

# Final Business and Regulatory Impact Assessment

**Title of Proposal**

Historic Environment Scotland Act 2014 – Secondary Legislation

## Scope

This BRIA focusses on the impact of new regulations and other orders which will be required to complete the detail of changes to the processes of historic environment management arising from the Historic Environment Scotland Act 2014. The Bill for that Act was itself subjected to BRIA.

A public consultation exercise, including an online survey and meetings with stakeholder grouping, took place between 19 December 2014 and 27 March 2015. As well as consulting on draft regulations, the consultation also sought views on the principles of change in relation to transitional arrangements and discussed necessary consequential changes (naming the new body in place of, or alongside, the Scottish Ministers in a range of other legislation dealing with consultation and corporate standards).

Partly as a result of consultation responses, the final package of regulations is slightly different from the drafts, while additional orders will provide for consequential changes. All of the instruments are being laid at the same time, and this BRIA touches as appropriate on matters dealt with by the whole package of instruments.

Draft orders consulted upon:

- The Scheduled Monument (Notification and Publication) (Scotland) Regulations 2015
- The Listed Buildings (Notification and Publication) (Scotland) Regulations 2015
- The Scheduled Monuments (Applications for Scheduled Monument Consent) (Scotland) Regulations 2015
- The Planning (Listed Building Consent and Conservation Area Consent Procedure) (Scotland) Regulations 2015
- The Town and Country Planning (General) (Scotland) Regulations 2015
- The Scheduled Monuments (Appeal) (Scotland) Regulations 2015
- The Town and Country Planning (Appeals) (Scotland) Amendment Regulations 2015
- The Scheduled Monuments (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Scotland) Regulations 2015
- The Town and Country Planning (Determination of Appeals by Appointed Persons)(Prescribed Classes)(Scotland) Amendment Regulations 2015

## **Purpose and intended effect**

### **1. Background**

The Historic Environment Scotland Act gained Royal Assent on 9 December 2014 and establishes Historic Environment Scotland (HES) as a new Non Departmental Public Body which will take over the functions of Historic Scotland and RCAHMS.

In addition to changes to legislation reflecting HES' role and legal status, the Act changes processes for the designation of sites and buildings (by scheduling and listing) and for scheduled monuments, listed building consent and conservation area consent, and creating new rights of appeal against certain HES decisions.

HES will be a statutory consultee in relation to listed building and conservation area consents and also in relation to Environmental Impact Assessment. The specific details of how these processes work will have a direct impact on a wide range of people including owners of scheduled monuments and listed buildings, planning authorities and heritage professionals.

The overall approach to legislative change seeks to further streamline the system, aligning scheduled monument, listed building and planning systems where possible while retaining the same level of protection for our valuable historic environment. The approach also seeks to improve transparency through new requirements for notification and publication. In many cases this is how Historic Scotland already operates, but including these requirements in Regulations demonstrates the commitment of this Government, and Historic Environment Scotland to transparency and access to information.

In the draft Regulations, several revised or wholly new administrative arrangements are set out that come within the scope of this assessment. These include:

- The designation of listed buildings and scheduled monuments and amendments to existing designations (existing process revised)
- Applications for Scheduled Monument Consent (existing process revised)
- Applications for Listed Building Consent or Conservation Area Consent (existing process revised)
- Appeals against designation decisions (new)
- Appeals against Scheduled Monument Consent decisions and/or conditions (new)

### **2. Objectives**

The high-level objectives of the HES Act include:

- Ensuring that the new body is adequately empowered to ensure the celebration and protection of the historic environment
- Improving and simplify the delivery of public services, better aligning designations and statutory consents processes than at present
- Providing a clearly defined basis for historic environment regulation that adds value and transparency to the planning system and benefits the widest possible range of stakeholders
- Ensuring that the new body is a capable and competent partner for other decision-

makers, empowering them to make locally relevant decisions.

To that end, the Act provides for new and revised secondary legislation, in the form of Regulations. It is those Regulations which form the subject of this Assessment.

### **3. Rationale**

Scottish Government's key strategic drivers form the basis for assessing the impact of these proposed regulations. Those drivers include:

*Sustainability of functions and organisational resilience* - against a backdrop of challenging government and local authority funding. This will require the new organisation to develop operating models and procedures that make the most effective use of skills, expertise and resources as well as maximising the potential for alternative sources of income.

*The public service reform agenda* – the merger has provided an opportunity to streamline historic environment regulation and the new body will be subject to the Regulators Code of Practice.

*The review of Scotland's Historic Environment Policy* – which has led to the creation of an overall strategic framework for the first time, within which the new body will operate, providing leadership and supporting delivery of the strategy.

*The creation of a new body* – these regulations both require and reflect a fundamental review at the functions, skills and expertise available to the new body, considering how they might best be deployed and developed to deliver an exciting and effective vision for the historic environment.

The proposed regulations are also intended to support delivery of wider Scottish Government priorities including:

*Placemaking* - the historic environment provides a rich seam of inspiration for the placemaking agenda of today and into the future. These regulations have the potential to provide greater clarity and accessibility on the handling of the historic environment for stakeholders working in the architecture and built environment sectors.

*Culture and heritage* - contributing to Ministers' ambitions for Scotland's culture and heritage, which supports telling the story of Scotland and for Scotland and drives a collective ownership of arts, culture, creativity and heritage by individuals and communities and a growth in heritage tourism.

The desired outcomes from the creation of the new public body will support delivery of several of the Scottish Government's National Outcomes as set out in the National Performance Framework. In particular the merger will assist in the delivery of the following outcomes:

- Outcome 3. We are better educated, more skilled and more successful, renowned for our research and innovation
- Outcome 10. We live in well-designed, sustainable places where we are able to access the amenities and services we need
- Outcome 11. We have strong, resilient and supportive communities where people

take responsibility for their own actions and how they affect others

- Outcome 12. We value and enjoy our built and natural environment and protect it and enhance it for future generations
- Outcome 13. We take pride in a strong, fair and inclusive national identity
- Outcome 16. Our public services are high quality, continually improving, efficient and responsive to local people's needs

## **Consultation**

### **1. Within Scottish Government**

Consultations during the preparation of these Regulations have been held with the following areas of Scottish Government and key Agencies:

- Culture and Historic Environment Division
- Planning and Architecture Division
- Natural Resources Division
- Enterprise and Cities Division
- Transport Scotland (in relation to EIA only)
- Historic Scotland/RCAHMS

These partners have contributed to this analysis of the potential impacts of the proposed Regulations by ensure that they are either consistent with existing practice, or if different, do not have potential for adverse impacts on the business and regulatory activities in the areas on which they lead.

### **2. With Business interests**

Stakeholder workshops were held in the latter part of 2014 and included attendees from a number of business groups and interested individuals. Their contributions to the outcomes of these workshops have been taken into account in the proposed regulations. Key participants in these workshops included the Royal Institution of Chartered Surveyors, RTPI Scotland and the Law Society of Scotland.

While business groups (including professional groups) were somewhat under-represented in the written responses to the public consultation, despite efforts to encourage companies and bodies who have been active in projects with a strong historic environment content, those responses which were received were helpful in ensuring that the interests of the business community were not overlooked. The significant contributors to the consultation responses in this respect included the Law Society of Scotland, the Royal Incorporation of Architects in Scotland, and GVA Grimley

### **3. With Planning Authority partners**

Stakeholder workshops were held including attendees from several Planning Authorities, particularly including those who deal with historic environment regulatory casework. COSLA and HOPS (Heads of Planning Scotland) have provided particularly helpful advice, and will continue to be consulted during the consultation period. The outcomes of these workshops has been taken into account in the draft regulations, and a wider cohort of Planning Authority partners responded to the consultation regarding the impact of secondary regulation, including most of Scotland's larger local authorities and a number of smaller ones.

## Options for drafting the Regulations

### 1. Options

In terms of the five new or revised arrangements set out above and the sectors and groups that would be affected, a range of options was considered that could be used as models for drafting Regulations. These included:

1. maintaining existing administrative arrangements and not revising any element of the associated Regulations – the ‘do nothing’ option, or
2. altering the existing administrative arrangements without reference to stakeholders, and consulting on these only once the Regulations had been drafted, or
3. consulting with stakeholders prior to drafting and then conducting the public consultation exercise to establish what elements of those arrangements were viable, and what elements would need to be changed to satisfactorily deliver the intended outcomes.

Option 1 (‘do nothing’) was considered not viable for any of the new or revised arrangements, as it would not ensure that Scottish Ministers’ responsibilities for the historic environment were transferred to HES, would not provide an adequate right of appeal for applicants, owners or occupiers, and would preserve the status quo for planning authorities, owners and occupiers rather than offering any positive benefits.

Option 2 was considered not viable on the basis that Scottish Ministers have a commitment to working closely with key stakeholders to ensure that new Regulations do not adversely impact on their business requirements.

Option 3 was considered to offer positive benefits through ensuring that proposed changes to the Regulations benefited from assessment of feedback from key stakeholders, as well as promoting early familiarity with the fact and broad direction of changes to come. No negative effects were identified with this option, and this option has determined the subsequent approach to the Regulations.

### 2. Sectors and groups affected

The key sectors and groups that may be affected by these proposed changes would be:

- *Owners, tenants and occupiers of listed buildings and scheduled monuments* – this includes private landowners and occupiers, the business sector, local authorities and government bodies.
- *Planning Authorities* – this includes the 32 Councils and the 2 National Park Authorities
- *Applicants for Listed Building Consent, Conservation Area Consent and Scheduled Monument Consent* – this includes local authorities, the business sector (including developers), public and Government bodies including HES (as it will not be exempt from the need to obtain formal consents) and private individuals or groups.
- *Third parties with an interest in consent applications relating to the historic environment* – this includes groups such as landowners’ associations (whose

members may wish to make, or be affected by a consent application), professional groups (who may be interested in the general policy aims or, as project partners, in the detailed operation of all aspects of the heritage management system) and voluntary or community groups (who may have views on proposals, and may increasingly become applicants).

### **3. Benefits**

The overall approach has been to streamline the system, and in particular to simplify the scheduled monument and listed building systems and adjust these so as to align more closely with each other and, where appropriate and possible, the wider planning system. This offers a positive benefit in terms of time-saving and access for all stakeholders while retaining the same level of protection that is presently available. Increased transparency and accessibility is also proposed for the processes of designation, consents and appeals, and this should also see qualitative gains for all stakeholders.

*Owners and occupiers of listed buildings and scheduled monuments* – The proposed right of appeal against a decision to list or schedule an asset eases potential burdens on these groups, with the introduction of a formal right of appeal against a decision to designate offering further reassurance that such designations will be soundly based. The new right of appeal will serve as a last resort and will not replace existing arrangements for pre-notification dialogue. This change also means that action in the Courts will no longer be the sole resort of an appellant to the process, and this should have a slight positive financial impact on those who are unhappy with designation decisions, as well as minimising the risk of inconsistent decision-making in the first place.

Changes to Scheduled Monument Enforcement Notice process would mean that appeals would now be made to Ministers rather than to the Sherriff, which aligns with appeals against Listed Building Enforcement Notices and the wider planning system, ensuring consistency of approach for these groups. This can be characterised as having a neutral or slightly positive impact.

The regulations make provision for a less proscriptive and onerous listed building consent process in terms of notification, varying consents and discharge of conditions. The likely impact of this change on these groups would be slightly positive.

Presently, Historic Scotland has 28 days to respond to a notification by a planning authority of an intention to grant Listed Building or Conservation Area Consent. The proposed regulations should substantially reduce this period, as the earlier involvement of HES in the application process, at consultation stage, should mean that the key issues are identified and resolved earlier.

*Planning Authorities* – The proposed changes would see planning authorities consulting HES on Listed Building Consent applications at the outset of the application process, rather than once the authority has reached a provisional view. This front-loads the process, ensuring that HES can add value at an early stage in the application. This brings Listed Building Consent more broadly into line with the wider planning process, and potentially reduces decision-making timescales for the planning authority.

Once the changeover is made, this is likely to produce a neutral change for planning

authorities, but with potentially higher value being added in contentious cases. Presently, Historic Scotland has 28 days to respond to a notification by a planning authority of an intention to grant consent. The arrangements set out in the regulations should substantially reduce this period, as the earlier involvement of HES in the application process should mean that the key issues have been identified and resolved in a shorter timeframe. This has a potentially positive impact for planning authorities. Where the applicant for Listed Building Consent is the planning authority, the streamlining of the application process noted above potentially represents a slightly positive benefit.

*Applicants for Listed Building Consent and Conservation Area Consent* – Applicants for Listed Building Consent and Conservation Area Consent should benefit as a result of the clarity afforded by more considered involvement by HES at an earlier stage, and by the potentially reduced timescales that would result. Presently, Historic Scotland has 28 days to respond to a notification by a planning authority of an intention to grant consent. The proposed regulations should substantially reduce this period, as the earlier involvement of HES in the application process should mean that the key issues have been identified and resolved in a shorter timeframe. Shortening of the time from applications to decision should have a potential positive impact for applicants, following the truism that in development, and business more generally, “time is money”.

*Applicants for Scheduled Monument Consent (SMC)* - Applicants for SMC should benefit through the removal of the provisional view stage, which simplifies and streamlines the decision-making process. Existing pre-application dialogue will be maintained. Publication of SMC application materials and decision notices online would help to ensure clarity for applicants and their agents on the progress of an application, and the availability of access to decisions on previous cases will provide a useful library of precedent for applicants to consider when preparing their own applications, thus representing a slight positive benefit. As the new body will not have Crown Immunity, this means that the process by which HES applies for SMC will precisely mirror that for all other parties and, and HES own applications and related decisions would now be published to ensure full transparency, thus offering reassurance regarding the even-handedness of the regulatory process

*Third parties with an interest in consent applications relating to the historic environment* – The new body will publish online applications and decisions (appropriately redacted for personal information) and handling reports, which will allow wider scrutiny and understanding of the operation of the system overall and make available details of the nature of the works being applied for or consented. The introduction of this procedure would largely mirror the types of online portals already deployed by planning authorities. This change would amend the present situation where application material may not be easily made available to third parties, allowing for representations (but not appeals) to be made to HES. HES, as a responsible public authority, would be required to consider such representations. This may be considered as a slightly positive impact on this group.

#### **4. Costs**

The overall cost implications of the proposed regulations and changes to existing regulations were outlined in the Financial Memorandum

([http://www.scottish.parliament.uk/S4\\_Bills/Historic%20Environment%20\(Scotland\)%20Bill/b47s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Historic%20Environment%20(Scotland)%20Bill/b47s4-introd-en.pdf)) accompanying the primary legislation creating the new body. This predicted (at paragraphs 86 and 87) that local authorities and other stakeholders will not face additional costs, and that longer-term changes (particularly to the LBC process) will



create potential savings through efficiencies in the regulatory process. Consultation with key stakeholders as part of this exercise confirms that this remains the case, provided that HES provides adequate supporting guidance to enable a smooth transition to the new arrangements.

### **Scottish Firms Impact Test**

Consultation with business groups has taken place prior to the consultation period, and there has been some helpful stakeholder liaison (particularly with the Law Society of Scotland) in parallel with the public consultation.

The development sector, tourism and land managers were identified as key stakeholders, but apart from the tourism sector, it has proven hard to maintain contacts with the business community generally. From tourism there was a relatively good level of contact with those who run historic properties as visitor attractions, including the National Trust for Scotland and the Historic Houses Association in Scotland, the lead body for private owners. Scottish Land and Estates also offered comments.

Consultation responses received from business sector groups included representatives of the property, land management and legal sectors, but despite efforts to publicise the consultation and the coming changes, only one development company responded. These responses did not identify any potential adverse impacts on business. In general, it was considered that the changes would be slightly positive, with a small proportion of respondents considering that the changes would be of a neutral nature.

Potential uncertainty for the business sector in the delivery of the regulatory functions of HES was identified as a risk. However, it was generally considered that this would be mitigated as long as the new body places an emphasis on disseminating information on the proposed changes through enhanced guidance, and on a proportionate approach to the needs of the business sector. As HES will be a named body under the Regulatory Reform (Scotland) Act 2014, and will follow the *Scottish Regulators Strategic Code of Practice*, these expectations require to be fulfilled as part of the normal operations of the new body.

Overall, it is therefore considered that the proposed regulations would have a slightly positive impact on business groups.

### **Competition Assessment**

In the light of the answer to the Scottish Firms Impact Test above and using the Competition & Markets Authority Competition Filter questions as well as consultation responses from business sector groups, it is considered that there is unlikely to be any adverse impact on the competitiveness of firms in Scotland, and we predict a slightly positive effect. HES will be a named body in the *Scottish Regulators Strategic Code of Practice*, and adherence to this will require on-going review of the impacts its regulatory activities on the competitiveness of Scottish businesses.

### **Test run of business forms**

For most of the statutory functions of the new body, no wholly new forms will be introduced, as existing forms would receive new corporate branding, headers and footers but would be otherwise unchanged. These forms have already been tested as part of assessment of Historic Scotland's on-going assessment of its regulatory functions. As the changes now being made are very minor, it is not proposed to test these forms with

business stakeholders.

The exception to this will be the introduction of new forms to cover appeals to designation decisions, Scheduled Monument Consent and Scheduled Monument Enforcement Notices. While these are currently being developed, it is certainly possible to confirm at this date that they will follow the general layout and formatting of existing forms. HES will test specific forms with a sample of business stakeholders, particularly those who engaged with the consultation process.

### **Legal Aid Impact Test**

It is probable that the effect of the new regulations would be to reduce the potential numbers of legal appeals against designation of assets through provision of an appeal process to Ministers, thereby reducing the likelihood of an appeal to the Courts. This potentially reduces calls on the Fund. The potential impact of this change is positive in this respect, but legal challenges are at present extremely rare.

In terms of appeals against statutory consents, the proposed regulations reflect present arrangements, so no additional impact on the Legal Aid Fund is predicted for such processes.

Appeals against Scheduled Monument Enforcement Notices would also be to Ministers rather than to the Courts, which again implies a reduced likelihood of calls on the Fund, giving a positive impact in this respect but noting, once again, that legal challenges to such an order are, so far as we are aware, unprecedented.

### **Enforcement, sanctions and monitoring**

The proposed regulations will not alter the fundamental legal requirements in relation to the listing and scheduling functions, although there some proposed changes to the way in which these are managed. HES will be the regulator in relation to scheduled monuments, while local authorities will continue as the lead regulators in respect of listed buildings and conservation areas. It is proposed that Joint Working Agreements with planning authorities will be revised to ensure that the status quo is maintained in terms of a clear understanding of respective roles.

The changes in other regulations, including around planning and environmental assessment, will primarily impact on the Scottish Government and HES. Since HES will inherit the staff resource currently working on these areas in Historic Scotland “as Scottish Ministers”, the changes should be minimally visible to users, including owners and developers who are applying for various consents and approvals.

The right of appeal for Scheduled Monument Enforcement Notices to Ministers rather than to the Sheriff means that the process now more closely aligns with appeals against Listed Building Enforcement Notices and the wider planning system, and has potentially lesser cost implications. It provides a separation between HES as regulator and Ministers as the appeal body which has not previously been available

As noted above, HES will be a named body in relation to the *Scottish Regulators Strategic Code of Practice*, and will therefore have a responsibility to fulfil the duties of Ministers to continually improve the delivery of regulation, in line with the Regulatory Reform (Scotland) Act 2014.

Ministers are empowered under the Historic Environment Scotland Act 2014 to direct HES, and these powers are sufficiently flexible to ensure that any issue unforeseen in the above arrangements can be addressed.

### **Implementation and delivery plan**

The regulations will take effect on October 1, 2015. The public portal which will publish the applications to and decisions of the new body will also go online on that date. Transitional arrangements for applications made prior to that period will have been provided, to ensure that applicants are not disadvantaged. Partners in local authorities (and particularly in relation to Listed Building Consent and Conservation Area Consent applications) will have been briefed on the implications of the new regulations well before that date.

HES must comply with the *Scottish Regulators Strategic Code of Practice*, and in particular with Section 5(5) of the Regulatory Reform (Scotland) Act 2014 which emphasises that regulators must take account of the Code's provisions in terms of developing policies, principles, standards and guidance. This includes those guidance notes for the new regulations that will be produced for stakeholders.

### **Post-implementation review**

The effectiveness, transparency and of historic environment legislation including these regulations will be regularly scrutinised as part of the new body's on-going adherence to the *Scottish Regulators Strategic Code of Practice*.

Historic Scotland already submits an annual Planning Performance Report to SG Planning and Architecture Division regarding its fulfilment of statutory duties, and this reporting would be continued by HES.

The Board of HES will report annually to Ministers on their performance, which will include their satisfactory performance of these obligations.

### **Summary and recommendation**

This Business and Regulatory Impact Assessment concludes that, in following the third option of those considered, that of involving stakeholders as fully as possible in the design of the package of secondary legislation, it has been possible to offer assurance that :

- The secondary legislation will have no significant adverse impacts on the activities of business groups in Scotland
- The secondary legislation will have the potential for a slightly positive impact on the work of business groups and local authorities
- The proposed practical implementation of the secondary legislation would be robust and can be delivered without significant impact on the resources of either HES or local authority partners
- The implementation of the proposed secondary legislation, including its impacts on business, will be adequately monitored by HES and by Scottish Government.

This assessment is recommended for Cabinet Secretary clearance and submission, in support of Secondary Legislation for the Historic Environment Scotland Act 2014.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

2 June 2015

FIONA HYSLOP

Cabinet Secretary for Culture, Europe and External Affairs

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