

**HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND)
ACT 2011**

CONSULTATION ON DRAFT REGULATIONS

ANALYSIS REPORT

The Historic Environment (Amendment) (Scotland) Act 2011 – Consultation on Draft Regulations

Analysis Report

EXECUTIVE SUMMARY

1. On 21 March 2011 the Scottish Government launched a consultation on four draft Scottish Statutory Instruments that had been prepared under certain delegated powers introduced by the Historic Environment (Amendment) (Scotland) Act 2011 (“the 2011 Act”). The consultation invited comments on the content of the Regulations and on the Scottish Government’s views on whether business or equality impact assessments were required for the Regulations. Consultees provided valuable feedback on the draft Regulations and raised some issues for further consideration. A detailed summary of the responses to the consultation are set out below at paragraphs 13 to 26. Overall the majority of respondents welcomed the draft Regulations as the next stage in the implementation of the 2011 Act.

2. This report is the ‘Analysis Report’ called for in the Scottish Government’s good practice on consultation. It analyses and reports on the responses made to the consultation but does not set out Scottish Ministers’ comments or responses to those suggestions. The inclusion of a comment or suggestion in the report does not imply that any contribution is accepted as accurately characterising the actual policy position or operational practice.

INTRODUCTION

Background

3. The 2011 Act which received Royal Assent on 23 February 2011, is an amending piece of legislation which will enhance the ability of the Scottish Ministers and planning authorities to manage our historic environment in a sustainable way for the enjoyment and benefit of future generations. Copies of the Act can be accessed online at the UK Statute Law Database at the following web address: www.statutelaw.gov.uk

4. The 2011 Act is made up of four Parts. The first three parts comprise amending provisions corresponding to the three principal Acts amended by the 2011 Act and a fourth Part which includes provisions on “Interpretation” and “Short Title and Commencement”. The principal Acts are:

- The Historic Buildings and Ancient Monuments Act 1953 (“the 1953 Act”)
- The Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”)
- The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”)

Delegated Powers in the 2011 Act

5. The 2011 Act contains a number of delegated powers provisions which are explained in detail in the Delegated Powers Memorandum which accompanied the Historic Environment (Amendment) (Scotland) Bill on its introduction to Parliament on 4 May 2010. The Delegated Powers Memorandum, which was updated during the passage of the Bill

through Parliament to take account of any amendments, can be found on the Scottish Parliament's website.

6. The 2011 Act confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Act. Some of the powers contained in the Act are new, whilst others update or extend the application of existing powers in the 1979 and 1997 Acts to take account of the changes made by the 2011 Act.

7. While consultation on the draft Regulations is not required by statute the Scottish Government took the view that, in this case, and in line with the open and inclusive engagement with stakeholders that has characterised the legislative process to date, it was best practice to consult various interested bodies and individuals on those draft regulations that have a significant or practical policy dimension.

8. Certain delegated powers in the 2011 Act are technical in nature and will simply require consequential changes to be made to existing subordinate legislation. As these relate to minor technical consequential changes rather than matters of policy draft amending regulations were not provided for public consultation.

9. In preparing the Regulations for consultation we proceeded by way of drafting new Regulations or by revoking and replacing existing Regulations where appropriate. The approach taken is indicated below (in square brackets at the end of the title of each draft Regulation). The four draft Regulations that were subject to public scrutiny as part of this consultation exercise were as follows:

The Ancient Monuments and Archaeological Areas (Compensation) (Scotland) Regulations 2011 [Revokes and Replaces the Ancient Monuments and Archaeological Areas (Compensation) (Scotland) Regulations 1981¹]

These Regulations provide for the manner in which, and the time within which, claims for compensation under certain sections of the 1979 Act are to be made.

The Ancient Monuments and Archaeological Areas (Applications for Scheduled Monument Consent) (Scotland) Regulations 2011 [Revokes and Replaces the Ancient Monuments and Archaeological Areas (Applications for Scheduled Monument Consent) (Scotland) Regulations 1981²]

These Regulations make provision in respect of applications for scheduled monument consent. The Regulations also make provision as to the certificates which must accompany an application and prescribe the form of notice of application which must be given by the applicant to owners of the monument to which the application for scheduled monument consent relates. In addition, the Regulations make provision as to the person who is to be treated as the owner of the monument for the purposes of such notices and certificates.

¹ The existing Regulations being so out of date, it was believed preferable to revoke them entirely and to produce fresh Regulations rather than to amend the existing 1981 Regulations.

² As above.

The Town and Country Planning (Listed Buildings) (Amount of Fixed Penalty) (Scotland) Regulations 2011 [New Regulations]

These Regulations prescribe the amount of the penalty payable under a fixed penalty notice served under section 39A of the 1997 Act as inserted by section 24 of the 2011 Act.

The Town and Country Planning (Listed Buildings) (Prescribed Forms of Notices) (Scotland) Regulations 2011 [New Regulations]

These Regulations prescribe the form of the notices that will be required to fully implement section 26 of the 2011 Act (i.e. *Liability of owners and successors for expenses of urgent works*) which inserts sections 50A to 50E into the 1997 Act. The notice thus prescribed under the 1997 Act are:

- a) a notice of liability of expenses;
- b) a notice of renewal;
- c) a notice of determination; and,
- d) a notice of discharge.

Consultation Method and Responses

10. The consultation document was published on 21 March 2011 and the consultation period closed on 14 June 2011, although submissions were accepted up to 24 June 2011. The document was sent to 359 organisations and individuals. Twenty eight organisations responded. Respondents are listed in Annex A and a breakdown of responses is provided below. In most cases, responses formed the official response of the organisation. Responses from consultees who agreed their submissions to be made public are available at the following web address: <http://www.historic-scotland.gov.uk/heas-consultation-responses.pdf>

Respondent Type	Number
Local Authority	13
Heritage Organisation	4
NDPB/Executive Agency	3
Professional Body	7
Other	1
Total	28

11. The consultation document sought consultees comments on:

- the content of each of the four draft Regulations;
- the Scottish Government's views on whether a Business Regulatory Impact Assessment was required for the draft Regulations; and,
- the impact of the draft Regulations on equalities issues.

12. Responses are summarised below.

RESPONSES

General Comments/Key Themes

13. The four draft Regulations were broadly welcomed by the majority of consultees who noted that the Statutory Instruments were the latest phase in the implementation of the 2011 Act. Sixteen of the respondents had already commented on an early draft of the 2011 Act which was subject to full public consultation in 2009 under its then title of *The Ancient Monuments and Listed Buildings (Amendment) (Scotland) Bill*. General comments of support of the draft Regulations included the following:

“...It is recognised that the proposed amendments close a number of loopholes in the previous legislation on matters relating to the strengthening enforcement measures, and as such are to be broadly welcomed”.

“...support the production of draft Regulations as a further step towards the implementation of the Historic Environment (Amendment) (Scotland) Act 2011 with a view to improving the historic environment for the benefit of future generations”.

“...broadly supportive of these Regulations and their aim of simplifying legislation and improving consistency of policy in relation to the historic environment”.

14. The issues raised by consultees may be summarised as follows:

- those who sought clarification on how certain sections of the Regulations would work in practice;
- those that suggested possible amendments to the Regulations;
- those that provided editorial advice on minor technical typographical errors; and,
- those that made general comments on the Scottish Government’s regulatory and consultation process

15. These are outlined in more detail below.

Summary of Responses by draft Regulation

The Ancient Monuments and Archaeological Areas (Compensation) (Scotland) Regulations 2011

16. Of the 16 consultees who commented on these draft Regulations, 14 supported the Statutory Instrument as drafted. One respondent specifically welcomed the harmonisation of the scheduled monument enforcement compensation process with similar powers in relation to listed buildings. Another respondent suggested that the 6 month period for compensation claim should run from the date on which the stop notice ceases to have effect. Three respondents in particular noted and welcomed the Scottish Government’s intention to provide guidance on service procedures relating to claims for compensation.

The Ancient Monuments and Archaeological Areas (Applications for Scheduled Monument Consent) (Scotland) Regulations 2011

17. Of the 18 consultees who commented on these Regulations, 14 supported them as drafted. The majority of respondents generally agreed that allowing for electronic communication in the consents process would improve the efficiency of the scheduled monument consent process with one in particular noting that the Regulation would make the scheduled monument consent process ‘open and transparent’ and bring it into line with other consents. One respondent suggested that copies of the notice of application for scheduled monument consent should be made available to the planning authority, the community council and neighbours. Another respondent suggested that an Ordnance Survey map reference would be a more precise method of identifying the land in question rather than “a description of the location of the land” which could be open to subjective interpretation. The same respondent also suggested that, with regard to site notices, specific guidance should be provided for the agricultural sector.

The Town and Country Planning (Listed Buildings) (Amount of Fixed Penalty) (Scotland) Regulations 2011

18. These draft Regulations attracted the largest number of comments from respondents. Of the 19 consultees who offered comment 3 supported the Regulations as drafted. Sixteen respondents, while accepting the principle of the new fixed penalty regime, raised a number of issues as follows:

- Five respondents suggested that the level of fines set out in the draft Regulations were not sufficiently high enough to act as a deterrent.
- Two respondents suggested a revised level of incremental fine as follows: £2,000, £4,000, £6,000 or £2,000, £5,000, £10,000.
- One respondent suggested that the upper fine should be set at £10,000.
- One respondent sought clarification on why levels of fine set out in the draft Regulations had been chosen
- Concerns that Fixed Penalty Notice may be seen as alternative rather than complementary to prosecution.
- Further clarification on the process for serving these notices is required.
- Further clarification on whether prosecution would be pursued after escalating amounts had been paid but the breach continues.
- One respondent suggested that the money raised under the fixed penalty regime should be ring-fenced to assist in positive heritage management elsewhere in the local authority.
- A mechanism should be introduced that would allow the fixed penalty notice to increase at the same rate as the Retail Price Index.

The Town and Country Planning (Listed Buildings) (Prescribed Forms of Notices) (Scotland) Regulations 2011

19. Of the 18 respondents who commented on these Regulations, 10 welcomed the Regulations as drafted while commenting on typographical errors in the draft Regulations. Six respondents raised a number of issues as follows:

- The terminology in paragraph 2.24 is ‘too loose’ in terms of recording notices against properties.
- Concern that registration and updating Sasines could take too long and information on notices may not be available in time to prospective purchasers and could lead to compensation claims.
- Clear guidance on the application of this regulation is required.
- Full and detailed description of works should accompany the notice.
- Could urgent works be carried out if ownership of a building is unknown?
- One respondent suggested that notices of liability should not expire after 5 years and that 15 years would be more appropriate. They also suggested that powers to re-register a notice should not be lost if not actioned during the lifetime of an existing notice.
- Local authorities should ensure all means are made to acquire costs from original owner before shifting liability and suggest ‘Earnings Arrestment Orders’ are used to achieve this.

Business Regulatory Impact Assessment (BRIA)

20. The consultation document advised consultees that a Business Regulatory Impact Assessment had not been prepared for the four draft Statutory Instruments as it was the Scottish Government’s view that the draft Regulations would not lead to new or significant costs or savings for business, third or public sector organisations, regulators or consumers.

21. The consultation document also invited consultees to note that the full BRIA, which accompanied the Historic Environment (Amendment) (Scotland) Bill, had concluded (among other things) that: the Bill provisions would have very limited regulatory impact and that “proportionate engagement with Scottish businesses during consultation on the draft Bill did not reveal significant concerns”. Given that the full BRIA which accompanied the Bill remained directly relevant it was not thought proportionate to carry out a fresh BRIA for each of the draft Regulations contained in the consultation document.

22. The consultation document invited consultees comments on this assessment.

23. Of the 28 respondents who replied to the consultation, 2 commented on this aspect of the process as follows:

In relation to section 26 of the 2011 Act (*Liability of owner and successors for expenses of urgent works*) one respondent argued that this provision could lead to significant costs for organisations or individuals who become owners of such buildings (i.e. where a *Notice of liability for expenses of urgent works* had been registered against the property in question) as they may be unable to recover the costs from prior owners and may also incur related legal expenses.

One respondent questioned the assertion that there would be no financial impact on business suggesting that there would be an impact on business of any new legislation, since, for example, existing leases and other arrangements would have to be reviewed and professional advice taken on the implications of the legislation. The respondent in question also suggested that this was an issue in relation to other legislative impact assessments (not simply those relating to the historic environment) and urged the Scottish Government to address the issue.

Equalities Impact Assessment

24. The consultation document set out that Historic Scotland considered it unlikely that the Regulations would have significant equalities impacts, but invited views on the draft statutory instruments in that regard.

25. The consultation attracted no comments on Historic Scotland's assessment of equality issues.

Other Issues

26. A number of respondents took the opportunity to comment on broader issues relating to the historic environment legislative framework. For example, one respondent indicated that they hoped that the opportunities for a major review of historic environment legislation would not be overlooked by Scottish Government in the years to come. Another maintained that a consolidation Act was required rather than just amending legislation.

Conclusion and Next Steps

27. The consultation responses will be used to inform the Scottish Government's consideration of the final content of the Regulations. It is envisaged that the Regulations will be brought into force in late 2011.

List of Respondents

Aberdeenshire Council
Argyll and Bute Council
British Waterways
Built Environment Forum Scotland
Cairngorms National Park
Chartered Institute of Architectural Technologists
Dundee City Council
East Ayrshire Council
East Renfrewshire Council
Falkirk Council
Fife Council
Glasgow City Council
Institute for Archaeologists
Institute of Historic Building Conservation
Learning and Teaching Scotland
Loch Lomond and The Trossachs National Park
National Trust for Scotland
Perth and Kinross Council
The Royal Incorporation of Architects in Scotland
Registers of Scotland
Royal Town Planning Institute in Scotland
Scottish Borders Council
Scottish Land and Estates
Scottish Natural Heritage
Scottish Property Federation
South Ayrshire Council
Theatres Trust
Transport Scotland