Scottish Parliament, Education and Culture Committee call for evidence

Historic Environment Scotland Bill

1. Introduction

The National Trust for Scotland was founded in 1931 to harness the energies of the people of Scotland in helping conserve our places of historic interest and natural beauty. Over the decades, the NTS has grown to be Scotland’s largest conservation movement and membership organisation, with more than 320,000 members. As an independent charity the Trust now owns and manages 129 visited properties on behalf of the nation, and manages a further 400 Conservation Agreements. Our staff, volunteers and members provide public benefit through conserving, providing access and supporting learning and enjoyment.

Our ambitions extend beyond our own estate: from the time of our foundation the NTS has taken an interest in how well Scotland as a whole manages to conserve and enjoy our common heritage, as well as exercising conservation agreements on places owned by others.

The Scottish Government’s proposal to merge the Royal Commission on the Ancient and Historical Monuments of Scotland with its executive agency Historic Scotland to create a non-departmental public body therefore interests us on a number of levels: on the impact it may have on our own efforts on behalf of the nation, on the changes it may bring to the wider heritage sector, and the effect on Scotland’s heritage.

2. Overview

The Scottish Government’s Historic Environment Scotland bill proposes to create a new non-departmental public body to advise on issues affecting the historic environment, to fund activities supporting its conservation, and to act as a regulator. In all these regards, what is being proposed for the historic environment is an analogue of what already exists for the natural environment in the form of Scottish Natural Heritage.

It is also proposed to transfer responsibility for the management of the Scottish Government’s Properties in Care to the new body. This would make HES both an operator and a regulator, creating potential conflicts of interest.

In creating the new body, the Royal Commission will be brought to a close and its staff and collections transferred. The Royal Commission has been an important centre of excellence in surveying and recording Scotland’s historic environment for over a century and holds an unparalleled archive of photographs, maps, drawings and documents related to Scotland’s historic environment.

These issues, of regulation, of the future of the Royal Commission, and of caring for properties in the guardianship of the state are present across the United Kingdom, and each country has sought its own resolution of these:
Scotland – merge state heritage body with Royal Commission, combine regulatory and operator roles, propose potential charitable status is sought.

England - merge state heritage body with Royal Commission, separate regulatory and operator roles, expect charitable status is sought.

Wales – retain Royal Commission as a centre of excellence, retain state heritage body in central government

The proposed resolution for Scotland is closest to the English model, though with no separation of regulator and operator.

In the remainder of this document we set out our thoughts on the current proposals. In Section 3 we set out our own thoughts on how the proposed bill may affect the sector, and in Section 4 we address the specific questions posed by the Education and Culture Committee in the call for evidence.

3. Main issues

This section discusses in more depth a number of issues raised by the form of the proposed merger, providing context for our answers to the Committee’s questions in Section 4. The issues covered are:

- Regulatory role
- The role of RCAHMS
- Properties in Care
- Charitable status
- Fundraising

Regulatory role

Of all the roles currently performed by Historic Scotland, including advice, education, skills development, and property management, the most important is its regulatory role. Other organisations, including charities, universities or private enterprises can fulfill all of these other functions, but cannot be the central resource for regulation of activities affecting the historic environment. It is therefore imperative that the creation of a new organisation sustains and, if possible, enhances, this role.

In this regard, the separation of the policy-making function (now carried forward by the Historic Environment Policy Unit) and the regulator function should also be considered.

Placing the regulatory role inside an organisation whose financial sustainability will depend on its performance in visitor management and, over time, on fundraising may not be the most sustainable option. As sponsor, the Scottish Government may need to ring-fence the regulatory role in its funding arrangements with the new body.

The combination of regulator and operator in the one organisation also has implications for any future fundraising from private donors, whether as a charity or simply as a government agency. In making policy for the built environment, and with the power to call in (or not) specific developments, the new body cannot be perceived to be influenced by seeking or accepting donations from vested interests. Even where no conflict of interest takes place, the perception of undue influence could be damaging.

It is notable that in pursuing its own ambition to establish English Heritage as a charitable body, better able to raise funds for its property operations, the Department for Culture, Media and Sport has determined that the regulatory role must be carried out by a separate organisation as:
We would therefore recommend the Committee test whether the proposed model is the one best fitted to ensure effective and credible regulation for the historic environment, while continuing the important work of Historic Scotland and RCAHMS.

Role of RCAHMS

The Royal Commission has been a mainstay of historic conservation in Scotland for many decades, and its excellence in surveying and recording is recognised across the sector. In England, the Royal Commission on the Historical Monuments of England was merged with English Heritage in 1999. In retrospect, this merger was considered by many observers to have resulted in the loss over time of valuable experience. In separate communications with NTS, the Scottish Government has committed to learn from this experience. The creation of a new national strategy (“Our Place in Time”) the use of founding legislation to underpin the merger, and a comprehensive merger of teams and roles at an early date are argued to mitigate such losses in Scotland.

In Wales, the Welsh Government proposed merging the Royal Commission on Ancient and Historical Monuments of Wales with Cadw but, following consultation, it was decided to retain the two organisations as they were, for the time being. The Minister for Culture & Sport justified this decision on the basis that: “This avoids the financial costs, organisational risks and disruption to the sector at a time when public resources are scarce.”

Properties in Care – guardianship vs ownership

Scottish Government ministers are currently responsible for 344 historic properties. Of these, the vast majority (263) are the property of private owners. These are managed under guardianship agreements between the owner and the state, with the state as guardian of last resort committing to maintain and repair the properties.

The remaining Properties in Care are a mix of those owned by the Scottish Government (74), leased (6) or held under a memorandum of understanding (1). The Scottish Government’s proposal is therefore not to transfer management responsibility of only those properties owned by the government, but also those where the contracting parties are ministers and the private owners. The proposed transfer may be to HES or to any other third party. In our view, and that of our legal advisors, the bill will override the contractual position to enable delegation to take place.

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1 Department for Culture, Media & Sport (2013) “English Heritage New Model consultation”, page 15
2 Ibid. page 10
3 Ibid. Page 13
4 Welsh Government (January 2014) Minister announces new strategic approach for Welsh heritage
5 These powers are set out in the Ancient Monuments and Archaeological Areas Act 1979
In transferring these responsibilities, the liability for the maintenance of these properties, both those owned and in guardianship, will remain with ministers. The cost of maintaining these properties, and any backlog in repairs, is not currently known by the Scottish Government. For comparison, the NTS with 129 visited properties (which includes areas of natural beauty as well as historic properties) has recently estimated that it needs to increase its spend on conservation care by £46 million over the next decade. In England, English Heritage is to spend £52 million clearing its highest priority conservation backlog, with the remaining outstanding conservation works to be carried out as part of a regular four-year cycle.

Quantifying the scale of the underspend within the Properties in Care, is an urgent task for Historic Scotland and its successor. Without it there are the risks that:

- Ministerial commitments to maintain the condition of these properties will not be recognised and met by the operator.
- The operator will prioritise short-term income generation and spend (e.g. on visitor experience) without addressing the conservation backlog.
- The arrangement will result in unfair competition with the new state-sponsored operator free to “sweat the assets”, the liability remaining with the owner and ministers, while managers of other historic properties have to make provision for the long-term maintenance of their own assets.

To date, there has been no consultation with the owners of properties in guardianship as to how the proposed delegation would work or whether it would be an acceptable implementation of the guardianship agreement that was entered into, and which did not allow for transfer to third parties. We would therefore recommend that a consultation period is built into the legislation prior to transfer of responsibilities.

Bundling the management of the Properties in Care with the regulatory, funding and advisory roles also poses a management challenge. The Properties in Care are the largest spending department with the largest numbers of staff, and also the greatest immediate liabilities in terms of public health and safety. They can therefore be expected to demand the greatest amount of management attention, potentially at the expense of the regulatory and advisory role.

**Charitable status**

The declared motive for seeking charitable status for the new organisation is to improve its financial position, including rate relief and increasing donor support. Historically, charities have been composed of private individuals banding together for the common good. The public has recognised their value by granting exemptions (and applying restrictions) to encourage and direct their work.

As a state body, with both secure tax-payer funding as well as privileged access to government ministers and other government departments, there is a risk that the state charity does not operate on a level playing-field and squeezes out the voluntary sector.

For example, the NTS, as with other charities is limited by HMRC rules on the amount of benefit it can give to a member. We would look to the Scottish Government to ensure that a state charity would also be bound by the same rules as the voluntary sector in the amount of benefit that can be given to members.

In England, the expectation is that English Heritage, following its move to becoming a charity, will over time become entirely self-supporting. While the current Scottish administration is not proposing such a move, the proposed framework would lend itself to a similar move in future. The relative size of these two organisations should also be borne in mind. Historic Scotland operates 344 properties, compared to only 384 for English
Heritage covering a much larger country and population. With more than 3 million visitors to its properties, anchored by more than 1.3 million to Edinburgh Castle alone, Historic Scotland is already Scotland's largest historic heritage operator.

In proposing that HES may become a state charity, the parallel is made with the National Collections (e.g. National Library, National Galleries, etc.) but again the relative scale needs to be considered. The proposed new body would be more than twice as large as any of the National Collections, and in terms of expenditure is more readily comparable with its fellow regulators SNH and SEPA (which are not state charities).

Table: Comparison of state charities (SC) and regulators

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Estimated annual expenditure</th>
<th>Estimated staff complement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal Commission on the Ancient and Historical Monuments of Scotland (SC)</td>
<td>£6.5 million</td>
<td>110</td>
</tr>
<tr>
<td>National Galleries of Scotland (SC)</td>
<td>£23.5 million</td>
<td>256</td>
</tr>
<tr>
<td>National Library of Scotland (SC)</td>
<td>£19 million</td>
<td>340</td>
</tr>
<tr>
<td>National Records of Scotland (SC)</td>
<td>£20.2 million</td>
<td>407</td>
</tr>
<tr>
<td>National Museums Scotland (SC)</td>
<td>£31 million</td>
<td>430</td>
</tr>
<tr>
<td>Scottish Natural Heritage</td>
<td>£53.7 million</td>
<td>773</td>
</tr>
<tr>
<td>Historic Scotland</td>
<td>£77.9 million</td>
<td>1,100</td>
</tr>
<tr>
<td>Scottish Environment Protection Agency</td>
<td>£77.6 million</td>
<td>1,200</td>
</tr>
</tbody>
</table>

In discussions with the Scottish Government we have argued that there is a potential risk to the voluntary sector, and this has been recognised in part in the policy memorandum for the bill. We would ask the Committee to consider not just how the organisation will immediately affect the wider sector as a non-departmental public body, but also how the possible addition of charitable status to these legislative and organisational powers may affect the sector, and whether protections should be put in place in the legislation.

Fundraising

The historic environment, while contributing greatly to our identity, to and social and economic activities, can be expensive to maintain. Owners of historic properties, whether government, private individuals and companies, or community bodies must continually find funds to maintain their assets.

One of the motivations in creating a new body, and in preparing it to potentially acquire charitable status, is to improve the funding situation for central government activities. Both predecessor organisations have suffered budget falls in recent years, at more than the general level of decline in public spending. Drawing on Scottish Government projections, we estimate that RCAHMS has seen a 29% decline in government support (from £5.8 million in 2006-07 to £4.5 million in 2011-12) while Historic Scotland has experienced a 27% drop (from a high point of £51.7 million in 2008-09 to £37.8 million in 2013-14).

The potential impact on the voluntary sector of a new state body seeking to sustain itself, at least in part, through charitable fundraising has not been estimated by the Scottish Government. Fundraising could occur either as at present through a dedicated charitable vehicle such as the Historic Scotland Foundation, or, as envisaged by the policy memorandum, by the organisation applying to become a charity in its own right.

We estimate that the readily identifiable pool of charitable giving to the historic environment in Scotland is around £26 million a year (and most likely a little larger once smaller organisations are included). On this basis,
assuming it could be done, then reversing a £15.2 million reduction in government support would have an enormous impact on the wider sector.

4. Education and Culture Committee questions

In this section we provide answers to the Education and Culture Committee’s specific questions.

**Question 1: How will the creation of Historic Environment Scotland help to improve the overall management and promotion of Scotland’s historic environment? Will it help to make Scotland’s historic environment more attractive to communities, families and tourists?**

The historic environment in Scotland is extensive, some 8,000 scheduled monuments, 28 nationally important battlefields, 390 nationally significant gardens and designed landscapes, and 47,600 listed buildings (of which 3,800 are of the highest standard), and these are only the designated sites and properties. Historic Environment Scotland is expected to manage directly 344 of these properties. Its major impact on the historic environment will therefore need to come from its regulatory role, from providing advice, and from encouraging a culture that values our historic heritage across Government and society.

The test of the new organisation will be the extent to which it will be able to build on the regulatory and advisory functions of Historic Scotland, and the survey and recording functions of RCAHMS.

**2. Are the functions proposed for Historic Environment Scotland the correct ones or are there any omissions? Are the outcomes expected of the new body ambitious enough or could they be strengthened?**

**Functions** - The functions proposed carry over the responsibilities of Historic Scotland and RCAHMS, and it is important for the sector that these be continued. There is a question as to whether all of these functions will sit comfortably within a single organisation. As discussed in Section 3, potential issues such as disproportionate attention to Properties in Care or the combination of regulatory and charitable fundraising roles, may mean a separation of functions would be a superior organisational design.

**Outcomes** - The bill and accompanying policy memorandum do not set out outcomes for the new organisation, and we would expect these to appear in the corporate plan for the new body. We would look for the new body to contribute to the outcomes set for the Historic Environment strategy – yet to be developed – and to the relevant National Performance Indicators, including: Improve the state of Scotland’s historic sites; Increase cultural engagement; Improve people’s perceptions of their neighbourhood; and Improve Scotland’s reputation.

**3. Does the Bill establish a clear and appropriate relationship between Historic Environment Scotland and all other public and private bodies with an interest in Scotland’s historic environment?**

In our view, no, not at present. Two specific issues present themselves.

Firstly, the role of the new body in relation to the Properties in Care and the responsibilities of ministers. This is discussed in more detail in Section 4 above, but briefly there are a number of potential conflicts created by the current proposals, and which will have to be mitigated through an appropriate scheme of delegation.

We would also recommend that those parties affected by the proposed changes, the owners of the properties in care, are consulted on these arrangements.

Secondly, as a regulatory authority, the relationship between HES and Scotland’s local authorities will be a critical one. As the new body will be providing for the historic environment what Scottish Natural Heritage already provides for the natural environment, we would recommend that the bill incorporate similar provisions.
4. In what ways will the Bill help you/ your organisation to better manage and promote Scotland’s historic environment?

The impact on our own organisation, and on the public benefits we seek to deliver, will depend on whether the new body operates on a level playing-field, or whether the combination of functions (regulator, operator, funder, charitable fundraiser etc.) creates a destabilising presence in the sector.

We are therefore looking to the Scottish Parliament to deliver legislation that meets the Scottish Government’s aspirations to create a combined body that can help deliver the historic environment strategy, and which does so in a way that is complementary to non-governmental efforts.

5. Are there any areas of the Bill that you consider could be strengthened or improved?

In its current form, we consider there are a number of areas that could be developed:

**Definition** – one of the strengths of the Historic Environment Strategy is agreement on a common definition of what constitutes the historic environment. This should be incorporated into the bill in the same way as the definition of the natural environment is incorporated into the founding Act for Scottish Natural Heritage.

This would provide equivalent weight to the value of the historic environment and make clear the demarcation between these bodies in areas where there is potential overlap, e.g. on landscape policy.

**Role in relation to local authorities** – the main impact HES will have on the historic environment in Scotland will be through developing and overseeing the regulatory regime, and which will largely be executed by local authorities. By comparison with the legislation for SNH and SEPA, the proposed bill provides less detail on how this relationship is expected to work. By not defining roles and responsibilities at this stage, there is a risk that burdens will not be shared or properly addressed. The Institute for Historic Building Conservation has recently been conducting research on capacity and skills within local authorities, and this can be reviewed by the Committee.

The regulatory role in general hinges largely on the line of text in Section 2 (2) (d) “protecting and managing the historic environment.” We would like to see this more fully developed. For example, there is no reference to HES taking on the role of Scottish ministers in protecting the historic environment in Strategic Environmental Assessments, as set out in Part 1, Section 2 of the Environmental Assessment (Scotland) Act 2005.

Overall, we would recommend that the Committee assess how the proposed changes will work alongside the planning system.

**Sustainable development** – the legislation for the partner regulators, SNH and SEPA, both contain requirements for the regulator to have regard to sustainable development in exercising its functions. This should be included in the legislation for HES to balance social, economic and environmental concerns.

**Delegation** – the proposal to delegate Properties in Care (whether owned by the state or by private individuals) creates potential liabilities for the public, and may result in unfair competition for other operators in the sector. The bill should balance the power to delegate this function with an explicit requirement that the managing agent maintain the property in good condition and keep the guardian and owners informed of condition.

**Operating principles** – the current proposal is to combine an operator, regulator, funder, and advisory role in a single organisation creating, in our view, the potential for conflicts of interest. The Scottish Government has sought to provide assurances of mitigation in the policy memorandum, and we would hope that these are carried over into the first corporate plan. Short of an organisational redesign, the strongest protection that can be provided for the sector would be to embed the principles of collaboration and transparency in the legislation. There is ample precedent in this in the founding legislation for both SNH and SEPA where these regulators are required to have due regard to their impact on other interests.
The Scottish Government is proposing to continue subsidising HES, which as the dominant historic heritage operator in Scotland, means it will be free to seek to maximise visitor income, while not needing to meet the same costs as other operators. Embedding the principle of collaboration into the new body’s direction is therefore essential.

6. Do you consider that the Bill’s Policy Memorandum adequately sets out: the Bill’s policy objectives; whether alternative ways of meeting the objectives were considered; the consultation undertaken on the objectives; the Bill’s effects on equal opportunities, human rights, island communities, local government and sustainable development?

Policy objectives – the policy memorandum sets out a comprehensive and useful overview of the objectives and how the new body is expected to operate. We would encourage the Committee to consider how some of these commitments could be better incorporated in the text of the bill.

Alternative ways of meeting the objectives – separation of the regulatory role from the operator role, the main source of potential conflict of interest, is not considered in the policy memorandum and was not specifically addressed in the consultations. The separation of the policy making function from Historic Scotland (now embodied in the Historic Environment Policy Unit in the Scottish Government) and the example of separating operator from regulator in England, shows that alternative approaches are possible, beyond combining all functions in a single organisation.

Consultation – a number of consultations have informed the current bill. We would observe that only RCAHMS was the subject of a review to evaluate its role and functions, and that the design of HES would have benefitted from a parallel review of Historic Scotland.

In 2012, the review of RCAHMS tested three options: status quo, a merger with Historic Scotland as an executive agency of the civil service, and RCAHMS to be reformed as a Non Departmental Public Body. The review gathered views via an online survey and found that of 38 respondents, 7 wanted no change, 25 wanted changes to RCAHMS operations, 4 wanted a merger with Historic Scotland, and 2 to divide RCAHMS’s functions.

Built Environment Forum Scotland held a workshop in parallel with this review, where delegates were asked to vote on options. At this workshop, out of 30 respondents, 7 voted for no change, 20 for RCAHMS to become a public body with a wider remit, and three “don’t knows.” The option to merge with Historic Scotland received no votes.

The second consultation came in July 2013. At this point the Scottish Government had already determined that their preferred course of action was: “to merge Historic Scotland and The Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) to establish a new Executive Non Departmental Public Body (NDPB) and that provisions should be made to allow the new body to apply to the Office of the Scottish Charities Regulator (OSCR) to become a registered charity.” The consultation therefore focused on the detail of how this would be implemented, rather than whether a merger between RCAHMS and HS was the best option, or whether other options should be considered.

In our view, it would have been preferable to have developed the sector strategy first, and then determined what institutional arrangements could best deliver national ambitions, rather than running these two exercises separately.

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7 Built Environment Forum Scotland (February 2012) BEFS Workshop Report: RCAHMS Options Appraisal
7. The Scottish Government’s newly published historic environment strategy also seeks to improve enjoyment and understanding of Scotland's historic environment. The Committee does not wish to repeat the extensive consultation undertaken on the strategy, but would welcome your views on whether it and the Bill together:

- establish clearly who is responsible and accountable for delivering the strategy;
- will involve appropriately all those public and private bodies with a role in improving the historic environment;
- How will the Strategy lead to demonstrably better access to, and enjoyment and management of, the historic environment?

Responsibility and accountability - The new strategy is a work in progress. It sets out a vision for the sector, but has not yet identified specific actions, who will be responsible for these or how they will be resourced. Developing the strategy to this level of detail will be a task for the sector as a whole, and work is already underway to do this. NTS is contributing to two of the current working groups.

We expect that a programme of priorities, actions and responsibilities will emerge from this joint work.

Involvement – the final membership of the strategy board has yet to be announced, but we anticipate it will have good representation on the public and voluntary side. The challenge for the sector as a whole is that most of the ownership of the historic environment is in private hands and, as a very large and diverse population, there are more difficulties in securing representation for these interests.

Performance – One of the current working groups is concerned with performance measurement and is assessing what would be useful to measure and how it can be measured. Combined with the strategy board developing targets for the strategy, we would expect a framework for demonstrating improvement to emerge over the next year.

5. Conclusion

At this stage, in considering the general principles behind the bill, we would ask the Committee members to satisfy themselves that:

- The needs of the historic environment in Scotland, its conservation, enhancement and enjoyment are best served by the proposed model, particularly the continuation of Historic Scotland’s regulatory role and the survey and recording functions of RCAHMS.
- The design of the new body is sound in principle – combining regulatory, funding and operating roles – and that any potential conflicts of interest can be strongly mitigated in the legislation.
- That for guardianship properties, a suitable scheme of delegation can be put in place through the legislation, that the owners of guardianship properties have been consulted on the proposed delegation and are satisfied that this will protect their interests.
- That the impacts of the new body on the voluntary, local government and private sectors, both in the form currently proposed and as a state charity, have been assessed and found to be desirable.

The National Trust for Scotland welcomes the Scottish Government’s and Scottish Parliament’s continuing support for Scotland’s heritage. The new sector strategy for the historic environment provides a platform for
improved coordination, and we look forward to working with the replacement organisation for Historic Scotland and the Royal Commission.

We would be happy to provide the Committee with further written or oral evidence as required.