

# **ENVIRONMENTAL ASSESSMENT (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Environmental Assessment (Scotland) Bill introduced in the Scottish Parliament on 2 March 2005. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 38–EN.

### **The Bill**

2. The Bill seeks to implement the Partnership Agreement on Environmental Assessment. In doing so it will revoke and replace The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 in implementing the Directive 2001/42/EC of the European Parliament and Council on the assessment of the effects of certain plans and programmes on the environment (The Directive). It does so as regards plans and programmes which relate solely to the whole or any part of Scotland

### **Policy Objective**

3. The purpose of this Bill is to improve protection of the environment through better public decision making. In particular, it aims to-:

Implement the Partnership Agreement commitment in 'A Partnership for a Better Scotland'. 'The commitment was made to legislate to introduce Strategic Environmental Assessment (SEA) across the range of all new strategies, plans and programmes developed by the public sector in Scotland'

**Part 1** of the Bill sets out the requirement on responsible authorities to secure the carrying out of an environmental assessment on qualifying strategies, plans and programmes. It contains provisions for establishing which should be subject to the assessment process.

**Part 2** of the Bill sets out the requirements for carrying out scoping. Scoping is the setting out of the subject areas and degree of detail required for inclusion in the environmental report. It further sets out requirements for consultation and the taking into account of consultation responses.

**Part 3** of the Bill makes provision for the announcement of the adoption of any strategy, plan, or programme that has been subject to environmental assessment. It sets out the arrangements for the monitoring of the implementation of the strategy, plan or programme and requirements for forward monitoring and remedial action in respect of unforeseen effects.

**Part 4** of the Bill makes general provisions, including provision for order making powers. This part revokes The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (SSI 2004/258). Savings Provisions will be made by order to ensure any environmental assessment begun under the Regulations are completed under the terms of the Regulations.

4. The Bill furthers the commitment to place environmental protection at the heart of decision making, supporting the drive for genuinely sustainable development in Scotland. The provisions of the Bill set out a robust means of determining which strategies, plans, and programmes should be subject to SEA along with a consistent and thorough approach to completing an environmental report. The Bill promotes public involvement in the decision making process and by demanding that the public's views and the environmental report are properly taken into account, SEA delivers real accountability.

## **Background**

5. SEA is the commonly accepted abbreviation for the Strategic Environmental Assessment of Strategies, Plans and Programmes. It is an environmental assessment process well established in a number of countries, most notably Canada and Poland. As a result of a recent European Directive it is now in use across the EU, including Scotland where, through the Bill, we will become a leader in this field.

6. Environmental assessment (which we will refer to as "SEA" in the rest of this paper) is defined as the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the consultations in decision making, and the provision of information on the decision. Specific provisions are made in the Bill for all these aspects of the assessment and, also for monitoring the significant environmental effects of the implementation of the strategies, plans and programmes. The Bill provides a set of common procedural requirements necessary to contribute to a high level of protection of the environment and to more sustainable and effective solutions.

## **Commitments and Current Regulations**

7. Scottish Ministers are seeking to implement the commitment in [A Partnership for a Better Scotland](#). The commitment was made to legislate to introduce Strategic Environmental Assessment (SEA) across the range of all new strategies, plans and programmes developed by the public sector in Scotland. In meeting the commitment the Bill includes provisions to ensure compliance with European Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment", known as the Strategic Environmental Assessment

or SEA Directive. The Scottish Ministers have taken the opportunity of using primary legislation to go further and create an even more comprehensive SEA regime.

8. The current Scottish Regulations (*The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004*) will be revoked by this Bill. Other parts of the UK will retain their current Regulations to implement the Directive.

### **Relationship with other legislation**

9. The implementation of the Directive 2001/42/EC elsewhere in the UK is achieved through the following legislation:

- The Environmental Assessment of Plans and Programmes Regulations 2004, (SI 2004/1633)
- The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004, (SI 2004/280)
- The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, (SI 2004/1656) (W.170)

10. Scottish legislation is reliant on The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) in respect of the transboundary requirements of the Directive. Where qualifying plans and programmes are geographically of a UK wide application they will be subject to UK regulations. The Consultation Authorities named in the Bill are also named in the UK instrument in order that they can act as Consultation Authorities on any part of a UK wide plan or programme that relates to Scotland.

### **Consultation**

11. An ambitious and very successful consultation has been carried out over the last year. The consultation strategy engaged a wide variety of stakeholders and addressed the real need to capture and take into account the range of views across Scotland. Not least, the consultation exercise sought to embrace the principles in respect of public consultation that SEA will deliver.

12. Two written public consultations have been carried out. Initially, there was a 12 week exercise on SEA Regulations and Bill Principles. This was followed by an 8 week exercise on detailed issues including the Draft Bill. The first consultation on the SEA Regulations and Bill Principles was necessarily complex and technical in nature. Despite this it proved to be a very successful exercise with over 50 responses. The second consultation which was focussed on key provisions and included a draft Bill elicited 90 responses.

13. A major conference event (Edinburgh) brought together over 150 people interested in SEA and direct polling of the audience on key issues was a feature of the event. 2 large public seminars (Glasgow, Aberdeen), stakeholder meetings and presentation events have also been held and a wide range of views and research findings have been received and taken into account.

14. Consultation response analysis is presented as part of the detailed policy provision explanations in this document. A summary of the consultation with details of how views have been taken into account, and copies of individual responses, are available through the Scottish Executive Library or from the Scottish Executive [Consultation web pages](#).

## **DETAILED POLICY PROVISIONS**

### **PART 1**

15. This part sets out the major requirement of the Bill which is to secure the carrying out of an environmental assessment during the preparation of a qualifying strategy, plan or programme. It defines what constitutes an environmental assessment. The carrying out of an environmental assessment at an early stage of the development of strategies, plans and programmes should improve information available to decision makers, involve the public actively and lead to more transparent decision making. The consideration of alternatives at an early point should lead to decisions that include the greatest degree possible of environmental impact mitigation or avoidance.

16. The Bill is focused solely on the public sector, expressed here as any person, body or office-holder exercising functions of a public character. The phrase seeks to capture the full extent of the public sector, from central and local government, across the range of public bodies and to those private companies who perform public functions under licence or regulatory frameworks. The Responsible Authority is the owner of the qualifying strategy, plan or programme and only one authority can be deemed the Responsible Authority at any one time.

17. The Consultation Authorities who have statutory roles under the Bill are as follows:

- The Scottish Ministers
- Scottish Environment Protection Agency
- Scottish Natural Heritage

18. It should be noted that following the decision to include Historic Scotland in the role of Consultation Authority, it is necessary for The Scottish Ministers to appear on the list. This is purely a reflection of Historic Scotland's legal status and does not imply that other parts of the Scottish Executive will play any statutory role as Consultation Authorities.

19. This part also establishes the nature of strategies, plans and programmes that should be subject to SEA. It is intended that all strategies, plans and programmes that are likely to have a significant environmental effect should be subject to SEA. The sections set out the qualifying criteria intended to allow responsible authorities to establish which of their strategies, plans and programmes are subject to SEA.

### **Exemptions**

20. Exemptions to the assessment process are based on the contents and attributes of an individual strategy, plan or programme. Exemptions are based on an assessment by the

Responsible Authority that a strategy, plan or programme either has no or minimal environmental effects (pre-screening) or on the outcome of screening. The key to interpreting the exemptions is to consider that the overall objective of the SEA Bill is to ensure that only those strategies, plans and programmes likely to have significant effects on the environment are assessed. Only in the case of individual schools has a specific exemption been made outwith the screening processes. This is on the basis that it is considered highly unlikely that any strategy, plan or programme relating to a single school could have significant environmental effects.

### **Pre-Screening**

21. 'Pre-screening' deals with those strategies, plans and programmes where no doubt exists that they will have at most minimal environmental effect, and allows them to be quickly removed from the need for further assessment. This allows resources to be concentrated on strategies, plans and programmes likely to have significant environmental effects. Pre-screening is an assessment carried out by the Responsible Authority with reference to schedule 2 of the Bill without the need to consult more widely and only applies to certain qualifying strategies, plans and programmes under the Bill. Pre-screening is a tool for administrative efficiency not a means of avoiding obligations under the SEA Bill. The nature of public strategies, plans and programmes is such that in almost every case it will be plain if a public body adopts one that should have been subject to SEA. In the unlikely event that pre-screening is applied inappropriately then under section 11 Responsible Authorities can be subject to direction from the Scottish Ministers to carry out an assessment and/or judicial review should they fail to do so.

### **Determinations and Screening**

22. The policy driver behind these sections is to ensure that Responsible Authorities may be able to determine which strategies, plans and programmes are subject to SEA. For many strategies, plans and programmes they will be able to reach this decision themselves, however where an assessment of the likely significance of effects is required or where any doubt exists the screening process is to be used. Strategies, plans and programmes referred to in section 8(1) of the Bill should always be subject to the screening process. A brief report is submitted along with the plan, programme or strategy in question for consideration by the Consultation Authorities. Where agreement is reached between Responsible Authority and Consultation Authorities then the determination should be publicised. Disagreements will be referred to the Scottish Ministers for their decision.

23. Scottish Ministers may at any time direct a Responsible Authority to send them a strategy, plan or programme and, after due consideration, may direct the Responsible Authority to either enter the screening process or to carry out an SEA. This power helps to ensure compliance along with the provision that makes clear that no qualifying strategy, plan or programme deemed to have significant environmental effects may be adopted or acted upon before an SEA is carried out.

### **Alternative Approaches**

24. A number of alternative approaches have been considered in arriving at the policies set out above. In particular alternative administrative arrangements have been the focus of discussion. The choice of the 3 Consultation Authorities is believed to provide a range of expert

advice on the environment without creating an unmanageable or unduly costly bureaucracy. Responsible Authorities have a general obligation to consult and may very well want to consult in detail with other specialist bodies as well as the 3 nominated Consultation Authorities depending on the nature of their plan to ensure the quality of their environmental report. To set up a new independent body able to comment on all aspects of the environment would be a hugely expensive undertaking and would duplicate the areas of expertise already catered for in the existing environmental public bodies.

25. The administrative arrangements are largely to be contained in separate non statutory guidance. A small team in the Executive is to act as co-ordinator and manager of the process to minimise the effort for both Responsible and Consultation Authorities. In particular the development of closer links with the Consultation Authorities to keep pressure on turnaround times will be a focus.

26. The omission of Pre-screening was considered to avoid any suggestion that Responsible Authorities might be able to evade their SEA obligations. This option was rejected as the need to exclude those strategies, plans and programmes clearly not requiring SEA is important for efficiency. A very low threshold of no or minimal environmental effect ensures that abuses should be avoided, with screening available as a mechanism if any doubt exists. Further doubt should be reduced by the production of an indicative list, within guidance, of strategies, plans and programmes likely to be subject to SEA.

27. Exemption of specific bodies was considered to see if there might be any groups or single bodies that could be identified as never being able to produce strategies, plans and programmes that could have a significant environmental effect. Individual schools have been excluded. Others, such as universities and hospitals, were considered but they have not been excluded because we could not always be certain that they would not have strategic planning capability under the terms of this legislation.

### **Consultation Responses**

28. The administrative arrangements brought out a range of views but the majority favoured the operation of a single gateway housed in the Scottish Executive, working closely with the three Consultation Authorities. A minority backed another proposed arrangement, essentially that a single expert team be established to speed the administration. A small number of respondents called for the establishment of a new independent body to handle administration and disputes.

29. Pre-screening was commended by the vast majority as a helpful device for taking some non environmentally damaging strategies, plans and programmes out of the assessment process at the earliest opportunity. However, most of the respondents felt that further clear guidance on pre-screening was needed. A few concerns were raised that pre-screening could lead to responsible authorities seeking to avoid assessing strategies, plans and programmes with likely environmental effects.

30. The proposal that screening assessment by the consultation authorities should take place within a fixed period of 28 days was generally popular with a few calls for relaxation of the deadline in complex cases.

31. A very clear message from consultation responses on extending exemptions was that the ability to add exemptions beyond individual schools to other public bodies or even particular strategies, plans and programmes should be retained. It was equally clear that many felt a considerable period of experience would be needed before any consideration was given to extending the list of exemptions.

## **PART 2**

32. An important component of SEA is the environmental report. The report describes and evaluates the likely significant effects on the environment. The Bill provides that reasonable alternatives for delivering any strategy, plan or programme be evaluated within the report. This emphasises the need to carry out SEA at an early and effective point when viable alternatives are still being considered.

33. It is intended that the environmental report is proportionate to the strategy, plan or programme to which it relates. It is important that, as strategies, plans or programmes are often part of a hierarchy, Responsible Authorities consider at which level within that hierarchy each environmental effect is best measured and evaluated. Avoidance of duplication is the key here and consideration of likely effects at the most strategic stage is preferred. The content of the environmental report is central to quality control. A scoping stage (5 weeks) is included to ensure some external advice and scrutiny is brought to bear. The Responsible Authority must submit a scoping report outlining the proposed structure of their environmental report, the Consultation Authorities must offer their views and those views must be taken into account.

34. The need to encourage quality drives the inclusion of a provision demanding that the consultation period be set at the scoping stage. Scottish Ministers may alter the consultation period if they deem it inadequate but this is unlikely to be required. Achieving an early and appropriate public consultation is the desired outcome. Public comment must be invited early in the decision making process and those comments along with the environmental report must be taken into account. A criticism of many consultation processes is that views were sought but it was unclear how they impacted on the final decision and shape of the final plan. The demand placed on responsible authorities here to demonstrate how comments were taken into account is in part designed to address that criticism. Most importantly the provisions will aim to achieve better environmental outcomes.

## **Consultation Response**

35. The use of a standard set of environmental indicators was a subject that provoked a strong reaction in both the written consultation and public meetings. It is the clear view that the use of indicators within environmental reports is nearly always essential. Indicators can improve consistency and comparability and a standard set or menu of indicators can help simplify the environmental reporting. It is not at all clear, however, that there is an agreed and universally applicable core set of environmental indicators. Most felt that this was an area requiring further research and that good practice for use of indicators, not least when being used to measure

cumulative and synergistic effects, should be actively developed. The Executive is already working in this area with respect to Sustainable Development indicators and it is expected that SEA will further drive this activity. Guidance will seek to offer sources of environmental base line (current state) data from which indicators may be derived but this issue will not be quickly resolved.

### **Alternative Approaches**

36. Longer and shorter periods of time for the Consultation Authorities to respond to scoping proposals were considered but key stakeholders have agreed the 5 week limit appears to be a good balance between maintaining the speed of the process and allowing a fair time for scrutiny.

37. Consultation arrangements seek to reflect best practice and offer flexibility for Responsible Authorities, ensuring a high standard of public opportunity. A 12 week fixed consultation period was considered as was a 4 to 12 week range but concern was raised that specifying a range tends to lead to the minimum becoming the standard and that an upper limit might be restrictive on a few very large scale exercises.

### **PART 3**

38. In the context of greater openness and transparency of decision making this part ensures relevant strategies, plans and programmes are made available to the public and the Consultation Authorities to gather their views at an early stage in their preparation. Once implemented a clear account of why a particular plan, programme or strategy was adopted, how the views of consultees were taken into account and how the environmental effects are to be handled is also essential. This step demonstrates that consultation is an active participatory process that delivers real change and shows how everyone can influence strategies, plans and programmes that affect them. The taking into account of views expressed by those affected supports the ongoing drive for Environmental Justice.

39. Monitoring of environmental effects of strategies, plans and programmes must be planned and carried out. Monitoring has the dual role of ensuring that unforeseen impacts are quickly identified and action taken to mitigate or avoid them. It helps ensure that the ongoing monitoring of effects can inform future strategies, plans and programmes in terms of impact prediction. A great deal of monitoring is already carried out and so no new regimes are prescribed but where gaps exist responsible authorities will have to make new arrangements. Environmental Information (Scotland) Regulations 2004 set out the rights of access to environmental information held by public authorities in Scotland and makes it very likely that monitoring information should be published and therefore subject to public scrutiny.

### **Alternative Approaches**

40. Monitoring has been subject to much consideration and analysis of the consultation responses suggests that this is an area that will require clear guidance. The Bill provisions seek again to balance an obligation to monitor for unforeseen effects with ensuring that the administrative duties associated with this are as light as possible. Alternatives included leaving out monitoring arrangements entirely on the grounds that many monitoring regimes are already in place and a danger of duplication was considerable. However this is likely to be incompatible

with European law and could lead to unforeseen impacts going unnoticed. More detailed and prescriptive obligations could lead to high costs and to several Responsible Authorities operating in one area each monitoring the same environmental effect rather than sharing information. A further possibility is to create a new independent body with monitoring responsibilities but the duplication of effort with existing bodies and the additional cost would be very high.

## **PART 4**

41. The most important policy here is the revoking of The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004, SSI 2004 No.258, making this Bill the means of compliance with the European SEA Directive.

## **SCHEDULES**

### **Schedule 1**

42. Included for the convenience of the reader. This schedule avoids the need to cross refer to existing Environmental Impact (Scotland) Assessment Regulations 1999.

### **Schedule 2**

43. Much of the decision making process in respect of which strategies, plans and programmes should be subject to SEA hangs on the evaluation of the likely significance of environmental effects. This schedule seeks to offer a detailed framework of criteria for establishing significance. The criteria are consistent with those applied across Europe ensuring that while this Bill widens the scope of strategies, plans and programmes considered it does not raise or lower the level of significance at which SEA is applied.

### **Schedule 3**

44. Essentially schedule 3 is a quality standard to ensure that a high degree of consistency of reporting is maintained. Asking the Responsible Authorities to use the environmental receptors and the time and context based criteria as listed for reporting seeks to achieve a more standardised environmental report. Guidance sets out in some detail a methodology for constructing an environmental report but this schedule gives a framework for consistent reporting.

## **FURTHER POLICY CONSIDERATIONS**

### **Diversity**

45. Having considered equality issues it is assessed that the Bill's provisions are not discriminatory in terms of gender, race, age, disability, marital status, religion or sexual orientation. Responsible Authorities will wish to be careful to address equality issues in relation to the way they carry out consultation and publicise information as required by provisions within the Bill. In considering the mitigation of environmental measures Responsible Authorities will wish to ensure that impacts are not disproportionately felt by any particular group.

## **Human Rights**

46. The provisions of the Bill are compatible with the European Convention on Human Rights.

## **Island Communities**

47. The Bill is designed to ensure scrutiny of all strategies, plans and programmes likely to have significant environmental effects including those affecting island communities. There are no exemptions or differences in treatment in respect of public bodies that have strategic planning responsibilities for island communities.

## **Local Government**

48. The Bill lays responsibilities on all those carrying out functions of a public character and as such local government will be expected to comply with the provisions of the Bill. The Financial Memorandum sets out the expected cost to the public sector. The provisions are applied equally to all public bodies. The Bill extends obligations on local authorities currently set out in The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 SSI 2004/258.

## **Sustainable Development**

49. The Bill seeks to support sustainable development. SEA helps ensure that comprehensive environmental information is available to be directly taken into consideration at an early stage in the decision making process.

50. The objectives of the SEA Directive include the promotion of sustainable development. The following paragraphs consider what SEA provisions add to the requirements currently in place in regard to sustainable development. In A Partnership for a Better Scotland, which sets out its programme for 2003-07, the Scottish Executive highlighted the priority it attaches to sustainable development:-

We want a Scotland that delivers sustainable development; that puts environmental concerns at the heart of public policy and secures environmental justice for all of Scotland's communities.

51. In April 2002, the Executive reaffirmed its commitment to sustainable development - development that meets the needs of the present without compromising the ability of future generations to meet their own needs - in *Meeting the Needs... Priorities, Actions and Targets for Sustainable Development in Scotland*. (Work on a Scottish Sustainable Development Strategy is due to commence in early 2005 with a view to publication in the autumn of 2005.) This set out the vision and principles to be applied across the Executive and our main priority areas for action: resource use, energy and travel. It also identified twenty-four indicators to help monitor progress, on which we report annually. SEA adds to this by ensuring that at the strategic level the environmental aspects of sustainable development are fully explored and consequences of

particular actions understood at an early stage, for example in assessing plans, programmes and strategies for their impact on climate change.

52. The new requirements on public bodies, including the Executive and its Agencies, to take account of sustainable development in their work will help to drive a more consistent approach across the public sector in Scotland. In particular:

- the **duty of best value** requires public sector bodies to have regard to the need to contribute to sustainable development in carrying out their work;
- **strategic environmental assessment**, to ensure that the environmental dimension of sustainable development is more consistently and more thoroughly taken into account across all new strategies, plans and programmes developed by the public sector; and

53. SEA sets out to ensure that the environmental effects of alternative means of implementing strategies, plans and programmes are detailed in full so that they can play a proper part in the decision making process. No provision is made within the Bill to widen the scope of assessment to include the full range of social and economic effects. Ministers may by order alter schedule 3 which could affect this but have no current plans so to do. Responsible Authorities may choose to assess social and economic effects of their strategies, plans and programmes in addition to environmental effects but this is not part of the SEA provisions. When seeking to integrate SEA with appraisal of other types of effects, the following principles may be helpful:-

- Opportunities to optimise information collection processes so that information collected can be used to satisfy all appraisal requirements;
- The environmental report must be clearly identifiable to ensure compliance with the terms of the Bill;
- Consistency amongst objectives used;
- Compatibility of information generated through forecasting and prediction techniques to generate comparable results between social, economic and environmental information;
- Integrating staging of assessment to create a single process wherever possible, taking advantage of synergies;
- Facilitating transparency in decision making through analysis techniques that generate comparable findings;
- Implementing a consistent level of rigour throughout assessment and appraisal.

*This document relates to the Environmental Assessment (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 2 March 2005*

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