



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EDUCATION AND CULTURE COMMITTEE

Tuesday 19 August 2014

Session 4

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**Tuesday 19 August 2014**

**CONTENTS**

	<b>Col.</b>
<b>DECISION ON TAKING BUSINESS IN PRIVATE .....</b>	4319
<b>SUBORDINATE LEGISLATION.....</b>	4320
Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Historic Environment Scotland as Specified Authority) Order 2014 [Draft] .....	4320
<b>HISTORIC ENVIRONMENT SCOTLAND BILL: STAGE 2 .....</b>	4322

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**EDUCATION AND CULTURE COMMITTEE**

**21<sup>st</sup> Meeting 2014, Session 4**

**CONVENER**

\*Stewart Maxwell (West Scotland) (SNP)

**DEPUTY CONVENER**

\*Neil Bibby (West Scotland) (Lab)

**COMMITTEE MEMBERS**

\*George Adam (Paisley) (SNP)  
\*Clare Adamson (Central Scotland) (SNP)  
\*Jayne Baxter (Mid Scotland and Fife) (Lab)  
\*Colin Beattie (Midlothian North and Musselburgh) (SNP)  
\*Gordon MacDonald (Edinburgh Pentlands) (SNP)  
\*Liam McArthur (Orkney Islands) (LD)  
\*Mary Scanlon (Highlands and Islands) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Fiona Hyslop (Cabinet Secretary for Culture and External Affairs)  
Liz Smith (Mid Scotland and Fife) (Con)

**CLERK TO THE COMMITTEE**

Terry Shevlin

**LOCATION**

The James Clerk Maxwell Room (CR4)



## Scottish Parliament

### Education and Culture Committee

*Tuesday 19 August 2014*

[The Convener *opened the meeting at 10:00*]

#### Decision on Taking Business in Private

**The Convener (Stewart Maxwell):** Good morning, everybody. I welcome you all to the 21st meeting in 2014 of the Education and Culture Committee. I remind everybody that electronic devices—particularly mobile phones—should be switched off at all times, because they interfere with the broadcasting system. I welcome back Liz Smith, who is here for the stage 2 proceedings that we will come to shortly.

Agenda item 1 is a decision on whether to take in private item 5, which is consideration of our approach to curriculum for excellence. Do we agree to take that item in private?

**Members** *indicated agreement.*

## Subordinate Legislation

### Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Historic Environment Scotland as Specified Authority) Order 2014 [Draft]

10:00

**The Convener:** Item 2 is evidence on the draft order. I welcome Fiona Hyslop, the Cabinet Secretary for Culture and External Affairs, and her supporting officials from the Scottish Government. After we have taken evidence on the order, we will debate the motion under item 3. Officials will not be permitted to contribute to that formal debate.

I invite the cabinet secretary to make opening remarks.

**The Cabinet Secretary for Culture and External Affairs (Fiona Hyslop):** The order will ensure that appointments to historic environment Scotland are regulated by the Commissioner for Ethical Standards in Public Life in Scotland. The order provides that, for the purpose of, or in connection with, appointments to the body, historic environment Scotland is to be treated as if it were a specified body that is listed in schedule 2 to the Public Appointments and Public Bodies etc (Scotland) Act 2003.

As I said when I wrote to the committee in May, our policy position from the start has been that the new body should be a regulated body. In the accompanying documents to the Historic Environment Scotland Bill, on which stage 2 proceedings will follow, I set out my intention that the new body will be established in April 2015 and take up its full powers in October 2015.

To have the board in place and in a position to carry out the work to meet that timetable, and to meet Audit Scotland's recommendations on establishing and merging public bodies, I wish to appoint a board as soon as possible after the bill receives royal assent, if Parliament agrees to pass it. That is particularly important if the board is to have sufficient time to recruit the chief executive before the organisation takes up its full powers in October 2015.

It is important that the appointment process for the first board of what will be our new lead body for the historic environment is fully transparent and subject to the high-quality external scrutiny that the commissioner can provide. The order's adding of historic environment Scotland to schedule 2 to the 2003 act follows recent precedent in setting up new public bodies. The commissioner cannot formally regulate the appointments until the new body is added to the list of regulated bodies under

the 2003 act. I propose to achieve that through the order, which I invite the committee to support.

**The Convener:** Do members have questions?

**Mary Scanlon (Highlands and Islands) (Con):** I thank the cabinet secretary for her clear introduction. I am looking at paragraph 6 of the policy note. Are you on course to have the new body's leadership in place by six months before 1 October?

**Fiona Hyslop:** That is the intention and is why we want to move forward as swiftly as possible. We recognise Parliament's role, which is why we waited until stage 1 was completed. We are about to discuss a number of amendments on the board. We have waited for the process, but we are ready to move and to advertise. However, the appointments will be subject to the bill's being passed at stage 3.

**The Convener:** For absolute clarity, will you confirm that none of the appointments will be confirmed until after stage 3 has been completed?

**Fiona Hyslop:** When appointments have been made to other bodies, they have been subject to parliamentary proceedings. We can go through the process, but if something happened at stage 3—I am sure that that will not happen—the appointments would not commence.

**The Convener:** No other members wish to comment or ask a question.

As previously indicated, we move to the formal debate, which is item 3.

*Motion moved,*

That the Education and Culture Committee recommends that the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Historic Environment Scotland as Specified Authority) Order 2014 [draft] be approved.—[*Fiona Hyslop.*]

**The Convener:** Does any member wish to make a contribution?

**Members:** No.

*Motion agreed to.*

**The Convener:** I think that most of the officials will stay for the stage 2 debate on the Historic Environment Scotland Bill.

## Historic Environment Scotland Bill: Stage 2

10:05

**The Convener:** Our next item is consideration of the Historic Environment Scotland Bill at stage 2. I remind officials that they are not permitted to participate in this part of the proceedings.

I remind everybody that they should have with them copies of the bill as introduced, the marshalled list of amendments and the groupings of amendments. The groupings set out the amendments in the order in which they will be debated, and the marshalled list sets out the amendments in the order in which they will be disposed of.

I will briefly remind all those present of some of the main points of the procedure, so that we are clear.

There will be a debate on each group of amendments, and I will call members to speak in turn. Members who have not lodged amendments in a group but who wish to speak should indicate that by catching my eye or the clerk's attention.

Following the debate on each group, I will check whether the member who moved the first amendment in the group wishes to press or withdraw it. If they wish to press it, I will put the question on the amendment. If a member wishes to withdraw their amendment after it has been moved, they must seek approval to do so. If any member who is present objects, the committee will immediately move to a vote on the amendment.

If any member does not want to move their amendment when they are called to do so, they should say, "Not moved." However, any other member may move such an amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Voting in any division is by a show of hands. Only committee members are allowed to vote.

The committee is required to indicate formally that it has considered and agreed each section of the bill. I will therefore put a question on each section at the appropriate point.

*Section 1 agreed to.*

### Schedule 1—Historic Environment Scotland

**The Convener:** Amendment 6, in the name of Liam McArthur, is in a group on its own.

**Liam McArthur (Orkney Islands) (LD):** I re-emphasise my support for the general principles of the bill. I also acknowledge the cabinet secretary's willingness to engage constructively on the bill's

provisions and thank colleagues on the committee for including a visit to Orkney in our evidence-gathering sessions. Probably few other parts of the country can lay as much of a claim to being directly impacted by the implications of the bill as the constituency that I represent.

Although we have heard no real opposition to the principles of the merger, it is fair to say that we have heard consistent anxiety about the need to ensure that the new body is equipped for and tasked with dealing with the wide range of needs of stakeholders throughout the country.

Invariably, if not inevitably, merging organisations can lead to a more centralised approach that looks good on paper and has the benefit of simplicity but that, in practice, fails to represent the interests of all those that the merger has been set up to serve and/or struggles to reflect the complexity of the issues and tasks for which it is responsible. A number of my amendments are born of a desire to ensure that historic environment Scotland does not fall into that category. To be fair to the cabinet secretary, I think that she recognises and accepts some of those risks. We will come to those amendments in due course.

We have already discussed the mechanics of putting in place the new board. The concern behind amendment 6 is to ensure that HES embodies the geographical diversity for which it is responsible. I accept that, in appointing a board, it is not straightforward to ensure that it has the necessary mix of skills and that it balances appropriate male and female representation and any other factors that might be relevant. Nevertheless, the integrity and legitimacy of HES could only be enhanced if its board were to be seen to be drawn from the talents of individuals from across the country rather than simply those who are already within easy striking distance of Edinburgh, however well qualified they may be.

I do not underestimate the challenges that the amendment might present, particularly if the numbers on any future board are to be kept manageable. However, some of the concerns that have been felt, particularly by people who live outside the central belt, about the consequences of the merger could be allayed by a move along those lines.

I look forward to hearing what Fiona Hyslop has to say, and I move amendment 6.

**Clare Adamson (Central Scotland) (SNP):** I echo Liam McArthur's support for the bill and I, too, reference the beautiful, sunny trip to Orkney that we had. I appreciate the complexity of the situation in Orkney, but I feel that the nature of the process of getting the right candidate will mean that it will get people who understand the complex

nature of Scotland's historic environment. Including amendment 6 in the bill may limit choice and emphasise the selection of candidates in a way that might mean that we would not end up with the best people in position.

**The Convener:** I will make a small contribution to the debate. The principle behind amendment 6 is absolutely laudable. We all want to ensure that there is geographical diversity as well as any other diversity on any board that is appointed in the public's name. However, my concern is that amending the bill as amendment 6 proposes would create unnecessary difficulties. What the amendment proposes should be an aim to be discussed for possible guidance, but I am unsure that we would want to see it on the face of the bill.

**Fiona Hyslop:** Liam McArthur proposes that "geographical diversity" should be a factor of which special account is taken when selecting board members for historic environment Scotland. I agree that an understanding of the circumstances and issues in all areas of Scotland will be important, but I am not convinced that it should be the overriding consideration in appointing the board, and that would be the case if the bill was amended as amendment 6 proposes.

Our intention is to ensure that there is a diverse mix of backgrounds, skills and experience on the board, which will best serve historic environment Scotland and the wider historic environment in Scotland. We will not get that diverse mix by restricting which candidates we can choose. Historic environment Scotland will have a broad range of responsibilities within the general function of investigating, caring for and promoting Scotland's historic environment.

Despite the representations from some stakeholders, we chose not to specify particular fields of expertise—for example, archaeology—for board members, and the same argument applies for geographical and other factors. We need to get the widest possible field of candidates to get the best possible board, and that would not necessarily happen if potential candidates perceived that they were less likely to be chosen if they lived in, say, Glasgow rather than Orkney. Equally, if a specific number of board members had to come from, or have significant interests in, certain geographical locations, we could end up being unable to appoint the candidates who best met the other assessment criteria simply because they were based in the "wrong" parts of Scotland.

The committee has just considered the order that will allow HES to be regulated by the Commissioner for Ethical Standards in Public Life in Scotland. The appointment panel, which includes the commissioner's independent assessor, has developed criteria that best meet the needs of the body. We need the right criteria

and we want good candidates from every part of Scotland and beyond to put themselves forward. I emphasise that those who are selected will receive support with travelling and other expenses so that they can play a full part in the board. Indeed, MSPs themselves have a role in encouraging applications from all parts of Scotland, including the islands and other areas from which we want to ensure that we have good representation.

For the reasons that I have set out, I firmly believe that we should trust the commissioner and the selection panel to identify the best possible board. I am very conscious of the fact that, for all board appointments, we must ensure that we have representation from across Scotland and that board members have the skills that have been identified by the selection panel. Taking all those relevant factors into account, I urge the committee to oppose amendment 6.

**Liam McArthur:** I thank the convener and Clare Adamson for their contributions to the debate. I fully accept the reservations that have been expressed about the potential straitjacket that amendment 6 could create in establishing the board, and I think that those who are responsible for the selection process will have heard what has been said about that.

It is inconceivable that the organisation would not have expertise in the area of archaeology, and it would only enhance and strengthen the board if it was seen to be drawing from the wide representation of that expertise throughout Scotland. Nevertheless, I am reassured by the provisions that ensure that those who come from areas that are furthest away will not be disadvantaged as a result.

We will come on to some other amendments that may be more appropriate for the context of the bill, but I seek to withdraw amendment 6.

*Amendment 6, by agreement, withdrawn.*

10:15

**The Convener:** Amendment 7, in the name of Liam McArthur, is grouped with amendment 8.

**Liam McArthur:** The two amendments touch on an issue that arose during the committee's visit to a sun-kissed Orkney all those weeks ago, although it might be of less concern than other issues that we will discuss.

The purpose of amendments 7 and 8 is to maintain standards of accountability and quality when work is delegated or contracted out to, for example, local authorities. That would be achieved through the bill's placing a general duty on HES. As colleagues who were on the Orkney trip might recall, Orkney Islands Council representatives

highlighted the potential risk of technical processes that were undertaken objectively by HES becoming susceptible to politicking in a local authority environment. I suspect that the cabinet secretary might feel that the assurances that I am seeking are already covered in the context of the general operation and accountability of public bodies, but it would be useful to hear how that is expected to work in practice.

Likewise, I note that a later group of amendments proposes specific safeguards whereby a change to the system of delegation of properties in care would require bodies other than HES to be on a list of approved organisations. I understand that that would allow for quality, accountability and so on to be vetted before any body would be permitted to take responsibility for properties in care. Such a system seems sensible, and it might have mileage for application to other situations.

I look forward to what the cabinet secretary and others have to say, and I move amendment 7.

**Fiona Hyslop:** I was not quite sure where amendments 7 and 8 were coming from, and it was helpful to hear Liam McArthur's explanation of what he is trying to achieve with them.

However, I believe that the amendments run directly contrary to how we intend historic environment Scotland to operate, particularly with regard to its duty of accountability, to which Liam McArthur referred. Given that this part of schedule 1 specifically deals with how historic environment Scotland will discharge its functions under the bill, we are talking about a quite separate matter from that which is dealt with in sections 3 and 7, which relate to the delegation of ministerial functions to HES.

HES's central purpose is to be the expert lead body that will carry out the functions that, at the moment, are carried out by Historic Scotland on behalf of ministers as well as by the Royal Commission on the Ancient and Historical Monuments of Scotland, which the bill will transfer to HES. We do not believe that it is desirable for HES to delegate to other persons its functions under the bill, as that would involve an unacceptable loss of ministerial and parliamentary oversight, and it would risk obscuring lines of responsibility for delivery, reporting and accountability.

For that reason, paragraph 12 of schedule 1, which sets out HES's general powers including a wide variety of ways in which it can deliver its functions, does not allow formal delegation of HES's functions to others. There is a significant difference between working in partnership or entering into contracts and the formal delegation of functions to another person's control and



responsibility. In order for the committee—and me—to have oversight of HES and to guarantee that it is carrying out its functions, it is important that the functions can be delegated only to HES and that it should not have the power to delegate its functions under the bill to anyone other than a HES board member or a HES employee.

In short, the functions that are being given to HES should remain with HES. Nevertheless, as we will discuss later, we want HES to exercise those functions collaboratively and we have set out what would be required in contracts that HES might have with other bodies. I think that such an approach is far simpler. It is clear that the accountability and oversight rest entirely with me, but HES will also have clear responsibility for the functions that will be given to it and I would not want HES to be able to delegate its functions under the bill to anyone else.

**Liam McArthur:** In the light of what the cabinet secretary has said, particularly about the importance of the line of accountability that is owed not only to ministers but to Parliament—those points were well made—I am happy to seek to withdraw amendment 7.

*Amendment 7, by agreement, withdrawn.*

*Amendment 8 not moved.*

**The Convener:** Amendment 60, in the name of Liz Smith, is in a group on its own.

**Liz Smith (Mid Scotland and Fife) (Con):** When we took evidence at earlier stages of the bill, the Law Society of Scotland in particular expressed concerns about the possible conflict of interest between HES's regulatory functions, which would at times influence the giving of grants, and its ability to seek grants from other sources. The Law Society cited, for example, the fact that the

“listing of a building may be of significance in respect of the availability of grants and other financial issues.”

It pointed out that issues could arise about HES's role in securing that funding

“if at the same time it is making grants”.

There are potential issues about a conflict in respect of HES, which will hopefully be awarded charitable status in the future. That is clearly something that might exercise the Office of the Scottish Charity Regulator.

Amendment 60 is designed to ensure that there are enhanced reporting requirements on HES to ensure that its functions are kept separate and are not influenced unduly by any person or interest.

I move amendment 60.

**Liam McArthur:** Liz Smith quite rightly identifies one of the key issues that was raised with us at

stage 1 about that potential conflict of interest. Whether amendment 60 addresses that conflict or whether some revision of it is required, as things stand, the bill is in need of tightening up and clarifying in relation to that point.

**Fiona Hyslop:** Amendment 60 would impose duties on HES with regard to reporting on the exercise of its regulatory functions. I am very aware of the importance of the regulatory functions that HES will carry out and the need for them to continue to be undertaken in a professional and appropriate manner, as they are at present. However, that is equally true of all HES's functions—it is not just true of the regulatory functions. As such, the bill requires HES to report annually on the exercise of all its functions. That would, of course, include all the heritage management functions, such as designation and regulation, that have been put forward in amendment 60.

I am conscious of the concerns that were expressed during the stage 1 evidence sessions that HES might be under pressure to grow its commercial income at the expense of its regulatory functions, for example. The bill does not create such a risk. HES has a duty to undertake and report on all its functions, including designation and regulation, and it is required to do so to a high standard.

At stage 1, I addressed concerns that HES might treat internal scheduled monument consent applications differently from external ones. I think that that is the point that Liz Smith is making. Historic Scotland already has in place a voluntary process that works well, as I set out during stage 1 evidence. Our commitment to fairness and transparency is demonstrated by the fact that the bill strengthens the existing protections, as HES will not enjoy Crown immunity and will have to apply for scheduled monument consent in the same way as anyone else.

In addition, I intend to set out regulations in due course requiring all scheduled monument consent decisions, including those for HES and its own properties, to be published. That reflects the transparency that the committee asked for in a number of areas. Transparency of the regulatory functions will be obvious.

On the point about grants, I also made it quite clear in my response to the committee's report that HES will not be able to give itself grants. That is another part of the transparency of the process, so the compromise that Liz Smith identifies would not be available. In the Government's letter of guidance to the body, I will make quite clear the amount of money that I want to be available for bodies other than HES, so the compromise that Liz Smith talked about should not exist in that regard.

As a public body, HES will be subject to the normal expectations of high standards in delivery and accountability. A formal complaints procedure will be applied if concerns are raised, and complaints could be raised with historic environment Scotland, ministers, the Scottish Public Services Ombudsman and, ultimately, the courts. This committee will also have oversight and HES will be subject to Parliament's scrutiny. Therefore, through the combination of the bill's reporting requirements, which cover all its functions, including the regulatory functions, and the normal expectations and strategy obligations of HES as a public body, there are sufficient safeguards to ensure that HES picks up where Historic Scotland leaves off and will carry out its regulatory functions appropriately and to high standards.

As I said, the requirements will be set out in regulations and we will also have to publish requirements for all scheduled monument consents. That will allow the scrutiny that people are seeking through amendment 60. Therefore, I suggest that the committee opposes the amendment, having listened to my argument.

**The Convener:** I call Liz Smith to wind up the debate and indicate whether she intends to press or withdraw amendment 60.

**Liz Smith:** Cabinet secretary, issues about a potential conflict of interest remain. I hear what you say about other aspects of the bill, which you say will clarify some of that. It would be helpful ahead of stage 3 to ensure that the Government regulations that you talked about are extremely clear. If I get that guarantee, I am prepared to withdraw the amendment. There are concerns about exactly what information HES must report on given that, as you rightly point out, it could have a commercial interest and, as I say, that could lead to a conflict of interest. The regulations will be extremely important in clarifying what the controls will be.

*Amendment 60, by agreement, withdrawn.*

*Schedule 1 agreed to.*

## **Section 2—Functions of Historic Environment Scotland**

**The Convener:** Amendment 1, in the name of Liam McArthur, is in a group on its own.

**Liam McArthur:** Colleagues will recall that we deliberated over the cases for and against the inclusion of a definition of "historic environment" in the bill. We reached the conclusion that a case for its inclusion was not compellingly made, although that decision was met with disappointment in some quarters, not least by the Law Society of Scotland.

More persuasive is the Law Society's argument that "conserving and enhancing", as set out in section 2(2)(e) are, or at least could be, mutually exclusive. To address that issue and to draw a distinction between what could be incompatible functions, rather than simply replacing "and" with "or", it might be helpful and indeed clearer to separate out the two functions into stand-alone provisions. I hope that the cabinet secretary will agree to that relatively minor but important clarification.

I move amendment 1.

**Fiona Hyslop:** Liam McArthur mentioned the Law Society of Scotland. It did indeed, in discussion with the Government and in its stage 1 evidence, argue that conservation and enhancement are not at all the same or even necessarily complementary, and I agree.

You will recall that much of the debate is about how we can deliver the produced strategy. A lot of consideration and thought were given to what would be the vision and aims of the historic environment strategy for Scotland. The stakeholders involved and I accepted that conservation and enhancement are not interchangeable, that we must conserve before we seek to enhance and that we can enhance only when we do not undermine basic conservation. That was brought home to me just yesterday when I visited Hospitalfield house in Arbroath, as it wants to enhance what it has, but it is conscious that it must conserve what it has, too.

The debate on the strategy—I am not sure that the Law Society of Scotland was as involved in that as the thousands of people who took part were—made it clear that the tension is important. Indeed, one must be conscious of both conservation and enhancement in order to deliver both. Importantly, one of the strategy's aims is:

"Protecting—By caring for and protecting the historic environment, ensuring that we can both enjoy and benefit from it and conserve and enhance it for the enjoyment and benefit of future generations."

People may consider the terminology issue to be pedantic, but there is a genuine debate.

We both want to achieve the same thing. However, if we listed each term separately, would that mean that one would get more attention than the other? Deliberately having the two terms together ensures that they are considered together. In the strategy and in the bill, conservation and enhancement are placed together precisely because we all recognise that inherent tension and the fact that there can be difficult choices to be made. The pairing of the two serves as a reminder that, when we think about enhancement, we should always think about conservation, and vice versa.

Giving each of the terms its own line in the bill would not change the functions in any way but would reorder them. However, I feel that, in separating the two terms, we would miss the opportunity to send a real signal to historic environment Scotland that it should always keep in mind the important point that they should be seen in relation to each other.

For those reasons, I would prefer to keep the wording in the bill as it is, which is consistent with the wording in the strategy. Although it might seem pedantic, I would prefer the committee to oppose the amendment.

10:30

**Liam McArthur:** I think that stage 2 is made for pedantry, in many respects.

I hear what the cabinet secretary says and I understand it at one level, although I am not sure that having “conserve” and “enhance” in separate lines would create a hierarchy among the two. There is also the possibility that in certain circumstances, although conserving prior to enhancing is inevitable, we would be able to conserve only a portion in enhancing the overall building or whatever we were looking to preserve.

Although previous amendments have been withdrawn with no view to their being brought back at stage 3, I will reflect on what the cabinet secretary has said and will perhaps have discussions with her and her officials between now and stage 3 to see whether anything in the amendment could be salvaged and then enhanced. For now, I seek to withdraw amendment 1.

*Amendment 1, by agreement, withdrawn.*

**The Convener:** Amendment 9, in the name of the cabinet secretary, is grouped with amendment 10.

**Fiona Hyslop:** I have made clear my intention that historic environment Scotland will continue the existing functions of Historic Scotland and the Royal Commission on the Ancient and Historic Monuments of Scotland. Those functions are set out in the bill at section 2 and in the many changes that the bill makes to the main enactments relating to ancient monuments and listed buildings. I have also made it clear that HES will operate in an even more collaborative mode. In short, it will be more of a leader, partner and facilitator within and beyond the sector. HES will respect the hugely valuable roles that are played by others, be they the many private owners of Scotland’s heritage, local authorities or voluntary groups.

At stage 1, the committee deliberated on this area in particular and several suggestions were made for improving how that ambition for

collaborative working is expressed in the bill. The amendments that the Government has lodged are based on suggestions from the Built Environment Forum Scotland and the National Trust for Scotland. HES will work with all parties in a wide range of relationships, some of which will be formal but many of which will be informal. We feel that it is, therefore, right for the word “partnership” to remain in the bill, as that will be an important mode of operation for HES.

We are happy to add the word “collaboration”, as BEFS and NTS have suggested, to emphasise the wide variety of formal and informal arrangements that are covered by section 2(5). That will also align with the agreed approach of the historic environment strategy, “Our Place in Time”. The amended wording for that subsection would read:

“working in collaboration with other persons (whether in partnership or in other ways)”.

I move amendment 9.

**Liam McArthur:** I very much welcome amendments 9 and 10. We were all struck by the collaborative approach that we witnessed in Orkney, which was taken across a range of partners. The fact that we are able to underscore that more explicitly in the bill is to be welcomed, and it sits nicely with some of the amendments in the next group.

**Fiona Hyslop:** I thank the committee. It is an example of stage 1 consideration having enhanced the bill.

*Amendment 9 agreed to.*

**The Convener:** Amendment 2, in the name of Liam McArthur, is grouped with amendments 11 and 3.

**Liam McArthur:** If there was a defining message from those whom we met during our visit to Orkney earlier this year, surely it was the need to ensure that the newly merged body takes proper account of the needs, aspirations and expertise of those on the ground in places such as Orkney. A centralised body with an HES-knows-best attitude would be the worst of all worlds, and I am pleased to say that that view is shared pretty much across the board.

In essence, I seek a regionalised structure for the operation of HES so that, from the outset, accessibility, accountability and responsiveness are built into the new organisation even when members of staff are not physically located in the areas for which they have responsibility.

Capturing that in the bill is not straightforward and provisions would almost certainly be insufficient. It will need to be fully reflected in the overarching strategy for the historic environment

as well as in the corporate plan and budgeting of the newly formed HES. However, amendments 2 and 3 are an attempt to ensure that, as far as the bill is concerned, that expectation is met during the establishment of HES. They require HES to

“have regard to local issues and local decision-making processes”

and ensure the involvement of local communities.

I welcome the fact that the cabinet secretary has attempted to do something similar in amendment 11 and I will listen carefully to what she has to say in that regard.

I appreciate that capturing this sort of thing in legal language is not at all easy. It reflects a philosophy almost as much as a structure in an organisation. However, I am sure that, having seen at first hand the levels of expertise, collaboration and appetite to protect, enhance and make accessible Orkney’s truly world-class archaeology and built heritage, colleagues will agree that we should support that through the bill as much as we possibly can.

I move amendment 2.

**Fiona Hyslop:** These amendments all arise out of concerns that were expressed during stage 1 and in the committee’s stage 1 report that the bill may not sufficiently recognise the local dimension. What Liam McArthur is trying to do is similar to what the Government is trying to do in that regard, and the committee will need to assess what might be the best way to deliver that.

The concerns include the importance of communities and the need to take account of local issues and decision making by local authorities. As the committee will be aware, those matters are also at the heart of the historic environment strategy’s work. I undertook to consider them again before stage 2, and amendment 11 is my proposal to address them at this point in the bill.

I emphasise that there will already be a requirement on historic environment Scotland, as on all public bodies, to take account of all relevant factors in undertaking its functions. “All relevant factors”, of course, include local issues.

To signal how seriously we take the matter, the amendment that I have lodged places the interest of local communities alongside national policies and strategies. Therefore, amendment 11 changes section 2(8) to read:

“In exercising its functions, Historic Environment Scotland must have regard—

(a) to any relevant policy or strategy published by the Scottish Ministers,

and

(b) as may be appropriate in the circumstances, to the interests of local communities.”

At the same time, HES will be a body with a national remit. Local concerns cannot, and should not, always be the overriding consideration. Therefore, I have proposed an amendment that requires HES to consider the circumstances of each situation. Amendment 11 provides a legal mechanism to deliver that local dimension.

Amendment 2 does not work, because the bill at this point refers to HES working with persons—that is, natural or legal persons, such as local authorities, community trusts or similar. Local communities can be hard to define. They might be the occupiers of a small group of houses beside a monument, the inhabitants of an island or even people who do not live locally but feel a special bond to a particular place. Therefore, legal definition of “local communities” is difficult.

HES, like any other public body, will be expected to take account of all relevant factors in reaching its decisions. That is how public bodies are required to work as a matter of first principle. The local decision-making process is already covered in different areas, such as planning, environmental impact assessment and listed building legislation.

The bill clearly defines the way in which HES will be required to interact with local authorities in areas where they play formal roles in decision making. However, we are conscious that HES will be a national body and, although the local dimension is hugely important, we would not want to signal that it was always pre-eminent, although it often will be.

We have tried to pay some attention to how we can ensure that the principles that Liam McArthur is trying to identify can be part of the bill. Mr McArthur and I are in close accord about the principle that the local dimension matters. I suppose that the issue is how we put it into the bill in a meaningful way that has a legal content and bearing. I have responded to the requests from the committee at stage 1. I promised to come back at stage 2, and amendment 11 is the result.

**Clare Adamson:** Once again, I agree with Liam McArthur’s intention behind amendment 2. I had a query about what is meant by local communities, but the cabinet secretary has explained the complexities in defining the expression. I listened carefully to what she said and I intend to support amendment 11 rather than amendment 2.

**The Convener:** There does not seem to be any difference between Liam McArthur and the cabinet secretary on the principle behind their amendments. What I am concerned about—as is the cabinet secretary—is the place at which it is intended that amendment 2 be inserted. We are well used to the fact that a person is often legally defined in a bill, but putting local communities in

the same part of the bill may be a bit of a problem. I agree with Clare Adamson. It is safer, as well as more accurate, to amend line 22 on page 2 in section 2, which is what amendment 11 proposes.

**Liam McArthur:** I thank those who have contributed to the debate on amendment 2. I do not think that there is any disagreement. Although I used the example of Orkney to illustrate where the need and desire for the amendment arose from, I suspect that the situation is pretty much uniform in communities throughout the country. Amendments 2 and 3 were my stab at trying to reflect that. However, coming up with language that would suit the context of the bill was a little like trying to nail jelly to a wall. Amendment 11 does it more than adequately for my purposes, so I am happy to withdraw amendment 2 and support amendment 11.

*Amendment 2, by agreement, withdrawn.*

*Amendment 10 moved—[Fiona Hyslop]—and agreed to.*

**The Convener:** Amendment 61, in the name of Liz Smith, is in a group on its own. I call Liz Smith to move and speak to amendment 61.

**Liz Smith:** When the National Trust for Scotland and Historic Houses Association Scotland supplied their evidence to the Education and Culture Committee, they reported the extent of their property maintenance backlogs, which are significant in monetary terms, at a time when the whole historic environment budget is under huge pressure.

The cabinet secretary has said, correctly, that the whole of the historic environment matters and that ownership, whether public or private, is not really the main concern. Amendment 61 is a probing amendment, to make it explicit that HES's powers are not limited when it comes to the objects in private ownership. I would be grateful for the cabinet secretary's response.

*Amendment 61 moved—[Liz Smith].*

**Mary Scanlon:** As a bit of a latecomer to the bill, I seek some clarity. As Liz Smith said, there seem to be real concerns, for example from the National Trust for Scotland and indeed the owners of private historic houses. The maintenance backlog will cost the National Trust £46 million, while the backlog for Historic Houses Association Scotland is £57 million and growing.

I would add to that the properties in care. Of 345 properties, 76 are privately owned. Given the funding priorities in the bill, I seek clarity about whether houses in care that are privately owned will be treated on the basis of the priority for the historic environment. Will National Trust houses and houses that are privately owned be treated equally?

Finally, Historic Houses Association Scotland said in its submission:

“Historic Environment Scotland will be an owner of significant heritage assets, a tourist operator, and a regulator.”

The association went on to say:

“Historic Environment Scotland will be responsible for awarding taxpayer funded grants for the sector and yet at the same time be in competition with the sector.”

Given that those points were made, I seek assurance that everyone will be treated fairly.

10:45

I am sorry. I said that that was my final point, but I have another. In paragraph 134 of the policy memorandum it says:

“it is expected that details of Ministerial authorisations and of grant decisions will be published.”

Perhaps the cabinet secretary will confirm that ministerial authorisations and grant decisions will be published—I hope that that will happen annually.

**Fiona Hyslop:** I appreciate the points that Liz Smith and Mary Scanlon made. I said in the context of an amendment that we debated earlier that we will publish the letter of guidance from Government in relation to funding and what is available for non-HES properties. That will be public and open to scrutiny by this committee and other people. Mary Scanlon correctly identified the expectation that is set out in the policy memorandum; the letter of guidance is the mechanism in that regard.

There are no funding priorities in the bill, and it is important to put on record again that historic environment Scotland will not own properties in care but act on behalf of owners. The role of private owners in protecting and managing our heritage and making it accessible for others to enjoy is vital, and it is right that we acknowledge that. It is undoubtedly the case that private owners look after a large majority of our heritage—certainly far more properties than all our public and charitable national bodies look after.

That means that HES not only should but must support and work with private owners. If it does not do so, it simply will not be able to deliver its strategic functions. That is why we have given HES the power to support and assist “any other person”. We have just reflected on the legal definition of that term, which includes all private property owners as well as national bodies, charities and local authorities. I do not think that we need to expand the phrase “any other person”, which is all-inclusive.

There is a danger that the effect of amendment 61 might be to limit rather than promote HES's role in supporting private owners. Section 2(6) is comprehensive and enables HES to give support and advice in respect of any function

"of a similar nature to its functions",

whereas amendment 61 focuses on protection and management and would not cover, for example, HES helping private owners to market their historic properties as visitor attractions, as part of Scotland's overall heritage offer. Amendment 61 is—probably inadvertently—quite narrow in focus.

We talked about collaboration. Historic environment Scotland and the National Trust for Scotland will be able to work alongside the Historic Houses Association, for example, to add value to what everyone does. Such work will bring in visitors, whose contributions swell the resources that are available to private owners, and they will help everyone to maintain their part of the shared heritage.

As I said, we will be open about investment through non-HES grants, so there will be more transparency in that regard. In addition, the bill makes it clear that we expect HES to support the private sector in relation to not just protection and management but all functions. I hope that it is clear that we have made a commitment in that regard and that HES will have responsibilities in those areas. I do not want us accidentally to restrict how HES can work with private owners, which I think that amendment 61 might do.

The bill gives HES the power that it needs if it is to work collaboratively and support and assist "any other person", including private owners. The provisions are comprehensive, but by lodging amendment 61 Liz Smith has enabled the Government to clarify them. I hope that I have made it clear that we are conscious of the importance of private ownership. HES must support and work with private owners, but it would be preferable not to restrict HES's involvement to protection and management, as amendment 61 would do.

**The Convener:** I call Liz Smith to wind up and indicate whether she wishes to press or withdraw her amendment.

**Liz Smith:** I thank the cabinet secretary for her comments, which have helpfully provided some of the clarity that is required and which is already in the bill. On that basis, I will not move amendment 61—I did not move it at the start.

**The Convener:** You should have. [*Laughter.*]

**Liz Smith:** I didn't.

**The Convener:** I think that it is taken that you moved it, given that it is the only amendment in the group and you have spoken to it.

**Liz Smith:** In that case, I will seek the committee's agreement to withdraw it.

*Amendment 61, by agreement, withdrawn.*

*Amendment 11 moved—[Fiona Hyslop]—and agreed to.*

*Amendment 3 not moved.*

*Section 2, as amended, agreed to.*

### **Section 3—Delegation of functions in relation to properties in care**

**The Convener:** Amendment 12, in the name of Liam McArthur, is grouped with amendments 13 to 16, 19 to 23 and 59.

**Liam McArthur:** In speaking to and moving earlier amendments, I covered a number of general concerns about the delegation of functions and the need to maintain quality and accountability. My amendments in this group return to the same principle, although I should say that I am conscious of the cabinet secretary's comments in relation to those earlier amendments.

From speaking to local authorities, I understand that in certain cases ministers might deem it sensible or desirable to delegate, particularly in relation to properties in care or listing. Although I agree that such an approach would be sensible, the public would expect it to be taken where the necessary level of knowledge, skills and expertise existed. I note from the cabinet secretary's amendments in this group that she seems to concur with that principle. I am certainly happy to support those amendments, but I am interested to hear her observations on amendment 12.

It is with pleasure that I move amendment 12.

**Fiona Hyslop:** I want to set out the rationale behind the Government's amendments in this group, all of which relate to properties in care and associated collections that ministers hold on behalf of the people of Scotland.

I should say that I believe that Mr McArthur's amendments 12, 14, 19 and 21 will not be necessary if the proposed Government amendments 13, 15, 16, 20, 22, 23 and 59 are agreed to. It looks like we will just have to navigate our way through all these amendments in the same area, convener.

**The Convener:** Yes, we will.

**Fiona Hyslop:** Through the bill, the properties in question will be preserved and made accessible now and in future because we will ensure that they are managed by those with the best skills and

expertise. We need to be able to respond to changing circumstances and to provide what is best for a property, for the estate and for the people of Scotland.

We are committed to openness and transparency in the management of the properties, and I have lodged my amendments to ensure appropriate scrutiny of and transparency around the delegation of functions in relation to properties in care. I am grateful to the Delegated Powers and Law Reform Committee for the recommendations in its stage 1 report, which have informed the thinking behind my amendments. Indeed, I indicated at stage 1 that I would respond directly to that committee's request with regard to this area.

Amendments 13, 16 and 59 mean that, when ministers wish to delegate functions to persons other than historic environment Scotland, those persons should be prescribed by order, subject to the affirmative procedure. Amendments 20 and 23 will have the equivalent effect with regard to the Scottish ministers' collections. That will allow parliamentary scrutiny of the suitability of any proposed candidate for delegation other than HES and give Parliament an opportunity to question HES about the body's experience or capability. The approach is, therefore, as transparent as the Parliament will require and is, as I have said, a response to what the Delegated Powers and Law Reform Committee recommended in its report.

Amendments 15 and 22 seek to place ministers under a duty to publish any such delegations. As I confirmed when I wrote to the Delegated Powers and Law Reform Committee, it was always my intention to publish such delegations, and amending the bill to include those provisions underlines my commitment to transparency.

My amendments balance the need for future flexibility with the need for scrutiny and transparency, and I believe that they effectively address the issue of clarity that the Delegated Powers and Law Reform Committee raised in its stage 1 report. As a result, I believe that amendments 12, 14, 19 and 21 are not required, as their effect is achieved by the Government amendments in this group. I recommend, therefore, that the committee approve the Government's amendments rather than Liam McArthur's.

**Liam McArthur:** As has been said, the principle here is agreed, and some of the detail will come forward in secondary legislation. That is probably appropriate for the purposes of this group of amendments. The cabinet secretary's amendments also go some way towards addressing the concerns that I was trying to express. I will reflect further on the matter ahead

of stage 3, but for now I am happy to withdraw amendment 12 and not to move the others.

*Amendment 12, by agreement, withdrawn.*

*Amendment 13 moved—[Fiona Hyslop]—and agreed to.*

*Amendment 14 not moved.*

*Amendments 15 and 16 moved—[Fiona Hyslop]—and agreed to.*

**The Convener:** Amendment 17, in the name of the cabinet secretary, is grouped with amendments 18 and 26.

**Fiona Hyslop:** The Delegated Powers and Law Reform Committee raised a question about the clarity of which properties could and which properties could not be delegated under the bill. The committee recommended that the bill should have a clearer definition of properties in care.

As we studied that recommendation and how it might be brought into effect, it became clear that refining the definition or specifying exclusions would in themselves pose challenges. Our particular concern was that such changes might accidentally limit the type of properties that ministers might take into care. We must bear in mind that the bill and its provisions must be sufficiently flexible to take account of future priorities. Much of what we regard as heritage today was not regarded as heritage a generation ago: industrial archaeology is a good example of that.

At stage 1 we found that definitions can be challenging, and we looked to find an alternative approach that would meet the Delegated Powers and Law Reform Committee's requirements. We believe that we have come up with a simpler solution with the added advantage of absolute clarity.

Our proposal is to publish a list of exactly which properties held by ministers are to be treated as properties in care and thus capable of delegation under the bill. Amendment 18 provides for that and amendments 17 and 26 cross-refer to that provision. Publishing the list is the simplest and most transparent way in which we can address the challenge.

I move amendment 17.

*Amendment 17 agreed to.*

*Section 3, as amended, agreed to.*

### After section 3

*Amendment 18 moved—[Fiona Hyslop]—and agreed to.*

*Sections 4 to 6 agreed to.*

### Section 7—Delegation of functions in relation to collections

*Amendment 19 not moved.*

*Amendment 20 moved—[Fiona Hyslop]—and agreed to.*

*Amendment 21 not moved.*

*Amendments 22 and 23 moved—[Fiona Hyslop]—and agreed to.*

*Section 7, as amended, agreed to.*

*Sections 8 to 10 agreed to.*

### Section 11—Advice, information and assistance

11:00

**The Convener:** Amendment 24, in the name of Liam McArthur, is grouped with amendment 25.

**Liam McArthur:** Thank you, convener. You will be delighted to hear that these amendments are my last hurrah for the morning.

Amendments 24 and 25 seek to ensure that local and national bodies work effectively in collaboration, which is a point that the cabinet secretary picked up earlier. They also aim to enable decision-making processes in the often sensitive area of planning, for example, to make best use of all available relevant expertise. From speaking to local authorities and the Built Environment Forum Scotland, I know that there is a desire to see the informal advice and guidance that Historic Scotland provides councils with at present continue as a core function of the new body.

Colleagues may recall that, ahead of the stage 1 debate, BEFS highlighted threats to the front-line role that planning authority officers play in safeguarding the historic environment. In particular, BEFS identified big reductions over recent years in conservation services across local authorities and it even suggested that that trend is continuing and that there are three councils providing planning services with no specialist local conservation advice.

It is all the more important therefore that planning authorities have access to appropriate external expertise so that decision makers have the information and advice that they need to determine statutory consent applications relating to the historic environment. I understand that the Government may be concerned that, with HES being obliged under the bill to provide advice to the Scottish ministers, introducing a further obligation for HES to advise local authorities might lead to awkward situations in which local authorities are in dispute with the Scottish

Government. However, although I see that as a potentially valid argument, I cannot imagine that such situations would arise other than very infrequently, and I would presume that for such occasions an exception or exemption clause could be inserted in the bill to provide the reassurances that ministers require.

As for the argument that putting the proposed requirement in the bill might lead to job losses in local authorities, the forum's evidence suggests that the horse has bolted. As one council official working in this area put it to me recently,

"The fundamental point is that local authority staff need the support and advice that HES provides, and this is a structural necessity of the overall heritage management system in Scotland."

He argued that that must be reflected in the bill and that guarantees that the current provision of advice will be maintained are essential. I agree and I hope that the cabinet secretary will, too.

I move amendment 24.

**The Convener:** No members have indicated that they wish to contribute to the debate, so I call the cabinet secretary.

**Fiona Hyslop:** I agree that this is an important area to discuss and explore, but I have concerns. We already discussed the local dimension when considering amendments 2, 3 and 11, and the committee of course gave much thought to this area at stage 1. I believe that the major concern in relation to amendments 24 and 25 is that local authorities currently receive support from Historic Scotland that they value and respect and there is a desire that that level of support is maintained when HES comes into operation. I think that Liam McArthur made that point.

I have already confirmed that that support will continue, so there is no need for amendment 24 to make that happen. Some forms of historic environment knowledge and expertise are scarce. Historic Scotland and RCAHMS are sometimes the only sources, and in future that is likely to be the case with HES. Local authorities regularly consult the national experts, and they wish to be reassured that HES will similarly assist them as required. I am happy to give that assurance. HES will indeed continue to offer a national resource for local authorities and others, and the bill already provides for that.

Partnership working between local and national bodies is important; it includes the input of RCAHMS on sharing and using historic environment records. Again, that will be continued and it will be underpinned by strengthening the requirement for collaboration, which we have already debated in the bill, and by a very active working group within the historic environment strategy.



Amendment 24 seeks to place a strict duty on HES whose effect would be to require HES to be constantly providing advice to local authorities without any thought of the need to deliver its functions more widely. To provide such a service, either resources would need to be diverted from other functions that are being given to HES or HES would need to, for example, be able to charge local authorities for the service. One of the assurances that I have given local authorities is that we will not add any extra financial burdens on to them as a result of the bill. I do not think that either of the possibilities that I indicated is desirable, nor do I think that they are what Liam McArthur intends by amendment 24. I think that the bill as drafted enables HES to give advice and support, and that is correct.

The changes that are proposed by amendments 24 and 25 would also put local authorities on the same footing as ministers but place HES in a subordinate position to them. That simply will not work. There are various duties on local authorities to consult HES or to notify it of things. As a statutory consultee, HES has to be able to stand apart from an authority and act independently of it.

Finally, there is a real danger in the amendments for local authorities and local communities. Most local authorities follow the national planning policy and Scottish historic environment policy recommendations, and maintain access to local expertise and information, which allows them to deal with historic environment issues. However, a few, for their own reasons, do not. It is always open to the committee to scrutinise and discuss those issues and skills with local authorities; that can be done independently anyway. If HES is required to act as an on-demand supplier, as the amendments set out, that might tempt more local authorities to reduce or abandon their own historic environment capacity, and I do not think that any of us wants that to happen. That would work directly counter to the intention that we understand lies behind the amendments, which is obviously, as Liam McArthur said, to retain and strengthen capacity at local level.

We do not want to provide some kind of get-out that would allow local authorities to reduce their own expertise because they can always call on HES. The end result could be counterproductive. There could be a more centralised and less locally aware historic environment service, and I do not think that anybody would want that.

Amendment 25 is simply unnecessary, as local authorities are already covered by the term “any other person”, which is used at that point in the bill.

For those reasons, I do not believe that the amendments would add value to the bill. Indeed, I

believe that amendment 24 poses risks for HES and local authorities. Therefore, I oppose the two amendments.

**Liam McArthur:** I am very encouraged by what the cabinet secretary said about the importance of the relationship and ensuring that the accessibility and expertise that are currently in RCAHMS and Historic Scotland remain going forward. I do not necessarily accept that local authorities are likely to be constantly in touch with HES, but I acknowledge the concerns about the relationship between the new body and local authorities.

We may need to return to the issue. If there is any diminution in local authorities’ access to that expertise, we will be into the territory that I referred to earlier of having a merged organisation that is seen to have retrenched to the centre rather than respecting its role in providing a service and responding to the needs of all parts of the country.

For the time being, in light of what the cabinet secretary said, I am happy to seek to withdraw amendment 24.

*Amendment 24, by agreement, withdrawn.*

*Amendment 25 not moved.*

*Section 11 agreed to.*

## **Section 12—Directions and guidance**

**The Convener:** Amendment 4, in the name of Liz Smith, is grouped with amendment 5.

**Liz Smith:** Throughout the consideration of the bill, there have been issues about where accountability for strategic decision making lies. That was borne out by comments from witnesses who believed that there was a slight lack of clarity on that.

In giving evidence to the committee on 20 May, the cabinet secretary indicated that, if the board of the new body were to have a difference of opinion with the Scottish Government about strategic direction, the minister would have the final say on what that direction should be. The cabinet secretary has reaffirmed that in her comments this morning. The cabinet secretary added in a letter to the convener on 28 May that, if the Scottish ministers did not think that HES was

“playing a sufficiently strong role in addressing matters of concern to the wider”

cultural sector, as captured in the strategy, they would

“direct the board of Historic Environment Scotland ... to work in partnership and ... more effectively.”

Specifically, paragraph 88 of the policy memorandum says that the Scottish ministers will be able

“to give directions to Historic Environment Scotland”

about the exercise of its functions, but not on objects or properties as referenced in section 12(2). Obviously, that is to ensure operational independence. Section 12(3) says that section 12(2)(a) does not apply when the Scottish ministers have delegated functions in relation to properties in care. I think that the cabinet secretary affirmed that in oral evidence. In its response to the Delegated Powers and Law Reform Committee, the Scottish Government said that the exclusion in section 12(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.”

As a result, some questions remain about who ultimately will be responsible for overseeing the delivery of the strategy and how HES’s corporate plan will align with the “Our Place in Time” strategy, which has already been published. The consensual language of the historic environment strategy document, which clearly envisages joint working and a shared vision, does not entirely sit easily with the language in the bill that states that the new body

“must have regard to any relevant policy or strategy published by the Scottish Ministers”.

Amendments 4 and 5 are designed to address the issue by clarifying the exact relationship between ministers and the HES board and limiting the scope of ministerial power. To ensure that we do not undermine the bill’s compatibility with other similar legislation governing Scottish Natural Heritage, Creative Scotland or the National Library of Scotland, I think it important that we do not remove section 12 altogether, which obviously would have been another option. However, there is a case for ensuring that HES need not implement directions under section 12(1) if their effect would not be in line with HES’s corporate plan. Obviously, the minister will be part of the body that agrees the corporate plan, but questions of accountability will certainly arise if ministers try to move away from that agreement.

I move amendment 4.

**Fiona Hyslop:** Liz Smith is quite right to recognise the corporate plan’s importance, and I completely share her assessment of it. That is why we have included in the bill a provision for HES to create a plan and for that plan to be approved by ministers.

The corporate plan is the linchpin of HES’s corporate performance framework, and because it will be approved by ministers, we will share ownership and accountability of it. Given that the plan is a public document and that the performance report for the organisation will be published, at least annually, failure to deliver will

be transparent, as will the board’s explanations for failure, including the sort of unbalancing direction that Liz Smith appears to have in mind. Moreover, the committee will be able to scrutinise the plan, as it does the corporate plans of other bodies, and to call me as minister to account if members think that I have done something that is not consistent with the corporate plan.

It is not unusual for public bodies to receive ministerial direction, which is why the provision has been included in the bill. The power of direction exists for good reason; in fact, it could be used to support HES by, for example, clarifying procedural matters such as how routine sponsorship arrangements will work. Amendments 4 and 5 seem to assume that I will regularly issue directions to HES to do something that HES thinks is a bad idea. I can say here and now that I will not do so; in fact, I cannot recall ever issuing in my seven years as a minister a formal direction in opposition to the advice of a sponsored body. It would have to be a serious matter for any minister to do so; I am not saying that that will not happen, but if it were to happen, the seriousness of the situation would be quite obvious.

The chair and board of a non-departmental public body do not require specific provision to challenge any proposals that would significantly compromise delivery of agreed outcomes such as those in the corporate plan, and the nature of the sponsorship relationship between Government and NDPBs is such that these matters are explored and usually resolved long before any formal communication or direction takes place. In short, a formal direction, especially a formal direction against the advice of a body, is the end of a long process of discussion, not the starting point.

For those reasons, I believe that the amendments would serve only to introduce unnecessary complications into the clear and straightforward relationship that is based on the corporate plan. As a public document, the corporate plan can be scrutinised at any level, and I can be held to account if it is perceived that a ministerial direction that I have issued runs counter to it. Those are exactly the circumstances in which I would expect the committee to call the minister before it and ask for the rationale behind his or her decision, and those mechanisms already exist.

It is certainly important that we have the corporate plan to ensure consistency with other public bodies, but it would be wrong to think about ministerial direction as something that would happen frequently. The matter would have to be quite significant for such a direction to be issued, and there are already plenty of mechanisms for

making me and the body accountable that involve not only me but the Parliament and the committee.

11:15

**The Convener:** I call Liz Smith to wind up and to indicate whether she wishes to press amendment 4.

**Liz Smith:** I hear what the cabinet secretary says. I do not doubt that, in the vast majority of situations, there would be the collaboration that she mentioned. I am not in any way casting aspersions on her role in the process but, as she rightly pointed out, the potential exists for there to be a disagreement, and I think that there is still a lack of clarity about such situations. On that basis, I intend to press amendment 4.

**The Convener:** The question is, that amendment 4 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Baxter, Jayne (Mid Scotland and Fife) (Lab)  
Bibby, Neil (West Scotland) (Lab)  
McArthur, Liam (Orkney Islands) (LD)  
Scanlon, Mary (Highlands and Islands) (Con)

**Against**

Adam, George (Paisley) (SNP)  
Adamson, Clare (Central Scotland) (SNP)  
Beattie, Colin (Midlothian North and Musselburgh) (SNP)  
MacDonald, Gordon (Edinburgh Pentlands) (SNP)  
Maxwell, Stewart (West Scotland) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

*Amendment 4 disagreed to.*

*Amendment 5 not moved.*

*Section 12 agreed to.*

### **Section 13—Interpretation of Part 1**

*Amendment 26 moved—[Fiona Hyslop]—and agreed to.*

*Section 13, as amended, agreed to.*

*Section 14 agreed to.*

### **Schedule 2—Functions of Historic Environment Scotland in relation to scheduled monuments**

**The Convener:** Amendment 27, in the name of the cabinet secretary, is in a group on its own.

**Fiona Hyslop:** Amendment 27 is an amendment to tidy up the drafting of schedule 2, as the present drafting allows two slightly different readings. It seeks to adjust the wording of the bill and the changes that it makes to the Ancient Monuments and Archaeological Areas Act 1979 to

ensure that ministers can set out in regulations timescales for historic environment Scotland to notify all those who need to be told that a monument has been added to or removed from the schedule, or when an entry relating to a monument has been amended.

I move amendment 27

*Amendment 27 agreed to.*

**The Convener:** Amendment 28, in the name of the cabinet secretary, is grouped with amendments 29 to 31 and 35 to 41.

**Fiona Hyslop:** The call-in power in the bill for scheduled monument consent is a new power that results from the creation of HES as a separate legal entity from the Scottish ministers. The amendments in this group and two subsequent groups all stem from the fact that HES will not act as ministers, unlike what happens in the current situation, in which Historic Scotland can act as ministers. At stage 1, the committee asked for clarity on roles generally, and that is what the amendments in this group, and those in subsequent groups, seek to provide.

The existing ministerial powers would have allowed us to administer call-in, but we took the view that it would provide greater clarity to set matters out in the bill. The amendments set out the processes relating to the call-in of cases involving scheduled monument consent. They provide for ministers to determine a case that has been called in under the power in the bill.

Call-in is used when a case raises matters of sufficient importance for ministers to take the decision out of the hands of the usual authority, which in this case would be HES. The power is intended to be used very sparingly. The changes align with changes that have already been made in relation to listed building consent and as part of our approach to simplifying the role of the historic environment in the planning system.

I would like to explain in a little more detail the specific provisions in the amendments and the requirement for them. They make it clear how ministers will be informed that there is a case that might merit call-in, and they will ensure that HES does not reach a decision while such a case is being considered for call-in. They make it clear how ministers will go about reaching a decision on a called-in case and communicating that decision. They also set out the consequences that follow from ministers, rather than HES, having made a decision.

Amendment 37 inserts new paragraph 2C into schedule 1 of the Ancient Monuments and Archaeological Areas Act 1979 to ensure that HES is required to notify the Scottish ministers of certain specified applications for scheduled

monument consent. The specific criteria will be set out in regulations or directions—the amendment is in effect the trigger to do that.

Amendment 37 allows ministers to ensure that we do not see every case that HES deals with, as relatively few are likely to raise issues that might make call-in worth considering. It also provides the timeframe for notification by HES and the response from ministers. In essence, we will have 28 days to call in a case, to decide that we will not call it in or to seek more time to consider the matter.

The remaining amendments make technical adjustments to allow ministers to determine applications that have been called in and to take all the necessary actions for called-in cases that HES would have taken had a case not been called in.

The group contains a large package of amendments, but they are necessary to ensure that the call-in power for consent, which is already provided for, works effectively and that everyone involved understands exactly who is responsible for which actions at each stage of the process.

I move amendment 28.

*Amendment 28 agreed to.*

*Amendments 29 to 31 moved—[Fiona Hyslop]—and agreed to.*

**The Convener:** Amendment 32, in the name of the cabinet secretary, is grouped with amendments 33 and 34.

**Fiona Hyslop:** The amendments in the group are linked to those that we have just considered. They are relatively simply explained.

As we have discussed and agreed, when ministers choose to call in a case for determination, they should take responsibility for the immediate consequences. It would not be equitable to leave historic environment Scotland with responsibility for cases on which it had not taken the decision.

It can arise, though rarely, that the applicant may have a right to compensation as a result of being refused consent. The situations in which that can occur are limited and we can find no record of anyone ever successfully seeking compensation. However, if that unusual situation arose after ministers had determined a case on call in, it would be only equitable that any compensation liability was for ministers to deal with, rather than HES.

The amendments change the provisions in the bill that adjust the 1979 act so that that is indeed the case and HES is not left with a liability to pay compensation on a decision that it has not made.

I move amendment 32.

*Amendment 32 agreed to.*

*Amendments 33 to 41 moved—[Fiona Hyslop]—and agreed to.*

**The Convener:** Amendment 42, in the name of the cabinet secretary, is grouped with amendments 45 to 48.

**Fiona Hyslop:** The need for this group of amendments flows again from the provision for historic environment Scotland rather than ministers, as is currently the case, to issue scheduled monument enforcement notices.

Scheduled monument enforcement notices are rare. They can be issued to someone who has a scheduled monument consent but appears not to be complying with its terms or when someone has carried out works without consent. Notices are usually issued only after all other forms of resolution have been exhausted.

An immediate consequence of the change that will see HES issuing the notices is an opportunity to align processes. Until now, scheduled monument enforcement notices have been issued by Historic Scotland acting for ministers, so any appeal has been to sheriffs to ensure that there is a clear separation of decision-making and appeal functions. Given that HES will have an independent existence, our intention is that any appeal should be to ministers, as is the case for appeals against similar notices in respect of listed buildings.

The amendments in the group support the simplification agenda that is laid out in the policy memorandum for the bill, as they will help to harmonise different types of heritage management regulation and help them align more closely with the planning system. That in turn will help to ensure clarity and separation of roles between HES, local authorities and ministers, while retaining appropriate ministerial oversight.

The amendments are necessary and beneficial as they clarify roles, which the committee is keen on doing, and align processes.

I move amendment 42.

*Amendment 42 agreed to.*

**The Convener:** Amendment 43, in the name of the cabinet secretary, is grouped with amendments 44 and 49 to 51.

**Fiona Hyslop:** A few minutes ago, we looked at the arrangements for ministers to call in scheduled monument consent cases for determination, and we have just considered some of the arrangements around scheduled monument enforcement notices. The five amendments in this group bring those two matters together.

If the recipient of a scheduled monument consent fails to adhere to the conditions of that consent or has undertaken works without consent, it is only right that the responsibility for any enforcement action should fall to ministers in situations in which they made the decision, and to HES in situations in which it made the decision.

The amendments in this group change the provisions in the bill that adjust the 1979 act so that that will indeed be the case, and so that HES will not be burdened with the responsibility of issuing enforcement notices in respect of a decision that was taken by ministers on call-in.

I move amendment 43.

*Amendment 43 agreed to.*

*Amendments 44 to 51 moved—[Fiona Hyslop]—and agreed to.*

*Schedule 2, as amended, agreed to.*

*Section 15 agreed to.*

### Schedule 3

**The Convener:** Amendment 52, in the name of the cabinet secretary, is grouped with amendments 53 to 57.

**Fiona Hyslop:** Amendments 52 to 56 are necessary to support our policy intention to include a mechanism to enable the Scottish ministers to set out which classes of listed building or conservation area application planning authorities need to consult HES on before they grant or refuse consent.

The need for the amendments became clear as we engaged with stakeholders on the design of the new system in secondary legislation. Stakeholder engagement suggested strong support for a filtering mechanism at the consultation stage in the process, to enable local decisions to be taken, with the national body being consulted only on the classes of application in which a national perspective would add value.

The application of such a filter is wholly consistent with the principles of planning reform, as it will help to streamline the system, aid transparency and ensure an appropriate balance of local and national Government—again, that issue has come up in the committee a number of times. Applying the filter at the consultation stage rather than waiting until the Scottish ministers are notified of applications will also ensure that the expertise that resides within HES is utilised to best effect.

Amendment 57 will align the handling of cases in which ministerial call-in is contemplated for listed building and conservation area consent so that it operates in the same way as the planning

system. That will offer consistency across the wider sector.

Our intention is to call in cases only when there is no other way of resolving issues of national significance. At present, if an application involves an extensive package of works for a listed building all of which are good conservation practice except for one important item that is not, ministers' only options are to call in the application for determination or to let it proceed unchallenged. With amendment 57, it will become possible for ministers to indicate to the planning authority that, if the one unacceptable aspect is addressed in conditions, the case will not be called in.

The measure will serve to reduce the number of listed building and conservation area consent cases that need to be called in. It will also offer absolute clarity for all parties on which issues are giving rise to concern and how they can be resolved.

I move amendment 52.

*Amendment 52 agreed to.*

*Amendments 53 to 56 moved—[Fiona Hyslop]—and agreed to.*

*Schedule 3, as amended, agreed to.*

*Section 16 agreed to.*

*Schedule 4 agreed to.*

*Sections 17 and 18 agreed to.*

*Schedule 5 agreed to.*

*Sections 19 to 21 agreed to.*

### Section 22—Applications for listed building consent

*Amendment 57 moved—[Fiona Hyslop]—and agreed to.*

*Section 22, as amended, agreed to.*

### After section 22

11:30

**The Convener:** Amendment 58, in the name of the cabinet secretary, is in a group on its own.

**Fiona Hyslop:** Amendment 58 is required to enable a local authority to determine applications for consent made by itself for the demolition of a building within a conservation area, rather than ministers' doing that, as is currently provided for in the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Our intention is to change the regulations so that local authorities can determine their own listed buildings consent applications. Amendment 58 brings the process for demolition in conservation areas into line with

what is envisaged for the listed buildings consent process, and thus with the wider planning system.

As I have just said, the process for local authorities determining their own applications—where they are the developer or the owner—is already established practice in the wider planning system. Checks and balances are in place to ensure that the process works smoothly, and we replicate those here.

Local authorities will be required to consult HES before they make a decision, and in certain circumstances that will be set out in regulations they will be required to notify ministers so that a case can be called in for ministerial determination. I am satisfied that those measures will provide adequate scrutiny of the system while allowing for an increase in responsible local decision making.

I move amendment 58.

*Amendment 58 agreed to.*

**The Convener:** Amendment 62, in the name of Neil Bibby, is in a group on its own.

**Neil Bibby (West Scotland) (Lab):** The objective of amendment 62 is to ensure that local authorities are able to handle the management of the historic environment, whether in house or through shared services. Scottish planning policy and the Scottish historic environment policy say that local authorities should have access to relevant expertise and information, but reports have shown that capacity is increasingly stretched and there is widespread concern in the sector that front-line conservation and archaeology services are increasingly vulnerable. One such report from December 2013 stated that Scottish conservation services are contracting, with 15 per cent reductions estimated over two years.

As we have already discussed this morning, expert knowledge of the historic environment is important if authorities are to deliver on national policy commitments, which is what my amendment seeks to ensure. The amendment would allow flexibility for expertise to be located in house or through shared or contracted services.

I appreciate that the amendment is similar in ethos to what Liam McArthur proposed in amendments 24 and 25, and I note what the cabinet secretary said about them. I would welcome her comments on amendment 62 and any reassurances that she can offer to allay concerns in this area.

I move amendment 62.

**Fiona Hyslop:** I remind the committee that the purpose of the bill is to establish historic environment Scotland and what it will do as an organisation. We have to be careful as to what other duties and responsibilities we use the bill to

load local authorities with, which is the core of what amendment 62 does.

We have just discussed HES's advice and support to local authorities. Amendment 62 looks at the same matter, but from the local authority's perspective. Local authorities already play a full role in protecting, managing and promoting enjoyment of our historic environment. As Councillor Hagan of the Convention of Scottish Local Authorities said at the launch of the strategy:

"Local government has a crucial role in managing and promoting the historic environment, as a positive element for individuals and their local communities alike."

There is already clear guidance in the Scottish planning policy. It states:

"planning authorities should have access to a Sites and Monuments Record (SMR) and/or a Historic Environment Record (HER) that contains necessary information about known historic environment features and finds in their area."

The guidance in the "Scottish Historic Environment Policy" is even clearer. It says that planning authorities

"should also ensure that they have access to sufficient information and suitably qualified and experienced staff to meet their needs."

We commissioned the Institute of Historic Building Conservation to undertake research into the capacity and operations across Scotland's local authority conservation services. That confirmed that

"Scotland's conservation services continue to cope despite ongoing financial pressures, thanks not least to the dedication of skilled conservation staff."

My view is that the existing guidance sets out very clearly what responsible local authorities should do, and I do not believe that we should make this into a statutory duty. There is a serious point about what the Government and the Parliament do in relation to providing statutory duties to local authorities in a bill that is ostensibly about what historic environment Scotland's responsibilities should be. I believe that it is far better to work together in partnership with local authorities through our shared strategy—which is why they are a key part of the forum that I have established to take the strategy forward—and the supporting working groups to look at and resolve any issues that arise.

A good example of what we can achieve in that way is already visible in the form of Scotland's historic environment data strategy—SHED—which was launched on 9 April 2013. It is a collaboration between national and local Government experts to ensure that historic environment knowledge and skills are pooled to best effect. It has been widely welcomed in Scotland and beyond and is exactly the sort of innovative joint working that we need if

we are to deliver on the collective ambition for the historic environment that is a thread that has run through the strategy and the work on the bill.

If there are local authorities that are not following guidance for whatever reason, we should help them by working with them through shared projects such as SHED, rather than imposing a statutory duty on them.

We are not complacent on the issue. The roles of maintaining advice, expertise and skills across the historic environment are key issues for the strategy to address. Several groups that have been established as part of the strategy are considering the issue, including the local and national Government joint historic environment group. I believe that working collaboratively with our local authority partners is the best way of addressing issues such as those that we are discussing.

The amendment concerns a theme that we keep coming back to. It was raised in Liam McArthur's amendments, too. The issue is whether the bill respects local authorities' rights to determine their own resourcing or whether it is going to be used in a way that it was not intended to be used—the intention behind the bill is to establish HES—in order to place on local authorities a burden that they have not asked for. My view is that we should oppose amendment 62.

**Neil Bibby:** I thank the cabinet secretary for her comments and will reflect on the discussion. I seek leave to withdraw my amendment.

*Amendment 62, by agreement, withdrawn.*

*Section 23 agreed to.*

#### **Section 24—Subordinate legislation**

*Amendment 59 moved—[Fiona Hyslop]—and agreed to.*

*Section 24, as amended, agreed to.*

*Sections 25 and 26 agreed to.*

*Schedule 6 agreed to.*

*Sections 27 to 30 agreed to.*

*Long title agreed to.*

**The Convener:** That ends stage 2 consideration of the bill. I thank the cabinet secretary and her officials for attending.

As our next item will be in private, I close the meeting to the public.

11:39

*Meeting continued in private until 11:50.*





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