

Consultation on The Historic Environment Scotland Act 2014, Etcetera, Secondary Legislation

Scottish Government Response

FOREWORD



I launched this consultation last December in the context of two major initiatives to change how Scotland's historic environment is managed and promoted. Those initiatives comprise Scotland's first-ever Historic Environment Strategy - *Our Place in Time* - and the establishment of a new lead public body, Historic Environment Scotland (HES), to support and enable the delivery of that shared strategic vision, working in collaboration with everyone who cares about Scotland's rich and diverse historic environment.

The Historic Environment Scotland Act 2014, which establishes our new lead body, is now on the statute book. The Chair and Board were appointed in January 2015 and are now meeting regularly in preparation for taking on operational duties on 1 October 2015.

It was great to see the spirit of common purpose and partnership working reflected in responses to this consultation and in discussions with stakeholders during the consultation period. While the new Act has set the framework, I understand how important it is to get the technical details right, and welcome the strong support given for the broad approach and for the draft regulations, as well as the constructive answers to our detailed questions on important matters such as the transitional arrangements for cases already in the system.

This response outlines our thinking on the principal issues raised by respondents.

I am very conscious that we are still on a journey. The necessary Regulations and Orders will soon be in place, but there is more to the task of preparing for the new ways of working which these introduce. That includes the preparation of "easy to use and accessible guidance for those who have to use the system. I have asked Historic Scotland to work closely with all interested parties, especially the staff at our local authorities who deliver so much of the protection for Scotland's historic environment, and to liaise with the Board of HES to ensure that HES,, begins its working life with good working relationships with its partners as well as a solid body of and accessible guidance.

I welcome the widespread agreement that we are changing for the better, but I know that change is never easy. Our shared objective must be to establish the new processes as efficiently as possible, so we can all concentrate on the central task of ensuring Scotland's historic environment is managed and promoted to ensure it is delivering maximum benefit for all.

I would like to thank those who participated in this consultation for sharing their expertise, for their positive engagement and above all for their commitment to the future of Scotland's historic environment.

A handwritten signature in black ink, appearing to read 'Fiona Hyslop'. The signature is written in a cursive, flowing style.

Fiona Hyslop
Cabinet Secretary for Culture, Europe and External Affairs

2 June 2015

CONTENTS

- **INTRODUCTORY COMMENTS**
- **DISCUSSION AND RESPONSES**
- **CONCLUDING COMMENTS**

INTRODUCTORY COMMENTS

This is the Scottish Government's response to the points raised by those who responded to the online public consultation, which ran from 19 December 2014 to 27 March 2015. The consultation paper can be found on the [Scottish Government website](#).

There were 36 responses and those for which permission to publish was received may be read online on the [citizen space website](#).

An analysis of the responses, with numeric data and a summary of key themes and issues raised, will be available on both the Scottish Government and citizen space website.

The consultation also extended beyond the written consultation. During 2014 Scottish Government officials and staff from Historic Scotland held several well-attended workshops with stakeholders, to develop and test proposals prior to the drafting and publication of the written consultation and draft Regulations and contacts will continue in the run-up to the full transfer of responsibilities to the new NDPB, Historic Environment Scotland, on 1 October 2015.

Within Scottish Government, the proposals for secondary legislation have been tested with policy leads for all areas on which they are likely to impact, with the new and revised regulations also having been considered for their consistency with the principles of Better Regulation. A series of Impact Assessments has been undertaken, building upon similar assessments done prior to the submission of the Historic Environment Scotland Bill to Parliament in March 2014.

All of these sources have helped to refine the final drafting of the secondary legislation which is now being laid before Parliament, and which will appear on the Parliament's website.

DISCUSSION OF COMMENTS AND RESPONSES

The structure of this section follows that of the consultation, dealing with the issues raised in the same order as the questions. Where relevant, comments received in relation to other questions have been drawn upon, in the interest of offering a coherent and comprehensive response.

Throughout the paper we refer to the Ancient Monuments and Archaeological Areas Act 1979 as 'the 1979 Act' and the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 as 'the 1997 Act'.

Substantive responses which set out how we intend to address key issues raised in the consultation exercise are set in bold type.

LISTING AND SCHEDULING PROCESSES (QUESTION 1)

The Scottish Government welcomes the widespread agreement (75% of all responses) with the general approach taken in the draft regulations to amending the arrangements in the 1979 Act and the 1997 Act in respect of notification and publication of additions, deletions or amendments to entries in the Schedule and List.

Thoughtful comments reflected on the improved efficiency of the processes, while at the same time highlighting the importance of continued notification of local authorities and the value of engagement before, during and after designation and modification of entries in the Schedule and the List.

We welcome and concur with the emphasis placed upon the ready availability of accurate and up-to-date information about decisions on amendments, additions and deletions, and the need for such information to be made available to all.

Response: We believe that the regulations as drafted secure the necessary changes to scheduling and listing processes appropriately, and have therefore made no significant changes prior to laying before Parliament.

We note the desire for more detail to be made available about administrative and consultative processes around listing and scheduling, especially as regards timing, method, and how decisions are taken on who will be consulted and notified by HES, over and above owners, tenants and occupiers.

Response: We confirm that revised advice and detailed guidance on all aspects of case handling are being prepared and will be made available by Historic Scotland in advance of the transfer of responsibilities to Historic Environment Scotland on 1 October 2015, and further note that Historic Scotland's staff will transfer to HES, ensuring continuity of functions.

We note the desire for greater clarity in terms of designation of Conservation Areas.

Response: We confirm that designation of Conservation Areas remains a matter on which local authorities lead, consulting with HES as required. While Ministers and HES will have the power to designate Conservation Areas, the leadership role of local authorities in this area means it would in general be counter-productive for Ministers to designate a Conservation Area if a local authority does not itself consider that an appropriate course of action.

SCHEDULED MONUMENT CONSENT – GENERAL APPROACH (QUESTION 2)

We welcome the widespread agreement (78% of all responses) with the general approach taken in the draft regulations to amending the arrangements in the 1979 Act in respect of applications for Scheduled Monument Consent (SMC).

Response: We believe that the regulations as drafted secure these matters appropriately, and have not made significant changes prior to laying before Parliament.

We note and agree with the comment that “it is important that individuals and communities are able to access potential changes to treasured heritage assets”, a statement which echoed several other responses. However, despite our general aim of providing consistency across different consenting regimes, we are not persuaded that advertisement in the print media or neighbour notification, analogous to those in place for planning applications, are necessary and proportionate for SMC. This would represent costs which we are not convinced are balanced by benefits, especially since any changes proposed to scheduled monuments which are of sufficient magnitude to impact significantly on neighbouring properties are likely to require planning permission in addition to SMC, which will secure these ends without the need to duplicate the provisions in the SMC regime.

Response: We remain committed to wider public engagement and to online publication, but do not propose to require publication of notifications of applications or consents for SMC in the print media, nor do we propose to introduce a neighbour notification requirement in relation to SMC. The HES website will be the primary vehicle by which these matters are made available to the public.

SCHEDULED MONUMENT CONSENT – PUBLICATION, PARTICULARLY IN RELATION TO PROPERTIES IN CARE (QUESTION 3)

We welcome the very positive reception and supportive comments (80% in favour, none against) to the approach here, which is that HES will be treated in the same way as any external applicant when applying to carry out works at the properties in Ministers’ care which are delegated to HES to conserve, manage and operate, by being required to seek and obtain SMC, with applications and decisions published online.

Response: We believe that the regulations as drafted deal appropriately with publication, for the purpose of achieving transparency in decision-making on SMC, and have not made significant changes prior to laying before Parliament.

A number of issues were raised in relation to publication of SMC applications and decisions and to the scheme of delegation. These are addressed further, above and below respectively.

SCHEDULED MONUMENT CONSENT – ENDING “PROVISIONAL VIEW” (QUESTION 4)

We note that a substantial majority of respondents (58% agreed to 14% who disagreed) supported our view that the new availability of appeals against HES decisions makes the existence of the current administrative arrangement, whereby applicants are given a provisional view on whether or not they are likely to be granted SMC, unnecessary.

Response: Provisional views on SMC will cease to be issued.

However, we take particular note of widespread agreement among respondents that pre-application advice is important for a wide range of reasons, including efficiency, early identification of issues and reaching positive outcomes. We believe several respondents who opposed removing the “provisional view” may have done so on the basis of a misunderstanding, believing that pre-application engagement would cease. This is not the case.

Response: We confirm that pre-application – and post-application but pre-decision – engagement on SMC applications will continue to be carried out by HES.

We note, as with several other areas of the consultation, that respondents expressed a need for clarity regarding operational processes and procedures.

Response: We confirm that revised advice and detailed guidance on all aspects of case handling are being prepared and will be made available by Historic Scotland in advance of the transfer of responsibilities to Historic Environment Scotland on 1 October 2015, and further note that Historic Scotland’s staff will transfer to HES, ensuring continuity of functions.

SCHEDULED MONUMENT CONSENT – NOTIFICATION OF MINISTERS TO ALLOW FOR CONSIDERATION OF THE NEED FOR CALL-IN (QUESTION 5)

We note that the introduction of call-in for SMC was welcomed by stakeholders during the passage of the Bill and in pre-consultation stakeholder meetings. Because this is a new capability, we were particularly interested to learn

stakeholders' views on what criteria for notification would be appropriate, with a view to setting criteria which are effective but proportionate.

Although these criteria will be set out in Directions after the Regulations have completed their passage through Parliament, we are following good practice by setting down here what we intend, at the same time we lay the relevant regulations before Parliament.

Several constructive suggestions were made in response to our proposal that HES might be required to notify Ministers:

- when it intends to grant SMC in circumstances where the decision is likely to represent a significant departure from established policy, and
- where there are other related consent applications, for example planning consent.

Suggested additional/alternative criteria included:

- Scale of the site – including area, cost and complexity
- Condition of the monument – including where consent would allow significant parts of the monument to be irretrievably lost
- Other parties involved - e.g. where there could be a significant departure from established policies of another government agency or local authority or a local development plan, or where there would be potential or actual negative impact on a third party or parties or where considerable public objection to designation is anticipated.
- Where HES is itself the applicant – where HES is in ownership, management control of a monument, or has a controlling interest in an application.

On the other hand, we also note that several respondents suggested the criteria for notification should focus solely on the historic environment dimension, arguing that this was the only aspect on which HES was qualified to make judgements. This would also align with the well-established principle of not duplicating regulatory provisions. That would suggest there is no need to regulate through historic environment provisions in respect of matters which are already dealt with by other consenting regimes.

On balance, we do not feel that the scale, complexity or cost of a project is in itself useful criteria, especially as large projects will in any case tend to require separate planning consent. We also note that relatively small-scale projects can

present policy issues which are equally or more challenging than many large projects.

Finally, we are not convinced that there is merit in requiring the notification to Ministers of all applications where HES is the applicant (where it is managing properties under delegation from Ministers). This would inevitably result in a sizeable number of applications for routine works of maintenance and conservation coming to Ministers with no value added. Instead, we believe that HES should be allowed to deal with these matters on the basis of its in-house expertise, notifying only cases where it is clear that there will be an actual (or perceived) departure from established policy if consent is granted. The commitment already given and noted above, to publish all applications and consents, will afford the opportunity for all interested parties to monitor the even-handedness of the operation of the SMC process.

We therefore believe that the sole criterion for notification should be significant departure from established policy, noting that “established policy” would include a joined-up approach in relation to other consenting regimes, a “level playing-field approach” to SMC and also the point made in relation to significant loss of original fabric.

Response: Once the necessary regulations have been approved by Parliament, we intend to direct that the criterion for notification of SMC decisions by HES to Ministers will be:

- **Significant departure from policy.**

LISTED BUILDING (LBC) AND CONSERVATION AREA CONSENT (CAC) – GENERAL (QUESTION 6)

We welcome the strong support (67% for, 14% against) for the approach set out in the regulations covering applications for Listed Building Consent and Conservation Area Consent, but also take note that a sizeable number of respondents felt that they needed more detail to be able to comment fully, or made their support conditional upon such detail being made available before implementation.

We note that there was particular concern around timescales. These were mentioned both in terms of the potential for the proposals to streamline processing and improve timescales and also in relation to a request for clarity on timescales going forward, in particular around setting response times to local authority consultations. A number of respondents cited SNH’s ‘A Service Statement for

Planning and Development 2012”¹ Annex B as a good example of clear guidance on response times and level of response.

Two respondents queried the scope of the consultation requirement in relation to Conservation Area Consent. We note that Conservation Area Consent, in terms of the relevant legislation, is consent for the demolition of any building in a Conservation Area, and that the regulations as drafted do require consultation of HES on such applications.

Response: We have amended the regulations prior to submission to Parliament to provide more clarity on certain response times.

We confirm that revised advice and detailed guidance on all aspects of case handling are being prepared and will be made available by Historic Scotland in advance of the transfer of responsibilities to Historic Environment Scotland on 1 October 2015, and further note that Historic Scotland’s staff will transfer to HES, ensuring continuity of functions.

Several responses commented on the potential impact on, and interaction with, local authority capacity, though from differing perspectives. We recognise the leading role which local authorities play in this area of work, and note that local authorities, individually and through COSLA, have welcomed in principle the main change in process here. This change, already effected by the HES Act 2014, makes HES a statutory consultation authority.

This means that HES will not be notified once planning authorities are “minded to approve”. As with planning applications, a local authority may be required to notify Ministers at this point. The circumstances in which this is required will be set out in a separate Direction.

Response: We believe that the regulations as drafted set out appropriate arrangements for LBC and CAC, and have not made significant changes prior to laying before Parliament.

¹ Note that SNH issued an updated version of their service statement in late April 2015: [Planning for Development - Our Service Statement](#).

LISTED BUILDING (LBC) AND CONSERVATION AREA CONSENT (CAC) – LOCAL DECISION-MAKING (QUESTION 7)

We welcome the strong support (67% for, 8% against) for the policy intention that Listed Building Consent and Conservation Area Consent decisions should wherever possible be taken locally, making use of local expertise and supporting local decision making.

We take particular note of comments concerning the need to establish an administrative mechanism which can achieve broadly similar efficiencies of handling to the former Removal of Duty to Notify, which for various reasons we are not able to translate directly into a “Removal of Duty to Consult.”

While prepared to accept that such a mechanism was desirable in terms of reducing double-handling, several respondents expressed a desire that it should be transparent. It was recommended by several respondents that the general principle of transparency in decision-making required that any arrangements between HES and local authorities, for example revised Joint Working Agreements, should be published, and should take account of the capacity and availability of expertise within local authorities.

The need for monitoring and reporting on these new procedures was mentioned in a number of comments, as was the need for there to be the ability to review and amend once the new arrangements had been tested in operation.

Response: While this is for Historic Scotland and, in due course, HES to take forward, we confirm that we have advised Historic Scotland and through them, the Board of HES, that we expect any agreements on case handling between HES and local authorities (jointly and individually) to be made public and subject to regular review as regards their effectiveness in delivering appropriate and proportionate regulation.

LISTED BUILDING (LBC) AND CONSERVATION AREA CONSENT (CAC) – ACCESS STATEMENTS (QUESTIONS 8 AND 9)

We sought views on whether or not existing powers to issue regulations relating to the provision of access statements with LBC applications should be activated and, if so, whether a freestanding access statement should be the exception rather than the rule.

We regret that the word “freestanding” caused some confusion. To clarify this, it was our intention to signify a formal, detailed access statement in a separate document

which is required to be submitted along with an application for LBC, as distinct from a more summary statement relating to access contained within such an application.

We welcome support for the established principle that all LBC applications should address access as appropriate, taking account of all relevant legislation and guidance, and note the preference for access statements to be required only on an exceptional basis. As well as thoughtful comments on possible thresholds for such a requirement, we also note comments to the effect that access requirements are more appropriately addressed through planning permission (with reference to Design and Access Statements). This reflects the point about not duplicating consenting regimes, made in another context above.

On balance, we do believe it is important to ensure that every possible avenue is available to local authorities to ensure that access has been properly considered, especially in cases where there is likely to be a significant impact on the nature or extent of access consequent upon works under LBC. This would be especially important where, for whatever reason, the works in question do not require parallel Planning consent.

Response: We will therefore provide in these regulations for access statements to be required in support of LBC applications, but will specify this in a way which allows a proportionate approach and which limits the scope of such statements to the specific works for which LBC is sought.

APPEALS AGAINST LISTING AND SCHEDULING (QUESTION 10)

We welcome the strong support for the introduction of appeals, as provided for in the HES Act 2014. The creation of the right of appeal does, as was recognised and welcomed during the passage of the HES Bill, is enabled by the separation of functions created by the Act, between designating authority and reviewing authority, which was not the case previously.

We noted some concerns in relation to the extent to which appeals are available – both those who felt these were too widely available and those who by contrast felt they should be available to third parties in general.

Response: The question of who would have a right of appeal in this instance was a matter set by the HES Act 2014 after due Parliamentary process and cannot be adjusted by regulations.

We take note of concerns in relation to the role of the Directorate for Planning and Environmental Appeals (DPEA) and the need to ensure the availability of historic environment expertise.

Response: We are satisfied that DPEA will be able properly to address this new demand (and also the new role in relation to SMC appeals, see below). The need for additional resource was foreseen and is included in the Financial Memorandum submitted when the HES Bill was presented to Parliament.

We note that a number of respondents asked for greater clarity on the role of Local Authorities.

Response: We confirm that, while HES will routinely work in collaboration with local authorities in undertaking its listing and scheduling work, local authorities will not have a right of appeal unless the property in question is in the ownership, tenancy or occupation of that authority.

One topic on which comments were made was whether there was a case to be made for exclusions to the right of appeal, so that it would not be possible to appeal against minor or administrative changes, for example a change of address of a listed building due to street renumbering. Several respondents felt that allowing an appeal against the fact of listing to be triggered by minor adjustments to an existing designation was disproportionate.

While this is a reasonable view, we have to recognise that the identifier for what is listed, according to the terms of the 1997 Act, is the statutory address, which makes exempting changes of address challenging in legislative drafting terms.

We would also note that it is already open to an owner, tenant or occupier – or indeed anyone else – to ask for the designated status of a building or monument to be reviewed. We are not convinced that the right of appeal would be regularly used in the way envisaged by some respondents unless HES were perceived not to be taking such requests seriously.

Response: We confirm that pre-designation contact will continue to be made, broadly as at present, with the intention that directly interested parties should not be taken by surprise by a formal notice of listing or scheduling.

APPEALS AGAINST LISTING AND SCHEDULING (QUESTION 11) - GROUNDS FOR APPEAL

There was strong support in the consultation responses for clear and simple grounds of appeal, with which we agree.

Response: The Regulations will make provision for the following grounds to apply:

- **Scheduling - that the monument is not of national importance [for reasons of historic, architectural, traditional, artistic or archaeological interest] and ought to be removed from the Schedule compiled under section 1 of the 1979 Act.**
- **Listing - that the building is not of special architectural or historic interest and ought to be removed from the list compiled or approved under section 1 of the 1997 Act.**

We note that, while most respondents agreed with the principal grounds set out above, some felt that other considerations should be taken into account.

1. The building is so altered as to no longer being of special or historic interest
2. That although the monument is of national importance it can be better protected if not scheduled
3. Recognition of the need for sustainability, ensuring the building has a viable economic future.

However, we are not persuaded that any of these additional grounds is needed, for the following reasons:

1. Extensive alteration would be captured by the general ground set out above.
2. Scheduling is discretionary, and HES can and will take account of such considerations in the course of pre-designation assessment.
3. While modern conservation management practice and decision-making can and does take account of the principles of sustainability, the statutory criteria do not cover this. We believe that the correct approach is to list where the criteria are met and then seek solutions which combine sustainable use and protection of the characteristics of a building for which it is listed, doing so through the consents regime (which already has a right of appeal in place).

Response: We do not propose to add additional grounds for appeal against designation.

APPEAL AGAINST SCHEDULED MONUMENT CONSENT (QUESTION 12)

We welcome the very high level of support for the provisions as set out.

Response: We believe that the regulations as drafted secure these matters appropriately, and do not intend to make significant changes prior to laying before Parliament.

We note that there, while there were a limited number of comments on these proposals, one particular source of concern was the extent to which third parties would have access to appeal, including the suggestion of a community right of appeal.

Response: We note that the questions of who would have a right of appeal in this instance was a matter set by the HES Act 2014 after due Parliamentary process and cannot be adjusted by regulations.

APPEAL AGAINST SCHEDULED MONUMENT ENFORCEMENT NOTICES (QUESTION 13)

We welcome the very strong support for the approach as set out in the draft Regulations for appeals in relation to Scheduled Monument Enforcement Notices,

While we agree with comments received concerning the need for flexibility with regard to timescales, to allow time for HES to consider more complex issues or for third party expertise to be consulted, we would point (as at least one respondent did) to the existence of stop notices as an essential enabling mechanism in addressing this.

We would also observe that Scheduled Monument Enforcement Notices are a relatively new facility (having been introduced only in 2011) and that as yet there is no body of evidence against which to judge their efficacy. So far the potential for their use seems to have had an effect in ensuring compliance, but we are aware of only one Notice having been issued. This suggests that appeals against such Notices are likely to be very rare indeed.

Response: We believe that the regulations as drafted secure these matters appropriately, and do not intend to make significant changes prior to laying before Parliament.

ENVIRONMENTAL IMPACT ASSESSMENT (PLANNING) (QUESTION 14)

We welcome the strong support for removal of the requirement to consult the Scottish Ministers on Environmental Impact Assessment (Planning) and the new requirement to send a copy of the environmental statement to Ministers for information only.

Currently Historic Scotland, as an agency of the Scottish Ministers has in many cases covered the only aspect of Ministers' interest in EIA under the present arrangements, and this will cease when HES takes over this responsibility as a statutory consultee. This change further enhances the separation of the EIA process from government.

After the consultation was issued, it came to our attention – and several respondents also pointed this out – that there are some other aspects of Ministers' interests beside the historic environment covered here – notably in relation to aquaculture.

Response: We have adjusted the amendments to regulations prior to laying before Parliament to ensure that EIA requirements are only changed in respect of historic environment interests.

We also noted a more general concern in relation to the impact of changes to the statutory consultation around EIA, with local authorities having to consult HES rather than the Scottish Ministers, and a number of inquiries about how this will be resourced.

We believe there will be little if any resource consequence for local authorities, since in the large majority of cases these changes will mean the simple replacement of the need to deal with one statutory consultee (the Scottish Ministers) with the need to deal with another (HES). At national level, HES will inherit the staff currently within Historic Scotland who currently deal with such consultations as Scottish Ministers.

Although the specific question in the consultation concentrated on EIA in the context of Planning, the name of HES will also be added as a consultee on a wider range of EIA regulations. Such consultation already takes place, and is serviced by the same staff as it will be in future, so this is not a new burden, merely a change of legal entity. This is being done by consequential and supplementary order. The need and the nature of any changes to EIA regulations will be determined by two factors: the wording of the underlying regulation and the likelihood of historic environment interest arising.

Response: We have brought forward changes to relevant EIA Regulations to ensure that the historic environment interest, formerly secured by Historic Scotland acting as Scottish Ministers, is in future secured by seeking information and advice from HES.

SCHEME OF DELEGATION FOR PROPERTIES IN THE CARE OF MINISTERS (QUESTION 15)

We welcome the comments regarding the scheme of delegation which will set out the terms under which Ministers will delegate their functions in relation to properties in care.

Response: The Scottish Government supports the view, common to most respondents, that robust, transparent arrangements are required to ensure the long term conservation of the properties in care and the provision of public access.

The absence of a published Ministerial acquisitions and disposals policy was a concern for some respondents, as was the lack of a set of strategic priorities for the estate of historic properties. These respondents felt that such a policy and priorities should be created urgently, and should explicitly link to the Historic Environment Strategy for Scotland, *Our Place in Time*². It was felt that there should be wide public consultation before such a policy and set of priorities was finalised and adopted.

We note that respondents were agreed on the vital importance of an effective methodology to quantify the condition of the properties in care at the point of transfer and to allow subsequent changes in condition to be monitored. The importance of an evidence-based asset management strategy was advocated as a way of structuring the requirements placed upon HES (and upon any other body).

Response: We are currently working on developing the scheme of delegation which will take effect from the 1st October 2015. Ministers are committed to ensuring the conservation of all properties in care and to the provision of public access. The scheme will require that HES develop an Asset Management Plan and a robust system for monitoring and reporting on condition. The scheme will state that HES must have regard to the priorities set out in *Our Place in Time*. In addition, the scheme will require that HES operates under a comprehensive set of published policies. The new HES Board are working with HS and RCAHMS to put these arrangements in place, as quickly as possible, building on current operational policy and practice.

It is clear that there is an appetite for more information about what the arrangements will comprise and about when the scheme will be made publicly accessible. Specifically, it was suggested that owners of Guardianship properties should be consulted prior to the scheme taking effect.

² <http://www.gov.scot/Topics/ArtsCultureSport/arts/Historic-environment/Strategy>

Response: The general principles of these arrangements have already been subject to public consultation and to scrutiny by Parliament. The Scottish Government will continue to consult with key stakeholders during the development of the scheme of delegation.

It is not our intention to carry out another formal consultation on a draft scheme of delegation, but concerns raised will be taken into account in the development of the scheme and supporting documents such as the Asset Management Plan and the Acquisitions and Disposals Policy.

We do not consider that individual consultation with owners is necessary as the terms of the 1979 Act give Ministers full control and management of Guardianship sites as well as duties to maintain them and provide public access. These powers and duties are not affected by the arrangements.

It is also apparent that the arrangements for delegation to HES will be a reference for any possible future delegation to other bodies, and that key concerns are generic rather than specific to HES. There were concerns about the suitability of any future body and how their 'competence, resources and financial capability' would be assessed.

Response: No other bodies are currently being considered for delegation, but it is important to be clear that where their functions have been delegated to another body, Ministers remain ultimately responsible for all properties in care and will therefore expect a high standard of care and service from anyone entrusted with carrying out their functions.

In addition, the HES Act requires that Parliament be given the opportunity to scrutinize the suitability of any other body to which Ministers propose to delegate their functions with regards to the properties in care.

TRANSITIONAL ARRANGEMENTS BETWEEN OLD AND NEW SYSTEMS (QUESTIONS 16 AND 17)

Two broad options were offered to test stakeholders' views, both in the written consultation and the wider consultative exercise, we noted markedly stronger support for the option of having the new regulations to apply to cases entering the system on or after 1 October 2015, but with the handling of cases already in the system to be governed by the existing regulations until each case reaches a decision-point. We noted that the alternative, of all cases being migrated to the equivalent handling point in the new system, regardless of what point they have reached in their consideration, was not favoured, for reasons of equity and practicality. It was felt that the disadvantage of having cases operating for some period under two different sets of rules was manageable and would be a problem which rapidly dwindled as cases reached decision points.

With the support of comments received, we were able to reaffirm the general principle for transition, that the transfer of responsibilities to HES should be as

complete as possible and that new procedures should govern all case handling from 1 October onwards, excepting only situations where an immediate change to new process would result in delay, cost or other inconvenience for applicants or others with cases “in the system” at that date.

Response: We have inserted transitional and saving provisions in the orders being laid before Parliament to allow for cases “in the system” on 1 October to continue to a decision under the rules in force at the time they began. Where actions arise from such decisions, for example rights of appeal, we have provided for them to be decided by the new provisions if the action arising is commenced on or after 1 October.

We noted a number of general comments around the importance of clear communication and guidance, with the avoidance of uncertainty being a high priority.

Response: We confirm that revised advice and guidance on all aspects of case handling, including transitional arrangements, are being prepared and will be made available by Historic Scotland in advance of the transfer of responsibilities to Historic Environment Scotland on 1 October 2015. Staff will also work with local authorities and other stakeholders to assist with training and familiarisation around the changed processes.

IMPACT ASSESSMENTS (QUESTIONS 18, 19 AND 20)

An Equalities Impact Assessment (EQIA), a Business and Regulatory Impact Assessment (BRIA) and a Privacy Impact Assessment (PIA) have been undertaken and are being published separately. The secondary legislation has been scoped as not requiring Strategic Environmental Impact Assessment (SEA).

These documents build upon the equivalent Assessments undertaken prior to submission of the HES Bill to Parliament in March 2014, and focus particularly upon how the detailed provisions contained in the draft Statutory Instruments, arising from the Act as passed, have the potential to amplify or modify impacts which were foreseen from the general principles set out at that time.

It should be noted that Impact Assessment is an on-going process, and that the principles of the various assessment regimes will continue to inform the preparation of the suite of advice and operational guidance currently under way.

GUIDANCE (QUESTION 21)

We have given undertakings above in response to the strongly expressed view of all respondents that there is a need for a wide variety of additional advice, information and operational guidance below the level of regulations. Such guidance exists at present and is much used and well-respected.

We fully appreciate that most of those who interface with the system, as applicants or as regulators, work primarily from such materials and not from the primary or secondary legislation.

We note and agree with the desire for clarity, plain English, and simplified online availability going forward, and particularly the widespread view that communication equivalent to Planning Circulars, is needed, as well as more detailed procedural guidance for individual processes.

Response: We confirm that all of the detailed points made by respondents will be taken on board in the preparation of revised advice and guidance on all aspects of case handling which are now being prepared and will be made available in advance of the transfer of responsibilities to Historic Environment Scotland on 1 October 2015.

We note that a number of respondents suggested thorough revisions to current policy documents, including listed building demolition criteria, the Managing Change in the Historic Environment series, and Scottish Historic Environment Policy (SHEP) itself.

Response: We confirm that these wider matters will be fully considered in due course, where appropriate in collaboration with Our Place in Time work streams and also with the input of HES and wider stakeholders. However, the primary objective over the next few months will be to ensure that everything is in hand to support a smooth transfer of operational responsibilities to HES, the widest possible understanding revised processes and that the handling of cases continues with maximum possible efficiency.

OTHER MATTERS (QUESTION 22)

We welcome the comments which were received in the concluding, open, part of the online consultation. In terms of detail, these related almost entirely to matters covered earlier, and have been dealt with above.

The key messages conveyed by respondents in their concluding comments included the importance of publishing and maximum transparency, the need for proportionality in all aspects of regulation and the need to keep all guidance and policy under review. This is a view shared by the Scottish Government.

CONCLUDING COMMENTS

The end of this consultation and the publication of the necessary suite of Regulations and other Orders is a very important step. By establishing Historic Environment Scotland as an NDPB in the processes by which our historic environment is protected and managed, and by introducing more consistency with wider planning practice, the statutory provisions for all who participate or interact with that task will be brought up to date.

It is the spirit in which that task is taken forward which will determine the success of our shared vision. A proportionate, open, collaborative and solutions-focussed approach is vital to success, keeping in mind the collective ambitions we share, and which are set out in [Our Place in Time](#). The key to success, for HES and for the whole sector, will be partnership working and a genuine effort to understand each other's needs and priorities. That applies just as much in dealing with small-scale applications for consent as in considering major conservation or tourism projects, and it applies to all participants.

We now have a shared Strategy, a new national lead body and updated legislation. HES will operate within the framework of the Strategy, including its duties under these Regulations as well as its wider functions under the Historic Environment Scotland Act 2014.

Culture and Historic Environment Division
Scottish Government
June 2015



© Crown copyright 2015

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78544-438-8 (web only)

Published by The Scottish Government, June 2015

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS51274 (06/15)

W W W . G O V . S C O T