



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

## **30th Report, 2014 (Session 4)**

# **Historic Environment Scotland Bill**

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## **Delegated Powers and Law Reform Committee**

### **Remit and membership**

#### **Remit:**

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
  - (a) any—
    - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
    - (ii) [deleted]
    - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
  - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
  - (c) general questions relating to powers to make subordinate legislation;
  - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
  - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
  - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
  - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
  - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

#### **Membership:**

Richard Baker  
Nigel Don (Convener)  
Mike MacKenzie  
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Stuart McMillan (Deputy Convener)  
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## Delegated Powers and Law Reform Committee

### 30th Report, 2014 (Session 4)

#### Historic Environment Scotland Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 25 March and 22 and 29 April, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Historic Environment Scotland Bill at stage 1 (“the Bill”)<sup>1</sup>. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)<sup>2</sup>.

#### OVERVIEW OF BILL

3. This Government Bill was introduced on 3 March 2014. The lead committee is the Education and Culture Committee.
4. The proposed new body, Historic Environment Scotland is sometimes referred to in this report as “HES”. The Royal Commission on the Ancient and Historical Monuments of Scotland is sometimes referred to as “RCAHMS”.
5. The Bill’s central objective is to create a new public body called Historic Environment Scotland. The Policy Note explains that it is intended that the new body will be a non-departmental public body (rather than a part of the Scottish Administration).
6. As a result of creating HES, the Royal Commission on the Ancient and Historical Monuments of Scotland would be abolished, and most of the assets, liabilities and staff of RCAHMS and Historic Scotland would be transferred to HES. Historic Scotland is an executive agency of the Scottish Government.

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<sup>1</sup> Historic Environment Scotland Bill [as introduced] available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/Historic%20Environment%20\(Scotland\)%20Bill/b47s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Historic%20Environment%20(Scotland)%20Bill/b47s4-introd.pdf)

<sup>2</sup> Historic Environment Scotland Bill Delegated Powers Memorandum available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/HES\\_Bill\\_-\\_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/HES_Bill_-_DPM.pdf)

## DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

- Paragraph 2(8) of schedule 1 (introduced by section 1(3)) - Power to vary the minimum or maximum number of board members of HES
- Paragraph 8(5) of schedule 1 - Committees of Historic Environment Scotland
- Paragraph 13(2) of schedule 1 - Accounts of Historic Environment Scotland
- Section 8(8) - Power to allow Scottish Ministers to vary the length of the period of HES' corporate plan
- Paragraph 2(e) of Part 1, schedule 2 (introduced by section 14) - power to specify persons required to be notified in relation to excluding or including a monument in the Schedule of Monuments, or amending the entry in the Schedule
- Paragraph 3 of Part 1, schedule 2 - power to regulate the manner in which HES must publish the Schedule of Monuments and make it available for inspection, etc.
- Paragraph 14(5) of Part 2, schedule 2 - Power to make regulations to make provision for the procedure to be followed by HES in relation to applications for scheduled monument consent under the Ancient Monuments and Archaeological Areas Act 1979 ("the 1979 Act")
- Paragraph 15(b) of Part 2, schedule 2 - power to prescribe the manner in which a revocation or modification order under section 4 of the 1979 Act must be advertised
- Paragraph 28 of Part 5, schedule 2 - power to set out procedure for (a) appeals against inclusion in the Schedule of Monuments and (b) appeals against a decision to amend an entry in the Schedule
- Paragraph 29 of Part 5, schedule 2 - powers to set out the procedure for appeals against decisions of HES in relation to scheduled monument consent
- Paragraph 30 of Part 5, schedule 2 - powers to prescribe classes of appeals under inserted sections 1C and 4B of the 1979 Act which are to be determined by an appointed person

- Paragraph 31 of Part 5, schedule 2 - power to make provision in connection with referrals under inserted section 3B of the 1979 Act
- Paragraph 3 of Part 1, schedule 3 (introduced by section 15) - power to specify persons required to be notified in relation to the compilation, approval or amendment of a list under section 1 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”)
- Paragraph 9 of Part 2, schedule 3 - power to specify persons who must be consulted by a planning authority in relation to an application for listed building consent
- Paragraph 10 of Part 2, schedule 3 - Power to prescribe persons who must be notified where a planning authority submits an order revoking or modifying listed building consent to the Scottish Ministers for confirmation
- Paragraph 11 of Part 2, schedule 3 - Power to prescribe persons who must notify the planning authority that they do not object to an order modifying or revoking listed building consent, in order for the procedure for unopposed orders to apply
- Paragraph 15 of Part 3, schedule 3 - power of HES to direct that a building is no longer deemed to be a listed building
- Paragraph 18 of Part 4, schedule 3 - power to set out procedure for appeals against inclusion in the list of buildings of special historic or architectural interest under section 1 of the 1997 Act
- Paragraph 18 of Part 4, schedule 3 - power to direct that an appeal under section 5B of the 1997 Act which falls to be determined by persons appointed by the Scottish Ministers shall be determined by the Ministers, etc.
- Paragraph 21 of Part 4, schedule 3 - power to direct HES to amend the list compiled or approved under section 1 of the 1997 Act
- Paragraph 23(a) of Part 4, schedule 3 - power to prescribe classes of appeals under inserted section 5B and section 18 of the 1997 Act which are to be determined by an appointed person
- Schedule 5 - Staff and property transfer schemes
- Section 20 - Local inquiries in relation to scheduled monuments etc.
- Section 22 - Application for listed building consent
- Section 25 - power to make ancillary provision
- Section 29 - power to commence provisions

8. At its meeting of 25 March, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

9. In light of the written responses received, the Committee determined that it did not need to draw the attention of the Parliament to these further delegated powers:

- Section 2(8) – Functions of Historic Environment Scotland
- Section 8(7)(a) Power to set the period of HES’s first corporate plan
- Section 12 – Directions and guidance

## **Recommendations**

10. The Committee’s comments, and where appropriate, recommendations on the remaining delegated powers in the Bill are detailed below. The powers in sections 3 and 7 are considered together.

### **Section 3(1) – Delegation of functions in relation to properties in care**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>written delegation</b>
<b>Parliamentary procedure:</b>	<b>none</b>

#### *Provisions*

11. Section 3(1) allows the Ministers to delegate functions in relation to “properties in care” to HES or to any other person/body considered appropriate, and to set out the detailed arrangements in respect of how such functions are to be exercised. The delegation may be to such extent and subject to such conditions as the Ministers consider appropriate.

12. The power excludes any function of subordinate legislation (section 3(2)). Where the function relates to the making or receiving of charges of any kind, any revenue received as a result of the function is revenue of the person/body to whom the function is delegated, unless provision to the contrary is made in the delegation (section 3(5)). The “default” position would therefore be that, assuming the function of collecting fees and charges from visitors to “properties in care” is delegated under the Bill to HES, then HES would keep that revenue (unless the delegation provided otherwise).

13. Any delegation under subsection (1) does not affect the ability of the Scottish Ministers to exercise the function, or their responsibility for that function. A delegation must be written, but can be varied or revoked (section 3(7)).

14. “Property in care” is defined as any heritable property which is of historical, archaeological, architectural or cultural significance or interest, *and* which is owned or occupied by, under the guardianship of, or otherwise under the management and control, of the Scottish Ministers (section 3(8)). This definition

would include the more than 300 historic sites presently in the care of Historic Scotland as an executive agency of the Ministers— (including for instance Edinburgh Castle) - <http://www.historic-scotland.gov.uk/index/places/aboutourproperties.htm>).

### **Section 7(1) – Delegation of functions in relation to collections**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>written delegation</b>
<b>Parliamentary procedure:</b>	<b>none</b>

#### *Provisions*

22. Section 7(1) allows the Ministers to delegate functions in relation to collections of objects which are in Ministers' management and control to HES, or to any other person/body, and to set out the detailed arrangements in respect of how such functions are to be exercised.

23. The provisions are similar to the powers in section 3 above as to functions in relation to "properties in care". Subsection (2) provides that the delegation of functions will operate, despite any prohibition or restriction that applies in an agreement which delegates the relevant functions. A delegation can be made in relation to a particular collection, a group of them, or all - or a particular object or group of objects in a collection.

24. The Ministers propose that HES should be able to exercise their management functions in relation to collections which are in the Ministers' care - mainly those items associated with "properties in care". They also wish to be able to delegate to another body in future, should this be considered more appropriate.

#### *Comments*

25. In particular, given the significance of the powers in section 3(1)(b) and 7(1)(b) which permit any other person/s which Ministers consider appropriate to be delegated with functions in relation to "properties in care" or collections, the Committee asked the Scottish Government whether it could be more appropriate for the determination of such persons to be made by an order that is subject to scrutiny by the Parliament.

26. The Scottish Government has responded that it will consider further the need for a higher degree of scrutiny, and may consult stakeholders on this.

27. The central objective of the Bill is the creation of HES as a non-departmental public body. The Committee considers therefore that these powers of written determination which further enable the Ministers to delegate the exercise of any of their functions in relation to the "properties in care" and the collections of objects to any other persons are potentially significant.

28. Further, where the function delegated relates to the making or receiving of charges, any revenue received is the revenue of the person to whom the function is delegated, unless provision to the contrary is made in the written delegation (sections 3(1)(b) and (5), and 7(1)(b) and (5)). The Scottish Government's

response has confirmed the significance of the sums involved. (For 2012/13, just over £23M was generated through admissions to the 80 properties where admission charges are levied.)

29. The Committee therefore considers that it would be more appropriate for any other person (apart from HES) who may be delegated with the functions to be specified by an order which would be subject to scrutiny and approval by the Parliament. An order should therefore be subject to the affirmative procedure, unless there is good reason why scrutiny of the order by the negative procedure would be more appropriate.

30. The Committee also notes that the accountability provisions contained in paragraphs 13 and 14, schedule 1 to the Bill apply to HES, but do not appear to extend to any other persons to whom these functions may be delegated in future. Paragraph 13 requires HES to keep proper accounts, prepare an annual accounting statement and submit it to the Ministers and to the Auditor General for Scotland for auditing. Paragraph 14 requires HES to submit published annual reports to Ministers, with a copy to be laid before the Parliament.

31. The Scottish Government's response also confirms that any written delegations of functions made under sections 3 and 7 would be published on its website. The Committee also considers that it would be a consistent approach, e.g. with the provisions for publication of directions and guidance to HES in section 12(6), that the Bill should provide for such publication.

32. The Committee also sought clarification as to which properties are included in the definition of "properties in care" in section 3(8), apart from the historic sites in the care of Historic Scotland. The response explains that the powers of delegation under section 3 are intended to relate to the 345 properties currently managed by Historic Scotland for conservation and public access. There are other buildings of historic significance, which are owned or managed by the Ministers and used for other purposes, and which could qualify as "properties in care". However the Scottish Government has no present intention that such functions in relation to the "operational" properties should be delegated to HES (or to other persons).

33. So while it is the current policy intention of the Scottish Government that the powers of delegation should not be used for those other operational properties, the scope of the powers enables them to be extended to these properties, should this be determined by a future administration. The financial and other effects of any such extension do not appear to be made clear in the Government's response to the Committee (nor precisely which other properties are involved.)

**34. The Committee therefore considers that it would be more appropriate for any other person (apart from HES) who may be delegated with functions under sections 3 or 7 to be specified by an order which would be subject to scrutiny by the Parliament under the affirmative procedure, unless there is good reason why the negative procedure would be more appropriate for the scrutiny of the order. This is given the significance and width of the powers in sections 3(1)(b) and (5), and 7(1)(b) and 7(4) to delegate functions in connection with "properties in care" and collections to any other person**

apart from HES, and to provide for how revenue received is kept. An alternative approach would be for sections 3(1)(b) and 7(1)(b) to be drawn more narrowly, to define the other persons who could be delegated with these functions.

35. The Committee notes that the Scottish Government has undertaken to consider the need for a higher degree of scrutiny in advance of Stage 2 of the Bill, and may consult stakeholders. The Committee will therefore consider these powers (as amended) in light of that review after Stage 2.

36. The Committee draws to the attention of the lead committee, in relation to those powers in sections 3(1)(b) and (5), and 7(1)(b) and 7(4) that the accounting and annual reporting requirements which are set out in paragraphs 13 and 14 of schedule 1 only apply to HES. The need for accounting and reporting requirements, where any other person apart from HES may be delegated with functions in connection with “properties in care” and collections, should be considered as part of the Scottish Government’s undertaking to review these provisions.

37. The Bill should provide for the publication of any written delegation of functions (to HES) made under sections 3 and 7. The Scottish Government has confirmed that any delegations would be published on its website.

38. The Scottish Government has confirmed that, while the powers in section 3 are defined as relating to the “properties in care” as defined by section 3(8), it is not intended that the functions of the Ministers should be delegated in relation to “operational” properties of historic significance which are not one of the 345 properties currently managed by Historic Scotland.

39. The Committee considers that, in principle, section 3 should be amended to exclude those “operational properties” from the definition of the “properties in care”, so that the scope of the powers reflects the policy intentions - unless the Scottish Government can provide good reasons why it is appropriate nonetheless for these properties to be included.

40. The Scottish Government is also asked to clarify, in response to this report, which “operational” properties this relates to.

## **ANNEX**

### **Correspondence with the Scottish Government—**

#### **On 25 March 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:**

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 25 March and seeks an explanation of the following matters:

#### **Section 2(8) – Functions of Historic Environment Scotland**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>“any relevant policy or strategy published by the Scottish Ministers”</b>
<b>Parliamentary procedure:</b>	<b>none</b>

2. Section 2(8) provides that in exercising its functions, Historic Environment must have regard to any relevant policy or strategy published by the Scottish Ministers.

3. Ministers have other powers to direct or issue guidance to Historic Environment Scotland, about the exercise of its functions, in section 12. Specifically in section 12(4)(b), Historic Environment Scotland must have regard to guidance issued by the Ministers in relation to the exercise of its functions.

4. **The Committee asks for explanation, in relation to the power in section 2(8) to issue any relevant policy or strategy which Historic Environment Scotland must have regard to in exercising its functions:**

- **What the purposes of this power are, and how it could be exercised, and**
- **Why this power is needed, beyond the powers of direction and guidance proposed to be conferred on the Ministers in section 12 (in particular the requirement for Historic Environment Scotland to have regard to any guidance issued in relation to the exercise of its functions)?**

#### **Section 3(1) – Delegation of functions in relation to properties in care**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>written delegation</b>
<b>Parliamentary procedure:</b>	<b>none</b>

#### **Section 7 (1) – Delegation of functions in relation to collections**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>written delegation</b>
<b>Parliamentary procedure:</b>	<b>none</b>

5. Section 3(1) allows Ministers to delegate functions in relation to “properties in care” to Historic Environment Scotland (or to any other person considered appropriate), and to set out the detailed arrangements in respect of how such functions are to be exercised.

6. Section 3(5) provides that where the function relates to the making or receiving of charges of any kind, any revenue received as a result of the function is revenue of the person to whom the function is delegated, unless provision to the contrary is made in the delegation.

7. Section 3(8) defines “Property in care”, as any heritable property which is of historical, archaeological, architectural or cultural significance or interest, *and* which is owned or occupied by, under the guardianship of, or otherwise under the management and control, of the Scottish Ministers.

8. Section 7(1) allows the Ministers similarly to delegate functions in relation to collections of objects which are in Ministers’ management and control to Historic Environment Scotland, or to any other person, and to set out the detailed arrangements in respect of how such functions are to be exercised.

9. **The Committee asks for explanation of these matters in relation to the powers of delegation in sections 3(1) and 7(1):**

- **Why is it considered that the exercise of the specific powers in sections 3(5) and 7(4) (as to who would receive the revenue received as a result of the exercise of such a function which is delegated by the Scottish Ministers) should not be subject to the approval of, or another form of scrutiny by, the Parliament,**
- **Could the possible financial effects of those powers in sections 3(5) and 7(4) be explained,**
- **Given the significance of the powers in section 3(1)(b) and 7(1)(b) which permit any other person/s which Ministers consider appropriate to be delegated functions in relation to “properties in care” or collections, whether it would be more appropriate for the determination of such persons to be made by an order that is subject to scrutiny by Parliament. If so, what scrutiny procedure would be considered suitable for the exercise of the power,**
- **Why is there no provision in the sections for the publication of any written delegation of functions, nor provision for a copy to be laid in the Parliament, and**
- **Which properties are included currently in the definition of “properties in care” in section 3(8), apart from the historic sites in the care of Historic Scotland?**

## **Section 8(7)(a) Power to set the period of HES's first corporate plan**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>order</b>
<b>Parliamentary procedure:</b>	<b>negative procedure</b>

10. Section 8(7)(a) allows the Scottish Ministers to set the period that Historic Environment Scotland's first corporate plan will cover. The corporate plan will set out Historic Environment Scotland's main objectives, the outcomes that would demonstrate achievement of these objectives and the activities Historic Environment Scotland expects to undertake.

11. As for the similar power in section 11(7)(a) of the Revenue Scotland and Tax Powers Bill in connection with the corporate plan of Revenue Scotland, the Committee would accept in relation to the power in section 8(7)(a) that a first planning period of 3 years is intended and that that period might need to be less. However it considers that the Scottish Government should provide a good reason why the power requires to be drawn to allow any period of more than 3 years to be specified, or otherwise the power should be limited to an appropriate maximum period.

**12. The Committee therefore asks the Scottish Government for an explanation of this matter, and why the power is not more narrowly framed, given the stated policy intention?**

## **Section 12 – Directions and guidance**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Direction or guidance</b>
<b>Parliamentary procedure:</b>	<b>none (but published)</b>

13. Section 12(1) provides that the Minister may give Historic Environment Scotland binding directions of a general or specific nature about the exercise of its functions. Directions cannot be given as to the exercise of functions in relation to any particular historic property (as defined in subsection (8)), collection or object, or the making of grants or loans under section 10. Directions could be given in relation to the exercise of functions which Historic Environment Scotland has by a delegation under sections 3 and 7.

14. Section 12(4) provides that Historic Environment Scotland must have regard to any guidance issued by the Ministers in relation to the exercise of its functions.

**15. The Committee asks the Scottish Government in relation to the powers of direction and guidance about the exercise of Historic Environment Scotland's functions in section 12:**

- **what the purposes of the powers are and how they could be used, and**
- **why the exclusions in subsections (2) and (3) are appropriate?**

**On 1 April 2014, the Scottish Government responded as follows:**

16. The Scottish Government's response is as follows.

**Section 2(8) – Functions of Historic Environment Scotland**

17. **The Committee asked the Scottish Government:**

- **What the purposes of this power are, and how it could be exercised, and**
- **Why this power is needed, beyond the powers of direction and guidance proposed to be conferred on the Ministers in section 12 (in particular the requirement for Historic Environment Scotland to have regard to any guidance issued in relation to the exercise of its functions)?**

18. The purpose of section 2(8) is to ensure that in the exercise of its functions Historic Environment Scotland (hereafter HES) delivers outcomes which are in support of any policy or strategy, published by Scottish Ministers, which may be in place for the historic environment or any other subject area.

19. Section 2(8) does not confer a power on the Scottish Ministers to issue policies and guidance. That is unnecessary. The Scottish Ministers already have a power at common law to publish policies and strategies on any subject they consider appropriate.

20. Section 2(8) imposes a duty on HES to have regard to any such policies or strategies that Scottish Ministers have published, for instance on reducing greenhouse gas emissions or on financial management for Non Departmental Public Bodies, if relevant to HES's functions.

21. In particular, in relation to the historic environment, the creation of HES is occurring at the same time as the publication of Scotland's first ever Historic Environment Strategy, *Our Place in Time*, which provides a set of strategic outcomes agreed across the sector and is a 10-15 year vision for the historic environment in Scotland. HES will be a key organisation in the delivery of this strategy, and its successors, and under section 2(8) will be required to have regard to this strategy amongst others.

22. Section 12, by contrast, provides for directions on the exercise of its functions to be issued by Scottish Ministers to HES, and requires it to comply with these. The section also requires HES to have regard to any guidance issued to it by Ministers. Directions and guidance issued under section 12 would be specific to HES, in contrast to the more general policies and strategies to which HES must have regard under section 2(8).

23. Section 12(4)(b) does not represent a power to issue guidance but, like section 2(8) is a duty on HES to have regard to any guidance.

**Section 3(1) – Delegation of functions in relation to properties in care**

**Section 7(1) – Delegation of functions in relation to collections**

**24. The Committee asked the Scottish Government:**

- **Why is it considered that the exercise of the specific powers in sections 3(5) and 7(4) (as to who would receive the revenue received as a result of the exercise of such a function which is delegated by the Scottish Ministers) should not be subject to the approval of, or another form of scrutiny by, the Parliament,**
- **Could the possible financial effects of those powers in sections 3(5) and 7(4) be explained,**

25. The Scottish Government is following normal practice whereby the delegation of functions is provided for administratively rather than by subordinate legislation. Recent examples include section 4 of the Revenue Scotland and Tax Powers Bill and sections 9, 10 and 11 of the Public Services Reform Act 2010. In general, this power to delegate functions may include non-statutory functions such as “common law” functions or functions the Scottish Ministers have through private agreements.

26. The Scottish Government considers that income received as a result of the exercise of a delegated function should normally accrue to HES, or to any other body managing properties on their behalf, so that this income can help to support the management of the properties. As such, it is considered that this ought to be provided for explicitly in the Bill. In addition, as a public body HES is accountable to Ministers and to Parliament and must publish its annual report. The Bill also specifies that a copy of the annual report must be laid before Parliament by Scottish Ministers.

27. In practice, this approach is equivalent to the current situation whereby Ministers currently exercise, through Historic Scotland, powers to charge for admission to properties in care and also to charge for related goods and services. Any income remains within the budgets of Historic Scotland. Commercial income generated from the properties in care is currently a key revenue stream for Historic Scotland coming primarily from admission charges, membership charges and trading income connected with the properties in care. In 2012/3 commercial income amounted to £32,272,000, which represents around 40% of total income. In the same period total income was £81,092,000 and included funding from Scottish Government of £47,346,000. Income from the properties is used to support the work of Historic Scotland including the management of the estate.

28. The main portion of this income (£23,003,000) is generated through admissions to the 80 properties where admissions charges are levied. A further 265 properties are free to enter and the Scottish Government does not expect this to change. A further £9,269,000 is generated through trading sales, functions and other activities.

29. Again, the Scottish Government expects these activities to continue on a similar basis to the current situation. The Government will make specific provisions

in the written delegation covering charges for properties in care to ensure that no significant changes are made to charging regimes without the agreement of Ministers.

**30. In relation to these same provisions, the Committee also asked the Scottish Government:**

- **Given the significance of the powers in section 3(1)(b) and 7(1)(b) which permit any other person/s which Ministers consider appropriate to be delegated functions in relation to “properties in care” or collections, whether it would be more appropriate for the determination of such persons to be made by an order that is subject to scrutiny by Parliament. If so, what scrutiny procedure would be considered suitable for the exercise of the power, and**
- **Why is there no provision in the sections for the publication of any written delegation of functions, nor provision for a copy to be laid in the Parliament?**

31. In the light of the committee’s comments, the Government will consider further the need for a higher degree of scrutiny in this area, and may consult stakeholders on this.

32. The Scottish Government intention is that the written delegation should be transparent. To achieve this, written delegations will be published on the Scottish Government website.

**33. Finally, in relation to these same provisions, the Committee also asked the Scottish Government:**

- **Which properties are included currently in the definition of “properties in care” in section 3(8), apart from the historic sites in the care of Historic Scotland?**

34. The powers of delegation under section 3 are intended to relate to the 345 properties currently managed by Historic Scotland for conservation and public access. There are other buildings of historic significance, however, which are owned or managed by Ministers and used for other purposes and which might qualify as “properties in care” by the definition used in the Bill, but there are no intentions that such function in relation to such “operational” properties should be delegated to HES under this provision.

#### **Section 8(7)(a) Power to set the period of HES’s first corporate plan**

**35. The Committee asked the Scottish Government for an explanation of this matter, and why the power is not more narrowly framed, given the stated policy intention?**

36. The primary intention here, as the Committee recognises, is to allow for a shorter period for the first Corporate Plan of HES, to allow for the intensive period of activity associated with setting up the new body and completing the transition of

functions. Adjusting the first period will also allow the HES planning cycle to be put into synchronisation with other cycles, such as that for the Public Spending Review.

37. It is not intended to extend the first planning period beyond 3 years. However, there might be a case for a slightly longer than 3-year first period if this is necessary to align the various cycles mentioned above, if the alternative would be to have an extremely short (less than 1-year) first planning period.

38. We would note that, by dealing with this matter by order as is proposed, any change would be subject to Parliamentary scrutiny.

## **Section 12 – Directions and guidance**

39. **The Committee asked the Scottish Government:**

- **what the purposes of the powers are and how they could be used, and**
- **why the exclusions in subsections (2) and (3) are appropriate?**

40. As noted above, section 12 provides for directions on the exercise of functions to be issued by Scottish Ministers to HES, and requires it to comply with these. Directions issued under section 12 and any guidance referred to in section 12(4)(b) would be specific to Historic Environment Scotland, in contrast to the more general policies and strategies to which Historic Environment Scotland must have regard to under section 2(8). Directions may be of a general or specific nature.

41. These powers would cover a range of circumstances, including:

- the manner in which Historic Environment Scotland performs its duties (for example, to require the body to increase its efforts in regard to a particular function relative to other functions);
- providing the body with clear, formal information about important matters, for example that Ministers expect HES to help lead a particular sector-wide initiative.

42. In general, these matters would be pre-agreed in a variety of conversations, leading to annual funding letters, letters of guidance and by formal agreement to proposals sent to Ministers by HES. It is envisaged that formal direction, in the narrow sense of Ministers instructing HES to do something which it appeared reluctant to do, would be an extremely rare occurrence.

43. **The exclusion at sub-section (2)** is to ensure that HES is free to make judgements based on specialist criteria in relation to routine casework.

44. By providing what is often referred to as “curatorial independence” in this way, the intention of the Bill is unequivocally to remove both the temptation and the perception that Ministers will be able to influence decision-making in respect of, for example, which historic building in need of a grant receives it, or which

particular items are acquired for the collections of the body. There is widespread expectation, from stakeholders and from other national collections, that such areas are protected from Ministerial intervention in such areas.

45. Nonetheless, the power at 12(1) would allow Ministers to direct HES as to the overall collecting policies of HES. Section 10(3) requires that any grant issued by HES must be in accordance with any general Ministerial authorisation as to the making of grants.

46. **The exclusion at sub-section (3)** makes it clear that Ministers may, by contrast give directions in relation to what would be regarded as “curatorial” matters in relation to those properties in care and collections, the functions in respect of which have been delegated by Ministers to HES. This is a recognition that, in such cases, HES will be acting for Scottish Ministers.

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