



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Education and Culture Committee**

### **4th Report, 2014 (Session 4)**

### **Stage 1 Report on the Historic Environment Scotland Bill**

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## Education and Culture Committee

### 4th Report, 2014 (Session 4)

#### CONTENTS

#### Remit and membership

<b>Report</b>	<b>1</b>
Introduction	1
The General Principles of the Bill	2
Establishing Historic Environment Scotland	2
The extent of Historic Environment Scotland's functions	4
National and local decision-making	6
Defining the historic environment	7
Funding and conflict of interest	9
Ministerial direction	13
The historic environment strategy	14
Conclusion	17



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## **Education and Culture Committee**

### **Remit and membership**

#### **Remit:**

The remit of the Committee is to consider and report on further and higher education, lifelong learning, schools, pre-school care, skills and other matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning and matters relating to culture and the arts falling within the responsibility of the Cabinet Secretary for Culture and External Affairs.

#### **Membership:**

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Clare Adamson  
Jayne Baxter  
Colin Beattie  
Neil Bibby (Deputy Convener)  
Gordon MacDonald (from 3 April 2014)  
Stewart Maxwell (Convener)  
Liam McArthur  
Mary Scanlon (from 27 February 2014)  
Liz Smith (until 27 February 2014)  
Joan McAlpine (until 3 April 2014)

#### **Committee Clerking Team:**

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##### **Committee Assistant**

Fiona Sinclair



The Scottish Parliament  
Pàrlamaid na h-Alba

## Education and Culture Committee

### 4th Report, 2014 (Session 4)

#### Stage 1 Report on the Historic Environment Scotland Bill

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. The Historic Environment Scotland Bill was introduced in the Parliament on 3 March 2014 by Fiona Hyslop, the Cabinet Secretary for Culture and External Affairs. On the following day the Scottish Government published *Our Place in Time*, which is “Scotland’s first ever Historic Environment Strategy”.<sup>1</sup>

2. The Scottish Government has made clear throughout Stage 1 the links between the Bill and the strategy, for example, the Bill’s Policy Memorandum states—

“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.”<sup>2</sup>

3. Given this close relationship, our report analyses the general principles of the Bill and also considers those parts of the strategy of particular relevance to the proposed legislation.

4. We welcome the acknowledgement across the historic environment sector that improvement and reform is necessary. This is evidenced both by the publication of the new, collaborative sector-wide strategy, and in various statements made by the Scottish Government. For example, the Bill’s Policy Memorandum says—

“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 ...”

<sup>1</sup> Scottish Government. (2014) *Our Place in Time - The Historic Environment Strategy for Scotland* Available at: <http://www.scotland.gov.uk/Publications/2014/03/8522> [Accessed 5 June 2014]

<sup>2</sup> Historic Environment Scotland Bill. Policy Memorandum (SP Bill 47-PM, Session 4 (2014)), paragraph 8. Available at: [http://www.scottish.parliament.uk/S4\\_Bills/Historic%20Environment%20\(Scotland\)%20Bill/b47s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Historic%20Environment%20(Scotland)%20Bill/b47s4-introd.pdf)

5. Further, we were told by officials that while some areas in Scotland were performing well, some were “punching below their weight” in terms of the historic environment.<sup>3</sup>

6. We hope, therefore, that the Stage 1 debate will be an occasion where members also consider how they can best help to promote Scotland’s historic environment to make sure its value is fully realised.

#### *Evidence*

7. We are grateful to all those who provided us with written and oral evidence. This helped us to understand more fully the possible implications of the proposed legislation and to consider how the Bill could be improved.

8. Our understanding of the Bill and appreciation of the value of the historic environment were also greatly enhanced by a visit we undertook to Orkney, which included trips to various archaeological and historical sites, and an informal meeting with local groups to gauge their views on the Bill. We thank all those who assisted during that visit.

9. A number of specific matters were raised in written evidence that we did not have time to discuss with the Cabinet Secretary. We requested a response from the Scottish Government to the issues raised and the reply is available on our website alongside all the other evidence submitted and a note of our visit to Orkney<sup>4</sup>.

### THE GENERAL PRINCIPLES OF THE BILL

10. The remainder of this report considers the main issues that arose during our Stage 1 scrutiny and how the Cabinet Secretary responded. It also sets out our recommendations.

#### **Establishing Historic Environment Scotland**

11. The Bill seeks to establish a new organisation that will effectively continue the functions of its two predecessor bodies, Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS). Some functions are also being “simplified” and “adjusted”<sup>5</sup> in passing to the new body, and the Bill includes some functions that have previously been carried out on a non-statutory basis<sup>6</sup>.

12. The Bill does not re-state all the statutory arrangements relevant to the historic environment and is therefore silent where new arrangements are not being proposed or where existing legislation is not being modified.

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<sup>3</sup> The Committee met officials from the Scottish Government, Historic Scotland and RCAHMS on a private visit to RCAHMS HQ on 18 February 2014.

<sup>4</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/74063.aspx>

<sup>5</sup> Historic Environment Scotland Bill. Policy Memorandum, paragraph 76.

<sup>6</sup> The Bill will put the functions of RCAHMS on a statutory footing for the first time.

*Expected benefits of the Bill*

13. The Bill's policy aim 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 [Scottish Government] National Outcomes”.<sup>7</sup>

14. The outcomes are not specified in the Bill or its accompanying documents.

15. The accompanying documents do set out various other changes or benefits that the establishment of the new body is expected to deliver. For example—

- “...even greater opportunities to develop existing collaboration and partnership within the [culture] portfolio.”
- “... a more transparent separation between the role of Ministers in setting regulations and the application of those regulations by appropriately skilled professionals.”
- a contribution “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.”
- 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. It also aims to streamline the process of listed building consent.

16. There was support for the merger in the written evidence submitted to us, mainly on the basis the Bill would remove stakeholder confusion about the respective roles of the current organisations. Some stakeholders focussed on areas where they felt further clarity or changes were needed, and such issues are considered in more detail in the report.

*The practicalities of merging*

17. Audit Scotland published in 2012 guidance for public bodies on how they can learn from previous public body mergers<sup>8</sup>. We asked the chief executives of Historic Scotland and RCAHMS to detail how they had taken this advice into account in their planning for the new body. We were told that key recommendations were being adhered to, for example, progress is ongoing to prepare a draft corporate plan for the new board to consider when it is formally established.

18. Existing assets and staff will transfer to Historic Environment Scotland, without any detriment to current employees. Again, planning in this area appears to be

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<sup>7</sup> Historic Environment Scotland Bill. Policy Memorandum, paragraph 36.

<sup>8</sup> Audit Scotland. *Learning the lessons of public body mergers*. Available at: [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) [Accessed 5 June 2014]

well advanced – we note that no serious concerns about employment or transfer rights were raised and we received no representations from any of the four trades unions involved.

**19. We welcome the intended benefits of the merger, but recognise questions have been raised by some witnesses. The extent to which the Bill and the strategy actually deliver all the anticipated benefits will only be demonstrated over time, and we intend to assess at a later date whether improvements have materialised.**

20. As noted, the Bill's accompanying documents do not specify the outcomes the new body is to deliver. However, Historic Environment Scotland is to publish regularly a corporate plan, to be approved by Scottish Ministers, that will set out the outcomes by which its main objectives are to be measured. **We recommend such plans should, after a suitable period of time has elapsed, also set out which objectives have or have not been achieved i.e. they should be both forward and backward looking.** Such assessment may help to inform Historic Environment Scotland's and the Scottish Government's future consideration of what outcomes should most appropriately be set.

#### **The extent of Historic Environment Scotland's functions**

21. Historic Environment Scotland is to have the general function of investigating, caring for and promoting Scotland's historic environment. It will also have—

- a number of particular functions, such as protecting and managing the historic environment;
- a function of managing its collections as a national resource for reference, study and research;
- to exercise its functions with a view to certain matters, such as offering and promoting leadership in relation to the historic environment.

22. While all its functions relate to the historic environment, Historic Environment Scotland will not own or have responsibility for all aspects of the historic environment; the vast majority of historic buildings are under private ownership and responsibility for example. In practice, Historic Environment Scotland will have delegated to it the management of 345 'properties in care'<sup>9</sup> and will maintain its role in relation to designation and regulation<sup>10</sup>. It was originally intended that Historic Environment Scotland would undertake all historic designations in respect of marine protected areas. However, it will now be an expert advisor only as the

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<sup>9</sup> Scottish Ministers hold an estate of 345 Properties in Care for the nation (including Edinburgh Castle, for example). These are owned or currently managed by Ministers through Guardianship or similar arrangements. Ministers will maintain their responsibilities for the properties but intend to delegate management to Historic Environment Scotland.

<sup>10</sup> 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.

Scottish Government considered the benefits to stakeholders of maintaining a unified system in the marine zone outweighed any benefits of change<sup>11</sup>.

23. While Historic Environment Scotland will have a defined role, the Bill does not seem to restrict the extent to which it is to 'investigate, care for and promote' the wider historic environment. Some organisations expressed doubt or concern about the possible extent of the new body's remit, for example—

"It is unclear as to whether the new organisation will be focused on the wider historic environment rather than just Scheduled Monuments and Listed Buildings (and to a lesser extent Inventory sites) and Properties in Care. Scheduled Monuments represent only c8% of the archaeological monument record which means that the other c92% of archaeological assets fall under the remit of planning authorities."<sup>12</sup>

"The Bill explicitly identifies Historic Environment Scotland as the 'lead body' for Scotland's historic environment. The actual relationship it will have with local authorities is not clear. The Historic Environment covers a vast array of different types of monuments including buildings and archaeological sites, the majority of which are, and will be, largely dealt with by local authorities. This gives a misleading impression that Historic Environment Scotland will be the main contact and adviser for historic environment matters when it will often be the local authority."<sup>13</sup>

24. Given such concerns, we asked the Cabinet Secretary to explain whether Historic Environment Scotland is to investigate, care for and protect *all* of the historic environment.

25. The Cabinet Secretary's response stressed two points: the new organisation will effectively continue the functions of its predecessors but, through the strategy, will be better able to work towards shared goals (such as conservation and tackling climate change) on a collaborative basis—

"I ... assure the committee that maintenance of, and the relationship with, the historic environment will continue, but the new body will provide a better platform to help all the different partners to collaborate. The body will be brand new, but a lot of its functions will be inherited and it will be in a better place to collaborate. We are also doing this in the context of a strategy, and this is the first time we have ever had that."<sup>14</sup>

26. The Cabinet Secretary's clarification of the extent of Historic Environment Scotland's role is welcome. The new body will not be expected to have the degree of direct responsibility for the historic environment that some stakeholders had thought it would, rather, it will increasingly look to provide leadership and work collaboratively with the sector. **Given the concerns raised by various bodies, it is essential that all stakeholders have a shared understanding of Historic Environment Scotland's role and how it is to interact with other relevant**

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<sup>11</sup> Historic Environment Scotland Bill. Policy Memorandum, paragraph 132.

<sup>12</sup> Archaeology Scotland. Written submission

<sup>13</sup> Stirling Council. Written submission.

<sup>14</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4160.*

**bodies. The Scottish Government should ensure this is explained as clearly as possible during the passage of the Bill and beyond.**

*Marine archaeology*

27. There is a specific issue about Historic Environment Scotland's responsibilities in relation to the marine environment on which we would welcome clarification from the Cabinet Secretary. As noted, Historic Environment Scotland will not undertake historic designations in respect of marine protected areas as was the original policy intention. Scottish Ministers will retain this role (with Marine Scotland undertaking it on their behalf) and Historic Environment Scotland will become an expert advisor.

28. During our discussions in Orkney some organisations were confused about the exact division of responsibilities, in particular that decision-making on submerged archaeological sites appears to sit with Marine Scotland rather than with Historic Environment Scotland. We also note the strategy's acknowledgement that the historic environment, on which Historic Environment Scotland is to lead, encompasses underwater<sup>15</sup>. The over-riding concern in our discussion was that responsibility for submerged sites should not fall between the remits of Marine Scotland and Historic Environment Scotland.

**29. Given these concerns, we call on the Scottish Government to clarify the role of Historic Environment Scotland in relation to the marine environment and how it will interact with Marine Scotland.**

**National and local decision-making**

30. Scotland has a wealth of historical attractions, which are to be found in abundance across all parts of the country. Our visit to Orkney brought home the importance of the historic environment but also its occasional fragility and the vital role of local knowledge in its promotion and preservation.

31. Local groups in Orkney highlighted the importance of guarding against centralised decision-making on the historic environment, by ensuring that decision-making processes are set at the appropriate levels. We discussed with the Cabinet Secretary the best means by which regionalised decision-making could be safeguarded, while at the same time recognising the need for consistency in the standard of protection being provided across the country.

32. The Cabinet Secretary's view was that the Bill would not lead to more central control. She saw no reason why Historic Scotland's current decentralised approach, involving different regions, would not continue and added—

“Indeed, the bill puts a responsibility on Historic Environment Scotland to work in partnership, which can be done only by working on a locality basis.”<sup>16</sup>

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<sup>15</sup> Scottish Government. (2014) *Our Place in Time - The Historic Environment Strategy for Scotland* Available at: <http://www.scotland.gov.uk/Publications/2014/03/8522> [Accessed 5 June 2014]

<sup>16</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4168*

33. We pressed the Cabinet Secretary on how further reassurance could be provided, whether through the Bill, or by another route such as in Historic Environment Scotland's corporate plan or a ministerial letter of guidance. The Cabinet Secretary confirmed her preference for a non-statutory approach.<sup>17</sup>

**34. We welcome the Cabinet Secretary's assurance that the current regional approach should continue and that the Bill should not lead to a more centralised approach to decision making. However, we believe this assurance needs to be underpinned in some way, noting both the importance of the historic environment to local communities across Scotland, and the concerns raised in Orkney. We therefore suggest the Bill would be enhanced by requiring Historic Environment Scotland to exercise its functions in a way that takes due account of local issues and local decision making processes.**

*The role of local authorities*

35. On a related issue, various written submissions considered the Bill should provide a clearer description of Historic Environment Scotland's relationship with local authorities.

36. The new body's relationship with local authorities did not, however, appear to be an issue of particular concern to COSLA when it provided evidence to us. COSLA considered the Bill could lead to organisations working together more effectively—

“We will be vigilant in order to ensure that the collaborative working becomes a reality and that we start to see some mainstreaming, as opposed to us all sitting in our own wee trenches doing our own little bit.”<sup>18</sup>

37. The Cabinet Secretary considered the Bill would not significantly change relationships with local authorities, although the new body would improve working relationships and make them simpler<sup>19</sup>.

### **Defining the historic environment**

38. A question raised by the Bill is: what is the historic environment? No definition is provided in the Bill, but there is a definition in the strategy, part of which is quoted in the Policy Memorandum—

“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.”<sup>20</sup>

39. One of the main debates at Stage 1 was whether the historic environment should be defined in the Bill. Various witnesses considered it should, primarily because it would provide some legal clarity, for example—

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<sup>17</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4169.*

<sup>18</sup> Scottish Parliament Education and Culture Committee. *Official Report, 6 May 2014, Col 4110*

<sup>19</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4155.*

<sup>20</sup> Historic Environment Scotland Bill. Policy Memorandum, paragraph 5.

“Though we appreciate the difficulty of developing a definition of the “historic environment” that would be both meaningful yet sufficiently flexible to anticipate changes over time, we believe strongly that the absence of any such definition, allied to the imprecision of the proposed general functions, will lead to confusion and potential future conflict. The Bill would benefit greatly from such a definition.”<sup>21</sup>

40. Some organisations also contrasted this Bill’s position with the legislation that established Scottish Natural Heritage, which contains a definition of ‘natural heritage’<sup>22</sup>. We also note the historic environment has previously been defined in legislation, namely the Public Appointments and Public Bodies etc. (Scotland) Act 2003<sup>23</sup>.

41. There is no set approach in bills to defining terms that may be particularly relevant to that legislation. We question whether the rather abstract definition contained in the strategy would be legally binding if it were included in the Bill.

42. There were mixed opinions amongst stakeholders on the issue, but the prevailing view was that the Bill itself need not provide a definition. However, it was reiterated that the term had to be clearly expressed somewhere, particularly to avoid possible legal confusion.

#### *The Cabinet Secretary’s position*

43. In oral evidence the Cabinet Secretary provided a number of reasons why the Bill does not provide a definition, which can be summarised as follows—

- the historic environment sector ‘overwhelmingly’<sup>24</sup> wanted the definition to be set out in the strategy rather than in the Bill;
- views on what constitutes the historic environment can differ or evolve over time, for example, whether to include intangible heritage or industrial heritage. The Cabinet Secretary considered this could lead to arguments about what was or was not defined in the Bill;
- in respect of the definition of ‘natural heritage’ (see paragraph 40), the Cabinet Secretary commented “... it does not set out the boundaries. All that it does is say what can be included, but loading things in does not help to define the boundaries of where else work is done.”<sup>25</sup>
- The Cabinet Secretary argued: “The bill is not about defining the historic environment. Most of that is done in other pieces of legislation. The bill

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<sup>21</sup> The Association of Certificated Field Archaeologists. Written submission.

<sup>22</sup> “For the purposes of this Act, “the natural heritage of Scotland ”includes the flora and fauna of Scotland, its geological and physiographical features, its natural beauty and amenity; and references to “natural heritage” shall be construed accordingly.”

<sup>23</sup> “Any or all of the structures and places in Scotland of historical, archaeological or architectural interest or importance.”

<sup>24</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 20 May 2014, Col 4166.

<sup>25</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 20 May 2014, Col 4163.

is about setting up an organisation.”<sup>26</sup> She questioned whether providing a definition in the Bill would add anything.

**44. On balance, we agree the term ‘historic environment’ need not be defined in the Bill. The most important consideration is that the term has to be clearly defined somewhere, in order to avoid possible legal confusion about the division of responsibilities between Historic Environment Scotland and other relevant bodies. There appears to be general agreement that the definition in the strategy is sufficiently clear, although the Scottish Government should continue to ensure all stakeholders have a shared understanding as the Bill and strategy are implemented.**

### **Funding and conflict of interest**

45. Various organisations expressed concern that Historic Environment Scotland may be increasingly likely to compete for charitable funding, to the detriment of other bodies in the sector. There is a related concern that funding pressures may also lead to, or heighten the risk of, a conflict of interest within the new body. These concerns raise a number of inter-linked issues, which are discussed together in this section.

#### *Current funding and charitable status*

46. Historic Scotland is currently funded from the Scottish Government’s culture portfolio, and also receives income from visitor fees (for admission to Edinburgh Castle, for example) and commercial activities. RCAHMS is also funded from the Scottish Government’s culture portfolio.<sup>27</sup>

47. The Bill does not confer charitable status on Historic Environment Scotland. However, the Scottish Government intends to dis-apply relevant legislative requirements to enable a future application for charitable status to be made by the new body. The financial memorandum states that, if granted, this could be expected to bring “significant financial benefit” to Historic Environment Scotland<sup>28</sup> which would principally arise from: income from HMRC as a result of gift-aid; possible charitable rates relief; and charitable donations. The Financial Memorandum estimates that charitable status could be worth around £25m in total to the new body over the period to 2024-25. Donations may be worth around £300,000 per annum.<sup>29</sup>

48. The non-financial benefits of charitable status are less clearly defined, although Historic Scotland considered that it would “...provide opportunities to work with the national collections and other players in the voluntary sector to consider buildings, archives and collections more generally”.<sup>30</sup>

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<sup>26</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4166.*

<sup>27</sup> In the 2014-15 Draft Budget, Historic Scotland is allocated £373.7m, RCAHMS £4.2m. RCAHMS receives grants that support its charitable purpose.

<sup>28</sup> Although the financial benefits do not flow from the legislation, the FM notes at para 91 that they are “significant and relevant to the decision to create a new body”.

<sup>29</sup> Historic Environment Scotland Bill. Policy Memorandum, paragraph 96.

<sup>30</sup> Scottish Parliament Education and Culture Committee. *Official Report, 18 March 2014, Col 3821.*

49. The Policy Memorandum acknowledges concerns expressed in consultation about charitable status and we explored these concerns in some depth.

*Funding concerns*

50. The National Trust for Scotland (NTS) claimed that reductions in Historic Scotland's funding from the Scottish Government have amounted to around £15m over five years and would have to be recouped from the "overall pot for charities in the historic environment sector" (which it calculated to be worth, very approximately, around £26m).<sup>31</sup>

51. Although welcoming in general terms the challenge that increased competition can bring, NTS suggested the new body would be at an unfair advantage—

"... we would be competing for funds with a body that was advantaged by being closely related to the Government and which would ... have access to Government ministers and departments."<sup>32</sup>

52. Another source of concern is the cost of paying for repairs to historic properties. NTS calculated its property maintenance backlog to total around £46m<sup>33</sup>, while the Historic Houses Association Scotland said its backlog amounted to around £57m<sup>34</sup>.

53. Separately, as noted, the Scottish Government intends to delegate management of the 'properties in care' to Historic Environment Scotland. NTS said it was not clear who would be responsible for any repairs to these properties. It said that if Historic Environment Scotland is not to pay any of the costs of these repairs—

"... that will create a very unlevel playing field and, as an organisation that has to raise most of its money on its own, we are not happy about that."<sup>35</sup>

*The Cabinet Secretary's response*

54. The Cabinet Secretary said she could not currently specify the outstanding repair and maintenance backlog for the 'properties in care' but expected a figure to be available by April 2015, in time for the establishment of the new body. She warned it would be a "substantial amount".<sup>36</sup>

55. The Cabinet Secretary confirmed there had been reductions in Scottish Government funding to Historic Scotland, but Historic Scotland had compensated for this by increasing its income from visitor activities. We also note that, over the three years to March 2013, cumulatively, both Historic Scotland and RCAHMS have had underspends. In response to concerns about Historic Environment Scotland potentially diverting funding from other bodies, the Cabinet Secretary replied—

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<sup>31</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4126.

<sup>32</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4126.

<sup>33</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4126.

<sup>34</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4127.

<sup>35</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4127.

<sup>36</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 20 May 2014, Col 4167.

“To an extent, the current bodies are already in competition for both income and visitors. However, to see the matter simply as an internal competition for limited resource is to look at it in the wrong way. The whole point of the strategy is that we need to grow the sector as a whole in terms of both tourism and income from other areas.”<sup>37</sup>

56. Should the new body be granted charitable status, the Cabinet Secretary said it could increase its income in a way that would not be detrimental to other bodies. In relation to the projected level of charitable donations to Historic Environment Scotland, £300,000 per annum, she added—

“I hardly think that that would threaten the NTS, given that Historic Scotland already receives charitable donations.”<sup>38</sup>

**57. We note the funding concerns expressed by some bodies in the historic environment sector but accept these may not materialise. We also note the suggestion that Historic Environment Scotland, as a result of previous reductions in Scottish Government funding to Historic Scotland, may have to make up this shortfall from the overall ‘pot’ of donations available to the sector. However, we do not consider there is evidence to suggest this will materialise. As the Cabinet Secretary set out, Historic Scotland has already responded to previous funding reductions by seeking to maximise income from other sources.**

**58. We appreciate the Scottish Government cannot currently quantify the extent of the repair and maintenance bill for ‘properties in care’, but welcome its commitment to doing so by April 2015. Given the strong concerns about this issue, the Scottish Government should clarify how such repairs are likely to be paid for – it is not clear to stakeholders whether the Scottish Government, Historic Environment Scotland or the property owners would be responsible.**

**59. We acknowledge the Bill does not directly confer charitable status on Historic Environment Scotland but highlight that significant financial benefits could be realised should it be granted.**

*Conflict of interest*

60. The discussion about funding and charitable status overlaps with the view of certain groups that Historic Environment Scotland may be at risk of a conflict of interests. We sought to understand this risk, given the new body is simply assuming the responsibilities of its predecessor bodies.

61. NTS suggested the new body could be disproportionately focussed on raising funds rather than on its regulatory role—

“The main difference will be the pressure that the organisation is under to raise its own funds and make its own money ... If we consider the staffing of the new body and how many staff will be involved in managing tourism

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<sup>37</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4174.*

<sup>38</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4176.*

outlets and heritage tourism properties, we can see a disproportionate emphasis on that part of the business. That leaves only a small number to cover the regulatory function ... That pressure might mean that there is a temptation to put less resource into proper scrutiny and regulation or to bend the rules a bit when it comes to the new organisation regulating itself.”<sup>39</sup>

62. Concerns about possible conflicts of interest and competition for funding were raised during our meeting in Orkney, and in other written evidence—

- Scottish Environment Link referred to the dangers of the regulatory, advisory and technical functions of government being mixed with the management of services, within the same government departments or agencies. It added: “It [Historic Environment Scotland] will be left, as proposed, regulating its own 344 sites and all the other sites defined as being of national importance. This creates a clear conflict of interests, and might damagingly mix government and non-government functions.”<sup>40</sup>
- “...listing of a building may be of significance in respect of the availability of grants and other financial issues. Issues may arise about the role of Historic Environment Scotland in that process if at the same time it is making grants or indeed potentially seeking grants as a charity.”<sup>41</sup>

#### *The Cabinet Secretary’s response*

63. Given the level of concern expressed, we discussed these issues with the Cabinet Secretary. In short, she did not consider the Bill would give rise to conflicts of interest. For example, the Cabinet Secretary pointed out that Historic Environment Scotland would be subject to the same scheduled monument consent process as applies elsewhere. She also made it clear Historic Environment Scotland would not be able to provide grants to itself, which has been an issue of significant concern to stakeholders<sup>42</sup>.

64. The Cabinet Secretary acknowledged that income generation may be a greater priority for the new body but said this did not arise from the Bill. She also rejected suggestions that focussing on increasing its income may lead Historic Environment Scotland to neglect its regulatory duties—

“I am accountable to Parliament in relation to that, so if ... we were not satisfied with the way that the regulatory function was carried out, I would be very concerned about that as part of my ministerial responsibility. However, I do not anticipate that happening.”<sup>43</sup>

65. The Cabinet Secretary also highlighted the bigger picture, that Historic Environment Scotland will aim to work in accord with the rest of sector rather than seek to harm it—

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<sup>39</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4135.

<sup>40</sup> Scottish Environment Link. Written submission.

<sup>41</sup> The Law Society of Scotland. Written submission.

<sup>42</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 20 May 2014, Col 4171.

<sup>43</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 20 May 2014, Col 4177.

“Because Historic Environment Scotland will be charged as a lead body, it should not do anything that will cause anybody else any difficulty, because if it did so it would not be carrying out the function of being a lead body that works in collaboration.”<sup>44</sup>

66. Historic Environment Scotland will inherit the functions of its predecessor bodies. The deployment of staff will be a matter for Historic Environment Scotland but we expect it to do so in a way that enables it to continue to fulfil its statutory functions.

**67. We understand the concerns expressed by some stakeholders about a possible conflict of interest. However, we acknowledge that such risks are not new and note, for example, that Historic Environment Scotland will not be able to award grants to itself. We welcome that bodies such as NTS have made positive suggestions as to how their concerns could be addressed. The Cabinet Secretary should continue to consider such suggestions, as the successful implementation of the Bill and the strategy will depend to a considerable extent on partnership working and the goodwill of all parties involved.**

#### **Ministerial direction**

68. When Scottish Ministers delegate to Historic Environment Scotland the exercise of functions in relation to properties in care, they can give it general or specific directions about those functions.

69. In correspondence to the Delegated Powers and Law Reform Committee, the Scottish Government said Ministers may give directions—

“... in relation to what would be regarded as “curatorial” matters in relation to those properties in care and collections, the functions in respect of which have been delegated by Ministers to Historic Environment Scotland.”<sup>45</sup>

70. This position is not explained in the Bill’s Explanatory Notes. As Scottish Ministers intend to so delegate every one of the 345 properties in their care to Historic Environment Scotland, we sought to understand whether there were any implications for its curatorial independence.

#### *The Cabinet Secretary’s response*

71. The Cabinet Secretary explained there would be a requirement for checks and balances when functions in relation to ‘properties in care’ were delegated to Historic Environment Scotland—

“If we had concerns about how Stirling castle was being maintained, we would need a power to ask that those concerns be looked into ... I do not think that people will accept a situation in which everything is transferred to

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<sup>44</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4174.*

<sup>45</sup> Scottish Parliament Delegated Powers and Law Reform Committee. 30<sup>th</sup> Report, 2014 (Session 4). *Report on Historic Environment Scotland Bill* (SP Paper 515).

Historic Environment Scotland and ministers abdicate their responsibilities for ensuring that the key and main properties are looked after properly.”<sup>46</sup>

72. The Cabinet Secretary also stressed that Scottish Ministers would not seek to exercise political interference over a particular property, and considered that, in the event that ministerial directions were issued, the legislation would make this process more transparent.

**73. Given the correspondence quoted at paragraph 68, we ask the Scottish Government to explain in more detail the Bill’s implications for the curatorial independence of Historic Environment Scotland.**

74. On a related point, NTS’s written submission questioned the legality of Ministers delegating some properties in care to Historic Environment Scotland. It stated that the vast majority are privately owned, and to transfer management responsibility where the contracting parties are ministers and private owners would “override the contractual position to enable delegation to take place”.<sup>47</sup>

75. We asked the Cabinet Secretary to confirm the steps taken to withstand any possible challenge on this issue. She replied “we have set out in primary legislation what the delegated functions will be” and confirmed that where delegation takes place there would still be a relationship with Scottish Ministers. **We would welcome confirmation from the Scottish Government that there is minimal risk of a legal challenge arising, and that it has consulted fully on these matters with the private owners in question.**

### **The historic environment strategy**

76. As noted, the Scottish Government has stressed the central importance of the accompanying strategy and Historic Environment Scotland’s lead role in its delivery.

77. We discussed with witnesses what the term ‘lead role’ would actually mean in practice, given some of the concerns outlined earlier and considering that the Scottish Government will retain policy-making functions in relation to the historic environment and powers of direction over the new body.

78. There was support for Historic Environment Scotland adopting a lead or championing role for the historic environment, albeit with some of the caveats already highlighted. There was also broad support for the strategy but a recognition that it is still at an early stage of implementation; there was some concern that it was vague and lacking in detail.

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<sup>46</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4161.*

<sup>47</sup> National Trust for Scotland. Written submission.

*Responsibility and accountability*

79. The specific outcomes the strategy will deliver are yet to be fully defined<sup>48</sup>. However, we were very keen to understand the precise lines of accountability for ensuring the outcomes that are agreed are delivered.

80. *Our Place in Time* sets out a governance structure for the implementation of the strategy that includes an ‘overarching historic environment board’, to be chaired by the Cabinet Secretary, and an operational board. It will also include four working groups<sup>49</sup>. *Our Place in Time* does not mention Historic Environment Scotland, or how its board fits into the governance structure that will deliver the strategy.

81. In questioning Scottish Government officials, we were particularly interested in who would ultimately be responsible for the strategy’s successful delivery. Officials said there was a partnership arrangement involving a range of different bodies and stressed the difficulties in the Scottish Government seeking to compel some of these bodies to take a particular action. We pressed officials to explain what would happen in the event of there being a problem in the strategy, for example, where there was disagreement on a specific issue relating to a body the Scottish Government did not control. Officials replied that—

“It is very difficult to put that into a specific context. The point is that we collectively agree that these are good outcomes. I imagine that there will be ways of working around any particular issue but, by bringing everyone together to agree the strategy, we have a moral agreement that it is a good thing and that we should all work together.”<sup>50</sup>

82. In following up this issue with NTS, its chief executive stated—

“It is difficult to say at this point who will be accountable because we do not have any outcomes under the strategy.”<sup>51</sup>

83. NTS went on to highlight the risk of a potential conflict should its trustees not agree that their strategy aligns with *Our Place in Time*, but acknowledged this was unlikely to arise. NTS, along with various other organisations, stressed that sufficient resources would be required to ensure the strategy is fully implemented—

“If we are to set objectives and outcomes and expect people to be accountable for them, we need to make sure that the funds are available to

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<sup>48</sup> A collaborative “Measuring Success” working group will be established through key stakeholders to begin to build up a suite of shared outcomes. Scottish Government. (2014) *Our Place in Time - The Historic Environment Strategy for Scotland* Available at: <http://www.scotland.gov.uk/Publications/2014/03/8522> page 28 [Accessed 5 June 2014]

<sup>49</sup> Two of these working groups have been established (on heritage tourism, and a joint central and local government group) and two are to be established (on education and volunteering, and on measuring success).

<sup>50</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 18 March 2014, Col 3838.

<sup>51</sup> Scottish Parliament Education and Culture Committee. *Official Report*, 6 May 2014, Col 4117.

enable the delivery of those outcomes. It is not yet clear where that money will come from or how it will be distributed.”<sup>52</sup>

*The Cabinet Secretary’s response*

84. On the question of accountability, the Cabinet Secretary reiterated that delivery of the strategy would be a “collective responsibility”; the internal governance arrangements of board members would continue to apply; and she would expect organisations to be supportive of the strategy in their respective corporate plans<sup>53</sup>.

85. Ultimately, however, the Cabinet Secretary said the Scottish Government would have the final say in the event of there being a difference of opinion about the overall direction of the strategy.<sup>54</sup>

86. In a subsequent letter to the Committee, the Cabinet Secretary put this remark into context—

“I clearly could not direct members of the forum overseeing the all-Scotland Strategy, nor would I seek to do so. The point I was making was that, in the unlikely event that the appointed board of Historic Environment Scotland was not, in my view, playing a sufficiently strong role in addressing matters of concern to the wider sector, as captured through the medium of the Strategy, then I would if necessary direct the board of Historic Environment Scotland to consider their duty in the Bill to work in partnership and engage more effectively.”

“...if there are points on which key players cannot find agreement or accommodation, then we will need to work around these or approach issues from fresh perspectives.”<sup>55</sup>

87. In terms of properly resourcing the strategy, the Cabinet Secretary said existing funding sources would make a contribution but suggested there would have to be additional investment—

“...the nation must understand that if it wants to have a built heritage that is accessible, which people can visit and which is there for future generations, there will need to be investment in the sector going forward.”<sup>56</sup>

88. The ‘overarching historic environment board’ is to hold players to account for delivery of the strategy and will report annually on the progress being made. Historic Environment Scotland is to play a lead role in the delivery of the strategy – and in relation to the historic environment as a whole – and will report in its corporate plan on the outcomes it is to achieve. **The Scottish Government should clarify how the overarching historic environment board and the separate Historic Environment Scotland board are expected to work together, in particular where any problems are experienced in implementing the strategy. It should also clarify how Historic Environment Scotland’s**

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<sup>52</sup> Scottish Parliament Education and Culture Committee. *Official Report, 6 May 2014, Col 4117.*

<sup>53</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4178.*

<sup>54</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4179.*

<sup>55</sup> Minister for Culture and External Affairs. Written submission, 28 May 2014.

<sup>56</sup> Scottish Parliament Education and Culture Committee. *Official Report, 20 May 2014, Col 4180.*

corporate plan will take account of the priorities and outcomes established through the strategy, which will be reported on by the overarching historic environment board. In short, we want to be satisfied that the two boards will work effectively together without duplication of effort, and in a way that will be understandable to the sector.

**89. We seek an explanation from the Scottish Government of how relevant bodies are likely to work together on prioritisation, for example, in determining which parts of the historic environment most need to be repaired. We ask the Scottish Government to clarify where the ultimate decision-making power on this crucial issue lies.**

#### CONCLUSION

90. The Scottish Government and other bodies have been commendably frank in acknowledging that the public sector's contribution to the historic environment could and should be improved. We welcome the strategic and collaborative approach that has been adopted in an attempt to effect the necessary improvements. The extent to which these efforts have succeeded will only become fully apparent later, but we appreciate that legislating to create Historic Environment Scotland is a necessary first step. **We therefore recommend to the Parliament that the general principles of the Historic Environment Scotland Bill be agreed to.**

91. One of our specific tasks at Stage 1 is to report on the Bill's Policy Memorandum and Financial Memorandum. No substantial comments were provided to us on the Financial Memorandum nor in the submissions forwarded by the Finance Committee. We have covered the financial implications of charitable status in some depth, but reiterate that this is not provided for in the Bill and that related figures are provided in the Financial Memorandum for illustrative purposes only. We consider the Policy Memorandum to be generally well written and informative, and that it demonstrates effective consultation took place. However, we have highlighted some issues that it, or the Explanatory Notes, could have covered in more depth. Finally, we thank the Delegated Powers and Law Reform Committee for its Stage 1 report.

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