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EH6 6QQ

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24 March 2015

Dear Sir / Madam,

**Consultation on the Historic Environment Scotland Act 2014, etcetera, Secondary Legislation**

Thank you for the opportunity to comment on this consultation.

**The Chartered Institute for Archaeologists**

The Chartered Institute for Archaeologists (CIfA) is a professional body for the study and care of the historic environment. It promotes best practice in archaeology and provides a self-regulatory quality assurance framework for the sector and those it serves. The Institute was granted a Royal Charter of Incorporation on 03 June 2014.

CIfA has over 3,200 members and more than 70 registered practices across the United Kingdom. Its members work in all branches of the discipline: heritage management, planning advice, excavation, finds and environmental study, buildings recording, underwater and aerial archaeology, museums, conservation, survey, research and development, teaching and liaison with the community, industry and the commercial and financial sectors.

CIfA's Scottish Group has over 250 members practising in the public, private and voluntary sector in Scotland. Furthermore, CIfA is a member of the Built Environment Forum Scotland (BEFS), a network organisation that brings together non-governmental organisations and professional bodies that work with Scotland's built environment.

**The Historic Environment Scotland Act 2014, etcetera, Secondary Legislation**

**General**

CIfA has strongly supported the publication of Scotland's first-ever Historic Environment Strategy, *Our Place in Time* and share Scottish Government's desire to see a new lead public body which will *'support and enable the delivery of that shared strategic vision, working in collaboration with everyone who cares about Scotland's rich and diverse historic environment.'* (Cabinet Secretary's Foreword to the consultation document, page 3)

The Institute also endorses Scottish Government's aims, in producing secondary legislation, to achieve simplicity, consistency and transparency. ClfA's primary concern in considering the draft secondary legislation the subject of this consultation is to ensure that it does not inadvertently reduce levels of protection for the historic environment and facilitates rather than impedes the role of Historic Environment Scotland in supporting and enabling the delivery of the shared strategic vision. To a very large degree the draft secondary legislation achieves those aims and the detailed comments below should not be taken in any way to undermine ClfA's general support for the measures necessary to implement the provisions of the Historic Environment Scotland Act 2014 ('the Act').

### Specific Questions

#### **The Scheduled Monument (Notification and Publication) (Scotland) Regulations 2015 and The Listed Buildings (Notification and Publication) (Scotland) Regulations 2015**

##### **Q1. Do you agree with the approach taken in the Regulations covering the notification of listing and Scheduling?**

1.1 Yes.

1.2 These draft regulations relate to notification of scheduling or exclusion, but not to consultation prior to the decision to schedule or exclude. It is appreciated that the draft regulations of necessity reflect the provisions of the Act (and in this case, paragraph 3 of Schedule 2 to the Act), but in the absence of regulation it would be helpful if firm guidance could be provided (perhaps by means of a revision of Scottish Historic Environment Policy (SHEP)) advocating similar consultation as required for listing (see section 1(3) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997). Ideally we would like to see the words '(listing only)' removed from the text box on page 7 of the consultation document (*'HES considers proposal, must consult as appropriate (listing only)'*) but understand that this might require primary legislation.

1.3 ClfA also endorses the suggestion made by BEFS in its response to this consultation that the HES website should include a monthly list of the latest amendments to the Schedule and List to allow all stakeholders to remain fully informed.

1.4 There appears to be a typographical error in draft regulation 4 which refers in the last line to a requirement for the notice *'to be given in accordance with this regulation and regulation 4'* [my underlining for emphasis]. This and other glitches in the numbering of regulations will no doubt be addressed before final publication of the regulations.

#### **Scheduled Monument Consent**

##### **Q2. Do you agree with the general approach taken in the Regulations covering applications for SMC?**

2.1 Yes.

2.2 With regard to archaeological works in respect of scheduled monuments, ClfA would like to see requirements as to the application of professional standards and the competence of

those carrying out the works (<http://www.archaeologists.net/codes/ifa>), if not in secondary legislation, at least in guidance through revision of SHEP.

**Q3. As an NDPB Historic Environment Scotland will be treated in the same way as an external applicant when they are carrying out works at the properties in care (the 345 historic properties conserved and opened to the public by HES on behalf of the Scottish Ministers). All applications and decisions including HES will be published, this means that the system will be transparent and the public will be able to compare the approach to internal and external applications. Do you agree with the approach to publish all applications and decisions?**

3.1 Yes.

**Q4. The current administrative arrangement whereby applicants are given a provisional view on whether or not they are likely to be granted SMC will cease once these Regulations take effect. This extra step in the process was useful in the absence of a right of appeal to give applicants the chance to challenge the decision or any conditions attached before the decision was issued. However discussions with stakeholders suggest that they saw pre-application engagement as a more important tool for ensuring a dialogue between HES and the applicant, and the new right of appeal gives applicants a more formal way to appeal the decision to Ministers. Do you agree with the decision to no longer issue the provisional view?**

4.1 Yes, provided that there are clear and effective mechanisms to ensure meaningful pre-application engagement. ClfA agrees that pre-application engagement is a crucial part of the process.

**Q5 – The draft Regulations do not include the circumstances in which HES, where they intend to grant consent, will be required to notify Ministers about an application for SMC. These circumstances will be set out subsequently in directions and may include cases where the decision is likely to represent a significant departure from established policy or where there are other related consent applications, for example planning consent. Please give details of what you think such criteria might be?**

5.1 ClfA agrees that in the vast majority of cases SMC applications should be determined by HES. The examples of possible triggers for notification set out on page 11 of the consultation document appear sensible. Care should be taken not to draw the criteria in this respect too widely, but it may be appropriate to notify in any case where it is proposed to grant consent against the advice of the relevant local authority.

#### **Listed Building Consent and Conservation Area Consent (LBC and CAC)**

**Q6. Do you agree with the approach taken in the Regulations covering applications for LBC/CAC?**

6.1 Yes, save that consideration might be given to requiring planning authorities to consult with HES before determining LBC applications involving archaeological interest

**Q7. Do you agree with this administrative approach?**

7.1 Yes, provided that *'consideration of the available capacity and expertise within the Planning Authority'* includes capacity and expertise to deal with the archaeological implications of proposals. We would normally expect expertise in relation to archaeological matters to be measured by accredited membership of ClfA.

**Q8. Do you agree that a freestanding access statement should be the exception rather than the rule?**

8.1 No comment.

**Q9. Would you like to offer any comments, for example in relation to thresholds for such a requirement?**

9.1 No comment.

#### **Appeals against Listing and Scheduling**

**Q10. The draft regulations for appeals against listing and scheduling set out the procedural details for making an appeal. Do you agree with the approach taken in the regulations?**

10.1 Yes, provided that Scottish Ministers and appointed persons will have access to appropriate expertise in relation to the historic environment and, in particular, to archaeological issues.

#### **Grounds of Appeal against scheduling or listing (or amendments to the Schedule/list)**

**Q11. Do you agree that this approach will provide a suitable basis for grounds of appeal against scheduling and listing?**

11.1 Yes, subject to paragraph 11.2 below.

**Are there further areas/ grounds for appeal which should be considered?**

11.2 Yes. since scheduling is discretionary it should be possible to appeal against a decision to schedule on the ground that, although the monument is of national importance it is better managed if not scheduled. Furthermore, it should be possible to argue that the asset does not constitute a 'monument' within the meaning of the Ancient Monuments and Archaeological Areas Act 1979 as amended by the Historic Environment (Amendment) (Scotland) Act 2011 (whether nationally important or not).

#### **The Scheduled Monument (Appeal) (Scotland) Regulations 2015**

**Q 12. The draft Regulations for appeals in relation to scheduled monument consent set out the procedural details for making an appeal. Do you agree with the approach taken in the Regulations?**

12.1 Yes.

#### **The Scheduled Monument (Appeals) (Scotland) Regulations 2015**

**Q 13. The draft Regulations for appeals in relation to Scheduled Monument Enforcement Notices set out the procedural details for making an appeal. Do you agree with the approach taken in the Regulations?**

13.1 Yes. CfA supports the setting of timetables to facilitate the expeditious handling of appeals. However, there needs to be sufficient flexibility to allow those time limits to be extended, particularly in relation to the response of HES, where the issues are sufficiently complex to warrant more extensive consideration and where, for instance, third party expertise needs to be consulted. In most cases this should not arise since HES should be conversant with the issues prior to the issue of the Scheduled Monument Enforcement Notice. However, in some cases the statement of appeal may raise fresh issues which need further consideration.

#### **Environmental Impact Assessment & the Planning system**

**Q14. Do you agree with the removal of the requirement to consult The Scottish Ministers on EIA's and the new requirement to send a copy of the environmental statement to the minister for information?**

14.1 Yes.

#### **Scheme of Delegation**

**Q15. Do you have any comments on this approach?**

15.1 The requirements around asset management, condition monitoring and conservation and maintenance standards should include archaeological matters and standards.

#### **Transitional arrangements**

**Q 16. Do you have a preference for which option should be taken forward?**

16.1 No, but whichever option is taken forward, there will need to be clear communication and guidance to the sector and the public to avoid uncertainty and confusion.

**Q 17. Are there any particular issues in relation to ongoing cases during the transition phase which you feel might particularly affect you or your organisation?**

17.1 No.

#### **Equalities Impact**

**Q18. Do you think that the proposals presented might impact on people differently depending on characteristics such as age, disability, gender, race, religion or belief, sexual orientation, gender identity, or marriage and civil partnership status?**

18.1 No.

**Could the proposals enhance equality or good relations? If so, please tell us more.**

18.2 No comment.

#### **Business Regulatory Impact**

**Q19. Do you think that the proposals presented might impact on businesses, the third (voluntary) sector or have any other impact of concern?**

19.1 The impact should generally be positive.

**Privacy Impact**

**Q20. Do you think that the Privacy Impact Assessment has identified the key issues associated with Privacy in the draft regulations?**

20.1 No comment.

**Guidance and further Comments**

**Q 21. What level and types of information in particular would you like to see in new and revised guidance?**

21.1 In addition to general guidance on the operation of the new regime, ClfA, as a professional body, is particularly keen to see guidance upon the application of professional standards and the competence of those carrying out archaeological work in relation to listed buildings and scheduled monuments.

21.2 One specific area in which guidance would be useful would be as regards the formulation and imposition of conditions on listing building and scheduled monument consents. Such conditions should ensure that work is carried out pursuant to such consents to professional standards by accredited practitioners.

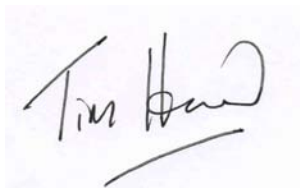
21.3 Scottish Government should also ensure that there is consistency between SHEP, Scotland's Historic Environment Strategy, the emerging Archaeology Strategy for Scotland and any new guidance. This may involve revision of existing documents such as SHEP.

**Q 22. Please add any other comments you have on any aspect of the Regulations, or expand on any points that you wish too.**

22.1 No comment.

ClfA would be happy further to contribute to the formulation and implementation of these measures. In the meantime, if there is anything further that I can do to assist please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Tim Howard', with a horizontal line underneath.

Tim Howard LLB, Dip Prof Arch  
Senior Policy Advisor