

# **HISTORIC ENVIRONMENT SCOTLAND BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Historic Environment Scotland Bill introduced in the Scottish Parliament on 3 March 2014. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 47–EN.

2. The purpose of the Bill is to establish a new lead body for Scotland's historic environment, to be known as Historic Environment Scotland, which sustains the functions of two predecessor bodies, Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS).

3. The Bill is proposed at the same time as the publication of Scotland's first Historic Environment Strategy. The policy aim of the Bill is for a more outcome-focused, resilient, efficient and effective service in support of the historic environment and the people of Scotland, and for Historic Environment Scotland to be enabled to deliver on a range of National Outcomes.

4. This policy memorandum provides an overview of the two predecessor bodies, Historic Scotland and RCAHMS, outlines how Scotland's first Historic Environment Strategy sets the creation of a new lead body for the sector and summarises the policy intent and consultation which has informed the provisions of the Bill.

### **BACKGROUND**

5. As defined in Scotland's Historic Environment Strategy, *Our Place in Time*,<sup>1</sup> "Scotland's historic environment is the physical evidence for human activity that connects people with place, linked with the associations we can see, feel and understand." The historic environment is part of people's everyday lives.

6. People cherish places, and the values of the historic environment lie in that connection of people to a place. It provides roots. It enhances regional and local distinctiveness. It forges connections between people and the places they live in and visit. The sense of place and strong cultural identity provided by the historic environment play a large part in the sustainability and wellbeing of communities and in promoting a positive image of Scotland across the world.

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<sup>1</sup> [www.scotland.gov.uk/historicenvironment](http://www.scotland.gov.uk/historicenvironment)

7. Scotland's historic environment is intrinsic to the nation's sense of place and strong cultural identity. It is diverse, but collectively it tells the story of a shared past. It is important in its own terms, providing key evidence of the lives and creativity of people in the past. It also helps to create a sense of place, identity and physical and social wellbeing, and benefits the economy, civic participation, tourism and lifelong learning. It is dynamic and ever-changing and that dynamism lies at the heart of the need for sound principles of stewardship. For the people of Scotland to continue to gain real, and increasing, benefits from their historic environment, it needs to be understood, valued and championed. This requires a strategy, and a series of coordinated actions by a range of players from the public, private and the third sector through which that strategy can be delivered. The publication of Scotland's Historic Environment Strategy<sup>2</sup> ("the Strategy") alongside the introduction of the Historic Environment Scotland Bill represent the beginning of this.

8. The Strategy sets the strategic context for the proposals contained within the Bill to create a new lead body which will be integral to the delivery of the strategy. The Strategy is explained in more detail in the subsequent sections of this document.

9. Currently there are two principal public bodies operating within the historic environment sector in Scotland, Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS). This Bill will create a new lead body for the Historic Environment in Scotland to sustain the functions of the two predecessor bodies and play a lead role in the delivery of Scotland's first Historic Environment Strategy.

10. The current roles of Historic Scotland and RCAHMS are set out below.

## **Historic Scotland**

11. Historic Scotland is an Executive Agency of the Scottish Government, which sits within the Culture and External Affairs Ministerial portfolio. The Chief Executive is directly accountable to the Cabinet Secretary for Culture and External Affairs, and its functions and accountability are defined in the Historic Scotland Framework Document 2013<sup>3</sup>.

12. Historic Scotland undertakes a range of statutory functions on behalf of the Scottish Ministers, chiefly deriving from the Ancient Monuments and Archaeological Areas Act 1979 ("1979 Act") and the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 ("1997 Act"), but also involving wider planning and marine legislation.

13. Historic Scotland's core functions as outlined in the most recent Framework Document are:

- caring for and presenting to visitors the properties in care on behalf of Scottish Ministers;

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<sup>2</sup> [www.scotland.gov.uk/historicenvironment](http://www.scotland.gov.uk/historicenvironment)

<sup>3</sup> <http://www.historic-scotland.gov.uk/framework-document.pdf>

- maintaining the statutory schedule of monuments of national importance, the statutory list of buildings of architectural or historic interest, the inventory of Gardens and Designed Landscapes, the Inventory of Historic Battlefields and Marine Protected Areas;
- providing specialist advice and expert knowledge to the Historic Environment Policy Unit (HEPU) to inform the development of Scottish Ministers' policies as they relate to the historic environment and other matters;
- providing financial assistance towards the conservation and enhancement of the historic environment; and
- providing guidance on the management of the historic environment.

14. In 2013, the policy function, previously operated from within Historic Scotland, was transferred into the core of the Scottish Government to discharge the policy making functions of Scottish Ministers in relation to the historic environment. This decision was taken so that the importance of the historic environment would be better reflected across all aspects of Scottish Government policy, and to address a perception of a potential conflict of interest between the policy setting and delivery functions of Historic Scotland. It also delivers better alignment of culture and heritage policy. This change was taken following extensive stakeholder discussion around the need for a shared sector-wide strategy for the historic environment.

#### **Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS)**

15. RCAHMS is a Royal Commission originally established by Royal Warrant. It is treated as an Executive NDPB of the Scottish Government for administrative purposes, and is overseen by a board of Commissioners. In addition it has been a registered charity since 1992<sup>4</sup>, when the Royal Warrant was last updated<sup>5</sup>.

16. RCAHMS was established in 1908 to “make an inventory of the ancient and historical monuments and constructions connected with or illustrative of the contemporary culture, civilisation and conditions of life of the people of Scotland from the earliest times to the year 1707”.

17. RCAHMS' work, and remit, has evolved to include the curation of a large collection including an online database and a substantial archive relating to the historic environment. There is also now a much stronger emphasis on promoting understanding through knowledge sharing, education and outreach. The original “inventory” is still at the core of this collection with the results of investigative field survey by RCAHMS preserved alongside material collected from elsewhere including excavation archives, architectural drawings, photo albums, aerial photography and other records of the historic environment.

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<sup>4</sup> Charity No. SC026749 <https://www.oscr.org.uk/search-charity-register/charity-extract/?charitynumber=sc026749>

<sup>5</sup> [http://www.rcahms.gov.uk/rcahms\\_media/files/about\\_us/royalwarrant.pdf](http://www.rcahms.gov.uk/rcahms_media/files/about_us/royalwarrant.pdf)

18. The purpose of RCAHMS, as defined by ‘*Future RCAHMS*’<sup>6</sup> the most recent five year business strategy for the organisation, is to:

- identify, survey and analyse the historic and built environment of Scotland;
- preserve, care for and add to the information and items in its collections; and
- promote understanding, education and enjoyment through interpretation of the information it collects and the items it looks after.

### **Options appraisal of RCAHMS and Outline Business Case**

19. An options appraisal<sup>7</sup>, commissioned in November 2011 amidst concerns about RCAHMS’ long term sustainability, concluded that the status quo was no longer a viable option. RCAHMS’ future had been the subject of repeated consideration over recent years and the appraisal recognised that this was detrimental to the organisation and that current and future financial pressures risked undermining its viability.

20. Two alternatives were considered for RCAHMS – merger with Historic Scotland or formal establishment in legislation as a separate NDPB. Merger between RCAHMS and Historic Scotland was subsequently identified as the preferred option and an Outline Business Case (OBC) was commissioned by Ministers to examine this option in more detail.

### **Decision to create a new lead NDPB**

21. Based on the evidence set out in the OBC<sup>8</sup>, Ministers concluded that a new Non-Departmental Public Body should be established in legislation to carry out the functions formerly carried out by RCAHMS and Historic Scotland, and that the body should act as a lead body for the historic environment and in the delivery of Scotland’s Historic Environment Strategy.

22. The OBC considered two main alternatives for the creation of a new public body, an Executive Agency or an NDPB. Based on the evidence in the OBC the Scottish Ministers decided that an NDPB was the most viable option for the new body.

23. The Executive Agency model was considered to be inconsistent with the majority of other bodies within the Scottish Government Cultural and Heritage portfolio, where Historic Scotland is currently unusual in terms of its closeness to government. Positioning Historic Environment Scotland on a par with the majority of National Collections, such as National Museums Scotland or National Libraries of Scotland was felt to provide even greater opportunities to develop existing collaboration and partnership within the portfolio.

24. In addition, a greater degree of distance from government would place the new body more in line with other bodies with a similar regulatory function such as Scottish Natural

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<sup>6</sup> [http://www.rcahms.gov.uk/rcahms\\_media/files/news/future\\_rcahms.pdf](http://www.rcahms.gov.uk/rcahms_media/files/news/future_rcahms.pdf)

<sup>7</sup> <http://www.scotland.gov.uk/Publications/2012/07/5774>

<sup>8</sup> <http://www.scotland.gov.uk/Publications/2013/05/1373/20> and <http://www.scotland.gov.uk/Publications/2013/05/1373>

Heritage and the Scottish Environment Protection Agency. This would create a more transparent separation between the role of Ministers in setting regulations and the application of those regulations by appropriately skilled professionals.

25. The NDPB model provides for Ministerial oversight and public accountability while allowing for the specialist nature of the work which the body will undertake. It is important to stakeholders that the new body has the independence to make operational decisions based on the specialist knowledge and experience of its staff and on appropriate sector standards and ethics.

26. Ministers believe that the functions of Historic Environment Scotland meet with the definition of charitable purposes set out by the Office of the Scottish Charity Regulator (OSCR) and NDPB status is consistent with this. However a decision on whether or not to apply for charitable status would be a decision for the board of Historic Environment Scotland, with OSCR determining whether charitable status ought to be granted. This issue was subject to consultation and further detail is provided below (page 9).

## **SCOTLAND'S HISTORIC ENVIRONMENT STRATEGY**

27. The decision to create a new lead body, to be called Historic Environment Scotland, was made in the context of the development of Scotland's first Historic Environment Strategy: *Our Place in Time*.

28. The vision of the Strategy, that "Scotland's historic environment is understood and valued, cared for and protected, enjoyed and enhanced. It is at the heart of a flourishing and sustainable Scotland and will be passed on with pride to benefit future generations" has been integral to the development of policy for the creation of Historic Environment Scotland.

29. The Strategy has been developed in collaboration with key participants in Scotland's historic environment sector. It sets out a shared vision, definition and desired outcomes for the historic environment as well as a set of overarching principles and strategic objectives, with the intention of ensuring that Scotland's historic environment will be understood, protected and valued.

30. The three key aims of the strategy are:

- **Understanding - By investigating and recording** the historic environment to continually develop our knowledge, understanding and interpretation of our past and how best to conserve, sustain and present it.
- **Protecting – By caring for and protecting** the historic environment, ensuring that we can both enjoy and benefit from it and conserve and enhance it for the enjoyment and benefit of future generations.
- **Valuing – By sharing and celebrating** the richness and significance of our historic environment, enabling us to enjoy the fascinating and inspirational diversity of our heritage.

31. As a key partner in the Strategy, Ministers will expect Historic Environment Scotland to work alongside other bodies in the sector in discharging its functions. It will seek to ensure that knowledge, understanding and appreciation of the historic environment continues to grow and that this knowledge is made readily available as a means of encouraging individuals, communities and decision makers to better understand and enjoy their historic environment, for example:

- By increasing and disseminating knowledge, understanding and appreciation of the historic environment, it is believed that it will be better protected and managed according to both its cultural significance and to its potential to contribute to the wellbeing of communities.
- More knowledge, understanding and appreciation should also support the delivery of better place-making, ensuring that the historic environment plays a stronger and more central role, contributing context, identity and connection in decisions about the future of Scotland's communities.

32. The Strategy will be published alongside the Bill<sup>9</sup> and will continue to set the strategic context both for the Bill and the historic environment sector in Scotland, establishing a series of collaborative working groups to address key issues, such as the role of local government in the management of the historic environment.

33. The Strategy will provide the opportunity to align activity across the sector and create common agendas between Historic Environment Scotland and other members of the sector. This collaborative approach is supported through the creation of a single NDPB which is able to sustain and deliver the functions of Historic Scotland and RCAHMS in the context of the Strategy and with increased emphasis and opportunity to work in partnership across the historic environment sector.

34. A high-level board will oversee the delivery of the Strategy, supported by working groups which will focus on particular key themes. This model has already promoted a shared improvement agenda and will provide a continued opportunity for the widest range of stakeholders to influence future policy agendas, informing the role of Historic Environment Scotland and other bodies in the sector.

35. An example of this approach is through one of the shared working groups, which is focused on how both central and local government look after the historic environment with wide representation including from central and local government, and organisations such as Historic Scotland, Scottish Sustainability Network, SLAED<sup>10</sup> and VOCAL<sup>11</sup>. This group establishes a shared improvement agenda for the protection and regulation of Scotland's historic environment and has influenced policy development for this Bill and has ensured support for the proposals in relation to the planning system from organisations such as COSLA and their engagement in policy development.

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<sup>9</sup> The strategy will be available via [www.scotland.gov.uk/historicenvironment](http://www.scotland.gov.uk/historicenvironment)

<sup>10</sup> <http://www.slaed.org.uk/>

<sup>11</sup> VOCAL - The Voice of Chief Officers of Cultural and Leisure Services in Scotland

## **POLICY OBJECTIVES OF THE BILL**

36. The policy ambition of the Bill is for a more outcome-focused, resilient, efficient and effective service in support of the historic environment and the people of Scotland, and for Historic Environment Scotland to be enabled to deliver on a range of National Outcomes.

37. There is a common perception in the sector that the historic environment has unrealised potential to contribute to a range of other public policy areas including place-making and regeneration, to deliver key national priorities including sustainable economic growth, health, education, wellbeing and biodiversity.

38. Through a more focussed approach, with a lead body able to work in partnership with the sector, the historic environment will realise its potential in delivering these outcomes for Scotland.

39. For example, by further connecting the functions previously delivered by Historic Scotland and RCAHMS, Historic Environment Scotland will be able to provide greater opportunities for the tangible and intangible historic environment to contribute directly to public policy through areas such as Curriculum for Excellence, by providing enhanced information and materials for teaching.

40. The policy is also part of the public service reform agenda. Bringing together the functions of RCAHMS and Historic Scotland maximises synergies. This will be delivered through the functions of Historic Environment Scotland as set out in the Bill, which deliver on the four pillars of public service reform set out in *Renewing Scotland's Public Services*<sup>12</sup>:

- Prevention: through acting to promote better maintenance of the historic environment rather than repairing it at greater expense once damage has been done, and by intervening with information and advice early in decisions about change, rather than coming later in the process and acting as an obstacle.
- Greater integration of public services at a national and local level: not just through bringing the two existing bodies together, but by working more through partnership and collaboration with other national and local bodies and with individuals.
- Investment in the people who deliver services through enhanced workforce development and effective leadership: not simply by clearly defining the core functions and therefore the core skills and expertise required by Scotland's historic environment, but by ensuring training and learning opportunities are made widely available, thus widening the skills and knowledge base, promoting employment opportunities as well as better care for the historic environment.
- A sharp focus on improving performance, through greater transparency, innovation and use of digital technology: the creation of an NDPB with clear and open reporting will in itself enhance transparency, while the considerable achievements of both bodies in the areas of new technology and digital solutions will benefit from the synergies available through the merging of complementary skills and expertise.

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<sup>12</sup> <http://www.scotland.gov.uk/Publications/2011/09/21104740/9>

41. In order to deliver on these broad policy objectives, the Bill will confer on Historic Environment Scotland functions currently carried out by RCAHMS, and functions currently carried out by Historic Scotland on behalf of the Scottish Ministers.

42. The Bill will put the functions of RCAHMS on a clear statutory footing for the first time, and will clarify the functions of Ministers, currently carried out by Historic Scotland, including the broader range of non-statutory functions which Historic Scotland delivers, for example educational activities.

43. Doing so will ensure that these core functions are sustained for the long term, and are capable of being delivered in such a way that they fulfil the policy objectives described above and support the delivery of the Strategy.

## **CONSULTATION**

44. The Scottish Government has consulted widely throughout the process of policy development which has underpinned both the decision to create Historic Environment Scotland and the development of Scotland's first strategy for the historic environment. This has included consultation with staff from both Historic Scotland and RCAHMS and with stakeholders during the initial Options Appraisal and Outline Business Case in 2011 and 2012<sup>13</sup>.

45. On 8 May 2013, the Scottish Government launched a Joint Consultation on the Historic Environment Strategy for Scotland and the merger of Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS). The consultation sought views on the proposed Strategy and on the merger of the two organisations. The 12 week public consultation closed on 31 July 2013, and 96 responses were received from a wide range of stakeholders from public, private and third sector organisations, and individuals. More detail is given on specific issues raised in the specific policy sections which follow below.

46. Non-confidential consultation responses were published on 31 August 2013 on the Scottish Government website. The Scottish Government commissioned the independent research company, Why Research, to undertake a formal analysis of consultation responses, and this was published on 7 November 2013<sup>14</sup>.

47. In parallel with the written consultation exercise, the Scottish Government also conducted a series of national engagement events in conjunction with partners<sup>15</sup> to discuss the proposals around the Strategy and the Bill with a wide range of stakeholders. These events were held over the summer of 2013 and were attended by over 250 people from the public, private and third sectors. An online survey of Historic Scotland members (approximately 26,540 people) was also undertaken during the 12 week consultation period.

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<sup>13</sup> <http://www.historic-scotland.gov.uk/strategic-appraisal-report.pdf>

<sup>14</sup> <http://www.scotland.gov.uk/Publications/2013/09/4850> and <http://www.scotland.gov.uk/Publications/2013/09/4850/downloads> and <http://www.scotland.gov.uk/Resource/0043/00437691.pdf>

<sup>15</sup> E.g. Built Environment Forum Scotland (BEFS) <http://www.befs.org.uk/uploads/resources/reports/13.06.13.WorkshopReport.HEStrategyandMerger.pdf>

48. Further tailored consultation meetings and events with key stakeholders have taken place throughout the process. For example, a seminar was held specifically to explore the views of equalities groups and to consider opportunities for positive impacts and included for instance a session with the Scottish Council for Development and Industry.

### **Outcome of consultation and engagement**

49. Overall the consultation responses were supportive of the merger and did not raise any new issues which had not already been discussed with stakeholders during the development of the OBC and Strategy, reflecting the inclusivity of the approach taken to policy development.

50. In respect of the merger proposals, consultation responses confirmed a number of concerns, those relating to the policy of the bill are dealt with in the specific sections below in the discussion of specific provisions:

- Charitable status both in terms of the potential distorting effect of a new large charitable body and potential unfair competition with other charities (see paragraph 51);
- Changes to heritage management functions altering the balance of work for local government and reducing heritage protection standards; and
- The body may be at an unfair advantage should it be able to access its own grants or apply different standards to applications for listed building or scheduled monument consents relating to the sites it directly manages.

### **Charitable status**

51. No specific provision is required in this Bill to enable the board of Historic Environment Scotland to make application for charitable status. However it is discussed here as it was an issue raised during consultation.

52. Scottish Ministers' view is that the functions of Historic Environment Scotland are consistent with charitable purposes as defined by OSCR. Following the example of other bodies who manage National Collections, the board may wish to make an application for charitable status. There is extensive precedent of similar bodies with charitable status, most notably RCAHMS itself, National Galleries of Scotland, National Libraries of Scotland, National Museums of Scotland and the Royal Botanic Gardens (Edinburgh).

53. There were mixed views on this issue amongst respondents. While a majority agreed that the purposes of the proposed new body were, in their view, charitable, there was some concern about the presence of grant-giving and regulatory functions in a charitable body alongside commercial functions.

54. The potential financial impact of a large new body with charitable status on other bodies in the sector was also a source of concern during the consultation. The Scottish Government is committed to the historic environment sector as a whole and Historic Environment Scotland will be expected to work in a collaborative manner within the sector. The functions of Historic Environment Scotland set out in the Bill specifically require it to offer and promote leadership in

the sector and to work with others. Whether or not Historic Environment Scotland were to become a charitable body, operating in a manner that was detrimental to the interests of other bodies in the sector (such as the National Trust for Scotland) would be inconsistent with these requirements.

55. This Bill will not confer charitable status on Historic Environment Scotland and it is for the board to determine whether, when and in what configuration an application for charitable status should be made, and for the Office of the Scottish Charity Regulator to determine the application. There will be an expectation that potentially conflicting functions are clearly separated in Historic Environment Scotland, with transparent processes in place, and the policy intention for the Bill delivers this.

56. Accordingly it is Scottish Government's intention to bring forward an order under section 7 of the Charities and Trustee Investment (Scotland) Act 2005 to dis-apply the requirement in the 2005 Act which requires that a body's constitution is not directed or controlled by Ministers, in order to enable a future application for charitable status by Historic Environment Scotland.

### **Objectives added after the end of the formal public consultation**

57. A number of policy areas were subject to further development or emerged in full subsequent to the launch of the consultation. However, views have been sought on these additional provisions from key partners in the sector. No objections were expressed in respect of any of these additional proposals.

#### *Extent of listing*

58. The first additional issue related to improving the focus of protection in relation to listed buildings, by providing the ability to exclude aspects of a statutory address from the designation of a listed building and to specify exactly which elements of a building are and are not protected. While not necessary for the creation of Historic Environment Scotland, it was decided to include this overdue and non-contentious provision into the Bill.

#### *Protection and regulation of marine zone*

59. The second additional issue concerned how best to engage Historic Environment Scotland in relation to the protection and regulation of activities in the marine zone. To position Historic Environment Scotland consistently with Scottish Natural Heritage within the integrated system of designation and regulation operated by Marine Scotland under the Marine (Scotland) Act 2010, it was decided to depart from the original policy intention that Historic Environment Scotland would undertake all historic designations, and position it as an expert advisor only, in respect of Marine Protected Areas. The policy advantage of maintaining an integrated system for the marine zone was assessed as outweighing the attractions of a single body as designation authority for all historic assets on land and at sea.

#### *Diversity and equal opportunities*

60. A third issue that has been further developed since consultation is equal opportunities and diversity. During policy development and consultation it was identified that there is a need to improve the diversity of people accessing the historic environment. Access is broadly defined

and includes improving the diversity of people working and volunteering in the historic environment sector, visiting properties, accessing collections and all other ways of engaging with the historic environment.

61. The Bill contains two provisions relating to equality. One is a provision that states that Historic Environment Scotland must carry out its functions with a view to promoting the diversity of people accessing the historic environment and the second relates to how people are appointed to the Board of Historic Environment Scotland. Diversity should be considered in its widest sense including groups that are not covered by the protected characteristics under equalities legislation such as socio-economic diversity or linguistic diversity. The second provision gives a clear statement on equalities by placing a duty on Ministers to make appointments in a manner that encourages equal opportunities.

#### *Properties in care*

62. Finally, the policy regarding properties in care was further developed in response to issues raised during the consultation. The policy aim is that Ministers are able to delegate management of properties in care to a body other than Historic Environment Scotland should this be appropriate. This approach allows for future flexibility, is consistent with the policy aims of the Scottish Government in relation to community empowerment, and ensures that Ministers can take a decision regarding who manages properties based on the best interests of both the properties and the people of Scotland. More detail on this is provided on page 19.

### **POLICY OBJECTIVES: SPECIFIC PROVISIONS**

63. This summary offers more details on the key policy areas to be addressed by the Bill. Each section below sets out what will change from the present situation and why, the effect of these changes, and how stakeholder views have been considered.

64. It should be noted that the Bill is not a self-contained re-statement of all of the statutory arrangements relevant to the historic environment. Rather, it sets out changes. The Bill is therefore silent where new arrangements are not being proposed or where existing legislation is not being modified.

### **Establishment of the body, governance and general powers**

#### *Policy aims*

65. The policy aim is for Historic Environment Scotland as a new lead body for Scotland's Historic Environment, to play a principal role in investigating, recording, caring for, protecting and celebrating Scotland's Historic Environment. The policy will help maximise the benefit for, and derived from, Scotland's historic environment by ensuring it is valued, enjoyed and protected, both now and for future generations through delivery, in partnership with others, of Scotland's Historic Environment Strategy.

66. The policy aim is for a more transparent relationship with Government allowing for clear and accountable decision making based upon expert knowledge, striking the right balance between professional independence and public accountability. The policy is also to create an

organisation better placed to work alongside Scotland's other cultural institutions in celebrating its rich and diverse cultural heritage. This will be delivered in the Bill through specific provision on the role of Scottish Ministers in agreeing the operational framework for the body (through its corporate plan) and a clear position on the areas in which Ministers are able to direct Historic Environment Scotland.

67. Historic Environment Scotland will be free to consider choosing a public-facing name after considering the interaction of the identity and character of the body with the existing suite of brands operated by the two current bodies. This will be a matter for the Board of the new body once in place.

#### *Bill provisions*

68. The Bill will establish a new body, to be known as Historic Environment Scotland. The Gaelic name of Historic Environment Scotland will be Àrainneachd Eachdraidheil na h-Alba.

69. The Bill will establish Historic Environment Scotland as an NDPB of substantial size in terms of staff (over 1100) and budget (around £80 million), with a wide range of duties including managing a substantial collection. The proposed establishment and governance are in line with modern practice and other recent examples of NDPBs.

70. The Bill makes provision for Ministers to appoint a Chair and Board members. The Board will appoint a Chief Executive, subject to the approval of Ministers, and will employ staff. The Chair of the Board will report to Ministers and Ministers must lay copies of reports before Parliament.

71. The Board size will be between 10 and 15 members. Members will be chosen to create a balanced mix relative to the responsibilities of Historic Environment Scotland, but there is no proposal to specify a list of required areas of expertise on the face of the Bill. The standard public appointments process will be followed, which includes taking account of equal opportunities requirements.

72. To support the transition, a Chair and Board will be recruited as soon as possible, with the process ideally beginning after the Stage 1 debate, so that a Chair designate, at least, has been identified by the end of Stage 3 of the Parliamentary process, permitting early appointment once the Bill's provisions are commenced.

73. A two-step approach will be taken to start-up whereby the Chair and Board will be appointed first, and the body will take on its full functions approximately 6 months later. This is in line with best practice as recommended by Audit Scotland in its review of public sector mergers<sup>16</sup>.

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<sup>16</sup> [http://www.audit-scotland.gov.uk/docs/central/2012/nr\\_120614\\_public\\_body\\_mergers.pdf](http://www.audit-scotland.gov.uk/docs/central/2012/nr_120614_public_body_mergers.pdf)

*Consultation and alternative approaches*

74. Some stakeholder groups would have preferred that Board members should come from specific named specialist backgrounds – for example archaeology, building conservation or records management. The Bill does not follow this approach, allowing instead for a Board that is flexibly defined in terms of its skills and experience, in recognition that the needs of the body will change, with areas of particular interest and expertise changing over time. Schedule 1 to the Bill sets out the detailed arrangements for governance, including around appointments.

75. The arrangements proposed were formulated following analysis of existing board structures for other broadly similar bodies and in the context of the wide range of functions which will be delivered by the new body.

**General functions and powers of the new body**

*Policy aims*

76. The main policy aim is that Historic Environment Scotland will carry out all of the functions of Historic Scotland and RCAHMS with the exception of the strategic policy function which, as noted above, has moved into the core of Scottish Government. The policy is to simplify and adjust some functions in passing them to the new body, ensuring that Historic Environment Scotland's functions are sustainable and support the delivery of a collaborative approach to the Historic Environment Strategy.

77. These general powers are also designed to give Historic Environment Scotland the maximum ability to operate as efficiently as possible, providing the best value for money by managing its operations and business effectively. The provisions for Ministerial oversight will ensure that there is appropriate transparency and that suitable checks and balances are in place.

78. The policy aim is to provide a long term strategic approach through the Corporate Plan for the body, which will act as a key tool in promoting the necessary long-term strategic approach to functions and in delivering Ministerial oversight at a strategic level.

79. In combination with the usual sponsorship relationship with Scottish Government, the Corporate Plan will provide visibility on the key planned activities, allowing Ministers to have confidence that significant departures from agreed priorities will be identified and addressed, as well as ensuring the new body will play its proper role in the delivery of the Historic Environment Strategy for the long term.

80. The current functions and specific powers of RCAHMS are set out in a Royal Warrant, mostly recently updated in 1992. As an Executive Agency of the Scottish Government the functions of Historic Scotland are set out in various Acts, for example the Ancient Monuments and Archaeological Areas Act 1979. In order to clarify and secure the functions of RCAHMS, a policy commitment was made that its functions would be put on a statutory footing. Although many of the functions of Historic Scotland are already statutory functions, it was considered that these functions also need to be represented as high-level functions of Historic Environment Scotland to ensure clarity and to put all of the functions on an even basis.

*Bill provisions*

81. The Bill will confer on Historic Environment Scotland the powers associated with a modern public body, with the ability to be flexible and responsive over time. For instance the Bill permits Historic Environment Scotland to enter into contracts, create and own companies, charge for the provision of certain goods and services and borrow money from Ministers, all subject to appropriate oversight by Ministers.

82. The Bill gives Historic Environment Scotland the general function of investigating, caring for and promoting Scotland's historic environment. In doing so, it has the following particular functions:

- identifying and recording the historic environment;
- understanding and interpreting the historic environment;
- learning about, and educating others about, the historic environment;
- protecting and managing the historic environment;
- conserving and enhancing the historic environment.

83. Historic Environment Scotland also has the function of managing its collections as a national resource for reference, study and research:

- preserving, conserving and developing its collections;
- making the collections accessible to the public and to persons wishing to carry out study and research;
- exhibiting and interpreting objects in the collections.

84. Historic Environment Scotland, in exercising its functions, is to do so with a view to:

- encouraging education and research;
- promoting and contributing to understanding and enjoyment of the historic environment and its collections;
- promoting the diversity of persons accessing the historic environment and its collections;
- offering and promoting leadership in relation to the historic environment;
- working with other persons (whether in partnership or otherwise);
- contributing, as appropriate, to the development and delivery of policies and strategies in relation to the historic environment.

85. These functions support the advancement of education and the arts, heritage and culture and therefore it is considered they will not present a barrier should the Board of Historic Environment Scotland wish to make an application to OSCR for charitable status.

86. The Bill provides that Historic Environment Scotland will be required to present a plan for Ministerial approval, setting out its most significant planned activities for a defined period.

*Consultation and alternative approaches*

87. The key themes in stakeholder comments were general support for the merger as a positive move forward and confirmation that the functions listed were comprehensive and appropriate. The most common themes in terms of concerns related to overlapping responsibilities between the new body and other organisations, the need for greater clarity regarding advice and guidance and potential conflicts with other bodies in relation to collecting policies. Drafting of the functions as put forward in the Bill has taken account of these concerns, to ensure that there is a clear link for all functions to the general function of investigating, caring for and promoting the historic environment.

**Powers of direction and guidance**

*Policy aims*

88. The policy aim is to enable the Scottish Ministers to give directions to Historic Environment Scotland, which is a standard approach in founding legislation for a body of this type and ensures appropriate oversight and public accountability. However, Scottish Ministers will not give directions on specific cases, objects or properties. Within the NDPB model there is clear precedent for exempting certain areas of work from Ministerial Direction, ensuring operational independence. Recent examples include exemptions for Creative Scotland in the Public Services Reform Act 2010 and for the National Library of Scotland in the National Library of Scotland Act 2012.

*Bill provisions*

89. The Bill provides that the Scottish Ministers will not be able to give directions on specific cases, objects or properties. This will emphasise that Ministers will maintain an appropriate distance from operational decisions, in particular those which more properly rest solely or primarily upon expert judgement and operational managerial decisions of the Board. The areas in which distance from Ministerial involvement is of particular interest to stakeholders include designation and regulatory work, the allocation of grants and the management of collections.

90. The Scottish Ministers will, however, be able to give Historic Environment Scotland general and specific directions to which the Board must have regard. This is consistent with modern arrangements for public bodies. As with all NDPBs, there will be a range of financial and operational planning cycles. The Scottish Ministers will engage with these processes to exercise strategic oversight.

*Consultation and alternative approaches*

91. The nature and extent of Ministerial oversight and direct engagement in specific areas were key issues during early work on the OBC, and further work with key stakeholders has been undertaken to understand and respond to any concerns. The general principle of independence for collections, grants and heritage management is widely agreed. However there was also strong feeling that Ministers do need to have some oversight in these areas. Thus the Bill provides for certain regulatory decisions to be made by Historic Environment Scotland along with a new right of appeal to Ministers in some cases.

92. The main alternative approach considered was to give Ministers the power to direct on any of the functional areas of the new body. However, this approach did not allow for the required level of curatorial and regulatory independence.

93. Removing any statutory role for the Scottish Ministers was also considered, but this was deemed to be inappropriate due to the nature of the body and the level of public funding it will receive.

## **Transfer schemes**

### *Policy aims*

94. The key policy aim in this area is that the staff, assets and liabilities of RCAHMS and Historic Scotland should transfer to Historic Environment Scotland. In achieving this there should be minimal disruption for staff during the transfer for Historic Environment Scotland and a seamless transfer of assets ensuring no break in service delivery or additional bureaucracy. The policy intention is that there should be no changes to the terms and conditions of staff in the transfer and staff will continue to be eligible for the Civil Service Pension Scheme.

95. An exception to the transfer of assets is in respect of heritable property either owned or currently managed by Ministers through Guardianship or similar arrangements. These primarily comprise the 345 properties in the care of the Scottish Ministers including Edinburgh Castle and associated operational properties such as visitor centres. The collections associated with the properties in care such as objects on display in a property will also remain with Ministers. Arrangements for these are set out on page 19.

### *Bill provisions*

96. The Bill gives Ministers the power to transfer staff employed by RCAHMS and Historic Scotland to Historic Environment Scotland by way of a transfer scheme. Pre-transfer terms and conditions of employment will be preserved and Ministers will seek a Section 104 order under the Scotland Act 1998 to add Historic Environment Scotland to schedule 1 of the Superannuation Act 1972. Both current bodies are already working with the trades unions to establish best process and to respond to staff interest and concerns.

97. The Bill gives Ministers the power to transfer to Historic Environment Scotland, by way of a transfer scheme, operational assets currently controlled by Historic Scotland, with the exception of the properties in state care. Ministers will also have the power to transfer assets from RCAHMS to Historic Environment Scotland and this will include the collections currently held by RCAHMS. These transfers will include assets currently held under leases, deposits, loans or similar, and Historic Environment Scotland will be bound by the original terms of these agreements.

98. The Bill does not give Ministers power to transfer any assets of the Historic Scotland Foundation<sup>17</sup> or SCRAN<sup>18</sup>, and these independent charities will be able to make their own arrangements with Historic Environment Scotland.

#### *Consultation and alternative approaches*

99. There were no major external stakeholder concerns in these areas. There has been on-going consultation with appropriate unions and support for the policy approach. This has been an area of attention internally within the two bodies, in particular the commitment that staff will benefit from no-detriment terms at the point of transfer and will remain members of the Principal Civil Service Pension Scheme, and there has been on-going internal consultation and updates around this issue.

100. Making the transfer of staff and assets on the face of the Bill was considered as an alternative, but using a transfer scheme offers maximum flexibility and ensures that transfers can be co-ordinated with staff and the assets they manage transferring at the same time after the establishment of Historic Environment Scotland.

### **Management of collections**

#### *Policy aims*

101. Historic Environment Scotland will be able to manage, develop and enhance its collections through acquisitions and disposals and through lending and borrowing. This will allow it ensure that the collections remain appropriate to the core purpose of the body and allow it to look for creative ways to enhance public access through borrowing, outward loans and exhibitions.

102. There is also a recognition that many other bodies hold important collections relating to the historic environment, including the other National Collections and local museums and archives. Historic Environment Scotland will be expected to work in collaboration with these other bodies to ensure best value for the people of Scotland and to recognise the complementary role of other bodies in curating and presenting Scotland's historic environment collections. The provision for lending and borrowing powers will allow Historic Environment Scotland to work with other bodies in providing access to its collections, for example through long-term loans to local archives.

#### *Bill provisions*

103. The Bill gives Historic Environment Scotland powers to acquire and dispose of objects and collections, and powers to both borrow and lend objects.

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<sup>17</sup> The Historic Scotland Foundation is an independent charity established in 2001 to support the work of Historic Scotland. <http://www.historic-scotland.gov.uk/hsfoundation>

<sup>18</sup> SCRAN Trust is an independent charity which manages an online learning resource base with over 370,000 images & media from museums, galleries, and archives. It is a company limited by guarantee, which is constituted as a wholly owned subsidiary of RCAHMS. <http://www.scran.ac.uk/>

104. Historic Environment Scotland will not be able to dispose of objects where that object is subject to a prohibition or restriction without consent from the person with the right to enforce any prohibition or restriction. However, in certain circumstances HES could still dispose of items:

- Where objects are damaged or infested they can be disposed contrary to a restriction if the person with the right to enforce any restriction cannot be identified or contacted despite reasonable efforts to ascertain their name and contact details;
- If the object is hazardous (for example objects that have severe mould which could be hazardous to health) then it can be disposed of.

105. With regards to lending, Historic Environment Scotland will be required to have regard to a number of factors when deciding whether or not to lend an object, including taking account of the needs of users, the purpose of the loan and the condition of the object. Similar to the disposal powers, Historic Environment Scotland will only be able to lend contrary to a restriction on lending if they obtain consent. However if the person with the right to enforce any restriction or prohibition cannot be contacted despite all reasonable efforts then HES will be able to lend the object.

#### *Consultation and alternative approaches*

106. A key issue in the consultation with regards to collections was the role of Ministers and the need to ensure curatorial independence. In addition there were concerns from some other collecting bodies about the wide definition of the historic environment in the strategy, with some expressing concern due to the fact that objects within their collections also relate to the historic environment and therefore there could be overlap in the collecting policies of Historic Environment Scotland and other bodies. There is always a degree of overlap in the collecting policies of different bodies and it is important to ensure that this is not detrimental, for example through unnecessary duplication in multiple collections. The initial collecting policies of Historic Environment Scotland will be broadly the same as those of Historic Scotland and RCAHMS, which already co-exist with the other National Collections, and its collecting policy will be developed in consultation with the other collecting bodies operating within the Scottish Government Culture and Heritage portfolio. It will be expected to work in collaboration with other these and other collecting bodies to ensure responsible collecting and to avoid unnecessary and wasteful duplication or competition.

107. Under the current arrangements RCAHMS uses its general powers under the Royal Warrant to develop and manage its collections. This does not include specific powers for acquisitions and disposals, borrowing and lending. The alternative approach would involve relying on the general collections functions of Historic Environment Scotland to allow them to carry out these activities. However, the approach taken in the Bill of providing for more specific and modern powers, similar to other National Collections, with appropriate restrictions, will help the body to manage its collections effectively through adding to them and also disposing of objects not required for the purposes of its collections and maximise potential for public access through lending and borrowing.

## **Properties in care and associated collections**

### *Policy aims*

108. Scottish Ministers hold an estate of 345 Properties in Care for the nation which together illustrate significant aspects of Scotland's past<sup>19</sup>. It is the policy intention that these properties remain in the care and responsibility of Ministers, whether they are currently owned by Ministers, in guardianship or held under other arrangements. Ministers will be able to delegate their functions with respect to these properties to ensure that they are appropriately managed and made accessible.

109. Ministers hold these properties for the purposes of long term preservation for public benefit. The estate has evolved over many years and now represents a diverse portfolio dating from pre-history to the industrial era and includes many different types of monument. The estate also includes a collection of some 35000 objects associated with the properties. Historic Scotland currently manages this estate and makes it accessible to the public, and it is proposed that the Historic Environment Scotland will continue to carry out this function.

110. However it is also recognised that in future there may be properties in the care of Ministers that could be best managed by another body, for example the National Trust or a community based trust.

111. Ministers will maintain their responsibilities for the properties in care (including their statutory duties of conservation and public access and powers under the 1979 Act and previous acts). This preserves the original intentions in giving them over to state care. However, Ministers will delegate management of these properties to Historic Environment Scotland, and could also delegate to another body if this was appropriate in the future. This ensures that such properties can be managed with a degree of curatorial independence, and day to day decisions would be taken by experts. Ministers would ensure oversight by attaching conditions to the delegation for example covering the condition of the properties, conservation and access principles and standards, charging policy and mechanisms for reporting on performance.

### *Bill provisions*

112. Under the Bill, the Scottish Ministers are given a power to delegate their functions with regards to the properties in care to Historic Environment Scotland or any other body which Ministers deem appropriate. Ministers will be able to attach any conditions to a scheme of delegation, which can relate to a particular property, a group or all properties in care.

113. Ministers will have similar powers with regards to the collections associated with the properties. These powers are not specific to the collections associated with the properties in care as there is no specific legal definition of these collections, rather this is drafted to be enabling and to ensure that all the collections currently managed by Historic Scotland are covered. Such an arrangement could also cover any other objects of historic value that Ministers currently own or care for, however the scheme of delegation would give additional detail about the specific objects covered. There are currently no intentions that this power would be used to delegate

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<sup>19</sup> <http://www.historic-scotland.gov.uk/index/places/aboutourproperties.htm>

management of any collections or objects other than those managed at present by Historic Scotland.

#### *Consultation and alternative approaches*

114. One of the main concerns raised in consultation responses was that title of the properties would be passed to Historic Environment Scotland. Ministers are clear that they will retain title to those properties that they currently own, and will retain responsibility for guardianship and similar agreements regarding other properties. Another concern was that there would be no clear definition of Historic Environment Scotland's responsibilities with respect to the conservation of the properties. This will be addressed through conditions in the scheme of delegation that will set out standards for how the estate is managed and expectations on performance.

115. Concerns raised about unfair advantages regarding grants and works to properties in the estate have also been addressed. The Bill provides that Historic Environment Scotland will not be a Crown body and will therefore not be able to exercise Crown immunity. This means it will have to apply for consents through the same process as an external applicant. In addition, it will not be able to apply for funding through its own grant schemes. There has been an active dialogue with key stakeholders such as the National Trust for Scotland on these issues and this will continue when the scheme of delegation is drawn up.

116. Transferring ownership of the collections associated with the properties in care that are currently managed by Historic Scotland to Historic Environment Scotland was considered. However, the large majority of objects in this collection are inextricably linked to the properties in care and it was considered that they could lose some or all of their significance if separated from the properties themselves. This would be a risk if these objects were held by Historic Environment Scotland while the properties were held by Ministers. Therefore Ministers will retain all associated collections along with the properties. This also allows for flexibility in future management arrangements, should there be a requirement for some or all of the properties to be managed by a party other than Historic Environment Scotland.

### **Heritage management**

#### *Policy aims*

117. The policy aim is for Historic Environment Scotland to undertake the functions previously delivered through Historic Scotland and RCAHMS in relation to the historic environment designation and regulation and the wider planning system. These functions have been reviewed and are being streamlined where appropriate to ensure that they are delivered in a manner consistent with the simplification and public service reform agendas and in line with the rest of the Scottish planning system. The intention is for the Bill to take an enabling approach where possible.

118. This policy also recognises that there is a wider improvement agenda being developed for this area as part of the Strategy, for example a review of regulatory functions in partnership with local authorities and through a working group established with COSLA. This group has fed in to the development of policy for the Bill and will continue to identify issues which can be addressed in the longer term. It will provide a forum for the identification and debate of a wider suite of potential reforms to the planning system than is within the policy aim of this Bill.

119. The operation of designation and regulatory functions is complex within the existing system and relates to a range of acts, powers and duties. It would create duplication in the system to transfer the heritage management functions across to the new body without making some changes to the system, to clarify which duties will pass to Historic Environment Scotland, which will remain with Ministers and how these inter-relate. The separation between Historic Environment Scotland and Ministers also offers an opportunity to streamline the system, improving transparency and providing for separate Ministerial oversight of the system.

120. Historic Environment Scotland will have powers to undertake all national-level designation functions: scheduling monuments, listing buildings. It will maintain the national inventories of battlefields and historic gardens and designed landscapes. The sole exception is in relation to designating and managing Marine Protected Areas, where it is important to maintain the integrated approach recently set in place. In marine matters, therefore, Historic Environment Scotland will act as expert adviser to Ministers.

121. Historic Environment Scotland will issue all consents for works to scheduled monuments.

122. In order to deliver on regulatory reform and simplification in relation to listed building consent (LBC) the existing arrangements have been simplified. Streamlining the existing system by placing the new body as a consultation body on the same footing as other NDPBs, for example Scottish Natural Heritage or the Scottish Environment Protection Agency, could potentially remove 28 days of process from a high proportion of LBC. This parity of approach will allow Historic Environment Scotland to operate with a clear role in the process and develop a stronger role as an expert advice-giving body for the wider sector, as well as promoting early engagement through the planning system.

123. It is the firm policy intention that when proposing works to the properties it manages on Ministers' behalf, Historic Environment Scotland will be required to apply for consent in exactly the same way as any private operator. Scottish Ministers will expect Historic Environment Scotland to publish all consent applications and decisions. This approach is in line with the views expressed during public consultation on the issue.

#### *Bill provisions*

124. The Bill will include a large number of consequential amendments to the 1979 Act and 1997 Act to ensure that the policy aims described above can be met, in Historic Environment Scotland playing a role as a consultee in the Planning system, designating listed buildings and scheduled monuments and issuing scheduled monument consent.

125. The Bill introduces new rights of appeals to the Scottish Ministers against decisions of Historic Environment Scotland to designate property as a listed building or a scheduled monument and against decisions to refuse scheduled monument consent. These rights of appeal do not extend to the designation of Gardens and Designed Landscapes or Battlefields, as these are not subject to a consenting regime but are protected through the planning system.

126. The Bill provides for changes to the 1979 Act and 1997 Act to harmonise appeals processes with each other and with the Town and County Planning system, where possible. It

also gives Ministers powers to set out the detailed procedure in relation to appeals in regulations, to enable flexibility to deal with changes in the future, including any changes to the planning system.

*Consultation and alternative approaches*

127. The delivery of designation and regulatory functions was a key issue during consultation and a number of issues were raised by stakeholders about the balance of simplification gains against concerns over workload, and particularly the shortage in some local authorities of specialised expertise. Officials have been working through COSLA with local authority officials and individual authorities on this.

128. These concerns have been addressed through further consultation on this area. Agreement in principle has been reached that simplifying and clarifying roles will allow Historic Environment Scotland to offer even more targeted expert support and advice than Historic Scotland can presently deliver, with the same resources. Sharing services and working in partnership can support local authorities in taking informed decisions where they should be taken: at local level. This will also allow for an enabling approach to future change following the outcomes of work within the framework of the strategy. The call-in process through which Ministers can ensure the Historic Environment is protected appropriately will remain in place, for use where this is required.

129. The overall approach to heritage management is also consistent with the response in the consultation regarding the role of Ministers, with a clear message that expert judgement should be used in heritage management decisions, but also the concerns that removing the role of Ministers could weaken the system. The clear separation between Historic Environment Scotland and Ministers signalled by the exemption from Ministerial direction, alongside the creation of an appeal system, means that Historic Environment Scotland has the power to exercise its expert judgement as appropriate, while Ministers will retain a role in determining any appeals and offering strategic guidance and direction.

130. A range of alternative approaches were considered during the development of the policy in this area, including the designation and regulatory functions, and possibly grant-giving, being retained by the Scottish Ministers while other functions were transferred to an NDPB. However, this option was rejected following the commitment given in the OBC that the existing functions of both Historic Scotland and RCAHMS would be passed to the new body, and due to the fact that creating separation between the roles of Historic Environment Scotland and Ministers in this area improves transparency and protects expert decision making.

131. Alternative roles for Historic Environment Scotland in relation to the powers it will operate in place of the Scottish Ministers in regulation and designation were also considered. These included the body becoming a specialist advisor to the existing processes, with Ministers retaining a decision making role on the basis of advice from the new body. This option was rejected on the basis of the duplication it would cause and the impact of this on available resources. There was also stakeholder concern around the independence of decision making in relation to designation and regulation, which also supported the rejection of this option.

132. As noted above, marine designation and regulation will continue to be carried out by Ministers, with Historic Environment Scotland acting as expert advisor. An alternative approach would have been to provide for it to take on the power currently exercised by Ministers, but it was felt that the benefits to stakeholders of maintaining a unified system in the marine zone outweighed any benefits of making this change. Marine Scotland has been consulted and is content with this approach.

## **Grants and loans**

### *Policy aims*

133. The policy aim is for Historic Environment Scotland to have a broad power to award grants and offer loans for any activity contributing to its overall purposes.

134. Historic Environment Scotland will operate this power under a general authorisation from Ministers, which will set out, amongst other matters, details of programmes and eligibility criteria. Ministers will be excluded from being able to direct at the level of decisions on individual funding rounds or applications. In the interests of transparency, it is expected that details of Ministerial authorisations and of grant decisions will be published.

135. Existing statutory grant powers will remain with the Scottish Ministers, as there may be situations where for Historic Environment Scotland to fund might be perceived as creating a conflict of interest. However, Historic Environment Scotland will undertake all normal grant and loan provision in respect of its functional areas.

### *Bill provisions*

136. The Bill contains a single broad grant making power which will enable Historic Environment Scotland to issue grants in line with its functions as expressed in the Bill. This power would allow existing grant programmes to continue or new or modified programmes to be commenced. All existing grant commitments and agreements will be transferred to Historic Environment Scotland.

### *Consultation and alternative approaches*

137. During consultation, stakeholders were concerned about the maintenance of current levels of financial resource for the sector, with a particular concern that the value of grants available for distribution by Historic Environment Scotland might be reduced by diversion of funding into operational budgets. While it is not appropriate for the Bill to address matters of financial allocation such as this, the Bill's provisions in respect of transparency and publication will allow concerned stakeholders to monitor the disposition of funds.

138. Two principal alternative approaches to grant giving by the new body were considered during policy development.

139. Grant giving for all programmes or for specified major programmes might have remained with Ministers, rather than being delivered through Historic Environment Scotland, which might have reassured some stakeholders who expressed concern about fairness and conflict of interest.

There would then have been no need to create or transfer any powers, so continuity with existing schemes could be assured. However, this approach was rejected as it goes directly against the spirit of clear and increasing distance of Ministers from individual funding decisions, which applies widely across the culture and heritage sector, for example in Creative Scotland. In addition the operation of any new grant system would have needed to be resourced and to ensure independence from Historic Environment Scotland, new sources of specialist advice would have been required.

140. The second option considered was for grant giving to be moved to another body – either an existing body or a new one. This might have reassured some stakeholders but would not have delivered the same benefits in terms of the public sector simplification agenda, sharing many of the same drawbacks as retaining grant and loan giving in Ministers’ hands. In addition, this option would have required transitional powers and capacity for Ministers or Historic Environment Scotland to complete existing commitments over 10 years or more, since grant claw-back may be triggered by events up to 10 years after a grant-aided conservation project is completed.

141. Neither of these options was consistent with the overall policy intention of the Bill, which is to integrate functions in a single body.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

142. A draft partial Equalities Impact Assessment (EQIA) was included in the consultation launched by the Scottish Government on 8 May 2013. In addition, a seminar was held with equalities groups to examine the possible impacts and opportunities provided by the Bill and the Historic Environment Strategy.

143. Based on this assessment and consultation the Scottish Government considers that the Bill will have no negative impacts on the basis of age, sex, race, gender-reassignment, pregnancy and maternity, disability, religion or belief, or sexual orientation.

144. There are potential positive impacts: Historic Environment Scotland will be given a specific duty to promote the diversity of people accessing the historic environment and its collections. In addition, the increased clarity of role and position of Historic Environment Scotland should mean that the organisation is more visible, so that more people will be aware of the services it provides and what the historic environment can offer, including opportunities for employment and volunteering.

145. Lack of awareness among minority groups of services already offered by RCAHMS and Historic Scotland was identified as a key barrier during consultation, and there are opportunities for action in this area. Positive impacts will require to be realised by the policies and actions of Historic Environment Scotland itself: these will be informed by the consultation and assessment already carried out.

## **Human rights**

146. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). The Bill essentially operates to transfer existing functions exercised by Historic Scotland (for the Scottish Ministers) and RCAHMS to Historic Environment Scotland. The powers under which these functions are exercised in particular engage Articles 6 and 8 and Article 1 of Protocol 1 of the ECHR. Article 6 of the ECHR gives individuals a right to a fair trial, Article 8 gives individuals the right to respect for private life and Article 1 of Protocol 1 affords individuals the right to peaceful enjoyment of their property. The existing powers are considered to be compliant with the Convention and the transfer of functions will not alter this.

147. The Bill creates some new rights of appeals to the Scottish Ministers against a decision to designate property as a listed building or a scheduled monument and against a decision to refuse scheduled monument consent as the Bill transfers the functions of designation and the determination of applications for scheduled monument consent from Historic Scotland to Historic Environment Scotland. The Scottish Government considers that the new appeal processes themselves are compatible with the ECHR and that, together with the right of judicial review to an Article 6 compliant tribunal, the overall processes to which they relate will continue to be compatible with the Convention.

148. The Bill introduces a power of entry for Historic Environment Scotland to investigate the historic environment and also introduces limited powers for the disposal of objects. Beyond these, the Bill does not introduce any new powers which interfere with property rights.

149. The existing powers which would enable Historic Environment Scotland to interfere with property rights and these new powers are considered to be compatible with Article 1 of Protocol 1. The rights protected by Article 1 of Protocol 1 are not absolute and they may be interfered with if this can be justified in the public interest, is proportionate and is in accordance with the law. Although there may be interference in the enjoyment of an individual's property, such interference is considered limited in scope and subject to certain safeguards in pursuit of the aim of securing and managing the historic environment for future generations. This meets the fair balance test and does not offend Convention rights.

150. The provisions also strike a fair balance between the right to respect for home in Article 8 and the public interest. The provisions do not go beyond what is necessary and proportionate and any interference will be in accordance with the law.

## **Island communities**

151. The Bill will apply to all communities across Scotland, including island communities. Comhairle nan Eilean Siar and Shetland Islands Council both submitted formal consultation responses. Neither of these Councils had any significant objections to the proposals in principle. Both offered some specific suggestions which have been addressed during development of the Bill, but these were matters relating to the role of local authorities in general and not specific to their island situation.

## **Local Government**

152. The Bill will directly impact on local authorities in discharging their duties, and this effect is already set out in this Policy Memorandum and in the other Accompanying Documents to the Bill.

153. 17 Local Authorities submitted formal responses to the consultation on the Bill proposals. Significant numbers of local government staff, including many historic environment professionals, attended the national consultation and engagement events.

154. Engagement has been undertaken with COSLA on a Ministerial, official and informal level. COSLA and specific local authorities have been extensively engaged during development of the provisions of the Bill. COSLA have indicated that they are content with the policy aims, subject to detailed development of the Bill and working practices. Local authorities will be involved in this development work, which has already begun.

## **Sustainable development**

155. The historic environment has potential to contribute to sustainable economic growth and the Strategy provides the overarching direction to unlock these potential benefits. The Bill will contribute to these aims by enabling Historic Environment Scotland to play a key role in the delivery of the strategy, and their collaboration in projects which support key Scottish Government outcomes in this area such as town centre regeneration (see paragraph 37).

156. The Bill will streamline the planning system, potentially removing a period of 28 days statutory consideration from a proportion of cases which will promote more rapid and efficient decision making. The new body will be expected to take a positive and proactive approach to managing change in the historic environment, and the alignment of its role with other regulators, for example Scottish Natural Heritage, will provide increased clarity of operation.

157. The Bill will sustain of the functions of Historic Scotland and RCAHMS, including the important research on the conservation of the historic environment and the development of information and guidance to support the re-use of existing buildings, through specific functions for the body relating to research and economies of scale.

158. The important role which Historic Scotland plays in research into climate change and the development of energy efficient approaches to the use and development for Scotland's significant stock of traditional buildings will also continue.

## **Business and Regulatory Impact Assessment**

159. A Business and Regulatory Impact Assessment has been carried out and will be published to coincide with the introduction of the Bill. This concluded that there is no significant impact on business, but highlighted that the changes proposed to heritage management processes offer benefits to businesses through simplification of handling of applications for consent and potential reduction in the time required to make decisions, as well as more clearly defining the

respective roles of Local Authorities and the new body. This has the potential to save time and money for business, contributing to sustainable economic development.

### **Strategic Environmental Assessment (SEA)**

160. It is considered that the Bill is likely to have no detrimental effect in relation to the environment and, as such, is exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

161. A pre-screening report has been completed. This confirmed that the Bill will have minimal or no detrimental impact on the environment and consequently that a full Strategic Environmental Assessment did not need to be undertaken.

### **Privacy Impact Assessment (PIA)**

162. It is considered that the Bill is likely to have minimal effects in terms of privacy. This position has been determined through the preparation of a PIA screening questionnaire, with the input of advice from Scottish Government data protection and information assets staff and information and advice from Historic Scotland and RCAHMS about current and planned data management procedures.

163. This examination concluded that the Bill itself would not raise privacy issues significant enough to warrant a full-scale Privacy Impact Assessment. Historic Environment Scotland could operate with all the same data handling systems that the two existing bodies now have, but will in practice seek to merge and improve systems to achieve simplification and streamlining. Such changes will be screened and impacts assessed as necessary as part of the wider transition programme. Ministers will require that this is kept under careful scrutiny, both before and after merger.

*This document relates to the Historic Environment Scotland Bill (SP Bill 47) as introduced in the Scottish Parliament on 3 March 2014*

# **HISTORIC ENVIRONMENT SCOTLAND BILL**

## **POLICY MEMORANDUM**

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