

Rùnaire a' Chaibineit airson Cultair agus Cùisean an Taobh a-muigh
Cabinet Secretary for Culture and External Affairs
Fiona Hyslop MSP/BPA

T/F: 0845 774 1741

E: scottish.ministers@scotland.gsi.gov.uk



Stewart Maxwell MSP
Convener
Education and Culture Committee
T3.40
The Scottish Parliament

In 2014 Scotland Welcomes the World



Your ref/Ur faidhle: HES Bill
26 June 2014

Dear Stewart,

This letter is the Scottish Government's response to the Education and Culture Committee's Stage 1 report on the Historic Environment Scotland Bill, as published on 12 June 2014. I have addressed each of the points you raise in detail in Annex A.

I also want to take this opportunity to thank the Committee for such a well-considered and thorough report.

I welcomed the opportunity for further discussion of the Bill in the Stage One Debate on 19 June and particularly the strong consensus shown across the chamber for the principles which are set out in the Bill and for the Historic Environment Strategy. I have referred in the response at Annex A to two key issues raised in the debate, but will of course take under consideration all of the points made in the debate.

Firstly, I confirm that I have noted a desire for additional clarity on the operation of HES in relation to other parts of the planning system and in particular to the role of Local Authorities. Many of the functions of HES in the planning system are described in other legislation, which will be amended by this Bill to streamline the system for designation and regulation of the historic environment. In order to bring additional clarity to this area in particular, I can confirm that we will provide to the Committee, in advance of Stage 2, "as amended" versions of the other relevant Acts, showing the changes which would be made in consequence of this Bill.

Secondly, I wanted to emphasise the comments I made in closing the debate in relation to my powers of direction over HES, a topic which was also raised in the Committee's report. As a Minister, I cannot direct the Strategic Forum of the Historic Environment Strategy and will work towards consensus-based decision making. I can, however, direct HES on strategic matters and on properties in care, as they are a responsibility of Ministers delegated to delegated to HES. However, I cannot and would not direct on individual grant decisions, on listing and scheduling decisions or on acquisitions or disposals and curatorial matters, as these are responsibilities transferred to HES.



In the interests of completeness, I have included at Annex B the Scottish Government response to Delegated Powers and Law Reform Committee report, which covers some matters not directly raised in the lead Committee's report.

I look forward to the opportunity to discuss the Bill further during Stage Two. If I, or my officials, can provide additional information in the meantime then please do not hesitate to contact me.

FIONA HYSLOP

Education and Culture Committee's Stage 1 report.

The Scottish Government welcomes the Committee's report. This letter responds in turn to each of the specific matters raised by the Committee, with the relevant Committee points shown in **bold**.

Benefits: **We welcome the intended benefits of the merger, but recognise questions have been raised by some witnesses. The extent to which the Bill and the strategy actually deliver all the anticipated benefits will only be demonstrated over time, and we intend to assess at a later date whether improvements have materialised.**

I am very keen to ensure that the benefits which I believe this Bill will deliver for Scotland's historic environment are fully realised and I will be monitoring the establishment and operation both of Historic Environment Scotland (HES) and the Strategy to ensure that they meet the high aspirations which have been outlined for them. In the case of the Strategy a group chaired by the Built Environment Forum Scotland has been set up which will concentrate on how to measure success at a sectoral level, and HES will develop a comprehensive monitoring regime for its own work. I welcome the Committee's support in this important matter.

Corporate Plan: **We recommend such plans should, after a suitable period of time has elapsed, also set out which objectives have or have not been achieved i.e. they should be both forward and backward looking.**

I accept the principle that HES's Corporate Plan should provide an analysis of the performance of HES against its key objectives. Whilst it will be for the Board of HES to decide the content of the Corporate Plan, the final plan will be agreed with Ministers who will also share the expectation that any plan will provide a robust appraisal of previous performance. Please also note that other forms of reporting will also exist in the form of annual reports and accounts as set out in schedule 1, paragraphs 13 and 14 of the Bill.

Role of HES: **Given the concerns raised by various bodies, it is essential that all stakeholders have a shared understanding of Historic Environment Scotland's role and how it is to interact with other relevant bodies. The Scottish Government should ensure this is explained as clearly as possible during the passage of the Bill and beyond.**

As I stated during the debate, I entirely accept the principle expressed here and will ensure officials continue to work with stakeholders to promote mutual understanding and awareness. Throughout the process of the Bill to date, and more broadly in relation to the Strategy, we have welcomed the engagement of stakeholders from across Scotland, and their continued support for this process will be critical to achieving our shared aspirations for the historic environment.

Marine responsibilities: **We call on the Scottish Government to clarify the role of Historic Environment Scotland in relation to the marine environment and how it will interact with Marine Scotland.**

I am happy to offer the clarification requested. As set out in paragraphs 59 and 132 of the Policy Memorandum to the Bill, I have considered carefully how best to engage HES in relation to the protection and regulation of activities in the marine zone.

I have decided that the best course of action is to position HES consistently with Scottish Natural Heritage within the integrated system of designation and regulation operated by Marine Scotland under the Marine (Scotland) Act 2010, and the Bill provides for this.

We are conscious that, in this one area of its work around designation and regulation of the historic environment, HES will not undertake designations at its own hand, instead acting as an expert advisor. The advantage of maintaining an integrated system for all activities in the marine zone, has been assessed as outweighing the attractions of having a single body as designation authority for all historic assets on land and at sea. Therefore, marine designation and regulation will continue to be carried out by Ministers, with HES acting as expert advisor, seeking to enable and empower action in the most effective manner.

The criteria for designation of Historic Marine Protected Areas under the Marine (Scotland) Act 2010 are sufficiently broad to include submerged archaeological sites which were once on dry land, as well as the sites of shipwrecks and other marine remains, so I am confident that there are no gaps between the terrestrial and marine provisions.

HES will of course continue to be involved in investigating and recording activities, as HS and RCAHMS are at present.

Regional structure / local decision-making: **We welcome the Cabinet Secretary's assurance that the current regional approach should continue and that the Bill should not lead to a more centralised approach to decision making. However, we believe this assurance needs to be underpinned in some way, noting both the importance of the historic environment to local communities across Scotland, and the concerns raised in Orkney. We therefore suggest the Bill would be enhanced by requiring Historic Environment Scotland to exercise its functions in a way that takes due account of local issues and local decision making processes.**

We note and understand these concerns, which we feel represent two rather different points: the way in which decisions are made within HS and in future HES, and secondly the need for HS/RCAHMS and in future HES to interact effectively with local authorities and communities on matters of local concern.

On the first of those points, I am sure that Committee will agree that there are functions which do need to be exercised with absolute consistency across the whole of Scotland – for example the criteria applied to listing buildings or scheduling monuments. I understand Committee's concern to be about avoiding unnecessary and unhelpful over-centralisation of decision-making. While the internal structures and operational arrangements of HES will be for its board and Chief Executive, when appointed, I will ensure that the Committee's comments are drawn to the attention of the board.

On the second point, as I said in the debate, this Government recognises the importance of the many local communities and communities of interest which make up the nation. I am happy to accept the point of principle here. We are considering adding HES to the list of bodies with an explicit responsibility to engage where appropriate in Community Planning Partnerships, and will consider other ways in which this aspect can be addressed as the Bill moves forward.

Definition: **On balance, we agree the term 'historic environment' need not be defined in the Bill. The most important consideration is that the term has to be clearly defined somewhere, in order to avoid possible legal confusion about the division of responsibilities between Historic Environment Scotland and other relevant bodies. There appears to be general agreement that the definition in the strategy is**

sufficiently clear, although the Scottish Government should continue to ensure all stakeholders have a shared understanding as the Bill and strategy are implemented.

We welcome this agreement with our own position, and as already noted above and mentioned in the debate, I confirm that we will endeavour to ensure that all partners in the Strategy continue to work to a shared understanding, and that HES (itself a partner in the delivery of the Strategy) uses that shared understanding as the basis for the discharge of its own functions as set out in the Bill.

It is also important that the definition which we will use, the development of which was itself a partnership exercise, is able to adapt to changes in conservation thinking, for example the recent increase in interest in the industrial heritage. This very point was made forcefully in the debate. Stakeholders were particularly keen that the definition could flex to meet these changes. I believe this means it is better placed therefore within Our Place in Time. The new forum for the Strategy will also keep an overview of this issue and act as a catalyst for ensuring sector-wide understanding is maintained and enhanced.

Wider impact on sector funding: **We note the funding concerns expressed by some bodies in the historic environment sector but accept these may not materialise. We also note the suggestion that Historic Environment Scotland, as a result of previous reductions in Scottish Government funding to Historic Scotland, may have to make up this shortfall from the overall ‘pot’ of donations available to the sector. However, we do not consider there is evidence to suggest this will materialise. As the Cabinet Secretary set out, Historic Scotland has already responded to previous funding reductions by seeking to maximise income from other sources.**

We welcome the Committee’s judgement on this matter, which accords with our own view. We are aware that this is likely to remain a matter of considerable sensitivity for stakeholders, and will keep it under close review.

Responsibility for repair of properties in state care: **We appreciate the Scottish Government cannot currently quantify the extent of the repair and maintenance bill for ‘properties in care’, but welcome its commitment to doing so by April 2015. Given the strong concerns about this issue, the Scottish Government should clarify how such repairs are likely to be paid for – it is not clear to stakeholders whether the Scottish Government, Historic Environment Scotland or the property owners would be responsible.**

I am happy to offer clarification as requested, setting out the very clear commitments I gave during the debate, and will take action to ensure this is communicated to stakeholders.

- There is no question of the owners of properties in care being responsible for repairs where responsibility for caring for sites has been taken on by Ministers under guardianship agreements.
- Ministers will remain responsible for repairs to sites which they own, sites which are subject to guardianship agreements (number) and any sites which have been taken on under other arrangements, for example by lease.
- Ministers will set out, in a scheme or schemes of delegation, the responsibilities to be undertaken by HES in respect of these properties, and also the measures by which delivery of these responsibilities will be assessed.

- Ministers will agree with HES an overall financial settlement which includes a quantum in recognition of the needs arising from these delegated responsibilities and also a quantum in recognition of the income expected to be generated from the visitor and other operations at and associated with the properties.

Charitable status: **We acknowledge the Bill does not directly confer charitable status on Historic Environment Scotland but highlight that significant financial benefits could be realised should it be granted.**

I welcome this acknowledgement. Ministers have made it clear that it will be for the new body to decide if, when and in what configuration it seeks charitable status. Ministers do believe that the functions set out in the Bill for HES are capable of meeting the charitable tests, but acknowledge this is a matter for OSCR to determine. I noted OSCR's helpful comments in its regard in its written evidence to the Committee.

The business model being developed for the new body does not depend for its viability upon charitable status being secured.

Conflict of interest: **We understand the concerns expressed by some stakeholders about a possible conflict of interest. However, we acknowledge that such risks are not new and note, for example, that Historic Environment Scotland will not be able to award grants to itself. We welcome that bodies such as NTS have made positive suggestions as to how their concerns could be addressed. The Cabinet Secretary should continue to consider such suggestions, as the successful implementation of the Bill and the strategy will depend to a considerable extent on partnership working and the goodwill of all parties involved.**

I understand the concerns expressed by some stakeholders, and welcome the Committee's comments. I also welcome the very constructive role played by NTS and many other stakeholders, not just in shaping these proposals but in developing and delivering the sector-wide strategy, and will continue to work in partnership to address remaining concerns.

I would note that, during the Committee's gathering of evidence and in the preceding public consultation, there was a lack of any substantive evidence for existing issues in respect of conflicts of interest, which confirms my assessment that internal separation of functions is currently effective but needs to continue to be effectively demonstrated. I am committed to continuing the existing high level of publication and transparency, and will indeed be increasing this in several ways, notably by publication of all applications and decisions on scheduled monument consent cases. I believe this will further serve to reassure those who still have concerns in this respect.

Curatorial independence: **Given the correspondence quoted at paragraph 68, we ask the Scottish Government to explain in more detail the Bill's implications for the curatorial independence of Historic Environment Scotland.**

I offer clarification as requested, noting that what follows also has a relationship to the comments above in relation to the topic of conflicts of interest.

Section 12 of the Bill covers Directions and Guidance and gives Scottish Ministers the power to give '*directions of a general or specific nature to Historic Environment Scotland about the exercise of its functions*'.

There is an exclusion in Section 12(2)(a) which means that Ministers may not direct HES on the exercise of its functions '*with regards to any particular historic property, collection or*

object'. This means that Ministers could not direct, for example, on a decision to designate a building as a listed building, or direct HES to acquire a particular collection. This ensures that HES has the required curatorial independence, at an operational level, on how it carries out its own functions and manages its own collections.

Section 12(3) provides that 12(2)(a) *'does not apply in relation to the exercise of functions which Historic Environment Scotland has by virtue of a delegation by the Scottish Ministers under section 3 or 7'*. This means that Ministers may direct HES where they are exercising functions **on behalf of Ministers** in relation to the properties in care and associated collections. This is important as in this case HES would be carrying out Ministerial functions and therefore Ministers need to be able to direct on the exercise of those functions.

To illustrate the interaction of these provisions, some examples might assist. If, in relation to a particular property in care, Ministers wished to direct HES to remove that property from the schedule of monuments, that would not be an area on which Ministers could direct, as the function of maintaining the schedule is not a function delegated to HES but one which HES is given under Part 1 of schedule 2 to the Bill, so the section 12(2)(a) exclusion would apply. However, if Ministers felt that the standards set out in a scheme of delegation, covering how properties should be cared for, were not being met at a particular property, then Ministers could if required direct that HES should address this, in relation to that specific property, under section 12(3), as that would be a delegated function.

We will endeavour to ensure that stakeholders understand the detail here, because we believe it delivers exactly what has been sought. Stakeholders have expressed concern about what has been termed a "level-playing field": securing a position whereby Ministers cannot, for example, direct HES to give scheduled monument consent for works to a property in care of a character which would not be permitted at a similar, privately-owned property not in Ministers' care.

We believe that the provisions of the Bill achieve this "level playing field" while at the same time ensuring that Ministers retain sufficiently strong ability to intervene to ensure that conservation of, and public access to, the properties in Ministers' care are maintained to an appropriate standard.

Delegation of properties in care and associated collections work: **We would welcome confirmation from the Scottish Government that there is minimal risk of a legal challenge arising, and that it has consulted fully on these matters with the private owners in question.**

Scottish Government has looked into this carefully and considers that it is clear that it is within the scope of the powers available under an Act of the Scottish Parliament to provide that functions exercisable by the Scottish Ministers in relation to properties in care may be delegated to another person such as Historic Environment Scotland. The Scottish Government considers that this is the case irrespective of whether the function to be delegated derives solely from legislation or from an agreement. An Act of the Scottish Parliament can override a contractual provision and section 3(3) and 7(2) make clear that where functions arise from an agreement they may be delegated despite any prohibition or restriction in that agreement.

We are also aware that analogous arrangements have been in place in England since 1983, under the terms of the National Heritage Act, and our advice from officials there is that delegation of Ministerial functions to another body has not been challenged. The number of properties in care is of the same order of magnitude in the two countries.

Interaction between Strategy and HES governance: **The Scottish Government should clarify how the overarching historic environment board and the separate Historic Environment Scotland board are expected to work together, in particular where any problems are experienced in implementing the strategy. It should also clarify how Historic Environment Scotland's corporate plan will take account of the priorities and outcomes established through the strategy, which will be reported on by the overarching historic environment board. In short, we want to be satisfied that the two boards will work effectively together without duplication of effort, and in a way that will be understandable to the sector.**

The strategy was co-produced by many bodies in the sector and beyond, and informs the priorities of all organisations and individuals working with the historic environment.

A three-tiered governance structure involving a range of stakeholders will support the implementation of the Strategy:

- The Strategic Forum chaired by me will act as the champion for the Strategy and have oversight of strategic delivery;
- The Operational Group will co-ordinate and manage activities identified as key priorities for stakeholders; and
- Working groups will agree and enable delivery of detailed work plans as identified.

We have sought wide ranging representation of the many interests in the governance structure but stakeholders will also have their own organisational governance arrangements in place to which they will be ultimately accountable.

The structure will enable contributors at all levels to work collectively towards its delivery. A good example of this is the Heritage Tourism Group, which brings together key delivery partners with Visit Scotland and others to provide a meaningful forum to ensure we are all optimising the benefits of this important asset to Scotland's tourism industry. We all face tough choices around resourcing and I believe this accountability model stresses the need for everyone to play their part.

The Strategic Forum will seek to agree how we take the work of the strategy forward collectively. This will include agreeing how accountability for the delivery for the various work streams will be shared.

The Operational Group will be charged with giving effect to the framework for delivery set out by the Overarching forum, to which it will report.

I will be responsible for ensuring the Strategic Forum reports publically at regular intervals on its progress, highlighting any issues. The exact form of how they will report has yet to be agreed and will be a matter for the Forum itself to decide.

While the governance of Historic Environment Scotland is separate from the Strategy, to ensure effective coordination the Chair of HES will sit on the Strategic Forum and the Chief Executive of HES will sit on the Operational Group.

Likewise, as a key partner in the Strategy, Ministers will expect Historic Environment Scotland to work alongside other bodies in the sector in discharging its functions and delivering the Strategy. To underline this, a requirement to contribute to the development and delivery of strategies in relation to the historic environment is built into HES functions in

the Bill. Given that requirement, it would be our expectation that all key documents would make explicit reference to the role of HES in delivering the wider Strategy

Resolving disagreements at strategic level: **We seek an explanation from the Scottish Government of how relevant bodies are likely to work together on prioritisation, for example, in determining which parts of the historic environment most need to be repaired. We ask the Scottish Government to clarify where the ultimate decision-making power on this crucial issue lies.**

As I stated in my follow-up letter to the Committee after the session on 20 May at which I gave evidence, and as I re-stated during the debate, the Strategy will only work as a voluntary collaboration. If there are points on which key players cannot find agreement or accommodation, then we will need to work around these or approach issues from fresh perspectives.

Although I will chair the Strategy's top-level Forum, my task there will be to promote and support consensus amongst the participants and to ensure that the Scottish Government and HES play their full role in supporting the delivery of the Strategy. I clearly could not direct members of the Strategic Forum, nor would I seek to do so.

In the unlikely event that the appointed board of HES was not, in my view, playing a sufficiently strong role in addressing matters of concern to the wider sector, as captured through the medium of the Strategy, then I would if necessary direct the board of HES to consider their duty in the Bill to work in partnership and engage more effectively.

For the other participants in the Strategy, their own governance arrangements will apply. In short, the "ultimate decision-making power" is distributed and consensual, and is so by design.