

HISTORIC ENVIRONMENT SCOTLAND BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Historic Environment Scotland Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.
3. In this Memorandum –

the “1979 Act” means the Ancient Monument and Archaeological Areas Act 1979;

the “1997 Act” means the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997; and

“HES” means Historic Environment Scotland

Part 1 – establishment of Historic Environment Scotland

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
Revised or new power: amended
Parliamentary procedure: none

Provision

4. This provision allows Ministers to delegate functions in relation to properties in care to HES (or any other body specified as being considered appropriate) and to set out the detailed arrangements in respect of how such functions are to be exercised. The provision has been amended at Stage 2 by the insertion of subsection (7A) which places Scottish Ministers under a duty to publish delegations.

Reason for taking the power

5. As set out in the delegated powers memorandum at introduction, 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. The power was amended at Stage 2 to require Ministers to publish any such delegation. The Government is committed to transparency and scrutiny and had intended to publish any such delegations, and has agreed to the recommendation of the Committee that publication be made a statutory requirement. (30th Report of the Delegated Powers and Law Reform Committee of 2014, paragraph 37.)

6. The Committee will also wish to be aware that an additional section 3A has been inserted at Stage 2 which places a duty on Ministers to compile and maintain a list, which they must publish, of properties in care in relation to which they may delegate functions under this section. A definition of property in care is given in the new section. It is defined as meaning any heritable property which is of historical, archaeological, architectural or cultural significance or interest and which is owned or occupied by, under the guardianship of, or otherwise under the management and control of the Scottish Ministers.

7. The amendment is a response to the recommendation of the Committee that there should be clarity concerning the properties in relation to which Ministers can and cannot delegate their functions. (30th Report of the Delegated Powers and Law Reform Committee of 2014 paragraph 38 onward.) The Committee recommended that this matter be addressed by adjusting the definition of "property in care" given in the Bill, but after consideration Ministers decided that any definition, however, detailed, would be open to interpretation, and for that reason absolute clarity could only be assured by creating and publishing a definitive list.

Choice of procedure

8. The Bill itself provides for HES to exercise such delegated functions. Giving effect to that is an administrative arrangement and it is not considered that parliamentary procedure is required. Ministers are now under a duty to publish delegations to ensure transparency of process.

Section 3 (8) - Power to prescribe persons Ministers consider appropriate to delegate functions to in relation to properties in care.

Power conferred on: the Scottish Ministers
Power exercisable by: order
Revised or new power: new
Parliamentary procedure: affirmative

Provision

9. Section 3(1)(b) of the Bill enables Ministers to delegate to HES their management functions in relation to properties in care. Ministers also wish to be able to delegate to another body in future, should this be considered more appropriate. As drafted at introduction, the power

This document relates to the Historic Environment Scotland Bill as amended at Stage 2 (SP Bill 47A)

in section 3(1)(b) allowed Ministers to delegate functions to any other person they considered appropriate.

10. At Stage 2, section 3(1)(b) was amended to provide that the persons to whom functions in relation to properties in care could be delegated are “prescribed persons” only. The power to prescribe those persons is contained in the definition of “prescribed” in section 3(8), which was inserted at Stage 2. If the Scottish Ministers wish to delegate functions to persons other than HES, they must prescribe by order the persons they consider appropriate.

Reason for taking the power

11. As stated in the Delegated Powers Memorandum provided at introduction, 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 more appropriate.

12. The requirement on Ministers to specify persons considered appropriate in an order subject to parliamentary scrutiny was introduced at Stage 2 following the recommendations of the Delegated Powers and Law Reform Committee. (30th Report of the Delegated Powers and Law Reform Committee of 2014, paragraph 34 onwards.)

Choice of procedure

13. A decision by Ministers to delegate to any other body would be a matter in which there is likely to be considerable public interest, and for that reason Ministers have accepted the recommendation of the Committee that an order with affirmative procedure is appropriate.

Section 7 - Power to delegate the exercise of any of Scottish Ministers’ functions in relation to collections to HES or any other person considered appropriate.

Power conferred on: the Scottish Ministers
Power exercisable by: written delegation
Revised or new power: amended
Parliamentary procedure: none

Provision

14. This provision allows Ministers to delegate functions in relation to their collections to HES (or any other body specified as being considered appropriate) and to set out the detailed arrangements in respect of how such functions are to be exercised. The provision has been amended at Stage 2 by the insertion of subsection (6A) which places Scottish Ministers under a duty to publish delegations.

Reason for taking the power

15. As set out in the Delegated Powers Memorandum at introduction, 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.

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16. The power was amended at Stage 2 to require Ministers to publish any such delegation. The Government is committed to transparency and scrutiny and had intended to publish any such delegations, and has agreed to the recommendation of the Committee that publication be made a statutory requirement. (30th report of the Delegated Powers and Law Reform Committee of 2014, paragraph 37.)

Choice of procedure

17. The Bill itself provides for HES to exercise such delegated functions. Giving effect to that is an administrative arrangement and it is not considered that parliamentary procedure is required, Ministers are now under a duty to publish such delegations to ensure transparency of process.

Section 7(7) – Power to prescribe persons Ministers consider appropriate to delegate functions to in relation to collections.

Power conferred on: the Scottish Ministers
Power exercisable by: order
Revised or new power: new
Parliamentary procedure: affirmative

Provision

18. Section 7(1)(b) of the Bill enables Ministers to delegate to HES their management functions in relation to their collections. Ministers also wish to be able to delegate to another body in future, should this be considered more appropriate. As drafted at introduction, the power in section 7(1)(b) allowed Ministers to delegate functions to any other person they considered appropriate

19. At Stage 2, section 7(1)(b) was amended to provide that functions in relation to collections can be delegated to “prescribed persons” only, and a definition of “prescribed” was inserted into section 7(7). That definition provides for the specification by order of persons to whom functions can be delegated.

Reason for taking the power

20. As stated in the Delegated Powers Memorandum provided at introduction, Ministers wish HES to be able to exercise Scottish Ministers’ management functions in relation to collections. They also wish to be able to delegate to another body in future, should this be more appropriate. The requirement on Ministers to specify persons considered appropriate in an order subject to parliamentary scrutiny was introduced at Stage 2 following the recommendations of the Delegated Powers and Law Reform Committee (Report of 29 April 2014, paragraphs 34-35).

Choice of procedure

21. A decision by Ministers to delegate to any other body would be a matter in which there is likely to be considerable public interest, and for that reason Ministers have accepted the recommendation of the Committee that an order with affirmative procedure is appropriate.

Part 2 – Functions in relation to scheduled monuments

Part 1 of schedule 2 - paragraph 2(ea) - 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

Revised or new power: amended

Parliamentary procedure: negative procedure

Provision

22. Paragraph 2(ea) 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 for a monument has been amended.

23. This provision replaces, with minor clarificatory drafting changes, the similar provision included in the Bill as introduced. It removes the requirement to notify “as soon as may be after” to clarify that HES must notify specified persons within such time as may be prescribed. The requirement to notify such persons as may be prescribed in such form and manner as may be prescribed remains unchanged.

Reason for taking the power

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

Choice of procedure

25. 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, since it is considered that there is unlikely to be any significant concern about ensuring that the requirement which already exists to notify appropriate persons is supported by regulations which would allow Ministers to specify who should be notified, or to prescribe a given form and a timescale. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure.

Part 2 of schedule 2 – paragraph 14(4A) – inserting new paragraph 2C into Part 1 of Schedule 1 to the 1979 Act – Power to make regulations or directions to provide that specified applications for scheduled monument consent must, where HES intends to grant consent, be notified to the Scottish Ministers.

Powers conferred on : the Scottish Ministers

Power exercisable by: regulations or directions by the Scottish Ministers

Revised or new power: new

Parliamentary procedure: negative procedure for regulations, none in respect of directions

This document relates to the Historic Environment Scotland Bill as amended at Stage 2 (SP Bill 47A)

Provision

26. The Bill as introduced included provision giving Ministers the power to call-in applications for scheduled monument consent for their own determination rather than HES. An amendment has been made to the call-in power at Stage 2 to ensure it operates effectively. The amendment, adding sub-paragraph (4A) to paragraph 14 of schedule 2 to the Bill inserts a new paragraph 2C into Schedule 1 to the 1979 Act to ensure that HES, where it intends to grant consent, is required to notify Scottish Ministers of certain specified applications for scheduled monument consent as set out in regulations or directions.

Reason for taking the power

27. This provision enables Ministers to set out the circumstances in which Ministers are required to be notified where HES intends to grant consent to works to a scheduled monument. It is considered that this level of procedural detail is more appropriately left to regulations or directions to deal with changing circumstances over time. As an example, the power might be used to direct that, where an application for scheduled monument consent was linked to a concurrent application for planning consent, HES should be required to notify Ministers so that any call-in, whether under scheduled monument or planning legislation, could consider all relevant issues together. The power would enable Ministers to vary the circumstances in light of future changes. The power to give directions allows Ministers to give prompt and effective changes.

Choice of procedure

28. 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, given that the principle of Ministerial call-in is contained within the Bill and that it would not be desirable or practicable for all cases handled by HES to be notified for possible call-in. It is not considered necessary or appropriate for directions to be subject to Parliamentary procedure.

Part 2 of schedule 2 – paragraph 14 (4A)– inserting new paragraph 2D into Part 1 of Schedule 1 to the 1979 Act – Power to give directions to HES to notify Scottish Ministers and any other specified persons in circumstances specified of any applications for scheduled monument consent and the decision taken on the applications.

Powers conferred on : the Scottish Ministers
Power exercisable by: directions by the Scottish Ministers
Revised or new power: new
Parliamentary procedure: none

Provision

29. Paragraph 14 of the Bill was amended at Stage 2. New inserted paragraph 14(4A) inserts new paragraph 2D into Part 1 of Schedule 1 to the 1979 Act. This power allows Ministers to give directions to HES requiring it, in specified circumstances, to notify Ministers and any other specified persons of any applications made to it for scheduled monument consent and the decisions taken in respect of those applications.

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Reason for taking the power

30. This provision enables Ministers to set out the circumstances in which Ministers (and others) are required to be notified of any applications for scheduled monument consent and the decision taken on those applications. It might be, as an example, reasonable for Ministers to wish to be advised of all applications and decisions relating to consent for works at properties in care as defined in the Bill, to ensure that separation of duties within HES is operating effectively. It is considered that this level of procedural detail is more appropriately left to directions to deal promptly and effectively with changing circumstances over time. The power would enable Ministers to vary the circumstances in light of future changes and harmonises the provisions relating to applications for scheduled monument consent with those relating to listed building consent and wider planning legislation.

Choice of procedure

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

Part 3 - Scheduled Monument Enforcement Notices

Part 3 of schedule 2 - paragraph 18A(d) – inserting subsection 9C(3A) into the 1979 Act – Power to prescribe time within which statement in writing in connection with scheduled monument consent enforcement appeals must be made and to prescribe what further information is required.

Powers conferred on : the Scottish Ministers
Power exercisable by: regulations
Revised or new power: new
Parliamentary procedure: negative procedure

Provision

32. As introduced, the Bill provided for an appeal against a scheduled monument enforcement notice to be made by summary application to the sheriff. At Stage 2, an amendment replaced this appeal to the sheriff with an appeal to the Scottish Ministers since Historic Environment Scotland rather than Ministers will be able to issue scheduled monument enforcement notices in future. This aligns the appeal process for scheduled monument enforcement notices with that which already exists for listed building enforcement notices. Paragraph 18A(d) of the Bill, introduced at Stage 2, inserts new paragraph (3A) into section 9C of the 1979 Act requiring appellants to submit a written statement of the grounds of appeal when giving notice of appeal or within such time as may be prescribed by Ministers. Ministers are also given the power to specify what further information is required to be submitted.

Reason for taking the power

33. This power has been taken to provide the Scottish Ministers with some flexibility on specifying the time within which grounds of appeal must be submitted and the additional information required. This is to allow adjustments to time limits to be made if there are specific or generic issues with establishing the precise date at which potential appellants become aware of the decision which triggers their right of appeal. While the Bill establishes the right of appeal, it is considered that this level of procedural detail is more appropriately left to regulations to

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allow for flexibility over time and to ensure harmonisation with the enforcement notice appeal process for listed buildings.

Choice of procedure

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

Part 3 of schedule 2 - paragraph 18B – inserting new section 9CB into the 1979 Act – Power to make regulations to make provision in respect of scheduled monument enforcement notice appeals

Powers conferred on : the Scottish Ministers

Power exercisable by: regulations

Revised or new power: new

Parliamentary procedure: negative procedure

Provision

35. As stated in paragraph 25 above, an amendment at Stage 2 replaced the appeal against a scheduled monument enforcement notice to the sheriff with an appeal to the Scottish Ministers. Paragraph 18B of the Bill added at Stage 2 inserts new sections 9CB into the 1979 Act allowing Scottish Ministers, by way of regulations to make provision in connection with such appeals. Regulations may also make provision about the procedure to be followed, including the form, manner and time for making an appeal, notification of the appeal, and the manner in which an appeal is to be conducted. Regulations may also include provision that the manner in which an appeal, or any stage of an appeal, is to be conducted is to be at the discretion of the Scottish Ministers (or person appointed by them).

Reason for taking the power

36. This provision enables Ministers to set out the procedures and time limits to be followed in relation to appeals against scheduled monument enforcement notices. This is to allow adjustments to time limits to be made if there are specific or generic issues with establishing the precise date at which potential appellants become aware of the decision which triggers their right of appeal. While the Bill establishes the right 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 the enforcement notice appeal process for listed buildings.

Choice of procedure

37. 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 that the level of parliamentary scrutiny should be the same as that which already applies in respect of appeals against listed building enforcement notices.

Part 3 of schedule 2 - paragraph 18B – inserting new section 9CB(4) into the 1979 Act – applying new schedule 1A (as inserted by the Bill), and changes to paragraph 30 of schedule 2 - powers to prescribe classes of appeals which are to be determined by an appointed person and in relation to publication of directions and expenses.

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Powers conferred on : the Scottish Ministers
Power exercisable by: regulations or directions given by Ministers
Revised or new power: amended
Parliamentary procedure: negative procedure in respect of regulations, none in respect of directions.

Provision

38. As introduced, paragraph 30 of schedule 2 inserts a new schedule 1A into the 1979 Act which makes provision in respect of the determination of certain appeals by persons appointed by the Scottish Ministers. The provisions apply to appeals relating to the designation of a monument as a scheduled monument and appeals in respect of decisions made by HES in relation to scheduled monument consent. At Stage 2, these provisions were amended so as to apply also to appeals against scheduled monument enforcement notices.

39. Paragraph 1(1) of new schedule 1A enables Ministers to set out in regulations the classes of such appeals which are to be determined by persons appointed by Ministers. 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 3(1) allows Ministers to direct that an appeal which falls to be determined by an appointed person to instead be determined by Ministers. Paragraph 6(1) of schedule 1A gives appointed persons the power to hold an inquiry in respect of an appeal and allows Scottish Ministers to direct that an inquiry must be held. 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 a standard daily amount of expenses. The amendment at Stage 2 extends all of these provisions also to apply to section 9C of the 1979 Act which deals with scheduled monument enforcement notices.

Reason for taking the power

40. The Bill was amended at Stage 2 to remove the right of appeal on summary application to the sheriff against the issue of a scheduled monument enforcement notices, replacing it with a new right of appeal to Scottish Ministers. This provision enables Ministers to specify classes of appeals which are to be determined by appointed persons instead of by Ministers. It allows classes of case to be excepted by regulations or directions by Ministers. The power to give directions gives Ministers greater flexibility and allows them to act quickly. It ensures harmonisation of process in respect of appeals under the 1979 Act

41. It is considered that this level of procedural detail is more appropriately left to regulations or in the case of the exceptions, regulations or 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.

Choice of procedure

42. 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 regulations subject to the negative procedure or direction is also

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appropriate given the detailed nature of the provision. The power to provide for the publication of any directions given by Ministers ensures transparency. Directions will be published on the Directorate for Planning and Environmental Appeals website. The intention is that the normal course will be for appeals of all kinds to be determined by appointed persons, with exceptions being rare. This explains the decisions to propose regulations for the normal course but directions for the (likely to be extremely rare) exceptions.

Part 3 – Functions in relation to listing and conservation

Schedule 3, part 2, paragraph 9 – power to specify the cases or classes of case in respect of which planning authorities are under a requirement to consult certain bodies before granting or refusing applications for listed building consent.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Revised or new power: new
Parliamentary procedure: negative procedure

Provision

43. The Bill inserted new section 9(4A) into the 1997 Act requiring regulations made by Ministers to require planning authorities to consult HES and such other persons as may be prescribed or specified in Ministerial directions before granting or refusing listed building consent. This provision has been amended at Stage 2 with new section 9(4A) removed and replaced by a new section 9(6), which retains the requirement to consult HES and such other persons but allows the Scottish Ministers to specify in regulations the cases or classes of case where this requirement to consult is to apply.

44. The amendment is to ensure that not every case seen by a local authority leads to an automatic consultation with HES, but to limit such consultation to cases or classes of cases where such consultation is likely to add value to the local authority decision-making process. Without amendment, every single case seen by a local authority would have required referral to HES, which would have represented a substantial inefficiency.

Reason for taking the power

45. The amended provision addresses the need to ensure that not every application for listed building consent is referred to HES for comment before the planning authority makes a decision. The power to specify cases in regulations allows flexibility over time, as an understanding of what types of case it will be useful to consult upon becomes clearer as the process is operated in practice. It is considered that this level of procedural requirement is more appropriately left to regulations to deal with changing circumstances over time.

Choice of procedure

46. 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, as the principle of regulating the volume of consultation is already established, and the regulations will serve to fine-tune this in response to practical experience and in relation to any changes in capacity at local authorities.

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