



RESPONSE TO THE ANNEX TO THE MINISTER'S LETTER ON HERITAGE PROTECTION LEGISLATION

REPORT ON THE NEED TO REVIEW HERITAGE LEGISLATION IN SCOTLAND

Given the high level of interest in the subject and engagement by the sector, Council was deeply disappointed that a considered analysis of the response to the report submitted in August 2006 on the need to review heritage protection legislation had not accompanied the Minister's response. The analysis set out in the Annex sent under cover of the Minister's letter dated 29 January 2008, served only to increase rather than allay the sense of disappointment.

Council has fundamental misgivings over what it considered to have been a highly selective use of the material arising out of the Historic Scotland stakeholder engagement process and from the HEACS report to the Minister, which has been used in justification of the decision that a review will not be undertaken. The analysis raises a number of issues which Council feels cannot pass without comment.

Before addressing the Stakeholder Engagement Process undertaken by Historic Scotland during the course of 2007, it is worth recalling that the external members of the HEACS Working Group were selected for the depth of their experience in areas that were relevant to the question posed to HEACS, and for the fact that their views were considered to be representative of some of the key organisations you have listed as having been consulted during the stakeholder process. BEFS was also included and given observer status.

There was, of course, substantial external consultation undertaken by the HEACS Working Group in the course of the thirteen meetings convened before the report was drafted, and also in workshops when some of the key issues were addressed. The workshop organised jointly by BEFS and HEACS, held on 24 May 2005, was attended by 41 delegates representing 17 organisations, and there was a further workshop held with BEFS on 17 November 2006 following the publication of the report. It will be recalled also that a well-attended Public Open Meeting in Falkirk in 2006 was held to consider the recommendations arising out of the publication of the four HEACS reports. In all, this amounts to a valuable body of informed advice and opinion.

The outcome of these consultations has been consistent in adopting a position in support of the HEACS recommendations for a review of the legislation. In the build-

up to the Elections last year this recommendation was endorsed by BEFS as part of its election manifesto, and by the National Trust for Scotland in its message to Parliamentary candidates. Expectations in the sector were raised considerably when the SNP Election Manifesto incorporated a clear commitment to undertaking a review, with the following: 'Current legislation on built heritage is complex and piece-meal, with significant gaps. For example, there is no statutory protection for battlefield sites in Scotland. An SNP government will conduct a full review and consultation on the legislation covering heritage protection, with a view to bringing forward a Heritage Bill in the next session of Parliament.' To turn away from such a clear commitment to the electorate would suggest to HEACS that compelling reasons would need to be postulated as to why it should be felt inappropriate to conduct a review.

It will be noted from the written record of the workshop held by BEFS in July 2007 that the flow of the debate had centred upon whether Options 2 or 3 were to be pursued, in line with the thinking behind the Minister's letter of 20 December 2006. Option 1 - that there should be no review - was not raised for discussion at that stage. In this context, given the consistency in the level of support for a review from the sector, the disappointment following the Minister's decision that there will be no review has been palpable, and expectations have not been met in the reasoning set out in the Annex to the Minister's letter.

The HEACS report is quoted as giving support for the view expressed regarding the fact that the system is 'basically fit for its present purpose'. The quotation that has been used is taken selectively from Clause 94: 'From the breadth of the evidence provided, HEACS recognises that current heritage protection legislation has considerable virtues and strengths.' This cannot be construed as meaning that the system is either 'broadly right' as is now being maintained, or even 'fit for purpose'. The quotation was preceded by the following clause (93) which is repeated here in full as it provides the context: 'The evidence presented to HEACS suggests that the shortcomings of the existing legislation are more fundamental and more wide-ranging than it has been possible to set out here. The historical development of the legislation, with the resulting complexity and compartmentalisation, have made it no longer fit for purpose.' Council questions such selective quarrying of material from its report.

It is held in paragraph 2 of the Annex that the outcome of the Historic Scotland Stakeholder Engagement Process is that the current system is 'broadly right'. From the recorded notes of the external stakeholders' workshops, HEACS sees no evidence of views emerging that contradict sharply the evidence base upon which the report was founded, nor in support of the decision that has been taken in which no real commitment has been given to promoting legislative change. This falls far short of the expectations of the sector. The notes on the respective workshops with BEFS and the Local Authority Historic Environment Forum recognise the spirit of optimism in which legislative reform might be possible, and in the plenary session of the latter it was noted that greater protection for 'Battlefields, Historic Gardens and Designed Landscapes and cultural landscapes could be addressed through new primary legislation'. The case for an over-arching designation, possibly to be graded, had been acknowledged in discussion.

In paragraph 4 of the Annex, it is noted that HEACS had laid stress on the review in England and Wales. It should have come as no surprise that the extent and significance of the review was addressed as fully in the report as knowledge of the intended changes allowed, as it was implicit from the task given to HEACS by the Minister when the body was formed. HEACS was asked specifically: 'This review,

and any changes ensuing from it, and the fact that Scotland shares some heritage protection legislation with England and Wales, will no doubt prompt calls for a review of the legislation in Scotland'. The process, embraced by English Ministers, is now underway and addresses far more potential benefits than the issue of single designations highlighted in the Annex. These have been summarised on pages 11 and 12 of the report. The reference to differing legislation within this paragraph, and the suggestion that HEACS had not considered it adequately, only suggests that the report cannot have been read and digested. It is set down clearly on pages 7 and 8.

Council considers it disingenuous to suggest that HEACS had not addressed in the report the issue of risks associated with carrying out a review: the request put to Council was whether, or not, a review was needed. In making the recommendation it was anticipated that one of the legitimate subjects to be considered during the course of a review would be an evaluation of the risks for any chosen option, and of the resource implications. These matters were noted in the Executive Summary and in Clause 128 of the report.

Having made that observation, HEACS did in fact address the issue when considering options at the time of the seminar organised in May 2005 in conjunction with BEFS, during which both sides of the argument were posed in a carefully balanced debate. The meeting concluded that, while certain risks had been identified (matching closely those set out in paragraph 5 of the Annex) they were not of such magnitude as to be suggesting that a review should not take place. It is difficult to see from the Historic Scotland consultation process where the potential risks identified have been articulated by the sector. Had there been an overriding concern HEACS would have expected this to have been raised during the Local Authority Historic Environment Forum. On the contrary one of the syndicate groups reported that local authorities 'would be able to cope with having changes made to the historic environment legislation (following bedding down of the planning act) by the end of the next parliamentary session'.

Finally, Council wishes to convey its extreme disappointment that the issue of a Statutory Duty of Care for the historic environment is absent from the analysis, and may not have been given due consideration. It is one of the primary recommendations of both reports on heritage protection legislation and on the role of local authorities. While it is noted that this has been covered in a cursory response to the latter, there was considerable strength of feeling in the sector that this was considered to be an important issue. It surfaced prominently in the external stakeholder workshops referred to in the introductory paragraph of the Annex. The cursory response in the Annex to the Minister's letter in response to the local authorities report gives no comfort that the views of the sector have been taken on board.

Elizabeth K Burns CMG OBE
Chair