been made:

- End classification of conservation areas as being outstanding for grant purposes.* Some local authorities would like to retain a classification of conservation areas;
- Introduce grading of conservation areas;
- Introduce protection for setting or the concept of ‘buffer zones’ surrounding conservation areas;
- Tighten controls over demolition within conservation areas and reverse the impact of the Shimizu decision*;² and

- Require design/conservation statements for proposed developments.

* Proposed amendments to the *Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997* contained within the *Planning etc. (Scotland) Bill*.

Dual and overlapping designations: scheduling and listing

66 A good deal of the concern relating to the legislation arises from the relationship between scheduling and listing and how the legislation has been utilised. It cannot, for instance, be immediately apparent why one viaduct is scheduled, and another listed.

67 Despite the separation between the protection systems afforded to monuments and buildings, it is legally possible for a structure to be both a scheduled ancient monument and a listed building and indeed many sites have such a dual designation. In recent years efforts have been made by Historic Scotland to reduce the number of structures subject to dual designations. It is argued, however, that dual designation might still be beneficial in some circumstances. There are sites where it might be important to protect the underlying and surrounding buried archaeology and also any archaeology within the structure. Although scheduling legislation takes precedence, the overlap can be a significant source of confusion and complexity.

68 To some extent dual designation may also occur where the curtilage of a listed country house is protected under the list entry, and also through being part of a designed landscape, or historic garden, in the Inventory.

Historic gardens and designed landscapes

69 The lack of statutory protection for historic gardens and designed landscapes is considered to be a significant gap in the protection of the historic environment.

70 The main means of identifying and protecting historic gardens and designed landscapes in Scotland is through the *Inventory of Gardens and Designed Landscapes in Scotland*. Structures within landscapes can be given statutory protection, either as listed structures, or as lying within the curtilage of a listed building. It has been suggested that old gardens could be scheduled as ancient monuments. Some protection may also be afforded by Tree Preservation Orders. It has also been proposed that designed landscapes could be protected as conservation areas. However, it is generally agreed that none of these mechanisms provide the kind of overall protection or enable the holistic approach which historic gardens and designed landscapes require.

71 The Scottish Inventory which was published in 1987-88 contained 275 sites. Supplementary volumes have taken the total to 346 sites. Progress, however, has been slow, and there is concern that the Inventory is a very partial survey of the existing resource, sometimes based on cursory levels of understanding. There is no statutory responsibility on either Scottish Ministers or SNH to compile or maintain a register. By contrast, English Heritage has a duty under the National Heritage Act 1983 to compile a register of sites.

72 Inventory sites are only afforded a measure of protection under the planning system (sites 'listed' after 1988 are not at present covered by the legislation at all). Furthermore, planning authorities are not required to notify Scottish Ministers or SNH when they are minded to grant consent to

a planning application that affects a 1988 Inventory site (as they are for Category A-listed buildings and scheduled ancient monuments). It is also apparent that the area Inventory format is a constraint and that it would be more effective if sites could be designated on an individual basis. There is no grading system for sites in Scotland, whereas there is in England.

73 It is argued that any legislative protection must be able to take account of the fact that gardens and designed landscapes are often, by their very nature, dynamic and that their management should reflect this important quality.

Battlefields

74 There is considerable concern that no specific statutory protection is afforded to battlefields under UK or Scottish legislation. There are, however, several difficulties in protecting battlefield sites. The major problem is in defining the area which might be protected. For most Scottish battlefield sites there are no visible physical remains and, in many cases, there is not enough evidence to allow the battlefield to be securely delineated on a map. For instance, there are now eight suggested locations for the Battle of Bannockburn, over a wide area subject to constant development pressures.

75 The 1979 Act does not allow the protection of battlefields by scheduling because they do not fall within the definition of 'monument'. Only a few battlefield sites contain upstanding remains which could be scheduled, and these normally comprise only a small part of the site. It has been suggested that battlefields could be designated as conservation areas. To apply this designation, the area of battle would have to be clearly known and would need to include some key elements for understanding its historical character as a battlefield. The evidence suggests that conservation area designation is inappropriate, particularly in view of the

general lack of structural remains, and ineffective. It may be noted that conservation area designation has not been used to protect battlefield sites in England.

76 In England a non-statutory Register of Historic Battlefields was produced in 1995 which identified over forty areas of historic significance in England where important battles took place. Historic Scotland has adopted the position of making nationally consistent information widely available without the creation of a formal register, and has funded the creation of a database of Scottish battlefield sites. An assessment of ‘Scotland’s Historic Fields of Conflict’ has been carried out to assist Historic Scotland to determine the most appropriate management strategies, and to provide guidance to local authorities and others involved in the management of battlefield sites. A fully researched, and updateable, register would be a useful first step to protecting battlefield sites in Scotland through the planning system.

Historic and cultural landscapes

77 There have also been calls to introduce protection for historic or cultural landscapes. Such landscapes may take a variety of forms, and range from archaeological landscapes, for instance field systems or multi-period remains, to landscapes of historical association. Planning guidance refers to the wider historic landscape and implies that it will be identified and protected through the development planning system. However, the consideration given in NPPG18 to the protection of the wider historic landscape is negligible as compared to that of in its English counterpart, *Planning Policy Guidance PPG15*. Moreover, it should be noted that historic landscapes are included in the non-statutory Register of Landscapes, Parks and Gardens for Wales, produced by Cadw.

78 It has been suggested that better or more extensive use could be made of conservation area designation. As has already been noted for battlefields, however,

there are considerable doubts, about the appropriateness of this designation. It may be noted that in the Heritage Protection Review in England, it is proposed that conservation areas should remain as a local designation and should not be included in the unified Register or the statutory definition of an historic asset. On the other hand, areas of historic importance will be recognised as a national designation which would enable a broader, national perspective to be brought to important local areas.

79 There is support in Scotland for an overarching area designation for historic or cultural landscapes. The designation in Sweden of Cultural Heritage Areas might provide one possible model. It has been further suggested that an overarching designation might be linked to the European Landscape Convention of the Council of Europe. As with other heritage assets, the designation might also be graded.

The issue of setting

80 It is claimed that there are adequate legislative powers to protect the setting of ancient monuments, listed buildings and designed landscapes, and that it is the application of these powers which is problematical. However, in the context of the discussions of gardens and landscapes, and of battlefields, but also in respect of other designations, HEACS has heard on several occasions concerns being raised over the inconsistency of the legislation in protecting the setting of sites, or of individual structures or monuments within them. In some instances, the appreciation of the significance of a site may, as in the case of a prehistoric stone alignment, depend on an uninterrupted view of the horizon. The relationship between a building, listed structure or monument, its site, setting, and its relationship with the wider area to which it may continue to make a contribution is rarely enshrined within the legislation. More frequently, it will be reliant on protection through the planning system.

81 Given what may be perceived to be ‘blurred edges’ between protection legislation and guidance through the planning system there have been many instances where an individual structure or monument, while protected adequately by the existing legislation, may be placed at risk by proposed development on an adjoining site. The risk may come, for instance, from the pressures of increased height of adjoining new developments within an individual street or block of a conservation area, or from a new development that may be on the edge of the same conservation area. Gardens and designed landscapes, and battlefields, are categories that have been mentioned as being particularly vulnerable to peripheral development affecting the integrity of the site.

82 It has been argued that the issue of protecting setting has not been developed in the legislative or policy sense. The principle of buffer zones, introduced for World Heritage Sites and operated through partnership agreements, may have a wider application.

World Heritage Sites

83 Attention has been drawn to the fact that no specific statutory protection is afforded to World Heritage Sites under UK or Scottish legislation. The most important elements of each site have been designated as scheduled monuments, listed buildings or conservation areas and are thus protected under the relevant legislation. In addition, world heritage sites enjoy general protection under the planning system. Moreover, a full management plan is required by UNESCO to assist in protecting and, where appropriate, enhancing the quality of each site. Much, however, will depend on the partners of the plan to commit to its delivery.

84 It must be recognised that World Heritage Sites vary considerably in terms of their nature, size, and complexity. Historic Scotland considers that it “would appear difficult to devise legislation appropriate for the great

variety of circumstances and be enforceable. The needs of Edinburgh, which is an organic developing city where change is essential if the city is to thrive, are very different from the conservation requirements of the Orkney site where change is not desirable.” It has been proposed, however, that protection could be strengthened through the introduction of a legal requirement to consider the effects of any planning proposal on a World Heritage Site.

Local authority services

85 Local authority services for archaeology and historic buildings are considered in detail in the HEACS report on the role of local authorities. Here it is intended merely to concentrate on the question for making such services a statutory function.

86 The protection of unscheduled archaeology is provided by the planning legislation and the guidance contained in NPPG 5 and PAN 42. These deal with the handling of archaeological matters in the planning process and emphasise the importance of development plans in protecting archaeological sites and access to a regularly maintained and professionally curated Sites and Monuments Record (SMR). The guidance has played a crucial role in the encouragement of developer funding of archaeology.

87 Professional expertise and an up-to-date record system are seen as essential components of a local authority archaeology service. Indeed, one of most important functions of professional archaeologists in local authorities has been to create and maintain a Sites and Monuments Record as a solid basis for decision making at a local level. Efforts have been made in the past to persuade the Scottish Executive to make SMRs statutory, partly with the aim of filling the gaps in the coverage of SMRs in Scotland. While the gaps have now largely disappeared, it is still held that SMRs are under resourced, and potentially vulnerable. There are also concerns that they vary in quality.

88 The Scottish Executive has held to the view that local authorities should be free to determine their own arrangements and that giving SMRs statutory status would not address the issue. The policy has been to encourage the provision of SMRs through advice and limited, short-term financial support. While the coverage of SMRs has significantly improved, there remain difficulties and in some areas the service is very limited.

89 The move towards managing the historic environment in a more holistic way is matched by the development of Historic Environment Records (HERs) which may cover all aspects of the historic environment, including more ephemeral items such as place-names and traditions. With developments in information technology, there is no need for local records to be stored locally. Indeed, relevant information can be drawn from various sources, the location of which need not be adjacent or apparent to the user. HERs may be provided through pooled arrangements or shared services between local authorities (see HEACS Report on the role of local authorities). Local access to locally-based expertise may be more important than geographical proximity to records in enabling local communities to engage effectively with the historic environment.

General duty of care

90 The introduction of a general duty of care for the historic environment for all public bodies and office holders has been strongly recommended in the HEACS Report on the Role of Local Authorities. The duty should parallel that introduced by the Nature Conservation (Scotland) Act 2004 to further the conservation of biodiversity. It should also be noted that the Planning Bill places a new duty on planning authorities to exercise their development planning functions with the objective of contributing to sustainable development.

91 The statutory requirement should be accompanied by the production of appropriate guidance on how public bodies might implement the duty, and also arrangements for reviewing and reporting. Consideration should also be given to the role of Historic Scotland as lead partner in the delivery of the duty.

Funding

92 HEACS has not paid specific attention to the funding arrangements for the historic environment. However, it should be noted that several proposals were put forward in response to the recent consultation on Historic Environment Grants. These included consolidation of the legislation on funding arrangements and the introduction of a general funding power for the historic environment. Historic Scotland undertook to explore these proposals at the earliest legislative opportunity.

Conclusions to commentary on current legislation

93 The evidence presented to HEACS suggests that the shortcomings of the existing legislation are more fundamental and more wide-ranging than it has been possible to set out here. The historical development of the legislation, with the resulting complexity and compartmentalisation, have made it no longer fit for purpose.

94 From the breadth of the evidence provided, HEACS recognises that current heritage protection legislation has considerable virtues and strengths. Existing legislation has enabled the range of designated and protected heritage assets to be expanded considerably in the last 30 years. There has been already a significant reinterpretation of what should constitute Scotland's 'heritage'. This is to be welcomed: there is no doubt that the current stock of designated assets reflects better the nation's prehistory and history (including its post-industrial history).

95 One set of views holds that the legislation affords adequate protection to the historic environment and could be made to work better than it does, should the will exist. Indeed, it has been suggested to HEACS that neither Scottish Ministers nor local authorities are using the extensive powers of enforcement which they have been given. Accordingly the issues which need to be addressed may not be those concerning the adequacy or otherwise of the legislation, but why it is not being used effectively. Further, the issues which need to be addressed, it has been suggested, are about resources, competence, and the will to implement the legislation. Associated with this approach is an emphasis on the value of identifying and promulgating best practice. It is also suggested that the existing provisions of the legislation could be used more imaginatively, particularly conservation area designations.

96 There is some scope for making improvements within the constraints of the existing legislation. For instance, the listing resurvey of historic buildings could be speeded up; a Register of Historic Battlefields or Fields of Conflict in Scotland could be compiled and referred to in planning guidance; and consideration could be given to restricting the scope of the ecclesiastical exemption to those denominations or faith groups which have a robust internal control system and the capacity to ensure that it is properly monitored.

97 However, a significant number of shortcomings to the legislation have been identified, more in number than have been highlighted in the previous pages. Many of these raise minor issues of procedure or practice but, taken collectively, they represent a powerful argument for change. HEACS is aware that there may be differing views as to the nature of these shortcomings, and how they should be remedied.

98 A number of improvements to the legislation have been suggested to HEACS, which, if implemented, would strengthen the respective roles of Historic Scotland and local authorities in managing the consent systems and would focus properly on national and local responsibilities. Other suggestions are at a more practical level: for example, securing Repairs Notices on the property rather than being charged against the owner would, it has been argued, remove a major impediment to action by local authorities.

99 There is general agreement that the lack of adequate statutory protection for the preservation and enhancement of historic gardens and designed landscapes is held to be a major shortcoming. Similarly there is strong support for the effective protection for battlefield sites. These heritage assets foster strong public interest and engagement, and yet they are not capable of being defined readily within the categories of designations of current legislation.

100 HEACS supports the introduction of a new designation for historic or cultural landscapes for which new legislation would be required. This would be consistent with equivalent designations that exist for the natural environment, and reflect current European thinking. A 'duty of care' is enshrined already in recent legislation for the natural environment, and HEACS has heard compelling arguments in favour of introducing for public bodies a similar requirement for the historic environment.

101 It is not, however, solely a question of measuring the effectiveness of the legislation in terms, for instance, of the numbers of monuments or buildings being 'saved' from unnecessary destruction or irreversible damage. There are questions of whether the legislation is fit for purpose, consistent, easy to use and understand, and how it is perceived by owners of properties, professionals working within the sector, and amenity bodies.

102 HEACS acknowledges that these are difficult questions to address, particularly as a good deal of the evidence is anecdotal. There is a danger, too, that perceptions are coloured by a small number of well-publicised cases. Moreover, to date, changes to the historic environment have not been monitored.

103 The historical development of the legislation has contributed to a separation between the protection systems afforded to monuments and buildings. It has been suggested that this distinction is sharper than in any other European country. The protection system for monuments lies very largely outwith the planning system, while that for buildings and conservation areas is effectively embedded within it. This divide prevents a holistic approach to managing the historic environment. All heritage assets are subject to change and have to be 'managed' to a greater or lesser degree.

104 There is inconsistency in the way in which heritage assets are currently defined. For instance, the application of grading varies from one type of designation to another. There can be confusion even in the minds of experienced practitioners, even, as to why one structure is scheduled and another, apparently identical, listed. Other heritage assets may be subject to dual, or overlapping, designations, again without apparent reason.

105 The consent systems present particular difficulties. The successes of past decades, particularly in terms of managing change or undertaking regeneration projects, have often been achieved with considerable difficulty. The legislation tends to emphasise preservation rather than provide an effective framework by which to manage change. There is a conservation backlog, a general lack of appropriate repair and maintenance, and a failure to use fully the opportunities presented by regeneration.

106 While the legislation rightly gives protection to heritage assets of national importance, it does not protect adequately sites and buildings of regional or local importance which often have significant value and can matter a great deal to local communities.

107 It is recognised that many of these issues are not necessarily directly related to the legislation. They may be about resources, about skills, and commitment – over which reference should be made to the HEACS Report on the role of local authorities. However, the provisions of current legislation are a significant factor in preventing the potential of the historic environment from being realised.

108 There is a need for more clarity and transparency in the decision-making process, particularly in terms of the arrangements for designating heritage assets, and in ensuring a consistency of approach.

OPTIONS APPRAISAL

109 The evidence which HEACS has gathered and examined suggests a range of options for Scottish Ministers to consider. HEACS has identified three main options:

- 1 There is no need for a review. However, Scottish Ministers should identify and address minor shortcomings in the legislation sequentially as the opportunity arises;
- 2 Scottish Ministers should not only identify and address minor shortcomings but should introduce provisions to deal with major issues requiring a legislative solution; or
- 3 Scottish Ministers should set in train a review of the heritage protection legislation with a view to introducing new historic environment legislation.

Consideration of options

Option 1: there is no need for a review. However, Scottish Ministers should identify and address minor shortcomings in the legislation incrementally as the opportunity arises.

110 It is noted that, as a first step, some of these gaps are, for instance, being dealt with by the Planning etc (Scotland) Bill by way of amendments to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

111 Option 1 would, in some respects, be a welcome step. It accepts that the legislation is broadly adequate but seeks to address certain limited shortcomings. However, the number of shortcomings for consideration is extensive, and there remains the task of identifying priorities for change. It would be possible for Scottish Ministers to arrange for the Scottish Law Commission to undertake a thorough examination of the existing legislation, identify

a comprehensive list of gaps, and advise on how these might be closed. But there remains the difficulty of waiting for the next legislative vehicle or opportunity to arise, which cannot always be predicted.

112 Option 1 does not address the more fundamental shortcomings that have been identified and HEACS cannot, therefore, recommend it to Scottish Ministers.

Option 2: Scottish Ministers should not only identify, and address, minor shortcomings, but should introduce provisions to deal with major issues requiring a legislative solution.

113 Under Option 2, Ministers could consider introducing a statutory duty of care for the historic environment to be placed on public bodies, and introducing statutory protection for designed landscapes.

114 Option 2 would introduce a number of improvements for which HEACS believes there is considerable public support. However, it might be justly argued that the introduction of a number of significant new measures should only be undertaken after a strategic assessment had been taken which should include consideration of the capacity of planning authorities to undertake additional responsibilities. This is particularly so given the concerns which have been expressed, and which are encapsulated, in the HEACS Report on the role of local authorities.

115 It would, in any event, be necessary for an exercise to be undertaken to identify gaps in the legislation, as outlined under Option 1. There are strong grounds for arguing that the proper and responsible approach to the implementation of Option 2 would require a thorough review of the legislation to be undertaken beforehand.

Option 3: Scottish Ministers should set in train a review of the heritage protection legislation with a view to introducing new historic environment legislation.

116 Option 3 is put forward on the grounds that the shortcomings of the legislation are of a more fundamental nature. The legislation has grown piecemeal, reflecting its disparate origins, and has reached the stage where it is complex and difficult to understand. It is not easily comprehended by the experienced professional, and it is certainly not easily understood by the developer, the wider community, or by individual property owners. There is not only overlap between the various designations, but there are also significant gaps in the legislation.

117 The Scottish Executive's drive to modernise the planning system provides an essential context for the consideration of the system of protection for the historic environment. The commitments to improve the planning system by strengthening the involvement of communities, speeding up decisions, reflecting local views better, and allowing quicker investment decisions may be applied with equal force to the management of the historic environment which should not be decoupled from the broader changes to the planning system. To break the link runs the risk that the historic environment is regarded as the subject of strongly held preservationist views and always providing a constraint on development. The impression given by the White Paper is that the historic environment is somehow peripheral to the aspirations articulated in the Partnership Agreement and White Paper. HEACS is of the view that this must be remedied.

118 The Heritage Protection Review in England is also of relevance. The challenges faced by local authorities in England appear to be similar to those experienced in Scotland, although greater prominence is given to the historic environment in the regeneration process in England and overall development pressures are probably greater than in Scotland. The absence in Scotland of the essential framework provided by *Power*

of Place, and *The Historic Environment: A Force for Our Future* is a drawback to making comparisons. However, it is reasonable to conclude that the same drivers for a review of the legislation exist in Scotland as they do in England.

119 There can be no doubt that the significant increase in the numbers of designated sites and buildings has put a considerable, and increasing, strain on consent systems. The process of managing the historic environment is of paramount importance, and it is essential that the legislative system makes that process as straightforward as possible.

120 The system should be able to facilitate change, where appropriate, rather than obstruct development. It should be able to unlock the potential of the historic environment and allow it to make a more effective contribution to social and economic regeneration than it does at the present. The historic environment should be a force for bringing communities together, encouraging participation and involvement. Accordingly there is a need for more efficient decision-making, for greater consistency and clarity, and for greater openness and transparency.

Recommendation

121 Having taken evidence, and hearing the views of the historic environment sector in Scotland, HEACS has given careful consideration to the issues. HEACS recommends to Scottish Ministers that a review should be undertaken of heritage legislation protection. The fundamental shortcomings of current legislation can only be addressed through the introduction of new historic environment legislation that will encompass the effective designation of all heritage assets, and which will be fit for purpose for the wider objectives of the Scottish Executive. The historic environment is a key asset. It can indeed make a significant contribution to sustainable economic growth, the building of confident communities, and promotion of social and economic regeneration.

THE REVIEW

122 HEACS takes the opportunity of considering the possible underlying assumptions, aims and scope of the review of the heritage protection legislation.

Context for the review

123 HEACS perceives that the emphasis of current legislation is towards effective protection, while acknowledging this to be one of its strengths. However, allied to its complexity and compartmentalisation, and the fact that it is largely geared towards the designation of individual sites, this does not fully allow the historic environment to be properly valued, nor promote its sustainable management.

124 Specifically current legislation does not enable the historic environment to be viewed as a whole. The legislation should not only afford protection for the historic environment, but also enable its full potential to be realised through the effective management of change.

125 Any proposed change for the management of the historic environment should, where appropriate, be fully integrated with the Scottish Executive's policy for modernising the planning system, and not be set apart from it.

126 HEACS observes that there is a need for the value of the historic environment to be better appreciated; for better engagement by stakeholders, increased public participation, and a more effective partnership approach to the management of the historic environment as a whole.

Scope of the review

127 A review of the legislation should be based on a presumption that the current levels

of protection afforded to heritage assets, from the nationally to the locally significant, would not be diminished in any way. A review would, however, provide an opportunity to examine the many shortcomings of existing legislation that have been identified, and propose possible remedies.

128 Any review must recognise that changes to primary legislation should only form one element in a package of proposals. HEACS recognises that there are issues to be addressed around the deliverability of any proposals. These include the resource implications, including the provision of specialist skills, especially for local authorities, and capacity building for the voluntary sector to enable it to make an effective contribution to the future management of the historic environment.

Suggestions for the review

129 HEACS advocates strongly that a review should include consideration of the introduction a new designation that recognises the significance of historic or cultural areas for which new legislation would be required, and for which there appears to be strong support.

130 A review should consider the benefits of establishing a single designation regime by way of a unified list which would remove overlap and confusion, and be simple to operate, allowing flexibility for legislation appropriate to specific heritage assets.

131 In the interests of improving administrative efficiency and speed of decision-making, and also of simplifying and bringing greater clarity and certainty, the case for introducing a unified consent regime should be developed and considered in the context of wider benefits of reforming the legislation.

132 The case for introducing grading of *all* heritage assets should be considered.

133 Further, the review might address the merits of ensuring that a unified consent system be accompanied by a unified system of financial assistance.

134 A review might also consider ways in which greater openness, transparency, and accountability could be brought to the administrative and decision-making process; HEACS advocates that this should include better appreciation of why an asset is designated.

135 The review should explore the most appropriate levels for decision-making. While appreciating that, for the reasons set out in paragraph 136 below, certain conditions should be in place, there should be a presumption that in the designation of assets national importance should be decided by central government, and local importance by local authorities.

136 Similarly, and subject to the same conditions, decisions relating to consent mechanisms should be taken at the most local administrative level unless there are strong reasons for taking them at a higher level.

137 There would be merit in considering whether there would be benefits in combining cultural and natural heritage protection.

138 HEACS supports the case for introducing a 'duty of care' provision in heritage protection legislation for public bodies, in parallel with recent legislation for the natural environment.

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