The National Trust for Scotland (Governance etc.) Bill was introduced by the National Trust for Scotland for Places of Historic Interest or Natural Beauty, on 7 January 2013.

The Bill proposes changes to the governance structure of the National Trust for Scotland. It affects the roles of president and vice-president of the Trust, co-option of council members, representative members of the council, and the name of the Trust.
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EXECUTIVE SUMMARY

The National Trust for Scotland (Governance etc.) Bill was introduced on 7 January 2013. It is a private Bill and has been introduced by the Bill Promoter, the National Trust for Scotland for Places of Historic Interest or Natural Beauty (the Trust).

The Bill continues the process of reforming the Trust’s governance structure and seeks to implement the final reforms recommended by the Strategic Review of 2009-10. It also proposes a change in relation to the name of the Trust.

The Trust was formally constituted in the National Trust for Scotland Order Confirmation Act 1935 (the 1935 Order). The Bill proposes the following changes to the 1935 Order—

- to establish the roles of president and vice-president as distinct from the role of the charity trustees (section 1);
- to extend the term that co-opted members can serve on the council from one year to a maximum of four years (section 2);
- to abolish the facility allowing members to be appointed to the council as representatives of other bodies or organisations (section 3);
- to confirm that the Trust’s abbreviated name (the National Trust for Scotland) is a valid and legally adequate reference to the Trust (section 4); and
- to provide for certain transitional arrangements to allow the Trust to operate in any intervening period between enactment of the legislation and the first subsequent AGM (section 5).

This briefing provides some context to the Bill and includes background in relation to the Trust, the legislative framework that regulates charities in Scotland and the general principles of good governance.

The briefing goes on to provide background in relation to the Strategic Review of the Trust’s governance structure in 2009-10 and the reform of the Trust’s sister organisation, the National Trust in England, Wales and Northern Ireland. Finally, the briefing outlines the policy intention behind the main provisions of the Bill.
BACKGROUND

THE NATIONAL TRUST FOR SCOTLAND

The National Trust for Scotland (the Trust) was formally constituted in 1935 as the National Trust for Scotland for Places of Historic Interest or Natural Beauty. The Trust is a conservation charity and was established in order to protect and promote Scotland’s natural and cultural heritage.

Among the Trust’s responsibilities are 129 properties of historic interest or natural beauty; 76,000 hectares of countryside encompassing 46 Munros; 35 major gardens; seven national nature reserves; 45 sites of special scientific interest; and 400 islands and islets.

The Trust is a membership organisation and its most recent Annual Review (2011-12) shows a membership base of 312,000. Membership subscriptions make up a major element of the Trust’s income, accounting for £10.8m (20%) in 2011-12.1

The National Trust for Scotland Order Confirmation Act 1935 (the 1935 Order)2 is the original incorporating Act and sets out the purposes, powers and regulations of the Trust. The 1935 Order has been extended and amended by the later Confirmation Acts of 1938, 1947, 1952, 1961 and 1973.

REGULATORY FRAMEWORK

The Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) introduced a new regulatory regime for charities in Scotland. It also included a ‘charity test’ that required organisations to provide public benefit in order to qualify as a charity. Equivalent legislation was passed in the UK Parliament as the Charities Act 2011.

In addition, the 2005 Act established the Office of the Scottish Charity Regulator (OSCR) as the statutory regulator of the charity sector in Scotland. Whilst OSCR existed prior to 2005, the Act gave it enhanced powers and responsibilities as an independent regulator to grant charity status, maintain a public register of charities and regulate charities’ compliance with the Act. In carrying out its role, OSCR was required to report to and be accountable directly to the Scottish Parliament.

Prior to the 2005 Act, the regulatory regime for charities in Scotland was fragmented. The granting of charitable status in Scotland was carried out by the Inland Revenue, supervision and investigation was carried out by OSCR on behalf of Scottish Ministers, whilst action could only be taken by the Court of Session. In 2001, the Scottish Charity Law Review Commission (the McFadden Commission) called for a single independent regulator to undertake all these functions.

In addition, criticisms had been directed at the regime in that it did not provide sufficient transparency and accountability and that the time taken between complaints to the regulator and action being taken in court was too long to be acceptable. The 2005 Act sought to address

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1 Other income for 2011-12: appeals and donations, £1.9m; legacies, £12.4m; commercial activities, £10.2m; investment income, £7.3m; grants, £4.3m; property and other income, £5.8m. Total income, £52.7m. Source: Consolidated statement of financial activities for the year ended 29 February 2012 (National Trust for Scotland, Annual Review 2011-12).
2 The 1935 Order dissolved the National Trust for Scotland for Places of Historic Interest or Natural Beauty Limited, incorporated under the Companies Act 1929.
these concerns and to establish a regulatory regime that would encourage public confidence in charities whilst not over-burdening the charity sector with bureaucracy.

The 2005 Act also referred to the role and activities of charity trustees and set out specific duties of trustees. Generally, a charity trustee must ensure that they act in the best interests of the charity without outside influence, that the charity is administered effectively, and that they are able to account for the charity’s activities and outcomes to OSCR and to the public.

PRINCIPLES OF GOOD GOVERNANCE

The 1995 Committee on Standards in Public Life (the Nolan Committee) identified seven principles of conduct – selflessness, integrity, objectivity, accountability and stewardship, openness, honesty and leadership. In Scotland, these principles were developed through the Ethical Standards in Public Life etc. (Scotland) Act 2000, which identified a further two principles – public service and respect.

Whilst not designed specifically for charities, these general principles underline the strong commitment to the promotion of high standards and probity and apply equally across the public, private and voluntary sectors. The principles also reflect the central importance of good governance to all sectors of the economy and have given rise to various codes of practice, such as that developed for charity trustees by the Trust (2011), OSCR (2006) and the Charity Commission (2012).

In addition, the National Council for Voluntary Organisations (NCVO), supported by the Charity Commission, produced a guidance document Good Governance – A Code for the Voluntary and Community Sector (2010), which set out some high level principles designed to be universal and applicable to all voluntary and community organisations. These principles set out good practice with the aim of assisting board members to provide strong leadership, enhance their decision making and demonstrate their accountability. The Code states that each and every trustee and board member must embrace the values of good governance, and apply them to the particular needs and circumstances of their organisation.

GOVERNANCE REVIEWS

STRATEGIC REVIEW OF THE TRUST

In recent times, the Trust has been subject to a number of reviews of its governance and organisational structure. The most recent and, in terms of the Bill, the most significant, is the Strategic Review of the National Trust for Scotland, which was led by The Rt Hon Sir George Reid.

The Reid review took place in 2009-10 and the report of its findings, Fit for Purpose, was published in August 2010. The remit of the review was to carry out a robust examination of the charity’s health. The review acknowledged the importance of adhering to good governance values and set out some key principles that were adapted from the Nolan principles and guidance from OSCR and the NCVO.

The review was established in response to concerns that the Trust faced serious issues about its financial sustainability. In his Foreword to the report, George Reid stated that there “was a

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substantial sense of shock in 2009 when the organisation made staff redundant, mothballed a number of properties, and sold its splendid headquarters”.

The Trust’s Chief Executive, Kate Mavor, explained the reasons for the cost cutting exercise to the Economy, Energy and Tourism Committee, in September 2009. In written evidence, she stated that the Trust had been living “beyond its means for many years, relying too heavily on its reserves and reducing them to an unacceptably low level”. Despite having successfully delivered annual savings of £1.5m, Kate Mavor said that the worsening economic recession had required the organisation to act quickly to make additional spending cuts.

At the time, there was also a general perception that the Trust needed to modernise its governance structure in order to sustain its long-term viability. In guidance to charities, Who’s In Charge: Control and Independence in Scottish Charities (2011), OSCR referred to the situation at the Trust prior to the review beginning in 2009. OSCR stated that it had received enquiries and complaints about how the Trust was being governed and that, as a result, had urged the Trust to bring forward plans to hold a formal review of its governance structure. In the guidance, OSCR used the Trust as a case study to illustrate how an overly complex governance structure could lead to a lack of clarity about who had responsibility for decision making and blurred lines of accountability.

Also, in 2009, the then Minister for Culture, External Affairs and the Constitution, Michael Russell MSP, was widely reported as having said that although it was not for the Scottish Government to interfere in the Trust’s workings, he recognised elements of its “complex and Byzantine” governance needed to change.

Streamlining the Trust’s governance structure

The Reid review found that – in line with the overwhelming evidence submitted to it – the Trust was “gridlocked by its governance structures”. The review made 23 recommendations (plus a further 22 proposals) that were designed to streamline the Trust’s decision making and governance structure.

One of the Reid review’s key recommendations was to remove the dual-governance structure that included the council and the Board and replace it with a single body. The new body was to be known as the Board of Trustees and was to have up to 15 members.

The Reid review was critical of the lack of certainty in decision making caused by the dual system of governance and by the sheer number of trustees that were involved, which numbered 87. In the report, the Reid review stated that it had been unable to find any other charity with “such inflated governance structures”. It considered that this structure had created “duplication and delay, uncertainty and friction” and prevented the Trust from tackling issues and setting strategic direction.

Other key recommendations of the Reid review included—

- the President should remain a Trustee until such time as the office is considered in new legislation, and vice presidents should be elected in an honorary capacity only;
- there should be no representative members on the Board of Trustees;
- the Board should be able to co-opt up to four Trustees;
- a new five-year strategic plan should be prepared to ensure that the Trust works in future to specific, measurable, attainable, relevant and time-bound objectives; and
there should be an audit of assets and, in particular, a full property portfolio review, in order to determine the scale, balance and cost of maintenance of the estate and its future management.

Implementation of the Reid recommendations

In September 2010, George Reid gave evidence to the Economy, Energy and Tourism Committee about the review’s findings. He told the Committee that he was “enthused by the positive attitude to change” shown by the Trust’s response to the findings of his review and hoped that the proposals would be signed off.

The council of the Trust accepted the Reid recommendations and, since 2011, has been in the process of implementing the various structural changes. The new governance structure of the Trust is included at the Annexe.

OSCR welcomed the findings of the Reid review and the Trust’s new governance structure. In its guidance to Scottish charities, ‘Who’s In Charge’, OSCR emphasised that “a simple structure with a single governing body usually streamlines decision making and makes it clear who is accountable for decisions”.

The Trust was able to implement the Reid recommendations within the terms of the 1935 Order and so primary legislation was not required. The 1935 Order includes the power for the Trust to draw up its own regulations, which appear in Schedule 2 of the 1935 Order, and these were updated following the conclusion of the Reid review. However, the Reid review left the door open to the possibility of a new Act of the Scottish Parliament in order to codify the reform process.

REFORM OF THE NATIONAL TRUST IN ENGLAND, WALES AND NORTHERN IRELAND

The National Trust in England, Wales and Northern Ireland has also recently undergone a period of change in terms of streamlining its governance structure. In 2002, the National Trust began a formal review of its governance structure and decision making framework, and published its Report on the Governance of the National Trust (the Blakenham review) in 2003.

The Blakenham review acknowledged the principles of good governance (as promoted by the NCVO and Charity Commission), which provided the context to the review. The review considered that “fundamental to current thinking on good governance are the existence of clear processes and an effective board which can be held publicly to account and which communicates with the corporation’s shareholders”.

In its report, the Blakenham review concluded that the decision making framework, which involved numerous internal bodies and committees, was overly complex and led to a lack of clarity and duplication of staff effort. The review also concluded that the size of the Council – which numbered 52 members – made it difficult for individual trustees to discharge their responsibilities. To address these concerns, the review recommended the creation of a new Board of Trustees, with a membership of between 9 and 15 members. It also recommended a “radical streamlining” that involved the removal of a number of the central committees.

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5 Its formal name is the National Trust for Places of Historic Interest or Natural Beauty.
6 The Blakenham report is not available online. However, details of how the National Trust is run is available on its website at: http://www.nationaltrust.org.uk/how-we-are-run/
The majority of the review’s recommendations were incorporated in an updated constitution – *The Charities (National Trust) Order 2005* – which came into effect in 2005.

**PROVISIONS OF THE BILL**

The Bill together with the accompanying documents is available on the Scottish Parliament website at: *The National Trust for Scotland (Governance etc.) Bill*.

The *Promoter’s Memorandum* states that the Bill continues the process of reforming the Trust’s governance structure and seeks to implement the final reforms recommended by the Reid review. It suggests that whilst most of the Reid recommendations have been implemented, a number require to be given legislative effect by means of amendments to the 1935 Order.

**SECTION 1 – PRESIDENT AND VICE-PRESIDENTS**

The 1935 Order states that the council of the Trust (renamed the Board of Trustees following the Reid review) must include the president and any vice-presidents of the Trust. Those post holders, therefore, have liability as charity trustees.

The Promoter’s Memorandum states that the Bill seeks to establish the roles of president and vice-president as “being suitably distinct from the role of the charity trustees”.

**President**

The Reid review considered that the president should have a more impartial role and should no longer be party to Board decisions. To this end, the Reid review suggested that the Trust may wish to revise the requirement in the 1935 Order and that until that point in time the president should act as ambassador for the Trust.

As the Promoter’s Memorandum states, following adoption of the Reid recommendations, “the president remains a charity trustee by virtue of the 1935 Order but does not exercise any control or management over the Trust in practice and is not involved in decision making”. The Bill, therefore, seeks to remove the requirement for the president to be a member of the Board and so would remove any liability of the president as a charity trustee.

**Vice-presidents**

The Reid review also looked at the role of vice-presidents at the Trust and recommended that they “should be elected in an honorary capacity only”. As with the role of president, the Reid review suggested vice-presidents should be impartial and they should be removed from the decision making process of the Board. To achieve this, the review recommended the creation of new honorary vice-presidents, which would not require post holders to serve as Board members.

As the 1935 Order stands, although there is no requirement to appoint any vice-presidents, it is clear that if any were appointed – as with the president – they would have liability as charity trustees. The Bill, therefore, seeks to make the role of vice-president distinct from that of the charity trustees. If the proposal in the Bill is enacted, it is understood that the post of honorary vice-president would be abolished by the Trust.
SECTION 2 – CO-OPTED MEMBERS OF COUNCIL

The 1935 Order provides for the council of the Trust (now known as the Board of Trustees) “from time to time to appoint a person being a member of the National Trust for Scotland as an additional member of the council”. These additional members are called co-opted members, and may only hold their post for one year. The 1935 Order also specifies that at any one time the number of co-opted members must not exceed four.

The Reid review considered the membership of co-opted members on the council. It recommended that the arrangement set out in the 1935 Order, whereby up to four members may be co-opted at any one time, should be maintained “to ensure an appropriate range of experience and skills among Trustees”. In relation to the term of co-opted members, however, the Reid review considered that whilst the 1935 Order stated co-options to be for one year, “co-options for a further year or years were not specifically ruled out and therefore affords a route which the Trust may wish to follow”.

The Bill suggests that the Trust should be able to co-opt members for a longer period than one year and proposes an extension of up to four years. Within this four-year parameter, the council would have the power to determine the term of any co-opted members. The Promoter’s Memorandum provides the rationale for the proposal in the Bill—

“It is thought by the Trust that it may increase the likelihood of securing suitable candidates for co-option if the council is able to appoint individuals for a longer period rather than just one year. It also considers that this is better practice in terms of charity governance as it ensures that the individuals who are being co-opted in this way are involved with the charity for sufficient time to allow them to make a meaningful difference and become properly involved in the governance of the charity without the need for repeated reappointments.”

OSCR has not produced any guidance about the appropriate length of time for co-opting members as trustees of Scottish charities. However, OSCR has confirmed that it has no specific objection to the proposal in the Bill.

SECTION 3 – ABOLITION OF REPRESENTATIVE MEMBERSHIP OF THE COUNCIL

The 1935 Order provides for certain public or scientific bodies to nominate representatives on the council of the Trust. They are known as representative members and the Trust has the power to change the list of bodies represented.

A similar arrangement exists at the National Trust where half of the members of its council are nominated by “appointing bodies”. Appointing bodies are organisations that are deemed to be relevant to the work of the Trust, such as scientific and natural heritage bodies. The Blakenham review of 2002-03 recommended maintaining this arrangement which, it considered, reflected the interests that the wider nation had in the National Trust. It is understood, however, that the appointees do not carry any representative responsibilities and once they are appointed their organisations have no power to direct the manner in which those members participate in council business or to rescind their appointment. The list of appointing bodies is reviewed every six years to assess their relevance and appropriateness.

In Scotland, however, the Reid review came to the view that council members (now known as charity trustees) should not be representatives of other bodies. The review recommended, therefore, that the practice of appointing representative members should come to an end. The review considered that whilst it had been appropriate to provide external organisations with a
voice in the direction of the Trust in the 1930s – when the Trust was building heritage capacity across Scotland – there were better ways for ensuring co-ordination, expert advice and policy development at a national level. For example, the review suggested that the Trust should engage in policy development and partnership working with non-governmental organisations in the private and voluntary sectors.

Given that the council had the power to change the list of bodies represented, the Reid review proposed that all of the bodies should be removed from the list. This was agreed by Trust in 2010.

In its guidance to Scottish charities, 'Who’s In Charge', OSCR highlighted the risks that could arise where a charity is linked closely to another body. For example, OSCR warned that such arrangements could result in a charity pursuing non-charitable purposes, a lack of independent decision making, conflicts of interest, and public distrust. OSCR did not specifically criticise the arrangements for representative members at the Trust, although it welcomed the findings of the Reid review and the recommendation that charity trustees should not be representatives of other bodies.

The Bill seeks to remove all references to representative members that appear in the 1935 Order. As there are currently no representative members on the Board, the change will have no effect on its current membership.

SECTION 4 – NAME OF THE TRUST

The official name of the Trust, as instituted by the 1935 Order, is the National Trust for Scotland for Places of Historic Interest or Natural Beauty. (This follows from the formal name of the National Trust for Places of Historic Interest or Natural Beauty, which operates throughout the rest of the UK.) Throughout the 1935 Order, however, the body is referred to as ‘the National Trust for Scotland’, which seems to suggest that this is an accepted abbreviation.

The Trust is referred to on its website by its shorter name and it is also its shorter name that is recorded in the Scottish Charity Register.

The Promoter’s Memorandum suggests that the use of different names has caused some confusion over the years. It also suggests that “doubts have been expressed as to whether it is legally competent for the Trust to enter into contracts or otherwise operate using its shorter name”. It suggests, therefore, that the proposal in the Bill simply “confirms that use of the abbreviated name alone is a valid and legally adequate reference to the Trust”.

SECTION 5 – TRANSITIONAL PROVISIONS

The Bill seeks to avoid the situation where the president and any co-opted trustees are removed from office on the basis that the legislation would alter their terms of appointment. It is proposed, therefore, that new terms of appointment would apply to those post holders appointed at the first AGM following the enactment of the legislation.

The Bill would, however, ensure that rather than only applying to a newly-appointed president, the existing president would benefit from their loss of charity trustee status with immediate effect.
ANNEXE: GOVERNANCE STRUCTURE OF THE TRUST

Governance structure of the National Trust for Scotland, March 2011—
SOURCES


The National Trust. Website page: How We Are Run. Available at: http://www.nationaltrust.org.uk/how-we-are-run/


The National Trust for Scotland (Governance etc.) Bill (SP Bill 21, Session 4 (2013)). Available along with information on the passage of the Bill and accompanying documents at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/57935.aspx
The National Trust for Scotland Order Confirmation Acts 1935 Ch.ii (includes Confirmation Acts 1938 Ch.iv, 1947 Ch.xxxviii, 1952 Ch.iv, 1961 Ch.xx and 1973 Ch.xxvii. Available at: http://www.nts.org.uk/about/downloads/nts_constitution_v3_0711.pdf


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