

IVORY BILL

Memorandum from the Department for Environment Food and Rural Affairs to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Ivory Bill (“the Bill”). The Bill was introduced in the House of Commons on 23 May 2018. This memorandum identifies the provisions of the Bill that confer delegated powers. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The Bill will prohibit all commercial activities (referred to in the Bill as ‘dealings’) concerning items which are comprised of African and Asian elephant ivory – within the United Kingdom; between the United Kingdom and the European Union; and between the United Kingdom and third countries. ‘Dealing’ concerns activities such as buying, selling or hiring. The Bill makes it an offence to breach the prohibition, to facilitate the breach of the prohibition or to cause the prohibition to be breached.

3. An item will be exempt from the prohibition if the item falls within the scope of one of the following five exemptions: (a) items of outstanding artistic etc. value and importance (‘the artistic exemption’) with a date restriction of 1918¹ or before; (b) items containing a de minimis amount of ivory at 10% or less of the total volume of the item, with a date restriction of 1947 or before; (c) musical instruments or their accessories containing a de minimis amount of ivory at 20% or less of the total volume of the item, with a date restriction of 1975 or before; (d) acquisition of an item by qualifying museums; or (e) portrait miniatures with a date restriction of 1918. It will be an offence to deal in exempted items without first obtaining an exemption certificate, or registering, as described below.

4. If a person seeks to be involved in dealing of an item which falls under the artistic exemption, the person would need to first obtain an exemption certificate. A certificate is obtained by applying to the Animal and Plant Health Agency² (‘the APHA’) via a designated website, or other means if the website is not suitable. The APHA would then consider an agreed list of advisory experts to determine which one could be approached to provide an opinion on whether the APHA should grant an exemption certificate; subsequently, the APHA (representing the Secretary of State) would use its discretion to decide whether the certificate should be granted.

5. If a person seeks to be involved in dealing of an item which falls under an exemption other than the artistic exemption, the person would need to first register the item. A person will register by logging onto a designated government website.

6. Both criminal and civil sanctions are available for offences under the Bill.

¹ The policy objective is to ensure the item is at least 100 years old at the time the Bill is commenced.

² APHA will perform certain functions conferred on the Secretary of State by the Bill. APHA is an executive agency within the DEFRA family and currently performs a number of statutory functions on behalf of the Secretary of State.

7. The following civil sanctions are available for offences committed: (i) monetary penalties; (ii) stop notices; (iii) enforcement undertakings; and (iv) enforcement cost recovery notices.

C. DELEGATED POWERS

Clause 2(3)(c) Guidance on determining whether an item is of ‘outstandingly high artistic, cultural or historical value’

Power conferred on: the Secretary of State

Power exercised by: guidance

Parliamentary Procedure: none

Context and Purpose

8. As to context, please see information about the artistic exemption – and applications for a certificate – at paragraph 4 above. Clause 2(3)(c) allows the Secretary of State to provide guidance on additional matters that are to be considered when determining whether an item is of ‘outstandingly high artistic, cultural or historical value’. Such matters, if any, will be additional to the factors listed at clause 2(3)(a) and (b). The person that makes the determination is required to account for these factors, but is not limited to considering these factors.

Justification for taking the power

9. Over time, it may become apparent that factors other than those listed at clause 2(3)(a) and (b) are relevant to determining whether an item is of ‘outstandingly high artistic, cultural or historical value’. The power at clause 2(3)(c) ensures that the Secretary of State has the ability to ‘standardise’ assessments by capturing further factors in guidance.

Justification for the procedure

10. The Government proposes that this power is exercisable through statutory guidance. The power is limited in so far as factors listed in guidance are merely means of assessing the statutory condition at clause 2(2)(b). Any additional factors will be of a detailed and technical nature.

Clause 2(5) Power to establish list of advisory institutions

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

11. Subsection (5) of clause 2 contains a power for the Secretary of State to establish a list of expert advisory institutions through regulations, which would specify by name institutions which possess acknowledged expertise in different types and areas of ivory, such as oriental art, medieval art, renaissance art or scientific and nautical instruments. The expert advisory institutions will be a selection of museums, universities and other artistic bodies. Subsection (6) of clause 2 provides that an institution can only be included on the list if the person in charge of the institution consents to it.

12. For an item containing ivory ('ivory item') to fall under the exemption in clause 2 concerning the artistic exemption, an applicant³ must make an initial application to the APHA. Upon receipt of the initial application, the APHA will approach the expert advisory institution on the prescribed list with the most relevant expertise in relation to the ivory item in question to obtain an opinion. The APHA would take the expert's opinion into account when exercising its discretion in respect of whether to grant an exemption certificate for the item.

13. The list of expert advisory institutions would help to ensure the exemption can operate effectively in practice, as the APHA does not have the expertise to opine on whether a pre-1919 ivory item is of outstanding artistic value and importance.

Justification for taking the power

14. We consider it is not possible or appropriate for the Secretary of State alone to determine whether an item would meet the criteria to be considered rare and important on the basis of its outstanding artistic, historic or cultural value. Rather, we believe expert advice needs to be secured, and recognise that such expertise resides in key national institutions, such as national museums and some university and other collections. This power therefore allows the Secretary of State to secure the advice of such specialist institutions.

15. The Government is of the view that the Secretary of State should have a regulation-making power to establish and amend the list of advisory institutions as and when institutions consent to be added to the list, or if such consent is later withdrawn.

Justification for the procedure

16. It is proposed that the negative procedure is reasonable because the advisory institutions have to consent to be included in the list and the list itself will not change or impact on the provisions of the primary legislation. In addition, establishing and maintaining the list is technical and detailed.

Clause 3(1)(g) Power to issue guidance requiring additional information in applications for exemption certificates

Power conferred on: the Secretary of State

Power exercised by: guidance

³ This would be an individual, business, organisation or an agent.

Parliamentary Procedure: none

Context and Purpose

17. If a person seeks to be involved in dealing of an item which falls under the artistic exemption, the person would need to first obtain an exemption certificate. A certificate is obtained by applying to the APHA. Clause 3(1) sets out the requirements for a valid application. Clause 3(1)(g) provides the Secretary of State with power to issue guidance requiring applicants to provide information that is additional to that required by the Bill.

Justification for taking the power

18. In the course of time, as the system for administering the artistic exemption develops, it may become apparent that applications need to contain information not listed in the Bill. This power provides a means for the Secretary of State to adapt quickly to such need.

Justification for the procedure

19. This power is limited, merely enabling the Secretary of State to require further information in applications. The principles of administrative law ensure that the power cannot be used to affect the scope of an exemption. The power is technical and detailed. The Government considers it important that this power can be exercised flexibly to promote an efficient administrative process.

Clause 3(1)(h) Power to prescribe fees for exemption certificates

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

20. Paragraph (h) of subsection (1) of clause 3 provides the Secretary of State with the power to set fees in regulations which must be paid by an applicant applying for an artistic exemption. A fee will be paid at two different stages of the process; firstly, an initial cost recovery fee will accompany the initial application informing the APHA of the applicant's intent to obtain an artistic exemption certificate. The initial fee is expected to cover administrative costs.

21. The purpose of the second fee is to pay the expert institution for the time it spends assessing the ivory item to determine whether it should provide a positive or negative opinion in respect of whether the ivory item falls within the artistic exemption. The Secretary of State must reimburse the reasonable costs of the institution according to subsection (6) of clause 3.

22. The opinion of an expert advisory institution will be important in assisting the APHA's determination on whether to grant an artistic exemption certificate as the APHA does not have sufficient expertise. Furthermore, we believe that it is unlikely

that expert advisory institutions will assist the APHA in respect of the artistic exemption unless they can receive reasonable costs for the advice they provide (i.e they may withhold consent to be added to the list of expert institutions – see entry for clause 2(5) above).

23. Possibly, different fees may be set for different categories of application.

Justification for taking the power

24. We believe it is reasonable to reimburse expert advisory institutions for the time taken by their expert staff to assess ivory items. This time would cover that needed to inspect the material submitted by the applicant, conduct any necessary research or consultation, and to file a report to the APHA setting out the recommendations against the published criteria. The fee will be set at a level that recognises the specialist and expert skills of these staff. We do not believe it is appropriate for this reimbursement to be paid from public funds as the function paid for is to facilitate the discretionary sale of an item at the request of a private individual or business.

25. It is proposed that the Secretary of State has this power to ensure the artistic exemption can operate in practice. As the administration of the artistic exemption evolves, there may be various reasons for changing fees – and it's important for the Government to be able to respond quickly to address these imperatives.

Justification for the procedure

26. The Government is of the view that the negative procedure is sufficient given the limited nature of the power. By implication (under administrative law), the power is limited to charging a fee that is reasonable and proportionate to the cost of the providing the service for which the fee is charged. We note other instances in primary legislation where there are similar powers: for example, section 76 of the Energy Act 2016 gives power to the Secretary of State to set fees for the Oil & Gas Authority under the negative procedure.

Clause 4(7)(b) Power relating to persons dealing in an item subject to an exemption certificate

Powers conferred on: the Secretary of State

Powers exercised by: (1) guidance, and (2) regulations

Parliamentary Procedure: (1) none for guidance; (2) negative procedure for regulations.

Context and Purpose

27. The person who applies for, and obtains, an exemption certificate may pass the item to a second person. The second person cannot undertake dealing in the item without first providing: information to the Secretary of State, as specified in guidance issued by the Secretary of State; and a fee, as prescribed in regulations made by the Secretary of State.

Justification for taking the power

28. The reliability of the certification regime for both buyers of ivory, and enforcement authorities, is supported by the requirement for subsequent owners of items to update details relating to the certification. As the administration of the artistic exemption evolves, there may be various reasons for changing the types of information required from subsequent owners and the fees payable by subsequent owners – and it is important for the Government to respond quickly to address these imperatives.

Justification for the procedure

29. Given the limited nature of the:

- power to issue guidance specifying information to be provided; and
- power to prescribe fees,

the Government believes that the chosen procedures are reasonable. By implication (under administrative law), the powers are limited to:

- requiring information that is reasonably necessary for maintaining the reliability of the certification system;
- charging a fee that is reasonable and proportionate to the cost of the providing the service for which the fee is charged.

Clause 4(8) Guidance on form/manner for actions relating to applications for exemption certificates

Power conferred on: the Secretary of State

Power exercised by: guidance

Parliamentary Procedure: none

Context and Purpose

30. Clauses 3 and 4 of the Bill together implement a regime for: applying for an exemption certificate; assessing an application; and providing further information after a certificate has been issued. Clause 4(8) allows the Secretary of State to issue guidance requiring anything that a person is required to do under these clauses to be done in a particular form or manner.

Justification for taking the power

31. This power allows the Secretary of State to standardise administrative forms and administrative process for providing information, in turn facilitating efficient and least costly administration by APHA. This power is best exercised flexibly in response to lessons learned in the course of administering the regime.

Justification for the procedure

32. The Government is of the view that published guidance, rather than regulation, is the most appropriate vehicle for standardising forms and processes because the power is very limited in scope (confined to procedural detail rather than substantive rights and obligations).

Clause 5(3) Appeals against refusal of the artistic exemption certificate

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

33. An applicant will have the opportunity to appeal against the APHA's refusal to grant an exemption certificate. The purpose of this right is to ensure compliance with Article 6 of the European Convention on Human Rights ('the ECHR'); therefore, subsection (3) of clause 5 provides the Secretary of State with the power to make regulations in respect of the appeals process. In particular the Secretary of State may make provision requiring an appellant to pay a fee of a prescribed amount.

Justification for taking the power

34. It is in line with government best practice to enable an appeal to be made against a decision taken on behalf of a Secretary of State. Provisions for an appeal process will be of a detailed, procedural nature. A power to prescribe fees is necessary to ensure that appeal costs can be recovered. Such detail is more suitable for secondary, rather than primary, legislation. In addition, there is advantage in being able to make timely changes to the appeals procedure in light of the experience gained from the process being applied in practice.

Justification for the procedure

35. The Government believes that as the Secretary of State's decisions on the appeals process will be constrained by Article 6 provisions within the ECHR, the need for parliamentary scrutiny is reduced and the negative procedure is appropriate. In addition, the power to prescribe a fee is limited to covering the costs associated with the appeal process, which must be reasonable to the cost of dealing with appeals.

Clause 9(4) Amendment to qualifying museums

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

36. Subsection (4) of clause 9 provides the Secretary of State with the power to make a consequential amendment if one of the bodies listed in paragraph (a) or (b) in subsection (3) of clause 9 either change their name or transfer one of their functions, to the extent it has a bearing on the operation of clause 9. The listed

bodies are not incorporated through Acts of Parliament (e.g. the Arts Council England was set up by Royal Charter).

Justification for taking the power

37. The power to allow the Secretary of State to make consequential amendments would be quite important if the listed bodies' names are changed by a means other than through powers in a Bill. If consequential amendments cannot be made to reflect the change of name or the transfer of functions of bodies listed in paragraph (a) or (b) in subsection (3) of clause 9, the qualifying museums definition is likely to become ineffective over time. In turn, this could undermine the effectiveness of the exemption concerning museums.

Justification for taking the procedure

38. It is proposed that the negative procedure would be reasonable because, although this clause would provide the Secretary of State with the power to amend primary legislation, the changes envisaged would be minor and consequential and would not have an impact on any substantive aspects of the Bill.

Clause 10(1)(f) Power to issue guidance requiring additional information when registering an exempt item

Power conferred on: the Secretary of State

Power exercised by: guidance

Procedure: publication

Context and Purpose

39. If a person seeks to be involved in dealing of an item which falls under an exemption other than the artistic exemption, the person would need to first register. Clause 10(1)(f) provides the Secretary of State with power to issue guidance requiring those registering to provide information that is additional to that required by the Bill.

Justification for taking the power

40. In the course of time, as the system for administering the exemptions develops, it may become apparent that registration needs to include information not listed in the Bill. This power provides a means for the Secretary of State to respond promptly to such need.

Justification for the procedure

41. This power is very limited, merely enabling the Secretary of State to require further information through the registration process. The principles of administrative law ensure that the power cannot be used to effect the scope of an exemption. The power is technical, detailed and must be used flexibly in support of an efficient administrative process.

Clause 10(1)(g) – Power to prescribe fees to register an ivory item

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

42. Paragraph (h) of subsection (1) of clause 10 provides the Secretary of State with the power to set fees in regulations, which must be paid by a person when registering an exempt item other than an item falling within the scope of the artistic exemption. Clause 10(3) allows the Secretary of State to provide for exemptions.

43. Please see paragraphs 3 and 5 above for further information about the requirement to register.

Justification for taking the power

44. It is important for the Secretary of State to have the power to set fees to recover the reasonable administrative costs associated with the registration system. It is intended to design and build an IT system to ensure the registration operates efficiently. As time passes, it may be appropriate to vary fees. Regulations enable the Government to vary fees in response to changing administrative costs and also to provide for exemptions to paying a fee in certain circumstances.

Justification for the procedure

45. The Government is of the view that the negative procedure is sufficient given the power is limited to charging a fee that is reasonable and relates to the cost of providing the service for which the fee is charged. We note other instances where regulations provide power to charges fees: for example, section 76 of the Energy Act 2016 gives power to the Secretary of State to make regulations to set fees for the Oil & Gas Authority under the negative procedure.

Clause 11(5) Guidance on form/manner for actions relating to registering an exempt item

Power conferred on: the Secretary of State

Power exercised by: guidance

Procedure: none

Context and Purpose

46. Clauses 10 and 11 of the Bill together implement a regime for: registering an exempt item; cancelling or amending registration. Clause 11(5) allows the Secretary of State to issue guidance requiring anything that a person is required to do under these clauses to be done in a particular form or manner.

Justification for taking the power

47. This power allows the Secretary of State to standardise administrative forms and administrative process for providing information, in turn facilitating efficient and least cost administration of the registration system by APHA.

Justification for the procedure

48. The Government is of the view that published guidance, rather than regulation, is sufficient because the power is very limited in scope (confined to procedural detail rather than substantive rights and obligations).

Clause 35(2) – Power to amend the definition of ‘ivory’

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: affirmative procedure

Context and Purpose

49. The prohibition on commercial dealing in ivory only concerns ivory from African or Asian elephants. Subsection (2) of clause 35 provides the Secretary of State with the power to add ivory from other ivory bearing species and animals to the scope of the Bill.

Justification for taking the power

50. The Bill only concerns elephant ivory. However, the Government recognises there could be an impact on other ivory-bearing species of the closure of the market for most elephant ivory: some displacement may occur to the extent that ivory from other species and animals such as hippos, will feature more heavily in the market. To this end, subsection (2) of clause 35 provides the Secretary of State with the power to include other ivory bearing species and animals within the scope of the definition at subsection (1) of clause 35, where those ivory bearing animals and species are listed in an appendix to the Convention on International Trade in Endangered Species (CITES). In practice, this could apply to six species of animals only – walrus, narwhal, the sperm whale, the killer whale, the hippopotamus and the warthog. Taking a delegated power will also enable the Secretary of State to consult on the extension of the scope of this Bill to other ivory-bearing species: the consultation exercise for this Bill related to elephant ivory only.

51. The power at clause 37(1) would allow the Secretary of State to amend subsection (5) of clause 35 to reflect any amendments to subsection (1) of clause 35 which extends the scope of the Bill to other species and animals.

Justification for the procedure

52. It is proposed that the affirmative procedure is used as subsection (2) of clause 35 would significantly amend primary legislation. It would alter the scope of the Bill, and, as such Parliamentary scrutiny is required. It is proposed that regulations by affirmative procedure are sufficient because the power is limited by CITES listing.

Clause 41 – Power to commence the Bill

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: no procedure

Context and Purpose

53. Subsection (1) of clause 41 provides the Secretary of State with the power to commence the Bill through regulations. Paragraph (b) of subsection (2) of clause 41 provides that regulations can be made for different provisions in respect of different parts of the United Kingdom.

Justification for taking the power

54. A number of other measures will need to be completed in order that the measures in this Bill can be implemented and enforced, including laying statutory instruments, building an IT system and issuing statutory guidance. This will necessarily take some time to complete.

Justification for the procedure

55. There is no procedure for the commencement regulations, as is standard practice.

Paragraph 14 of Schedule 1 – Power to make supplementary regulation in respect of Schedule 1

Power conferred on: the Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative procedure

Context and Purpose

56. Paragraph 14(1) of Schedule 1 provides the Secretary of State with the power to make supplementary regulations which either supplement provisions within Schedule 1, or make provision that is consequential on or incidental to the provisions in the Schedule. Paragraph 14(1) applies to the following paragraphs in Schedule 1:

57. Paragraph 16 (1): the Secretary of State can make supplementary provisions which concern the power the enforcement authority has to require a person to pay a monetary penalty under paragraph 1 of Schedule 1, or costs under paragraph 11 of the same Schedule. Supplementary provisions in this context concern provision for: (a) early payment discounts; (b) payment of interest or other financial penalties for late payment (under sub-paragraph 1(b) of paragraph 16 of schedule 1, such

payments must not exceed the total amount of the penalty imposed as a monetary penalty or a cost recovery payment); and (c) enforcement.

58. Paragraph 17: allows the Secretary of State to make supplementary regulations in respect of provisions concerning enforcement undertakings. It is important to the operation of the Bill for these provisions to be capable of being further developed to ensure enforcement undertakings are effective in practice. To this end, it would assist if these provisions could be outlined in supplementary regulations as opposed to being outlined on the face of the Bill.

59. Paragraph 18: allows the Secretary of State to make the following supplementary provisions in relation to an appeal which concerns either a requirement being imposed; or a notice served under any of the provisions in Schedule 1; provision to (a) suspend the requirement or notice whilst the appeal is pending; (b) the powers the tribunal should have in respect of appeals; and (c) how payments made as a result of a tribunal decision can be recovered.

Justification for taking the power

60. Further to paragraph 15(1) of Schedule 1, the Secretary of State must consult the relevant enforcement authority (if the Secretary of State is not the enforcement authority) and other persons he deems appropriate before making supplementary regulations concerning civil sanctions in Schedule 1.

61. If the consultation requirement referred to in paragraph 15 of Schedule 1 produces responses which require the proposals intended for the regulations to be substantially changed in whole or in part, the Secretary of State must conduct a further consultation with those he considers appropriate in respect of those changes under paragraph 15(2) of Schedule 1.

Justification for the procedure

62. It is proposed that the negative procedure should apply because the provisions will be of a detailed, procedural nature that is more apt for secondary legislation and so are the kind of provisions that are likely to need to be varied as time goes by. This provision in essence mirrors paragraph 16 of Schedule 19C of the Political Parties, Elections and Referendums Act 2000 (inserted by the Political Parties and Elections Act 2009); demonstrating that there is existing precedent for this provision.