

HISTORIC ENVIRONMENT SCOTLAND BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Historic Environment Scotland Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The purpose of the Historic Environment Scotland Bill is to create a new lead Non-Departmental Public Body ("NDPB") for Scotland's historic environment - Historic Environment Scotland ("HES"), which will take over and sustain the functions currently carried out by Historic Scotland (which is an Executive Agency of Scottish Government) and the Royal Commission on the Ancient and Historical Monuments of Scotland ("RCAHMS") (which is a body established by Royal Warrant and treated administratively as an NDPB). HES will be the lead partner in delivering the Government's contribution to a wider Scottish Historic Environment Strategy which has been developed collaboratively with all key stakeholders and which will continue as a long term process.
4. The Bill sets out the functions of HES and how it will be governed, including provisions for Ministerial oversight, guidance, direction and reporting. The Bill makes provision for Ministers to issue guidance and directions and there is a requirement for both of these to be published. It will provide for the delegation or transfer to HES of Ministerial powers and responsibilities under existing legislation as appropriate and enable the transfer of the property, staff and liabilities of both RCAHMS and Historic Scotland to HES (excluding properties and collections in the care of Scottish Ministers). The Bill will provide for consequential changes to legislation which is not specific to the historic environment, principally to ensure that HES is added to Schedules for consultation or other purposes. Finally, the Bill will provide for the dissolution of RCAHMS at a date to be determined by Ministers. The Bill is made up of 7 parts:
 - Part 1 – Historic Environment Scotland

- Part 2 – Functions in relation to scheduled monuments
- Part 3 – Functions in relation to listing and conservation
- Part 4 – Functions in relation to the marine environment
- Part 5 – Dissolution of RCAHMS and transfer of staff etc. to Historic Environment Scotland
- Part 6 – Further modifications in relation to the historic environment
- Part 7 – Final provisions

5. Many of Historic Scotland’s functions are set out in statute, mainly in the Acts listed below. The Bill amends these Acts to ensure that Historic Environment Scotland can operate as intended.

- the Historic Buildings and Ancient Monuments Act 1953 (“the 1953 Act”);
- the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”);
- the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”); and,
- the Marine (Scotland) Act 2010 (“the 2010 Act”).

RATIONALE FOR SUBORDINATE LEGISLATION

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

- the need to strike the right balance between the importance of the issue and providing flexibility for changing circumstances;
- the need to make proper use of valuable Parliamentary time;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

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

8. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

9. The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. The powers conferred in the Bill are mainly either of a technical and procedural nature, or are concerned with matters which require, because of their nature a flexible approach. It is therefore regarded as appropriate that they be dealt with by subordinate legislation.

10. The regulations and orders are mainly subject to the negative procedure in Parliament. The Government has chosen this procedure where the delegated powers sought are required to prescribe procedural detail.

DELEGATED POWERS

Part 1 – Establishment of Historic Environment Scotland

Section 1(3) - (introducing schedule 1) - paragraph 2(8) of schedule 1 - power to vary the minimum or maximum number of board members of HES.

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure

Provision

11. Section 1(3) introduces schedule 1 which makes provision about the status, membership, procedures and powers of HES. Paragraph 2(8) of that schedule gives Ministers the power to vary the minimum or maximum number of board members of HES.

12. This provision enables the Scottish Ministers to vary the minimum or maximum number of board members of HES.

Reason for taking power

13. This provision gives flexibility to vary the size of the HES board should the situation arise where the work of HES would benefit from increasing or decreasing the board's size. The size of the board under the Bill has been set at 10 to 15 members, including a chair, which it is felt will be appropriate to enable HES to discharge its business effectively. However, circumstances could change. There is always a need to be able to deal with the unexpected when setting up a new body, and the power would allow a smaller board to be established initially for a transitional period if such a need arose.

Choice of procedure

14. Negative procedure has been chosen in this case as the power only allows for alteration of the number of HES members without changing the structure or functions of HES, as agreed by the Parliament, in any way. It is felt that this matter is of a character which requires a flexible approach without using up Parliamentary time unnecessarily.

Section 8(7)(a) Power to set the period of HES's first Corporate Plan.

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure

Provision

15. The provision allows the Scottish Ministers to set the period that HES's first corporate plan will cover. The corporate plan will set out HES's main objectives, the outcomes that would demonstrate achievement of these objectives and the activities HES expects to undertake.

Reason for taking power

16. The board of HES will need time to consult on the corporate plan. As such the Scottish Ministers may need to specify that the corporate plan will cover a different period than the three year periods that subsequent plans will cover. The Bill sets out a planning period of three years. It is intended that plans will run from the first of April of the relevant three year period, however flexibility is needed in relation to the first period and this power will allow the Scottish Ministers to specify that period.

Choice of procedure

17. Negative procedure is considered appropriate for what is essentially an administrative matter.

Section 8 (8) - Power to allow Scottish Ministers to vary the length of time HES's Corporate Plans cover.

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure

Provision

18. The provision allows the Scottish Ministers to vary the period that any of HES's corporate plans cover after the first corporate plan from the standard three years set out on the face of the Bill.

Reason for taking power

19. It is anticipated that HES's corporate plans, following the first corporate plan, will cover a three year period. Scottish Ministers however recognise that if changes to HES's functions were anticipated three years may be too long a period for the corporate plan to cover and may wish to change the planning period.

Choice of procedure

20. Negative procedure is considered appropriate for what is essentially an administrative matter. The planning period for HES's corporate plans after the first corporate plan is set out

on the face of the Bill. The power would allow the Scottish Ministers to vary this planning period in the light of current business conditions.

Part 2 – Functions in relation to scheduled monuments

Part 1 of schedule 2 - paragraph 2 (e) - power to specify persons required to be notified in relation to excluding or including a monument in the Schedule or amending the entry in the Schedule relating to any monument under section 1 of the 1979 Act.

Power conferred on : the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

21. Paragraph 2(e) of Part 1 of schedule 2 amends section 1(6) of the 1979 Act allowing Ministers to make regulations specifying the persons required to be informed and the form and manner in which they are to be so informed and the time within which they are to be informed under section 1(6) where a monument has been included in or excluded from the Schedule or where an entry in the Schedule to a monument has been amended.

Reason for taking the power

22. This provision enables Ministers to set out those persons who must be notified and the procedure for doing so. It is considered that this level of procedural detail is more appropriately left to regulations.

Choice of procedure

23. It is considered appropriate that this power is subject to negative procedure because it will be used to set details of procedure.

Part 1 of schedule 2 - paragraph 3 - power to regulate the manner in which HES must publish the Schedule and make it available for inspection and to make further provisions in that respect and in relation to notification in relation to excluding or including a monument in the Schedule or amending the entry in the Schedule relating to any monument under section 1 of the 1979 Act.

Power conferred on : the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

1. Section 14 introduces schedule 2. Paragraph 3 of Part 1 of schedule 2 introduces a new section 1B into the 1979 Act allowing Ministers to make regulations specifying the manner in which HES must publish the Schedule and make it available for inspection and to make further provision in that respect and in relation to notification of excluding or including a monument in the Schedule or where an entry in the Schedule to a monument has been amended.

Reason for taking the power

2. This provision enables Ministers to set out how the Schedule is to be published and made available to the public and to allow further provision in relation to publication, availability and notification. It is considered that this level of procedural detail is more appropriately left to regulations.

Choice of procedure

It is considered appropriate that this power is subject to negative procedure because it will be used to set details of procedure

Part 2 of schedule 2 - paragraph 14 (5) - 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 1979 Act.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

3. Section 14 introduces schedule 2. Paragraph 14(5) of Part 2 of schedule 2 substitutes paragraph 2 of schedule 1 to the 1979 Act to allow the Scottish Ministers to make provision in relation to procedures to be followed by HES in considering and determining applications for scheduled monument consent under the 1979 Act.

Reason for taking the power

4. It is considered that this level of procedural detail is best dealt with through regulations. It allows for flexibility over time and enables procedures to be harmonised with other consenting processes - in particular in relation to listed buildings and wider planning process.

Choice of procedure

5. It is considered that negative procedure is appropriate for such administrative procedural matters.

Part 2 of schedule 2 - paragraph 15(b) - power to prescribe the manner in which a revocation or modification order under section 4 of the 1979 Act must be advertised (where no objection has been received by persons notified of the order).

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

6. Section 14 introduces schedule 2. Paragraph 15(b) of Part 2 of schedule 2 repeals paragraphs 5 to 9 of Part 2 of schedule 1 to the 1979 Act and inserts paragraphs 10 and 11 into that schedule to recast the provisions relating to the modification or revocation of

scheduled monument consent by HES. Inserted paragraph 11(3) gives Ministers the power to prescribe the manner in which a revocation or modification order made by HES under section 4 of the 1979 Act must be advertised (where no objection has been received by persons notified of the order).

Reason for taking power

7. It is considered appropriate for regulations to deal with this level of procedural detail and allows flexibility when considering the appropriate manner of advertising over time.

Choice of procedure

8. It is considered that negative procedure is appropriate for such administrative matters.

Part 5 (Chapter 1) of schedule 2 – paragraph 28 - 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 relating to a monument.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

9. Section 14 introduces schedule 2. Paragraph 28 of Part 5 of schedule 2 inserts sections 1C to 1E into the 1979 Act. Inserted section 1C introduces a right of appeal against a decision to include a monument in the Schedule compiled under section 1 of the 1979 Act or against a decision to amend an entry relating in the Schedule relating to a monument. Inserted section 1E allows the Scottish Ministers to make provision regarding the procedure to be followed in relation to such appeals. Such regulations may make provision about the grounds of appeal, information to be provided on appeal and the form, manner and time for making an appeal. Regulations may also make provision that the manner in which an appeal is to be conducted is to be at the discretion of Ministers (or a person appointed by them under the 1979 Act).

Reason for taking the power

10. This provision enables Ministers to set out the procedures and time limits to be followed in relation to appeals against designation. While the Bill establishes the rights of appeal, it is considered that this level of procedural detail is more appropriately left to regulations to allow for flexibility over time and to ensure harmonisation with other similar appeals processes, for example those in relation to appeals against decisions by HES in relation to applications for scheduled monument consent and those in connection with listed buildings.

Choice of procedure

11. It is considered appropriate that this power is subject to negative procedure because it will be used to set details of administrative procedure and timescales

Part 5 (Chapter 1) of schedule 2 – paragraph 29 - powers to set out the procedure for appeals against decisions of HES in relation to scheduled monument consent including powers relating to non-determination of an application by HES.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

12. Section 14 introduces schedule 2. Paragraph 29 of Part 5 (Chapter 1) of schedule 2 inserts sections 4B to 4D into the 1979 Act.

13. Inserted section 4B(1) introduces a right of appeal to the Scottish Ministers against certain decisions by HES including a decision to refuse scheduled monument consent or a decision to grant it subject to conditions. Where consent is granted subject to conditions an appeal is also allowed against a decision to refuse an application for the variation or discharge of such conditions. A right of appeal is also introduced against the decision to refuse an application for subsequent approval required by a condition to which consent is subject.

14. Inserted 4B(3) allows Ministers to set out the time period within after which a person may appeal if HES have not given notice of its decision in respect of an application for consent, an application for variation or discharge of conditions attached to consent or an application for subsequent approval required by a condition attached to consent.

15. Inserted section 4B (3) introduces the right of appeal to Ministers against the failure of HES to have given notice of its decision to refuse consent within the prescribed period.

16. Inserted section 4D allows Ministers to make provision regarding the procedure to be followed in respect of these appeals. Such regulations may make further provision including – provision about the grounds of appeal, information to be provided on appeal and the form, manner and time for making an appeal. Regulations may also make provision that the manner in which an appeal is to be conducted is to be at the discretion of Ministers (or a person appointed by them under the 1979 Act). In addition regulations may also include provision that an appeal in respect of an application for scheduled monument consent or in respect of the variation or discharge of conditions attached to consent must be accompanied by a certificate in the prescribed form as to the interests in the monument. Inserted section 4D(5) applies sub-paragraphs (2) to (4) of paragraph 2 of schedule 1 of the 1979 Act which provides that regulations may make further provision in respect of such certificates.

Reason for taking power

17. This provision relating to appeals in connections with scheduled monument consent allows Ministers to specify a period after which a person may appeal if HES have not given notice of its decision on an application for scheduled monument consent, an application for variation or discharge of conditions attached to consent or an application for subsequent approval required by a condition attached to consent. This provision enables Ministers to set out the procedures and time limits to be followed in relation to these appeals. While the Bill establishes the rights of appeal, It is considered that this level of procedural detail is more

appropriately left to regulations to allow for flexibility over time and to ensure harmonisation with other similar appeals processes, for example those in relation to appeals against the decision to schedule a monument and those in connection with listed buildings.

Choice of procedure

18. It is considered appropriate that this power is subject to negative procedure because it will be used to set details of appeal procedure and timescales and prescribe certificates

Provision

Part 5 (Chapter 1) of schedule 2 – paragraph 30 - 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 and in relation to publication of directions and expenses .

Power conferred on: the Scottish Ministers
Power exercisable by: regulations or directions given by Ministers
Parliamentary procedure: negative procedure for regulations, none in respect of directions

Provision

19. Section 14 introduces schedule 2. Paragraph 30 of Part 5 (Chapter 1) of schedule 2 inserts schedule 1A into the 1979 Act which makes provision for appeals relating to the designation of a monument as a scheduled monument and appeals in respect of decisions by HES relating to scheduled monument consent to be determined by persons appointed by the Scottish Ministers. Inserted paragraph 1(1) enables Ministers to set out in regulations the classes of such appeals which are to be determined by such appointed persons. Paragraph 1(2)(a) allows regulations to except, for the time being, classes of case from being so determined. Paragraph 1(2)(b) allows Ministers, by direction, to except classes of case from being determined by an appointed person. Paragraph 1(3) provides that regulations made under inserted paragraph 1(1) may make provision in respect of the publicity of directions given by Ministers. Inserted paragraph 3(1) of schedule 1A allows the Scottish Ministers to direct that an appeal relating to the designation of a monument as a scheduled monument or an appeal in respect of decisions by HES relating to scheduled monument consent which falls to be determined by persons appointed by the Scottish Ministers to instead be determined by Ministers. Inserted paragraph 6(1) of schedule 1A allows Scottish Ministers to direct that an inquiry must be held in respect of an appeal relating to the designation of a monument as a scheduled monument or an appeal in respect of decisions by HES relating to scheduled monument consent.

20. Inserted paragraph 1(1) enables Ministers to set out in regulations the classes of such appeals which are to be determined by such appointed persons. Paragraph 6(1)(a) gives appointed persons the power to hold an inquiry and paragraph 6(1)(b) requires them to hold an inquiry where directed to do so by Ministers. Paragraph 6(4) applies subsections (4) to (13) of section 265 of the Town and Country Planning (Scotland) Act 1997. Section 265 of that Act makes provision in connection with local inquiries. Section 265(11) gives Ministers the power to prescribe for any description of inquiry a standard daily amount of expenses.

Reason for taking power

21. This provision enables Ministers to specify classes of appeals which are to be determined by appointed persons instead of by Ministers. It allows exception of classes of case to be made by regulations or by direction given by the Scottish Ministers. The power to give directions gives Ministers greater flexibility and allows them to act quickly. The provision mirrors that in paragraph 1 of schedule 4 to the Town and Country Planning (Scotland) Act 1997 and paragraph 1 of schedule 3 to the 1997 Act and provides for harmonisation of processes.

22. The Bill introduces new rights of appeal in relation to scheduled monuments. The Government wishes the appeal process and the administrative procedures to be as far as possible and appropriate in line with the appeals processes and administrative procedures relating to listed buildings to ensure harmonisation of the designation and regulation regimes. The power mirrors the power in paragraph 3 of schedule 3 to the 1997 Act and paragraph 3 of schedule 4 to the Town and Country Planning (Scotland) Act 1997

23. It is considered that this level of procedural detail is more appropriately left to regulations or in the case of the exceptions, regulations to allow for flexibility over time and to ensure the classes of appeals to be determined by appointed persons remains appropriate as circumstances change over time.

24. This provision enables Ministers to prescribe a standard daily of amount of expenses in respect of any description of inquiry. It is considered such provision ought to be in regulations rather than on the face of the Bill given the detailed nature of the provision. Flexibility will also be required to update amounts over time.

Choice of Procedure

25. It is considered appropriate that this power is subject to negative procedure because it will be used to specify in detail the classes of appeals covered. It is considered that the power to except classes of cases by regulation subject to negative procedure or direction is also appropriate given the detailed nature of the provision. The power to provide for the giving of publicity to any directions given by Ministers ensures transparency. Directions will be published on the Directorate for Planning and Environmental Appeals website.

Part 5 (Chapter 2) of schedule 2 – paragraph 31 – power to make provision in connection with referrals under inserted section 3B

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

26. Section 14 introduces schedule 2. Paragraph 31 of schedule 2 inserts new sections 3B and 3C into the 1979 Act. Section 3B enables Scottish Ministers to give directions requiring applications for (a) scheduled monument consent (b) variation or discharge of conditions

attached to consent or (c) approval required by a condition attached to consent to be referred to them for determination instead of being determined by HES. A direction may relate to either a particular application or a class of applications. Section 3C enables Ministers, by regulations, to make provision in connection with referrals under inserted section 3B. Section 3B allows Ministers to require applications relating to scheduled monument consent to be referred to them instead of being dealt with by HES. Regulations may also make provision about the procedure to be followed and may include provision that the manner in which a referral is to be conducted is to be at the discretion of the Scottish Ministers.

Reason for taking power

27. The Bill confers functions on HES to deal with applications for scheduled monument consent however the Government considers there is a need to enable Ministers to deal with particular applications or classes of application should circumstances require. The Government wishes the powers and administrative procedures relating to applications for scheduled monument consent and the determination thereof to be as far as possible and appropriate in line with the administrative procedures relating to listed buildings to ensure harmonisation of the designation and regulation regimes. The power to call in applications mirrors the power in section 11 of the 1997 Act in relation to listed building consent. The power to make regulations is equivalent to the powers available in respect of the procedure for listed building cases contained in section 267 of the Town and Country Planning (Scotland) Act 1997 as applied by section 79(1) of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997..

Choice of procedure

28. The Scottish Government considers that the use of this power as with the powers to make equivalent provisions by regulations under section 267 of the Town and Country Planning (Scotland) Act 1997 should be by negative procedure as they set the detail of procedural matters.

Part 3 – Functions in relation to Listing and conservation

Part 1 of schedule 3 – paragraph 3 - power to specify persons required to be notified in relation to the compilation, approval or amendment of a list under section 1 of the 1997 Act.

Power conferred on : the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

29. Section 15 introduces schedule 3. Paragraph 3 of schedule 3 inserts section 1A into the 1997 Act allowing Ministers to make regulations specifying the persons required to be notified of any list compiled, approved or amended under section 1 of the 1997 Act. It also allows Ministers to make provision as to the form, manner and time in relation to such notification. Regulations may in particular provide for planning authorities to publish lists and make such lists available for public inspection and to notify.

Reason for taking the power

30. This provision enables Ministers to set out those persons who must be notified and the procedure and timescale for doing so. It is considered that this level of procedural detail is more appropriately left to regulations.

Choice of procedure

31. It is considered that the use of this power can be left to the level of Parliamentary scrutiny attached to the negative procedure. The making of procedural provision is an administrative matter.

Part 2 of schedule 3 – paragraph 9 - power to specify the persons who must be consulted by a planning authority in relation to an application for listed building consent.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations or direction given by Scottish Ministers
Parliamentary procedure: negative procedure for regulations, none in respect of directions

Provision

32. Section 15 introduces schedule 3. Paragraph 9 of schedule 3 inserts subsections (4A) and (4B) into section 9 of the 1997 Act to require regulations already provided for under that section to require planning authorities to consult HES before granting or refusing an application for listed building consent. The regulations must also require planning authorities to consult persons as may be (a) specified in the regulations or (b) specified in directions given by Ministers.

Reason for taking the power

33. This provision enables Ministers to set out those persons who must be consulted before an application for listed building consent is determined. It is considered that this level of procedural requirement is more appropriately left to regulations or directions to deal with changing circumstances over time. The power to give directions allows Ministers to make prompt and effective changes. Directions can be made to planning authorities generally, a particular planning authority or a description of planning authority.

Choice of procedure

34. It is considered that the use of the regulation making power can be left to the level of Parliamentary scrutiny attached to the negative procedure. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure.

Part 2 of schedule 3 – paragraph 10 - Power to prescribe persons who must be notified where a planning authority submit an order revoking or modifying listed building consent to the Scottish Ministers for confirmation.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

35. Section 15 introduces schedule 3. Paragraph 10 of schedule 3 amends section 22(2) of the 1997 Act giving the Scottish Ministers power to prescribe persons who must be notified where a planning authority submit an order revoking or modifying listed building consent to the Scottish Ministers for confirmation. Such persons are additional to those who must be consulted under section 22(2).

Reason for taking the power

36. This provision enables Ministers to specify the persons required to be consulted. Ministers require the flexibility to vary the persons who must be consulted in light of future changes to the Historic Environment Strategy. It is considered that this level of procedural detail is more appropriately left to regulations.

Choice of procedure

37. Negative procedure is considered appropriate for what is essentially an administrative matter.

Part 2 of schedule 3 – paragraph 11 - 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.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

38. Section 15 introduces schedule 3. Paragraph 11 of schedule 3 amends section 23(1)(b) of the 1997 Act giving the Scottish Ministers power to prescribe persons who must notify the planning authority that they do not object to an order made by a planning authority under section 21 of the 1997 Act revoking or modifying listed building consent.

Reason for taking the power

39. This provision enables Ministers to specify the persons required to notify planning authorities. Ministers require the flexibility to vary the persons who must notify in light of future changes to the Historic Environment Strategy. It is considered that this level of procedural detail is more appropriately left to regulations.

Choice of procedure

40. Negative procedure is considered appropriate for what is essentially an administrative matter.

Part 3 of schedule 3 – paragraph 15 – power of HES to direct that a building is no longer deemed to be a listed building.

This document relates to the Historic Environment Scotland Bill (SP Bill 47) as introduced in the Scottish Parliament on 3 March 2014

Power conferred on: HES
Power exercisable by: directions
Parliamentary procedure: none

Provision

41. Section 15 introduces schedule 3. Paragraph 15 of schedule 3 amends paragraph 2 of schedule 1 to the 1997 Act. The provision enables HES to direct that paragraph 1 of that schedule no longer applies to a particular building. The effect is that the building is no longer deemed to be a listed building.

Reason for taking the power

42. The Bill confers the function of compiling, approving and amending lists of buildings of special historic or architectural interest (under section 1 of the 1997 Act) on HES. Given HES will take on this role, it ought to have the direction giving function under paragraph 2 of schedule 1 to the 1997 Act currently lying with Ministers. In addition, given the role of Ministers in the various appeals processes under the 1997 Act (including the newly established appeal against the designation of a listed building), the provision also allows Ministers to similarly direct in respect of a building referred to in a notice of appeal.

Choice of procedure

43. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure as the power will be used in relation to a particular building.

Part 4 of schedule 3 – paragraph 18 – 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.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

44. Section 15 introduces schedule 3. Paragraph 18 of schedule 3 inserts sections 5B to 5D into the 1997 Act. Section 5B introduces an appeal to the Scottish Ministers against the decision to include a building in the list or amend the list compiled under section 1 of the 1997 Act. Section 5D allows the Scottish Ministers, by way of regulations to make provision in connection with appeals under section 5B. Such provision may include the grounds on which an appeal may be made, information required in that connection, and the procedure to be followed. Regulations may also include provision that the manner in which an appeal is to be conducted is to be at the discretion of the Scottish Ministers.

Reason for taking the power

45. This provision enables Ministers to set out the procedures and time limits to be followed in relation to appeals against the decision to include a building in the list or amend the list

compiled under section 1 of the 1997 Act. While the Bill establishes the right of appeal, it is considered that this level of procedural detail is more appropriately left to regulations.

Choice of procedure

46. It is considered appropriate that this power is subject to negative procedure because it will be used to set details of procedure and timescales. It is considered the level of parliamentary scrutiny should be the same as that which already applies in respect of appeals under section 18 of the 1997 Act.

Part 4 of schedule 3 – paragraph 18 - that an appeal which would otherwise fall to be determined by an appointed person is instead to be determined by them.

Power conferred on: the Scottish Ministers
Power exercisable by: directions given by Ministers
Parliamentary procedure: none

Provision

47. Section 15 introduces schedule 3. Paragraph 18 of Part 4 of schedule 3 applies Schedule 3 to the 1997 Act (see inserted section 5D(4)) to appeals under inserted section 5B which makes provision for appeals relating to the designation of a building as a listed building to be determined by persons appointed by the Scottish Ministers. Paragraph 3(1) of schedule 3 allows the Scottish Ministers to direct that an appeal under section 5B which falls to be determined by persons appointed by the Scottish Ministers to instead be determined by Ministers.

Reason for taking power

48. The power already exists in relation to appeals relating to listed building consent under section 18 of the 1997 Act. The Bill applies these powers to the newly created appeal power to ensure harmonisation of process. The power mirrors the power in paragraph 3 of Schedule 4 to the Town and Country Planning (Scotland) Act 1997. It is considered appropriate that such administrative matter be dealt with by way of direction allowing flexibility and enabling Ministers to act promptly and effectively. A similar approach is taken in respect of appeals relating to scheduled monuments.

Choice of procedure

49. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure as the power will be used in relation to a particular case. Directions will be published on the Directorate for Planning and Environmental Appeals website.

Part 4 of schedule 3 – paragraph 18 –power to direct an appointed person to hold a local inquiry.

Power conferred on: the Scottish Ministers
Power exercisable by: direction given by Ministers

Parliamentary procedure: none

Provision

50. Paragraph 18 of schedule 3 applies Schedule 3 to the 1997 Act (see inserted section 5D(4)) to appeals under inserted section 5B. Paragraph 6(1) of schedule 3 allows Scottish Ministers to direct that an inquiry must be held in relation to an appeal relating to the designation of a building as a listed building.

Reason for taking power

51. The power already exists in relation to appeals relating to listed building consent under section 18 of the 1997 Act. The Bill applies these powers to the newly created appeal power to ensure harmonisation of process. The power mirrors the power in paragraph 6 of schedule 4 to the Town and Country Planning (Scotland) Act 1997. A power of direction is considered appropriate as it allows Ministers to act quickly where need be to ensure a local inquiry is held in a particular case. A similar approach is taken in respect of scheduled monuments.

Choice of procedure

52. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure as the power will be used in relation to a particular case. Directions will be published on the Directorate for Planning and Environmental Appeals website.

Part 4 of schedule 3 – paragraph 21 –power to direct HES to amend the list compiled or approved under section 1 of the 1997 Act.

Power conferred on: the Scottish Ministers
Power exercisable by: direction given by Ministers
Parliamentary procedure: none

Provision

53. Paragraph 21 of schedule 3 amends section 37(4) of the 1997 Act to allow Scottish Ministers to direct HES to amend the list compiled or approved under section 1 of the 1997 Act on determination of an appeal under section 35 of the 1997 Act.

Reason for taking power

54. The Bill confers the function of designating building as listed buildings on HES. This provision enables Scottish Ministers to direct HES to exercise its power under section 1 of the 1997 Act to give effect to any determination Ministers have made on an appeal against a listed building enforcement notice. The purpose is to maintain an accurate and up to date list of buildings of special historic or architectural interest.

Choice of procedure

55. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure.

Part 4 of schedule 3 – paragraph 23(a) - 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.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations or directions given by Ministers
Parliamentary procedure: negative procedure for regulations, none in respect of directions

Provision

56. Section 15 introduces schedule 3. Paragraph 23(a) of Part 4 of schedule 3 applies Schedule 3 to the 1997 Act to appeals under inserted section 5B which makes provision for appeals relating to the designation of a building as a listed building to be determined by persons appointed by the Scottish Ministers. Paragraph 1(1) of Schedule 3 to the 1997 Act enables Ministers to set out in regulations the classes of such appeals which are to be determined by such appointed persons. Paragraph 23(a) of schedule 3 extends this power to the determination of appeals under new section 5B.

Reason for taking power

57. This provision enables Ministers to specify classes of appeals under section 5B which are to be determined by appointed persons instead of by Ministers. It allows exceptions of classes of case to be made by regulations or by direction given by the Scottish Ministers. The power already exists in relation to appeals relating to listed building consent (under section 18 of the 1997 Act). The Bill applies these powers to the newly created appeal power. It is considered that this level of procedural detail is more appropriately left to regulations or in the case of the exceptions, directions to allow for flexibility over time and to ensure the classes of appeals to be determined by appointed persons remains appropriate as circumstances change over time. The power to give directions gives Ministers greater flexibility and allows them to act quickly. The provision mirrors that in paragraph 1 of schedule 4 to the Town and Country Planning (Scotland) Act 1997 and provides for harmonisation of processes. A similar approach is taken in the Bill in respect of appeals relating to scheduled monuments.

Choice of Procedure

58. It is considered appropriate that this power is subject to negative procedure because it will be used to specify in detail the classes of appeals covered. It is considered that the power to except classes of cases by regulation subject to negative procedure or direction is also appropriate given the detailed nature of the provision. The power to provide for the giving of publicity to any directions given by Ministers ensures transparency.

Part 5 – Dissolution of RCAHMS and transfer of staff to Historic Environment Scotland

Paragraph 1 of schedule 5 – allows Ministers to make a staff transfer scheme.

Power conferred on: the Scottish Ministers
Power exercisable by: scheme
Parliamentary procedure: none

Provision

59. Schedule 5 provides for the transfer of staff and property etc. Paragraph 1 allows Ministers to make a staff transfer scheme making provision in connection with the transfer to HES of persons employed by RCAHMS and persons who are members of the staff of the Scottish Ministers employed in Historic Scotland. Paragraph 2(2) of schedule 5 requires the Scottish Ministers to specify the date on which staff will transfer to HES.

Reason for taking power and choice of procedure

60. It will be necessary to ensure that staff transfer to HES at the appropriate time. It may be necessary for different staff to transfer on different dates or for all staff to transfer on a particular date to support the smooth and effective transition to the new regime. The date or dates cannot at this stage be specified with certainty as this will depend on work undertaken with and by the existing bodies and the result of timescales for transition. It is therefore appropriate for the date or dates to be set by the scheme in due course. Bearing in mind the level of detail involved it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

Paragraph 4 of schedule 5 – allows Ministers to make a property transfer scheme.

Power conferred on: the Scottish Ministers

Power exercisable by: scheme

Parliamentary procedure: none

Provision

61. Section 18 introduces schedule 5, which provides for the transfer of staff and property etc. Paragraph 4 allows Ministers to make a property transfer scheme making provision in connection with the transfer to HES of property, rights, liabilities and obligations of RCAHMS and the Scottish Ministers (only in so far as they relate to HES's functions). Paragraph 5(2) of schedule 5 requires the Scottish Ministers to specify the date on which the transfer to HES takes place.

Reason for taking power and choice of procedure

62. The scheme will need to make detailed provision in order to capture all property, rights, liabilities and obligations and ensure that they are dealt with in an effective and principled fashion. Bearing in mind the level of detail involved, it is not thought that these matters could practicably be dealt with on the face of the Bill, or that they require the scrutiny of the Scottish Parliament.

Part 6 – Further modifications in relation to the Historic Environment

Section 20 – power to make provision by regulations as to the procedure to be followed in connection with inquiries or hearings conducted under the Act.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

63. Section 20 inserts sections 23A and 23B into the 1979 Act. Section 23A gives Ministers the power to hold an inquiry for the purposes of any of their functions under Part 1 of the 1979 Act. Section 23B gives Ministers a power to set out in regulations the procedure to be followed in respect of such inquiries or hearings. Section 23A(3) applies subsections (4) to (13) of section 265 of the Town and Country Planning (Scotland) Act 1997. Section 265 of that Act makes provision in connection with local inquiries. Section 265(11) gives Ministers the power to prescribe for any description of inquiry a standard daily amount of expenses.

Reason for taking power

64. This provision enables Ministers to set out the detailed procedure in relation to inquiries and hearings in regulations. It also enables Ministers to prescribe a standard daily amount of expenses in respect of any description of inquiry. It is considered that such procedural and administrative matters ought to be in regulations rather than on the face of the Bill. In respect of the amount of expenses given the detailed nature of the provision, it should also be left to regulations. Flexibility will also be required to update procedure and amounts over time.

Choice of Procedure

65. It is considered appropriate that this power is subject to negative procedure because it will be used to outline procedure and specific amounts.

Part 6 – Further modifications in relation to the Historic Environment

Section 22 - Power to specify circumstances in which Scottish Ministers are required to be notified where planning authority are minded to grant consent.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations or directions by the Scottish Ministers
Parliamentary procedure: negative procedure for regulations, none in respect of directions Provision

66. Section 22 amends section 12 of the 1997 Act to allow either regulations or directions to make provision as to the applications which must be notified to Scottish Ministers where a planning authority is minded to grant consent to works to a listed building.

Reason for taking the power

67. This provision enables Ministers to set out the circumstances in which Ministers are required to be notified where a planning authority is minded to grant consent to works to a listed building. It is considered that this level of procedural detail is more appropriately left to regulations or directions to deal with changing circumstances over time. The power would allow Scottish Ministers to vary the circumstances in light of future changes, for example to the capabilities and capacity of local authorities. The power to give directions allows Ministers to make prompt and effective changes. Directions can be made to planning

authorities generally, a particular planning authority or a description of planning authority.

Choice of procedure

68. It is considered that the use of the regulation making power can be left to the level of Parliamentary scrutiny attached to the negative procedure. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure.

Part 7 – Final Provisions

Section 25 – power to make ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: order

Parliamentary procedure: Generally negative procedure but affirmative procedure if making textual amendments to an Act

Provision

69. This provision enables the Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to, any provision of the Bill.

Reason for taking power

70. To enable the Scottish Ministers adequately to give effect to the provisions of the Bill. It is anticipated that this power will be used to modify a number of statutory instruments in consequence of section 1 establishing the new public body, Historic Environment Scotland. It may be that the consequences have not been identified and as such further changes may be required. The order-making power is considered to be necessary to allow for this flexibility.

71. It is considered that the power to make such provision should extend to the modification of enactments. Without the power to make incidental, supplementary and consequential provision, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament's or the Government's resources.

72. The power is limited as it can only be used if the Scottish Ministers consider it appropriate to do so for the purposes of, in connection with, or for giving full effect to, this Act or any provision of it.

Choice of procedure

73. An order made under this section which contains a provision which adds to, omits or replaces any part of the text of an Act is subject to the affirmative procedure. Any other order made under this section is subject to the negative procedure. This provides the appropriate level of parliamentary scrutiny, taking account of the nature of the orders which may be made using this power.

Section 29 - power to commence provisions

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: the Order must be laid before the Parliament (subject to section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010)

Provision

74. This provision enables the Scottish Ministers to appoint a day or days on which the provisions of the Bill come into force (other than sections 23 to 30 which come into force on the day after Royal Assent). The Scottish Ministers may make any such transitional, transitory or saving provision in the commencement order as may be required (see subsection (2)).

Reason for taking power

75. To enable the Scottish Ministers appropriately and flexibly to bring the Bill's main provisions into effect. The Bill establishes Historic Environment Scotland. RCAHMS will be dissolved. The Bill will allow for the transfer of staff of the Scottish Ministers employed in Historic Scotland and the staff of RCAHMS to HES. It also enables the transfer of certain rights, liabilities and obligations of those 2 bodies to HES, so flexibility of commencement is required. The transition between the regimes requires to be supported by transitional, transitory and saving powers to enable a smooth transition. This will allow Ministers to ensure that the powers and duties given to HES are commenced only when the new body is ready to take them forward.

Choice of procedure

76. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). This is typical for commencement orders.

Powers to delegate functions and to give directions

Section [3 (1)] - Power to delegate the exercise of any of Scottish Ministers' functions in relation to properties in care to HES or any other person considered appropriate.

Power conferred on: the Scottish Ministers
Power exercisable by: written delegation
Parliamentary procedure: none

Provision

77. This provision allows Ministers to delegate functions in relation to properties in care to HES (or to any other body), and to set out the detailed arrangements in respect of how such functions are to be exercised.

Reason for taking the power

78. Ministers wish HES to be able to exercise Scottish Ministers' management functions in relation to properties in care. They also wish to be able to delegate to another body in future, should this be considered more appropriate.

79. By delegating rather than transferring powers, Ministers will retain responsibility for the properties in care, including for their statutory duties regarding conservation and public access. Any scheme of delegation will set out what standards of performance will be expected and how these will be monitored. It will also provide for any exceptions to the general provision (at section 3(4)) that revenue received by HES (or another body in possession of such a delegation) will remain with HES (or the other body).

80. The use of a scheme of delegation will allow Ministers the flexibility to take into account the needs of the public and of the properties in care in deciding who is best placed to take on their management. Ministers may delegate their functions in respect of a particular property, a group of properties or all properties.

Choice of procedure

81. This is an administrative arrangement and it is not considered that parliamentary procedure is required.

Section 7 (1) - Ministerial power to delegate the management of their collections to HES or any other person considered appropriate.

Power conferred on: the Scottish Ministers

Power exercisable by: written delegation

Parliamentary procedure: none

Provision

82. This provision allows Ministers to delegate functions in relation to collections which are in Ministers' care to HES (or to any other body), and to set out the detailed arrangements in respect of how such functions are to be exercised.

Reason for taking the power

83. Ministers wish HES to be able to exercise the Scottish Ministers' management functions in relation to collections which are in 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.

84. By delegating rather than transferring powers, Ministers will retain responsibility for their collections. Any scheme of delegation will set out what standards of performance will be expected and how these will be monitored. It will also provide for any exceptions to the general provision (at section 7(3)) that revenue received by HES (or another body in possession of such a delegation) will remain with HES (or the other body).

This document relates to the Historic Environment Scotland Bill (SP Bill 47) as introduced in the Scottish Parliament on 3 March 2014

85. The use of a scheme of delegation will allow Ministers the flexibility in deciding who is best placed to manage their collections. Ministers may delegate their functions in respect of a particular collection, a group of collections or all collections and, within any collection, in respect of a particular object, or group of objects.

Choice of procedure

86. This is an administrative arrangement and it is not considered that parliamentary procedure is required.

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HISTORIC ENVIRONMENT SCOTLAND BILL

DELEGATED POWERS MEMORANDUM