

## **ENVIRONMENTAL ASSESSMENT (SCOTLAND) ACT 2005 (asp15)**

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### **EXPLANATORY NOTES**

#### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Environmental Assessment (Scotland) Act 2005 (asp15), which received Royal Assent on 14 December 2005 and came into force on 20 February 2006. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

#### **BACKGROUND**

3. The Act seeks to support the aims set out in the Policy Memorandum through the extension of current environmental protection measures to additional plans, programmes and strategies. Through the Act the aim is to improve protection of the environment, to improve public decision making and in particular to implement the commitment in 'A Partnership for a Better Scotland' to legislate to introduce Strategic Environmental Assessment across the range of all new strategies, plans and programmes developed by the public sector in Scotland. The use of primary legislation has allowed the extension of scope and wider matters to be subject to extensive public consultation and for the importance of the subject matter to be properly reflected. The term Strategic Environmental Assessment is sometimes shortened to SEA or to environmental assessment. The Explanatory Note uses the term environmental assessment.

#### **THE ACT**

4. The purpose of the Act is to introduce an environmental assessment regime for certain plans and programmes.

#### **COMMENTARY ON SECTIONS**

##### **The Main Provisions of the Act**

- **Part 1** of the Act sets out the requirement on Responsible Authorities to secure the carrying out of an environmental assessment on qualifying plans. It defines the term Responsible Authorities for the purposes of the Act, and contains provisions for establishing which plans and programmes should be subject to the assessment process. It also provides that any reference to plans and programmes in the Act includes strategies.
- **Part 2** of the Act sets out the requirements for performing scoping and producing the environmental report. Scoping establishes the subject areas to be included in the environmental assessment report and the degree of detail required in respect

of each subject. Part 2 further sets out requirements for consultation and the taking into account of consultation responses in reaching a final decision to adopt a particular plan or programme.

- **Part 3** of the Act makes provision for the announcement of the adoption of any plan that has been subject to environmental assessment. It sets out the arrangements for the monitoring of the implementation of the plan and requirements for forward monitoring and remedial action in respect of unforeseen effects.
- **Part 4** of the Act makes provisions for the preparation and publication of an annual report to Parliament on Environmental Assessment related activities.
- **Part 5** of the Act makes general provisions for order making powers and commencement of the Act. This part revokes The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (SSI 2004/258) (“the Regulations”).

## **THE ACT – SECTION BY SECTION**

### **PART 1 – ENVIRONMENTAL ASSESSMENT FOR PLANS AND PROGRAMMES**

#### **Section 1 – Requirement for environmental assessment**

5. Section 1 sets out the primary requirement of the Act which is to secure the carrying out of an environmental assessment during the preparation of a qualifying plan or programme. Section 4 identifies which plans and programmes are covered by the provisions of the Act, and section 4(4) provides that the phrase “plans or programmes” includes “strategies”. Section 1 also defines what constitutes an environmental assessment as the preparation of an environmental report, consultation and the taking into account of the report and the results of the consultations in the decision making process. Further provision on the report and consultation is made in sections 14 and 16 respectively.

6. Subsection (1) makes clear that the environmental assessment must be carried out before adoption or before submission to a legislative procedure for adoption of the plan or programme. It is anticipated that “Adoption” may be something as informal as deciding to act on the final plan or programme developed, or it may be more formal, for example, requiring approval under a statutory regime. The expression “submission for adoption through a legislative procedure” is derived from the European Directive 2001/42/EC and will take Directive meaning. It is understood to mean that the finalised plan or programme is submitted to the Scottish Parliament or other legislative body for endorsement. That body will then make the legislation necessary to allow the plan or programme to be carried out. Whether adopted through a legislative procedure, or in a less formal manner, it is intended that the environmental assessment be carried out before the plan or programme is finalised.

7. More than that, the environmental assessment should be carried out as an integral part of the plan and programme development and decision making process. This is implicit in the description of the environmental assessment given in subsection (2). Whilst the steps that form the parts of an assessment can be taken at any time before a plan or programme is adopted, it is expected that the assessment will be integrated into the early stages of the process. Environmental assessment can then be used to enhance the entire process and help to ensure that the best available outcome is achieved.

## **Section 2 – Responsible Authorities**

8. The Act is focussed solely on the public sector, defined in this section “as any person, body or office-holder exercising functions of a public character”. This phrase seeks to capture the full extent of the public sector from central and local government, across the range of public bodies and to those private persons or bodies which perform functions of a public character. This might apply to a private body operating under licence or in accordance with statutory powers. The Responsible Authority is in charge of the qualifying plan or programme and each qualifying plan or programme may only have one Responsible Authority at any one time. Where several authorities have an interest in a particular plan or programme they should agree amongst themselves who should be nominated as the Responsible Authority for that plan or programme. Where agreement cannot be reached, the Scottish Ministers will decide who should be the Responsible Authority.

9. Section 2(4) sets out the public sector bodies to which section 5(4) applies. The bodies listed include most Scottish public sector bodies. Paragraph (f) allows Scottish Ministers to specify further responsible authorities by order. Any additions would be made in respect only of functions of a public character being carried out by a person, body or office holder in Scotland. Any order made by the Scottish Ministers in this respect is subject to annulment in pursuance of a resolution of the Scottish Parliament.

## **Section 3 – Consultation Authorities**

10. The Act provides for named Consultation Authorities to have particular functions at various stages in the assessment procedure. These authorities are listed in section 3 and they are the Scottish Ministers, Scottish Environment Protection Agency and Scottish Natural Heritage. Although the Scottish Ministers are named, in practice, it is expected that Historic Scotland will be the part of the Executive to fulfil the Consultation Authority functions conferred on Scottish Ministers.

11. A Consultation Authority will not perform that statutory role in respect of its own plans and programmes.

## **Section 4 – Plans and programmes**

12. This section describes the plans and programmes, and modifications to them, that are potentially subject to environmental assessment. The plan or programme must relate solely to the whole or any part of Scotland. Those that relate to Scotland and any other part of the UK come within the provisions of The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) (“The UK Regulations”)

13. Section 4 (3) details certain absolute exclusions. These are plans or programmes that relate solely to national defence or civil emergency; finance and budgetary plans or programmes and the specified EU co-financed plans and programmes.

14. As mentioned previously, section 4(4) provides that any reference to plans and programmes in the Act includes strategies.

## **Section 5 – Qualifying plans and programmes**

15. This section describes in detail the plans and programmes to which the provisions of the Act apply and provides that these be called “qualifying plans and programmes”. The Act only applies to plans and programmes for which the first formal preparatory act takes place on or after the coming into force of section 5(1)(a) of the Act, and which are not exempt under sections 7(1) or 8(2).

16. Section 5(2) excludes those parts of plans and programmes that relate to matters that are not of a public character. The intention here is to ensure that the private activities of Responsible Authorities are not affected.

17. Section 5(3) deals with those plans and programmes required by the Directive. Section 5(3)(a) and (b) set out a group of activity areas which, by their nature, mean that plans and programmes relating to them are deemed always to be likely to give rise to significant environmental effects and therefore will always give rise to the requirement to carry out an environmental assessment. Subsection (5) allows Scottish Ministers to amend and update schedule 1 of the Act, to take account of any further amendments that may be made to Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ( “ the EIA Directive ”) on which schedule 1 is largely based. The additions of Motorway service areas and Golf Courses and associated developments are included to be consistent with the provisions of Environmental Impact Assessment (Scotland) Regulations S.I. 1999/1). Any order made in this respect by the Scottish Ministers is subject to annulment in pursuance of a resolution of the Scottish Parliament.

18. Section 5(3)(c) provides that even though a plan or programmes does not fall within sub-paragraph (a) or (b), it is still necessary to consider whether it sets the framework for future development consent of projects. So, for example, a core paths plan would not deal directly with the various categories of plans and programmes set out in schedule 1 to the Act, but it could set the framework for future development consent of those plans and programmes. That being so, the Responsible Authority would then have to determine whether the core paths plan would be likely to have significant environmental effects.

19. Section 5(4) introduces an additional set of plans and programmes that are subject to environmental assessment beyond those set out in section 5(3) and importantly therefore beyond those subject to assessment under existing regulations. Exclusions to this additional set are detailed in section 6. The ‘public’ bodies listed at section 2(4) are the Responsible Authorities for these additional plans and programmes. These bodies will require to apply pre-screening (see paragraphs 20-24) before entering the formal screening stage (see paragraphs 25-26).

## **Section 6 – Types of excluded Plans and programmes**

20. Section 6(1)(a) provides that plans and programmes relating exclusively to individual schools are excluded because it is considered that such developments will have no strategic element to which environmental assessment could be applied and would not be likely to have significant environmental effects. Subsection (2) provides a power to modify section 6(1)(a) should circumstances arise where the exclusion of such plans and programmes, or some of them, from the provisions of the Act is no longer appropriate.

21. Section 6(1)(b) provides powers for the Scottish Ministers to specify further exclusions by order. The intention of section 6(1)(b) is to ensure that it will be possible to exclude certain types of plans and programmes, which are proved, over time, to have no need for an environmental assessment. This will help to ensure that the Act provisions are targeted appropriately at plans and programmes which are likely to have significant effects on the environment. The proposed powers in section 6(1)(b) and (2) are limited by section 6(3) so that they may only be used to exclude plans and programmes under sections 6(1)(a) and 6(1)(b) which, in the opinion of the Scottish Ministers, are likely to have no effect or minimal effect in relation to the environment

### **Section 7 – Exemptions: pre-screening**

22. Section 7 introduces pre-screening but only for plans and programmes referred to in section 5(4)(see paragraph 15). This is essentially an in-house review carried out by the Responsible Authority to determine whether an environmental assessment is required. When exempting a plan or programme at the pre-screening stage, Responsible Authorities are not required to consult formally either the Consultation Authorities or the public.

23. When carrying out a pre-screening the Responsible Authority has to decide whether the plan or programme will have no or minimal environmental effects, in which case they may determine that an environmental assessment is not required. Responsible Authorities are required, by section 7 (2) to apply the schedule 2 criteria in making this determination.

24. Having made a determination the Responsible Authorities must notify the consultation authorities as soon as practicable. The notification should include the title of the plan or programme, the date of the opinion and a brief description of the plan or programme, including the area or location to which the plan relates.

25. Section 7(5) requires Scottish Ministers to ensure the maintenance of a register of the pre-screening notifications made under 7(3). The register of notifications is required to be available for public inspection and may include other information in relation to the plan or programme at the discretion of Scottish Ministers.

26. The intention of the pre-screening provisions is to ensure that the Act is effectively targeted at those plans and programmes which are likely to have significant effects on the environment. It will also reduce administration.

### **Section 8 – Exemptions: screening**

27. Certain plans and programmes as listed in section 8(1) require to undergo a formal screening process to establish whether or not they should be subject to a full environmental assessment. It applies to plans or programmes referred to in section 5(3) which determine the use of small areas at local levels, a minor modification of a plan or programme referred to in section 5(3), a plan or programme described in section 5(3)(c); or a plan referred to in section 5(4) which a responsible authority has decided is not exempt under section 7(1).

28. Section 8(3) provides that the criteria in schedule 2 of the Act have to be applied when making a determination under section 8(1). Where the determination is that the plan or programme is unlikely to have significant environmental effects, then it is exempt from the requirements of the Act (section 8(2)). Reasons must be given for reaching that determination, and those must state how the criteria in schedule 2 were applied to reach that determination.

### **Section 9 – Screening: procedure**

29. For plans and programmes that are subject to the formal screening procedure, section 9 provides that a Responsible Authority submit to the Consultation Authorities a summary of its views as to whether a particular plan or programme is likely to have significant environmental effects. The summary should be prepared with reference to section 8(3) which requires the Responsible Authority to have reached its view by applying the schedule 2 criteria for determining the likely significance of effects on the environment.

30. Section 9(3) provides that the Consultation Authorities shall respond to formal screening submissions within 28 days offering their views as to whether the plan or programme is likely to have significant environmental effects. Where agreement is reached between the Responsible Authority and Consultation Authorities then the Responsible

Authority should make a determination accordingly. Section 9(6) and (7) make provision for any disagreements to be referred to the Scottish Ministers to make a final determination as to whether the plan or programme is likely to have a significant environmental effect.

31. The intention behind the screening provisions is to ensure that due and transparent consideration is given to whether an environmental assessment is required. Moreover, they are designed to ensure that the Act environmental assessment requirements are targeted effectively at plans and programmes that are likely to have significant environmental effects.

#### **Section 10 – Screening: publicity for determinations**

32. Section 10 provides for how Responsible Authorities should publicise their determinations under section 8(1). This includes a requirement to send a copy of the determination (and any statement of reasons under section 8(2)(b)) to the Consultation Authorities and to make those items available to the public in various specified ways.

#### **Section 11 – Directions as regards plans and programmes**

33. Section 11 provides that Scottish Ministers may, at any time, direct a Responsible Authority to send them a plan or programme and on consideration of it direct the Responsible Authority, as appropriate, to either enter the screening process or to carry out an environmental assessment. Section 11 helps facilitate compliance with the Act and should help to ensure that no qualifying plan deemed to have significant environmental effects will proceed without an environmental assessment being carried out.

#### **Section 12 – Restriction on adoption or submission**

34. Section 12 provides that no qualifying plan or programme shall be adopted or submitted to a legislative procedure for adoption until the requirements of the Act have been met. The intention of this provision is to ensure compliance with the requirements of the Act.

#### **Section 13 – Relationship with Community Law requirements**

35. Section 13 provides that the requirements of the Act are without prejudice to any other European Community Law requirements.

### **PART 2 – ENVIRONMENTAL REPORTS AND CONSULTATION**

#### **Section 14 – Preparation of environmental report**

36. This section, along with schedule 3, sets out in detail the nature and content of an environmental report. The report should describe and evaluate the likely significant effects on the environment of the proposed plan or programme and of the alternative approaches considered. Section 14(5) allows Scottish Ministers by order to modify schedule 3. Any order made by the Scottish Ministers in this respect is subject to annulment by resolution of the Scottish Parliament.

#### **Section 15 – Scoping**

37. Section 15 sets out a quality assurance measure referred to as scoping. The Responsible Authority must set out the scope and detail of the information to be included in the environmental report along with the proposed public consultation period. They must then submit this to the Consultation Authorities for their opinions. The Consultation Authorities should respond with their opinions within 5 weeks and Responsible Authorities are bound to take their views into account when preparing, and consulting on, the environmental report. To help ensure the quality of environmental reports and to facilitate compliance with the Act,

Scottish Ministers may adjust the consultation period proposed by the Responsible Authority if they deem it inadequate (section 15(4)).

#### **Section 16 – Consultation procedures**

38. Section 16 sets out the framework for formal consultation with the Consultation Authorities and the public. It is intended that it will help to ensure that all stakeholders can contribute effectively, especially those likely to be affected directly by the plan or programme. Consultation must be sufficiently early in the process to allow for that consultation to be effective.

#### **Section 17 – Account to be taken of environmental report etc.**

39. Section 17 requires that the Responsible Authority takes account of both the environmental report and consultation responses in its preparation of the plan or programme. This includes those resulting from any transboundary consultations undertaken under the Environmental Assessment of Plans and Programmes Regulations 2004 made by the United Kingdom government.

### **PART 3 – POST-ADOPTION PROCEDURES**

#### **Section 18 – Information as to adoption of a qualifying plan or programme**

40. As soon as is reasonably practicable after the adoption of the plan or programme the Responsible Authority must publicise it. This has to include publication in at least one newspaper circulating in the area to which the plan or programme relates. A clear statement explaining why a particular approach was adopted must also be made available. Section 18(3) sets out what this statement should include:- how environmental considerations have been integrated; how the environmental report and consultation responses have been taken into account; the reasons for choosing the selected approach over the alternatives considered; and the arrangements for monitoring the significant environmental effects of the plan or programme.

#### **Section 19 – Monitoring the implementation of qualifying plans and programmes**

41. The Responsible Authority is placed under a duty to monitor the implementation of the plan or programme to identify and address any unforeseen adverse environmental effects.

### **PART 4 – MISCELLANEOUS**

#### **Section 20 – Annual Reports**

42. The Scottish Ministers are required to prepare and publish a report which would include information on any Environmental Assessment related activity they consider appropriate and specifically the exercise of the functions of the Scottish Ministers under this legislation. The report is to be laid before the Scottish Parliament as soon as practicable after the end of years 2006 to 2010. The reporting arrangements will be reviewed following a suitable consultation after the report for 2010 has been published.

### **PART 5 – GENERAL PROVISIONS**

#### **Section 21 – Crown Application**

43. This section makes provision for the Act to bind the Crown.

### **Section 22 & 23 – Orders and Ancillary provision**

44. Section 22 makes provision for the general powers and procedures for orders which may be made under powers conferred by the Act. Section 23 separately gives powers to make subordinate legislation which is incidental, supplemental, consequential, transitional or savings in respect of the provisions of the Act itself. Any order under section 23 which amends primary legislation must follow affirmative procedure.

### **Section 24 – Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004**

45. This section revokes the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (S.S.I. 2004/258). It is intended that the Act will become the implementing legislation for Directive 2001/42/EC of the European Parliament and Council as regards plans and programmes which relate solely to the whole or any part of Scotland.

46. It is also intended that plans and programmes which fall to be dealt with in accordance with the terms of the Regulations while they were in force will continue to be dealt with under the Regulations (see section 23).

### **Sections 25 and 26 – Interpretation, Commencement and short title**

47. Section 25 makes provision for interpretation of the terms “The Directive” and “the public”. It also provides that terms used in the Act which are also used in the Directive will have the meaning in the Act that they have in the Directive unless the context otherwise requires.

48. Section 26 provides that, except for sections 21, 22, 23, 25 and 26, the provisions of the Act come into force on a date or dates set by the Scottish Ministers by order. Sections 21, 22, 23, 25 and 26 will come into force on Royal Assent.

## **SCHEDULES**

### **Schedule 1 – Projects**

49. This schedule lists the projects referred to at 5(3)(a)(ii). The schedule largely lists Annexes I and II of the EIA Directive. This is done for the convenience of the reader and removes need to constantly cross refer to other legislation.

### **Schedule 2 – Criteria for determining likely significance of effects on the environment**

50. This schedule sets out the detailed criteria for establishing the likely significance of effects on the environment. The intention of this schedule is to assist Responsible Authorities in their determinations as to whether an environmental assessment is required and to facilitate the transparency, consistency and quality of those determinations.

### **Schedule 3 – Information for Environmental Reports**

51. This schedule sets out in detail the information required to be included in Environmental Reports.

## PARLIAMENTARY HISTORY OF THE ENVIRONMENTAL ASSESSMENT (SCOTLAND) ACT 2005

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place; the references to the Official Report of those proceedings; and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports	References
<b><i>Introduction</i></b>	
2 March 2005	
<b><i>Stage 1</i></b>	
<i>(a) Finance Committee</i>	
11 <sup>th</sup> Meeting 2005	<a href="#">19th April 2005, Cols. 2484 - 2496</a>
12 <sup>th</sup> Meeting 2005	<a href="#">26th April 2005, Cols. 2511 - 2512</a>
13 <sup>th</sup> Meeting 2005	<a href="#">10<sup>th</sup> May 2005</a>
<i>(b) Environment and Rural Development Committee</i>	
11 <sup>th</sup> Meeting 2005	<a href="#">20<sup>th</sup> April 2005, Cols. 1773 - 1802</a>
12 <sup>th</sup> Meeting 2005	<a href="#">27<sup>th</sup> April 2005, Cols. 1810 - 1844</a>
13 <sup>th</sup> Meeting 2005	<a href="#">11<sup>th</sup> May 2005, Cols. 1845 - 1860</a>
14 <sup>th</sup> Meeting 2005	<a href="#">18<sup>th</sup> May 2005, Cols. 1882</a>
15 <sup>th</sup> Meeting 2005	<a href="#">25<sup>th</sup> May 2005, Cols. 1942</a>
16 <sup>th</sup> Meeting 2005	<a href="#">1<sup>st</sup> June 2005</a>
<i>(c) Subordinate Legislation Committee</i>	
13 <sup>th</sup> Meeting 2005	<a href="#">26<sup>th</sup> April 2005, Cols. 995 - 998</a>
14 <sup>th</sup> Meeting 2005	<a href="#">3<sup>rd</sup> May 2005, Cols. 1005</a>
Report (Environmental and Rural Development Committee)	<a href="#">7<sup>th</sup> June 2005</a>
<b><i>Stage 2</i></b>	
<i>Environment and Rural Development Committee</i>	
22 <sup>nd</sup> Meeting 2005	<a href="#">14<sup>th</sup> September 2005, Cols. 2142 - 2183</a>

*These documents relate to the Environmental Assessment (Scotland) Act 2005 (asp 15)  
which received Royal Assent on 14 December 2005*

<b><i>Stage 3</i></b>	
Parliament	<a href="#">9 November 2005</a>
Bill Passed	<a href="#">9 November 2005</a>

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