HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Historic Environment (Amendment) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is a tightly-focused technical amending Bill that will introduce new provisions and remove barriers to the use of existing powers that will enhance the ability of the Scottish Ministers and planning authorities to manage our historic environment in a sustainable way for the enjoyment and benefit of future generations.

4. The Bill will also contribute to the Government’s central purpose of sustained economic growth by introducing a series of provisions that will enhance the ability of central and local government to manage Scotland’s unique historic environment. The amending Bill will support, in particular, the government’s Greener Objective and will provide the Scottish Ministers and the planning authorities with a much-improved toolkit to help manage, protect and enhance Scotland’s historic environment.

5. The draft Bill is made up of four Parts. The first three Parts comprise amending provisions corresponding to the three principal Acts that will be amended by the Bill. The fourth Part includes provisions on ‘Interpretation’, ‘Ancillary Provision’ and ‘Short title and commencement’. The principal Acts are:

• The Historic Buildings and Ancient Monuments Act 1953;
• The Ancient Monuments and Archaeological Areas Act 1979 (‘the 1979 Act’); and,
• The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (‘the 1997 Act').

**Rationale for subordinate legislation**

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Government has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill or the 1979 and 1997 Acts to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation;
- the need to make proper use of valuable Parliamentary time;
- the likely frequency of amendment;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of any provision in primary legislation approved by Parliament; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

7. Where subordinate legislation is required to implement Government policy some form of parliamentary procedure may be appropriate. A balance must be struck between the different levels of scrutiny involved in the procedures. In the Bill the balance reflects the view of the Government on the importance of the matter delegated by Parliament.

**Delegated powers**

8. The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. Some of the powers contained in the Bill are new, whilst others replace or update existing powers in the 1979 and 1997 Acts. The powers conferred in the Bill are mainly either of a technical and procedural nature, or are concerned with matters which require, because of their nature a flexible approach. It is therefore regarded as appropriate that they be dealt with by subordinate legislation.

9. Regulations and orders under the powers described below are mainly subject to negative resolution procedure in the Scottish Parliament. The Government has chosen this procedure where the delegated powers sought are required to prescribe procedural detail or other detail to supplement or update the provisions of the Bill or the 1979 and 1997 Acts. With regard to certain powers, affirmative resolution procedure is considered to be appropriate, as explained below.

10. This memorandum describes the provisions of the Bill which confer power to make subordinate legislation. It sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
This document relates to the Historic Environment (Amendment) (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 4 May 2010

- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and,
- the Parliamentary procedure, if any, to which the exercise of the power to make subordinate legislation is to be subject.

PART 1 – AMENDMENT OF THE HISTORIC BUILDINGS AND ANCIENT MONUMENTS ACT 1953

11. There are no delegated powers in Part 1 of the Historic Environment (Amendment) (Scotland) Bill.

PART 2 – MODIFICATIONS OF THE ANCIENT MONUMENTS AND ARCHAEOLOGICAL AREAS ACT 1979

Section 6 – Works affecting scheduled monuments: enforcement

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

12. Section 6 of the Bill inserts new section 9A to 9O into the 1979 Act. Inserted sections 9I and 9N make provision as regards compensation in relation to stop notices and temporary stop notices. The application of section 47 of the 1979 Act is extended to these provisions. New sections 9I and 9N therefore represent an extension of the cases in respect of which the existing power in section 47 may be used, rather than directly conferring a new power. Section 47 provides that any claim for compensation under the 1979 Act is to be made in the time and manner prescribed. By virtue of the definition of ‘prescribed’ in section 61(1) of the 1979 Act, this will be by regulations made by the Scottish Ministers. Such regulations are made by statutory instrument subject to negative resolution of the Scottish Parliament (section 60(2) of the 1979 Act).

Reason for taking power

13. This power has been delegated in line with any other claim for compensation under the 1979 Act as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain.

Choice of procedure

14. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure in keeping with other provisions in the 1979 Act dealing with compensation.
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Section 13 – Regulations and orders under the 1979 Act

Power conferred on: Scottish Ministers
Power exercisable by: regulations or orders made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

15. Section 13 of the Bill amends section 60 of the 1979 Act and confirms that any power under the 1979 Act to make regulations or orders includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision where this is thought necessary or expedient. This provision does not introduce or confer new powers as such, but builds on existing powers so that a range of different types of provision may be made under them.

Reason for taking power

16. This is a general provision included as part of the updating and modernising of the legislation to put it beyond any doubt that any regulations made under the 1979 Act could include these sorts of provisions. It is in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Choice of procedure

17. Regulations and orders made under the 1979 Act are subject to negative resolution procedure (see section 60(2) of the 1979 Act) except where regulations are made under section 19 of the 1979 Act. This approach on procedure is in line with the approach now taken in most Bills.

Section 15 – Scheduled Monument Consent: regulations as respects applications, etc.

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

18. Section 15(2) inserts paragraph (1A) into Schedule 1 of the 1979 Act allowing Scottish Ministers to make provision in regulations about the manner in which scheduled monument consent is granted and the form and content of such consent. Section 15(3) amends paragraph 2 of Schedule 1 allowing the Scottish Ministers to make provision including that to require a certificate in the prescribed form to accompany an application for scheduled monument consent in order for it to be considered, make provision as to the form and content of such certificates, make provision publicising applications for scheduled monument consent and make provision as to the notice to be given of any application for scheduled monument consent and the form and content of such notices.
Reason for taking power

19. This will bring the scheduled monument consent application and granting process into line with the model used in the listed building and planning legislation.

Choice of procedure

20. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

PART 3 – MODIFICATIONS OF THE PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) (SCOTLAND) ACT 1997

Section 20 – Declining to determine an application for listed building consent – Subsection (2)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

21. Section 20(2) amends section 18(2) of the 1997 Act to allow an appeal to the Scottish Ministers where a planning authority have not given notice that they have exercised their power to decline to determine an application (as introduced into the 1997 Act by section 20(1)) within the relevant period or agreed extended period. Section 18(3)(a) of the 1997 Act provides that the relevant period is such period as may be prescribed. Under section 81 of the 1997 Act prescribed means prescribed by regulations which under section 82(3) of the 1997 Act shall be subject to negative resolution procedure. The change to section 18(2) does not create or confer a new power, but merely extends the way the existing power in section 18(3) may be used.

Reason for taking power

22. The power is required since section 20(1) inserts a new section 10A into the 1997 Act allowing planning authorities to decline to determine applications in certain circumstances. The appeal provisions in section 18 of the 1997 Act are extended to include an appeal against the failure to give notice that the authority have declined to determine an application. In line with similar existing appeals the Scottish Ministers can specify the time within which such an appeal must be made.

Choice of procedure

23. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure in line with the procedure applicable in relation to the time period for existing appeals.
Section 23 – Stop notices and temporary stop notices - new section 41D – Compensation for loss due to stop notice - subsection (5)

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

24. This provision allows Scottish Ministers to prescribe in regulations how claims for compensation for loss due to a stop notice must be made and the timeframe for such claims.

**Reason for taking power**

25. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain. This is in line with the provisions relating to compensation in the 1979 Act.

**Choice of procedure**

26. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 23 – Stop notices and temporary stop notices - new section 41G – Temporary stop notices: restrictions - subsection (1)

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

27. Section 23 inserts new section 41G(1) which sets out that a temporary stop notice does not prohibit certain works as may be prescribed by regulations.

**Reason for taking power**

28. These powers will allow Scottish Ministers to set out in detail which works are exempt from being subject to temporary stop notices, and it is thought that since the types of works will likely change over time this is better set out in regulations than on the face of the Bill.

**Choice of procedure**

29. The power is subject to negative resolution procedure. Given the detailed and technical nature of these provisions this is thought appropriate.
Section 23 – Stop notices and temporary stop notices - new section 41I – Temporary stop notices: compensation - subsection (3)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

30. Section 41I(3) applies subsections (5) to (9) of section 41D to compensation payable in relation to temporary stop notices as they apply to compensation payable in relation to stop notices under section 41D. This provision allows Scottish Ministers to prescribe in regulations how claims for compensation for loss due to a temporary stop notice must be made and the timeframe for such claims.

Reason for taking power

31. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail which any regulations under this provision will contain. This is in line with the provisions relating to compensation in the 1979 Act.

Choice of procedure

32. As this is mainly a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 24 – Amount specified in fixed penalty notices for breach of listed building enforcement notice: procedure

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

33. This section inserts a new section 39A into the 1997 Act which allows the Scottish Ministers to determine the fixed penalty amount that may be paid when there has been a breach of a listed building enforcement notice.

Reason for taking power

34. What are appropriate fixed penalty amounts are likely to change over time and it is important to have flexibility to revise the amount when necessary. It is therefore appropriate to delegate the power to subordinate legislation.

Choice of procedure

35. As fixed monetary penalties are to be imposed on persons who are believed to have committed an offence, there is likely to be significant stakeholder interest in the level of the fixed
penalty and so it was considered appropriate to require an affirmative resolution of the Parliament. Section 82 of the 1997 Act is therefore amended by section 29(4) of the Bill to insert a new subsection (3A) providing for draft affirmative procedure.

**Section 25 – Liability of owner and successors for expenses of urgent works**

Power conferred on: Scottish Ministers  
Power exercisable by: regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

**Provision**

36. Section 25(3) inserts new sections 50A to 50G (liability of owner and successors for expenses of urgent works executed under section 49) into the 1997 Act. Section 50G(1) gives the Scottish Ministers power to prescribe the form of notices specified in that section. These are: a notice of liability for expenses, a notice of renewal, a notice of determination and a notice of discharge.

**Reason for taking power**

37. This power has been delegated as it is considered that secondary legislation is the more appropriate means of providing for the administrative detail of the form of notices. Flexibility is required as it is anticipated that the notices will be updated over time.

**Choice of procedure**

38. As this is an administrative measure it is considered appropriate to apply negative resolution procedure.

**Section 28(1) – Regulations in connection with inquiries, etc**

Power conferred on: Scottish Ministers  
Power exercisable by: regulations made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

**Provision**

39. Section 28(1) amends section 79(1) of the 1997 Act so that section 275A of the Town and Country Planning (Scotland) Act applies to the 1997 Act. This provision allows the Scottish Ministers to make regulations to set out both the process for dealing with applications and appeals in listed building cases and how any inquiry in connection with such an application or appeal is to be conducted.

**Reason for taking power**

40. It is considered appropriate for procedural arrangements in relation to inquiries, hearings etc to be set out in secondary legislation rather than on the face of the Bill.
Choice of procedure

41. As this is a procedural measure it is considered appropriate to apply negative resolution procedure.

Section 29 – Regulations and orders under the 1997 Act

Power conferred on: Scottish Ministers
Power exercisable by: regulations or order made by statutory instrument and order with no Parliamentary procedure
Parliamentary procedure: affirmative/negative resolution of the Scottish Parliament

Provision

42. Section 29(6) amends section 82 of the 1997 Act and confirms that any power under the 1997 Act to make regulations or orders includes power to make such incidental, supplementary, consequential, transitory, transitional or savings provision where this is thought necessary or expedient. This provision does not introduce or confer new powers as such, but builds on existing powers so that a range of different types of provision may be made under them. Section 29(2)(b) and section 29(5)(b) amend section 82 of the 1997 Act to clarify that any power under the 1997 Act to make orders under sections 7(5), 54(5) and 67(7) or regulations under the 1997 Act includes power to make different provision for different purposes.

Reason for taking power

43. These are general provisions included as part of the updating and modernising of the legislation to put it beyond doubt that the specified orders and regulations made under the 1997 Act could include these sorts of provisions. They are in standard terms which harmonises scheduled monument and listed building powers and brings them into line with planning legislation.

Choice of procedure

44. Regulations made under the 1997 Act are subject to negative resolution procedure (see section 82(3) of the 1997 Act). Orders are subject either to negative resolution procedure, affirmative procedure or no Parliamentary procedure (see subsections (4) and (5) of section 82 of the 1997 Act and section 24 of the Bill inserting section 39A into the 1997 Act). Nothing in this power alters the fundamental nature of the substantive orders and regulations and therefore does not alter the procedure that should be applied to those regulations or orders.

Section 31 – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative/negative resolution of the Scottish Parliament

Provision

45. Section 31 gives the Scottish Ministers powers by order to make such supplementary incidental, consequential, transitory, transitional or saving provision needed to give full effect to
any provision of this Bill. This includes provisions amending or repealing any other enactment or instrument.

Reason for taking power

46. This is a general provision in standard terms which allows Scottish Ministers to make provision by order to support the full implementation of what is an amending Bill. Any such provision must be considered necessary or expedient for the purposes of, or in consequence of or for giving full effect to any provision of the Bill. This provision is included to ensure the purposes of the Bill can be given full effect without the need for further primary legislation.

Choice of procedure

47. Orders under section 31 are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of an Act, in which case the order is subject to an affirmative procedure.

48. It is appropriate that where the order changes primary legislation it should be subject to affirmative resolution procedure. This approach on procedure is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 32 – Short title and commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: None

Provision

49. Section 32 gives the Scottish Ministers powers to commence provisions of the Bill by order. Section 32 is exempt from the coverage of this power and will therefore come into force on any Act resulting from the Bill receiving Royal Assent.

Reason for taking power

50. To enable Scottish Ministers to appropriately and flexibly commence the provisions in the Bill.

Choice of procedure

51. The power is subject to no procedure as is typical for commencement powers.
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