

# **HISTORIC ENVIRONMENT SCOTLAND ACT 2014**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

#### **Part 1 – Historic Environment Scotland**

##### ***Section 1 – Historic Environment Scotland***

10. **Section 1** provides for the creation of a new body to be known as Historic Environment Scotland, with the functions conferred on it by this Act and any other enactment. This section introduces schedule 1 to the Act, which makes provision about the status, membership procedures and powers of Historic Environment Scotland. Further notes on schedule 1 are given in paragraphs 105 to 117.

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

11. **Section 2** sets out the functions of the Historic Environment Scotland. Subsection (1) sets out that the new body has the general function to investigate, care for and promote Scotland's historic environment. Subsection (2) expands on the general function.
12. Subsection (2)(a) gives Historic Environment Scotland the function of identifying and recording the historic environment. It might, for example, do this by undertaking field and aerial survey programmes to identify new sites or gather more information about existing sites, and creating records of discoveries.
13. Subsection (2)(b) gives Historic Environment Scotland the function of understanding and interpreting the historic environment. It might do this by undertaking research into historic buildings to determine their date and building sequence and presenting the results to a variety of audiences in various media.
14. Subsection (2)(c) gives Historic Environment Scotland the function of learning about, and educating others about, the historic environment. This might be done by participating in collaborative research programmes with individuals, academic institutions and other bodies, or by acquiring knowledge of traditional skills and techniques and helping to maintain these by training new craftspeople, or by using material in the collections to contribute to teaching materials for schools.
15. Subsection (2)(d) gives Historic Environment Scotland the function of protecting and managing the historic environment. It could do this by engaging with the development planning process to ensure that the historic environment is considered in strategic development proposals. Its work in designating scheduled monuments, listed buildings, gardens and designed landscapes and battlefields will provide the foundation for protection of these important assets.
16. Subsection (2)(e) gives Historic Environment Scotland the function of conserving and enhancing the historic environment. Its work in this respect might include undertaking

or arranging hands-on maintenance and repair work at the visitor properties it manages, or supporting work to improve the general condition of a conservation area.

17. Subsection (3) gives Historic Environment Scotland the function of managing its collections as a national resource for reference, study and research. Subsection (4) expands on this function. Definitions of “collection” and “object” are given in section 14 of the Act and explained under ‘Section 14 – Interpretation of Part 1’ in paragraphs 77 to 81.
18. Subsection (4)(a) sets out that in exercising its section 3 function Historic Environment Scotland must do so with a view to preserving, conserving and developing its collections. It might, for example, do this by engaging specialist conservators to maintain or bring objects in the collections to a good condition, by ensuring that the objects in its collections are stored and accessed in ways which seek to minimise deterioration, or by adding significant new material to its collections to ensure that their value and currency are maintained. Such activities might be undertaken within the framework of a collections strategy.
19. Subsection (4)(b) sets out that in exercising its section 3 function Historic Environment Scotland must do so with a view to making the collections accessible to the public and to persons wishing to carry out study and research. This could be achieved by making public search rooms available so that objects in the collections can be brought to persons wishing to consult them or by digitally copying objects and making them available online.
20. Subsection (4)(c) sets out that in exercising its section 3 function Historic Environment Scotland must do so with a view to exhibiting and interpreting objects in the collections. Ways of doing this might include organising the public display of objects on a particular theme or topic, and delivering audio, visual or audio-visual aids to assist those wishing to understand the context and cultural significance of the exhibits. It might collaborate to exhibit collections internationally to encourage tourism to Scotland, or seek the loan of another body’s collections to support particular exhibitions. This function will also be delivered online.
21. Subsection (5) sets out the manner in which Historic Environment Scotland is to exercise its functions.
22. Subsection (5)(a) sets out that in exercising its functions Historic Environment Scotland must do so with a view to encouraging education and research. This might include partnering with academic institutions and other bodies in research projects, or seeking to encourage school and university students to use its collections or visitor sites in connection with curricular studies.
23. Subsection (5)(b) sets out that in exercising its functions Historic Environment Scotland must do so with a view to promoting and contributing to understanding and enjoyment of the historic environment and of its collections. Activities such as organising public events and activities at the properties that it looks after, publishing accessible and useful information and running hands-on activities to engage the public in the process of discovery would be among the ways it could achieve this.
24. Subsection (5)(c) sets out that in exercising its functions Historic Environment Scotland must do so with a view to promoting the diversity of persons accessing the historic environment and its collections. It might, for example, invest in works to improve physical access to the monuments and historic buildings it presents to the public or deliver community engagement activities that are focused on increasing diversity and tailored to meet the needs of particular groups and individuals. Online access to its services might be particularly important here.
25. Subsection (5)(d) sets out that in exercising its functions Historic Environment Scotland must do so with a view to offering and promoting leadership in relation to the historic environment. This could include leading collaborative projects to develop

standards in connection with the management, protection and conservation of the historic environment. It might also lead by example: demonstrating high standards of conservation work or producing attractive and informative publications.

26. Subsection (5)(e) sets out that in exercising its functions Historic Environment Scotland must do so with a view to working in collaboration with other persons (whether in partnership or in other ways). Ways of doing this might include providing training and support to groups wishing to identify and record their local historic environment, or supporting owners who wish to repair or maintain historic buildings in the most authentic manner. It might work with others to develop online solutions that fulfil specific user needs by providing integrated access to information and digitised collections held by several different collections.
27. Subsection (5)(f) sets out that in exercising its functions Historic Environment Scotland must do so with a view to contributing, as appropriate, to the development and delivery of policies and strategies in relation to the historic environment. This might involve active participation in and contributing expert knowledge to professional forums and committees. This strategic approach is currently represented by Scotland's Historic Environment Strategy, in which Historic Environment Scotland will be a key partner.
28. Subsections (6) and (7) allow Historic Environment Scotland to support and assist (including by financial support and assistance) any other person carrying out functions similar to its own functions.
29. Subsection (8)(a) requires Historic Environment Scotland, when exercising its functions, to have regard to wider relevant government policies and strategies. It might do this, for example, by ensuring that a modern building which acts as accommodation for its staff is compliant with government policies on energy efficiency and waste reduction, by ensuring that the management of visitor sites is in accord with biodiversity requirements or by considering wider regeneration objectives when allocating grants and loans under its various programmes.
30. Subsection (8)(b) requires Historic Environment Scotland, when exercising its functions, to have regard to the interests of local communities, as may be appropriate in the circumstances. It will be for HES to decide on what is appropriate in each case.

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

31. **Section 3** allows the Scottish Ministers to delegate their functions (statutory and non-statutory) in relation to properties in care to Historic Environment Scotland or any prescribed person Ministers consider appropriate. This means that Ministers may only delegate functions under this section to persons who have been first prescribed by order.
32. Subsection (3) allows for delegation to take place despite the existence of prohibitions or restrictions on delegation in agreements.
33. Subsection (5) makes it clear that any revenue received as a result of the exercise of any delegated function is the revenue of the person to whom the function is delegated unless Ministers provide otherwise in the delegation. Thus, Historic Environment Scotland would retain money paid for admittance to visitor properties.
34. Subsection (6) makes it clear that delegating functions does not affect the ultimate responsibility of the Scottish Ministers for properties in care.
35. Subsection (8) requires Ministers to publish delegations under subsection (1), in the interests of transparency.
36. The scheme(s) of delegation from the Scottish Ministers to Historic Environment Scotland or other bodies would specify expected standards of conservation and maintenance and degree of public access, and the measures by which achievement of

these would be monitored. Schemes of delegation could also deal with matters such as charging for access and for additional services.

#### ***Section 4 – Properties in Care***

37. Under section 4, the Scottish Ministers are under a duty to maintain and publish a list of “properties in care”, functions relating to which can be delegated under section 3.
38. “Property in care” means 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. Currently there are 345 such properties, consisting of a mixture of properties where Ministers hold title, properties where guardianship agreements have conferred management responsibilities on Ministers in perpetuity, and a small number of properties which are leased or held by other means. In all cases, these properties are held for the purpose of being conserved and made accessible for the public.

#### ***Section 5 – Power of entry to investigate the historic environment***

39. **Section 5** gives Historic Environment Scotland the power to enter land (including buildings or other structures on the land) to identify and record the historic environment, subject to certain provisions set out in the subsections.
40. Subsections (2) to (4) set out details of how this power may be exercised, including restrictions on the power, for example the exclusion of access to dwellings. Similar statutory powers of access, which already exist for Ministers and their employees, are only used as a last resort after every effort to contact the owner or occupier of a property has failed. These powers have been exercised very seldom – less than ten times in total over the past 30 years.
41. Subsection (5) makes it a criminal offence to (without reasonable excuse) intentionally obstruct a person exercising the powers of entry under subsection (1). The offence is punishable on summary conviction up to a maximum fine, set in subsection (6), of level 3 on the standard scale (currently £1000).

#### ***Section 6 – Acquisition, deposit and disposal of objects***

42. **Section 6** specifies Historic Environment Scotland’s powers in relation to the acquisition, acceptance on deposit of and disposal of objects. Historic Environment Scotland may acquire objects (either by purchase, exchange or gift) or accept objects on deposit to develop the collections. Deposit is an arrangement whereby a depositor charges a body (in this case Historic Environment Scotland) with the safe-keeping of an object or collection for a fixed or indefinite period of time, with ownership of the property resting with the depositor and subject to such conditions as are agreed between the body and the depositor. Deposit, which is common practice in a wide range of collections, creates additional requirements when objects are being disposed of, as set out below, in paragraphs 44-53.
43. Subsection (2) makes clear that these powers are in addition to any other powers of acquisition or acceptance on deposit that Historic Environment Scotland may have, as HES may in future be given additional statutory powers under other legislation, for example under the Museums and Galleries Act 1992.
44. Subsection (3) sets out the circumstances in which Historic Environment Scotland may dispose of any object from its collections.
45. The case for disposal in subsection (3)(a) is that an object is a duplicate of, or similar to, another object in the collections, for example where a collection of architectural drawings includes original drawings along with multiple un-annotated copies it may not be desirable to keep the copies.

46. The case for disposal in subsection (3)(b) is that Historic Environment Scotland considers that the object is not required for the purposes of the collections. This would allow Historic Environment Scotland to ensure that objects in the collection are relevant to the historic environment and consistent with its collecting policy.
47. The case for disposal in subsection (3)(c) is that because of damage, deterioration or infestation by destructive organisms, the object is no longer of use for the purposes of the collections. This would allow disposals in cases where an object was damaged to such an extent that it had lost all information content and was therefore not worth conserving, for example a heavily water-damaged document.
48. The case for disposal in subsection (3)(d) is that the object is hazardous. This provision would allow disposal in cases where an object is hazardous, for example where a material such as a cellulose nitrate film has degraded to the point of posing a possible fire hazard. The key test here would be whether any benefits of retaining such objects were outweighed by the risks.
49. The case for disposal in subsection (3)(e) is that the Scottish Ministers agree to the disposal. This would allow disposal in a case where there was a moral claim on an object that would ordinarily not be eligible for disposal under subsection (3)(a)-(d)
50. Subsection (4) clarifies that such disposals may be made by sale, exchange, gift, return or destruction. It is implicit that disposal (other than return) of an object is only possible where Historic Environment Scotland holds the object as owner.
51. Subsection (5) makes clear that these powers are in addition to any other powers of disposal that Historic Environment Scotland may have, as HES may in future be given additional statutory powers of acquisition and disposal under other legislation, for example under the Museums and Galleries Act 1992.
52. Subsection (6) sets out that where an object is subject to a prohibition or restriction on disposal, as in the case of an object on deposit, Historic Environment Scotland cannot dispose of the object without the consent of the person having the right to enforce the prohibition or restriction. However where an object is damaged, has deteriorated or become infested and is no longer of use for the purposes of the collections, HES can dispose of that object without consent if they have taken all reasonable steps to contact the appropriate person. HES may also dispose of any object which is hazardous even without consent. It is implicit that an object on deposit or loan is, by its very nature, subject to a restriction or prohibition on disposal.
53. These provisions protect the interests of depositors and lenders and will serve as a reminder to Historic Environment Scotland to check for any such prohibitions or restrictions when considering any disposal under subsection (3).
54. Subsection (7) clarifies that in this section and in section 7, references to Historic Environment Scotland's collections are references to collections of objects which are owned by, in the custody of, or otherwise under its management and control, excluding those collections they have been delegated the management of under section 7.

### ***Section 7 - Borrowing and lending of objects***

55. Subsection (1) of section 7 allows Historic Environment Scotland to borrow or accept loans of historic objects for exhibition, study or research while subsection (2) allows Historic Environment Scotland to lend any historic object from its collections.
56. Subsection (3) specifies the factors that Historic Environment Scotland must have regard to when deciding whether or not to lend an object, and when deciding how long to lend for and any conditions of lending.
57. The factors to which Historic Environment Scotland must have regard are: the interests of the users of the collections; the suitability of the prospective borrower; the purpose of



the loan; the physical condition and degree of rarity of the object, and any risk to which the object is likely to be exposed and the extent to which that risk can be mitigated or indemnified.

- 58. Subsection (4) makes clear that these powers are in addition to any other powers of borrowing, accepting loans or lending that Historic Environment Scotland may have, as Historic Environment Scotland may in future be given additional statutory powers under other legislation.
- 59. Subsection (5) protects prohibitions or restrictions on lending that donors have attached to objects in the collections and is intended to serve as a reminder to Historic Environment Scotland to check for any such conditions when considering lending objects under subsection (2). Prohibitions or restrictions on lending may only be overridden with the consent of the person having the right to enforce the condition or if the name and contact details of such a person cannot be ascertained despite Historic Environment Scotland taking all reasonable steps to ascertain them.

### ***Section 8 – Delegation of functions in relation to collections***

- 60. **Section 8** enables the Scottish Ministers to delegate the management of their collections to Historic Environment Scotland or to any prescribed person Ministers consider appropriate. This means that Ministers may only delegate functions under this section to persons who have been first prescribed by order.
- 61. Subsection (2) allows for delegation to take place despite the existence of prohibitions or restrictions on delegation in agreements.
- 62. Subsection (3) clarifies that such delegations can apply to a particular collection, a group of collections or all collections. The same subsection also clarifies that such delegations can apply to a particular object in a collection, or a group of such objects.
- 63. Subsection (4) makes it clear that any revenue received as a result of the exercise of any delegated function is the revenue of the person to whom the function is delegated unless Ministers provide otherwise in the delegation. Thus, money paid by a publisher in return for the right to use images of objects in delegated collections would remain with Historic Environment Scotland.
- 64. Subsection (5) makes it clear that delegation of functions does not affect the ultimate responsibility of the Scottish Ministers.
- 65. Subsections (6) and (7) require that the Scottish Ministers must make such delegations in writing, that they can be varied or revoked at any time and that they must be published.
- 66. Subsection (8) clarifies that references in this section to the Scottish Ministers' collections are to collections of objects which are owned by, in the custody of, or otherwise under the management and control of the Scottish Ministers – as distinct from the collections of Historic Environment Scotland itself by virtue of section 6 and any transfer of property scheme under paragraph 4 of schedule 5.

### ***Section 9 - Corporate planning***

- 67. **Section 9** places a duty on Historic Environment Scotland to prepare a corporate plan at the beginning of each planning period which must be submitted to the Scottish Ministers for approval. Subsection (2) outlines what such a plan must contain, subsection (3) describes the method for its approval and subsection (4) requires the plan once approved to be published and laid before the Scottish Parliament. Subsections (5) and (6) allow for modifications to the agreed plan. Subsection (7) sets the normal planning period as 3 years and allows for a different period for the initial plan (to be specified by Ministers by order), while subsection (8) allows for the normal planning period to be varied by order of Ministers – if for example experience shows that a longer or shorter period

is better suited to the cycle of planning and resource allocation. Ministers will be also able to offer directions and guidance on the content and presentation of corporate plans under the provisions of section 13 (see below) if this is necessary.

### ***Section 10 – Grants to Historic Environment Scotland by the Scottish Ministers***

68. **Section 10** allows the Scottish Ministers to make grants to Historic Environment Scotland. These may be for general or particular purposes – for example towards a named function or project. It also provides for such grants to be subject to such terms and conditions as the Scottish Ministers may determine. Examples might include additional funding to accelerate the delivery of a shared research project or to create a shared national resource, such as a building conservation skills training centre. Historic Environment Scotland's funding will normally be dealt with in corporate plan and annual financial allocation discussions, with the power in this section being for use only in exceptional circumstances.

### ***Section 11 – Grants and loans by Historic Environment Scotland***

69. **Section 11** allows Historic Environment Scotland to make grants and loans to such persons as it considers appropriate in furtherance of its functions subject to such terms and conditions as it may determine.
70. At present, grant programmes operated by Historic Scotland on behalf of Ministers include grants for the repair of historic buildings, grants for the care and maintenance of ancient monuments, grants for archaeology projects, grants in support of conservation skills training and grants to voluntary organisations. Total grant expenditure is in the order of £15 million per annum.
71. These grants are distributed under a variety of different powers held by Ministers, and there are a variety of terms and conditions associated with each power. The Act gives Historic Environment Scotland a single power which will allow it to take over all existing grant-giving activities and will promote a more responsive grant programme that can adapt to current needs and a less complex approach to programme terms and conditions.
72. Subsection (3) clarifies that such grants or loans made by Historic Environment Scotland must be made in accordance with any general authorisation given by the Scottish Ministers to Historic Environment Scotland. Such an authorisation might, for example, set the broad terms and eligibility/ranking criteria of all grant programmes which Historic Environment Scotland was expected to operate over the planning period. However, an authorisation would not extend to allowing Ministers to give direction in relation to the outcome of particular grant or loan applications.

### ***Section 12 - Advice, information and assistance***

73. **Section 12** places a duty on Historic Environment Scotland to provide the Scottish Ministers with advice, information and assistance on any matter relating to the organisation's functions, and also allows Historic Environment Scotland to offer these to Scottish Ministers. It also allows Historic Environment Scotland to provide advice, information and assistance to any person. This last provision is particularly significant, since Historic Environment Scotland will employ staff who have a very varied body of expertise and skills and will frequently be asked for advice.

### ***Section 13 - Directions and guidance***

74. **Section 13** allows the Scottish Ministers to direct Historic Environment Scotland (both generally and specifically) in relation to the exercise of its functions.
75. Subsection (2) provides that the Scottish Ministers will not be able to direct in respect of particular historic properties, collections or objects or the making of grants and

loans. This is to provide for curatorial independence, allowing for decision-making to be led solely by expert knowledge and judgement in these key areas. However, subsection (2)(a) which prevents Ministers from directing on a particular historic property, object or collection, does not apply (by virtue of subsection (3)) in cases where Historic Environment Scotland is exercising functions delegated by Scottish Ministers under section 3 or 8. This means that with regards to the properties in care and associated collections Ministers may give directions to Historic Environment Scotland, in recognition of the fact that these functions remain the responsibility of Scottish Ministers and are only delegated to Historic Environment Scotland.

76. Historic Environment Scotland must comply with directions and must have regard to guidance issued by the Scottish Ministers (subsection (4)). Directions must be given in writing (subsection (5)) and the Scottish Ministers must publish directions and guidance (subsection (6)).

### ***Section 14 – Interpretation of Part 1***

77. **Section 14** sets out how the terms “collection”, “object” and “property in care” are to be interpreted in Part 1 of the Act.
78. “Collection” in Part 1 means a collection of objects usually with some kind of shared characteristic, for example created by the same individual or referring to the same place. It is used in this Part to refer specifically to collections of objects, rather than to collections of buildings or sites. The term can refer to the entire collection of material managed by Historic Environment Scotland or smaller groupings within the ‘parent collection’.
79. The collections that will be managed by Historic Environment Scotland include material of many different types and in many different formats. The term “object” has been used throughout the Act to refer to a ‘thing’ curated by Historic Environment Scotland. The definition provided in the Act makes it clear that objects may be physical artefacts, documents or indeed anything, provided only that it is of relevance to the historic environment.
80. “Object” in the Act means an object, document or other thing having historical, archaeological, architectural or cultural significance or interest relating to the historic environment generally or with particular reference to Scotland. The term “document” used here takes its meaning from schedule 1 to the Interpretation and Legislative Reform Scotland Act 2010 and means “anything in which information is recorded in any form (and references to producing a document are to be read accordingly)”. “Document” would cover information recorded in electronic form, for example, digital images, databases, spread sheets and 3-D and 2-D spatial data.
81. “Property in care” has the meaning given to it in section 4.