

POLICY NOTE

THE HISTORIC ENVIRONMENT SCOTLAND ACT 2014 (ANCILLARY PROVISION) ORDER 2015

SSI 2015/xxx

The above instrument was made in exercise of the powers conferred by section 27(1) of the Historic Environment Scotland Act 2014 (“the 2014 Act”) and section 7 of the Regulatory Reform (Scotland) Act 2014. The instrument is subject to affirmative procedure

Policy Objectives

The purpose of this instrument is to make changes to primary legislation in consequence of provisions of the 2014 Act. The 2014 Act establishes a new lead body for the historic environment in Scotland, Historic Environment Scotland (“HES”). The 2014 Act confers functions in relation to the historic environment currently carried out by Historic Scotland for Scottish Ministers and the Royal Commission on Ancient and Historical Monuments for Scotland (“RCAHMS”) on HES. Historic Scotland and RCAHMS will cease to exist. The effect of the modifications is to ensure HES is named as a body to be consulted, or subject to legislative requirements, where currently such requirements rest upon either the Scottish Ministers, Historic Scotland or RCAHMS. The Order also makes transitional and saving provision in relation to certain of those changes.

These changes reflect the status of HES as a Non-Departmental Public Body, in contrast to the status of Historic Scotland which, as an Executive Agency of Scottish Government, acts in the name of, and is subject to requirements applying to, the Scottish Ministers.

The Order, from its date in force of 1 October 2015, will have the following effect –

Article 2 of the Order amends sections 91(4) and 151(1) of the Roads (Scotland) Act 1984 (“the 1984 Act”). The amendment to section 91(4) requires HES, rather than the Scottish Ministers, to consent in respect of proposals by a roads authority to undertake works in relation to securing road safety where the works would affect a wall (or retaining wall) forming part of an ancient monument or other object of archaeological interest.

Section 151(1) of the 1984 Act makes provision in respect of interpretation. Article 2(3) of the Order amends the interpretation provision so that the reference to Historic Scotland in the definition of “consultation bodies” is changed to refer to HES, to include HES in the procedures relating to the publication and notification of information on the likely environmental effects of certain trunk road projects.

Article 2(4) of the Order specifies the transitional arrangements in respect of the change to the section 91(4) of the 1984 Act. It makes it clear that the modification that section does not affect the validity of any consent given under that section before 1st October 2015.

Article 2(5) and (6) ensure that where, before the 1st October 2015, the Scottish Ministers have already given consultation bodies the opportunity to express an opinion in respect of the environmental assessment of certain road construction projects under section 20A(6) or certain road improvement projects under section 55A(6), then HES is not to be treated as a consultation body. The purpose of this provision is to avoid any double handling of cases which are well advanced as at 1st October 2015 (the date HES assumes its new responsibilities).

Article 3(1) of the Order amends section 35(3)(a) of the Building (Scotland) Act 2003 (“the 2003 Act”) to require HES, rather than the Scottish Ministers, to be consulted before a local authority serves a range of notices (a building regulations compliance notice; a continuing requirement enforcement notice; a building warrant enforcement notice; a defective building notice or a dangerous building notice, requiring a person to carry out any work (including demolition) in relation to a building) or where the local authority carries out works in relation to dangerous buildings, where the building in question is–

- a scheduled monument,
- a listed building,
- subject to a building preservation notice under section 3 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”), or
- covered by the terms of section 66 of the 1997 Act (control of demolition in conservation areas).

Article 3(2) makes saving provision in respect of the change. Where the Scottish Ministers have already been consulted by a local authority before 1st October 2015, there is no need to consult HES. The purpose of this provision is to avoid any double handling or delay in cases in hand at the date HES assumes its new responsibilities.

Section 29(2) of the Land Reform (Scotland) Act 2003 is amended by article 4 of the Order to refer to HES rather than the Scottish Ministers, allowing HES, rather than the Scottish Ministers, to put up and maintain notices for the purposes of protecting the cultural heritage of land in respect of which access rights under the 2003 Act are exercisable. Such notices might, for example, request that members of the public follow a particular route to avoid damage to features of historic environment interest.

Section 3(1) of the Environmental Assessment (Scotland) Act 2005 (“the 2005 Act”) is amended by article 5(1) of the Order to name HES, rather than the Scottish Ministers, as a consultation authority. This gives HES similar status to the other consultation authorities, Scottish Natural Heritage and the Scottish Environment Protection Agency under the 2005 Act. Under the 2005 Act, the consultation authorities have particular functions at various stages in the environmental assessment procedure in relation to certain plans and programmes.

Article 5(2) makes savings provision in respect of that change. For cases where the necessary details in respect of screening under section 9 or scoping under section 15 of the 2005 Act have already been sent to the Scottish Ministers before 10th October 2015 there is no need to send such details to HES. The purpose of this provision is to avoid the requirement for information to be sent afresh to HES, with resulting delay in reaching a screening or scoping decision.

Article 6(1) of the Order amends paragraph 5(2) of schedule 5 (HMO amenity notices: enforcement etc. listed buildings) to the Housing (Scotland) Act 2006 to require HES, rather than the Scottish Ministers, to be consulted when a local authority intends to carry out works and recover costs where an owner has failed to comply with a HMO amenity notice and where the building in question is a listed building, is subject to a building preservation notice under section 3 of the 1997 Act, or is covered by section 66 of the 1997 Act (control of demolition in conservation areas).

In respect of this change saving provision is contained in article 6(2) of the Order to the effect that where a local authority has already consulted the Scottish Ministers before 1st October 2015 there is no need to consult HES. The purpose of this provision is to ensure that consultation does not need to be undertaken afresh, avoiding unnecessary delay or the uncertainty which might arise from a change of procedure during handling.

It is important to note, in respect of all transitional provisions outlined above, that the staff of Historic Scotland will transfer to HES on 1st October 2015. The implication of this is that advice or decisions made before and after the date on which the changes made by this Order come into effect – 1 October 2015 – would be consistent in respect of cases in hand, so that any requirement to consult afresh with HES or to notify HES would serve no useful purpose, and would introduce delay and potential expense.

The changes to the Procurement Reform (Scotland) Act 2014 and the Regulatory Reform (Scotland) Act 2014 made by articles 7 and 8 of the Order have the purpose of securing good practice by HES in respect of procurement and regulatory activities respectively.

The Procurement Reform (Scotland) Act 2014 is amended at Part 3 of the schedule to the Act to add HES to the list of contracting authorities subject to the terms of that Act. The reference to the Royal Commission on the Ancient and Historical Monuments of Scotland in that list is removed.

The Regulatory Reform (Scotland) Act 2014 is amended at schedule 1 to add HES to the list of regulators subject to the terms of Part 1 of the Act. This places HES on the same footing as other environmental regulators, for example the Scottish Environment Protection Agency.

Consultation

A public consultation on the Historic Environment Scotland Bill took place in the summer of 2013, and a second consultation focussing more closely on changes to regulatory arrangements took place in the winter of 2014-2015

Both consultations made clear the intention that HES would, wherever appropriate, take over consultation and other functions which are currently conducted in the name of the Scottish Ministers by Historic Scotland. It was made clear at the same time that HES would inherit the staff of Historic Scotland (and of RCAHMS), which constitute the primary resource required to undertake these functions.

There were no objections to this approach in either consultation exercise, with respondents generally welcoming the commitment to continuity thus provided.

The more recent consultation sought views on the most efficient transitional arrangements. There was general support for the position (reflected in this Order) that, where Scottish Ministers have been involved in a process through Historic Scotland before 1st October then there is no need to duplicate that involvement with HES once it comes into operation.

Impact Assessments

No additional Equalities Impact Assessment (EQIA) has been carried out for this order, as the changes it brings about are essentially transfers of responsibility for processes which will otherwise continue unchanged. The EQIA carried out for the 2014 Act included consideration of the effects of this general category of change.

HES has already been added to the list of bodies subject to the public sector equality duty, which will require it to take account of equalities in undertaking all of its functions, including those given to it under this order, and to report on its performance in this respect.

Financial Effects

No specific additional Business and Regulatory Impact Assessment (BRIA) has been completed for this order, but the impact of the transfer of Ministerial functions to HES was considered in principle during the BRIA carried out for the 2014 Act, which found that there would be no financial impact.

The transitional arrangements set out in this order have been informed by the recent consultation on regulatory arrangements, in which there was general support for the position (reflected in this Order) that, where Scottish Ministers have been involved in a process through Historic Scotland before 1st October, then there is no need to duplicate that involvement with HES once it comes into operation.

The Cabinet Secretary for Culture, Europe and External Affairs has confirmed that no additional BRIA is necessary as the instrument has no financial effects on the Scottish Government beyond what was foreseen in the Financial Memorandum to the HES Bill, and none to local government or business.

Scottish Government
Culture, Europe and External Affairs Directorate

15 May 2015