

DEFECTIVE AND DANGEROUS BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of David Stewart MSP. Its purpose is to assist consideration by the Delegated Powers and Law Reform Committee, in accordance with Rule 9.6.2 of the Parliament's Standing Orders, of provisions in the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill amends the Building (Scotland) Act 2003 ("the 2003 Act") to provide the framework for local authorities to make charging orders for recovery of expenses incurred by them where they have carried out work to defective or dangerous buildings under the 2003 Act.

3. The Bill provides for recoverable expenses to include the cost of the work itself, plus fees and administrative expenses incurred in connection with the charging order and discharge of it. Provision is made for the registration, repayment (including early redemption), and discharge of a charging order. The Bill also enables charging orders to be appealed in certain circumstances. Schedule 5A sets out the information which is to be contained within a charging order (and discharge of such an order).

Rationale for subordinate legislation

4. The Bill contains two powers to make subordinate legislation which are delegated to the Scottish Ministers. These powers are new, and no existing powers are amended or repealed. The powers are explained in detail in the following paragraphs, but in considering if and how provision should be set out in subordinate legislation rather than on the face of the Bill the member has had regard to -

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the core provisions of the Bill and making proper use of Parliamentary time;
- the relatively better position of the Scottish Ministers when compared with an individual member in making decisions on the best use of public resources to meet objectives;
- the possible requirement to make further provision over time, as the new legislation establishes itself, to ensure that where a need is identified to address practical matters of detail, so as to assist the effective operation of the Bill, then these can be readily taken forward.

Delegated powers

Note: the section references which follow are to the sections which are inserted into the 2003 Act by virtue of the Bill.

Section 46A(3) – Form of charging orders and discharges of charging orders

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative

Provision

5. Section 46A(2) provides that charging orders (and discharges of charging orders) are to be in such form as the local authority determines to give effect to, and state the information required by, Schedule 5A. Section 46A(2) is however effectively subject to section 46A(3), which enables the Scottish Ministers to specify the form which charging orders (and discharges) must be in.

Reason for taking power

6. While Schedule 5A is intended to set out the necessary information to be contained in such orders (and discharges) to enable the new legislation to be operated, it is considered appropriate that the Scottish Ministers should be able to make alternative provision in relation to the details of the form which these are to take, should they so wish. Section 46A(3) therefore allows for that option.

Choice of procedure

7. This power, if exercised, can be used to set out the form which charging orders (and discharges) is to take. It can be used to make provision for their content, and the information to be contained in them. Given the narrow purpose of the power, and its focus on the administrative detail of the form and content of orders (and discharges), it is considered that application of the negative procedure to it will provide an appropriate level of scrutiny so far as any exercise of the power is concerned.

Section 46D(4)- Repayment or early redemption of amounts payable under a charging order

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative

Provision

8. Under section 46D(2) the owner of a building which is subject to a charging order can seek early redemption of an order, at a reduced level of repayment. This reflects one of the Bill's underlying policies of encouraging early repayment. In such circumstances, the owner would in the first place require to seek to reach settlement terms with the local authority. If this could not be done, the Bill enables the Scottish Ministers to determine the amount, on a case by case basis. Provision is also made for the Scottish Ministers to do so by reference to any order made by them under the power contained in section 46D(4).

Reason for taking power

9. Such an order may be useful to enable the Scottish Ministers, for example, to set out specific criteria to be taken account of by them in considering early repayment case where the owner and local authority have been unable to reach agreement. The power is expressed in quite wide terms, enabling the Scottish Ministers to make further provision, as they think fit, about the repayment or early redemption of amounts repayable under a charging order

10. It was not considered appropriate within a member's Bill to set out on the face of it a list of criteria, for example, which the Scottish Ministers would be obliged to have regard to when dealing with the above matters, and thereby constraining what could be done. At the same time the member recognises that the effective operation of the Bill may be assisted by means of the Scottish Ministers having the ability to make further provision about repayment or early redemption.

Choice of procedure

11. It is recognised that the power set out at section 46D(4), while being concerned with the particular matter of the repayment or early redemption of amounts repayable under a charging order, would enable the Scottish Ministers to make potentially significant further provision. Accordingly, it is considered appropriate that exercise of the order making power under section 46D(4) should be subject to the more rigorous form of Parliamentary scrutiny afforded by the affirmative procedure. This is accordingly provided for, under reference to the insertion which the Bill makes at section 1(d) to the subordinate legislation provisions set out at section 54 of the 2003 Act.

This document relates to the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill (SP Bill 39) as introduced in the Scottish Parliament on 30 October 2013

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