

Delegated Powers and Law Reform Committee

18th Report, 2014 (Session 4)

Housing (Scotland) Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

**Delegated Powers and Law Reform
Committee**

18th Report, 2014 (Session 4)

Housing (Scotland) Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

18th Report, 2014 (Session 4)

Housing (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 21 January and 18 and 25 February the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Housing (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 21 November 2013. The Infrastructure and Capital Investment Committee is the lead Committee.
4. Very broadly, the Bill makes provision about abolition of the right to buy, the allocation of social housing, the law affecting private housing, the regulation of letting agents and the licensing of sites for mobile homes. It also provides for the transfer of jurisdiction from the sheriff courts to the First-tier Tribunal for Scotland (to be established in the Tribunals (Scotland) Bill) in cases involving private rented sector housing disputes.

DELEGATED POWERS PROVISIONS

5. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

¹ Housing (Scotland) Bill [as introduced] available here:
[http://www.scottish.parliament.uk/S4_Bills/Housing%20\(Scotland\)%20Bill/b41s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Housing%20(Scotland)%20Bill/b41s4-introd.pdf)

² Housing (Scotland) Bill Delegated Powers Memorandum available here:
http://www.scottish.parliament.uk/S4_Bills/Housing_DPM_final.pdf

- Section 4(2) – Power to prescribe persons of a description or type who social landlords must include in their allocation policy. (Inserts new subsection (3B) in section 21 of the Housing (Scotland) Act 1987)
- Section 7(2) – Power to prescribe maximum period preceding an application for housing during which a social landlord may take account of certain circumstances, and to prescribe the maximum period for which a landlord may make an applicant ineligible for the allocation of housing as a result of those circumstances. (Inserts new section 20B(4) in the Housing (Scotland) Act 1987)
- Section 7(2) – Power to modify the circumstances under which social landlords may make an applicant ineligible for the allocation of housing. (Inserts new section 20B(7) in the Housing (Scotland) Act 1987)
- Section 12(c) – Power to make provision about the procedure to be followed by social landlords in connection with a review of a decision to seek recovery of possession of a property. (Inserts new section 36(4C) in the Housing (Scotland) Act 2001)
- Section 21 – Power to transfer civil cases relating to houses in multiple occupation from the sheriff to the First-tier Tribunal
- Section 23(1)(a) – Power to specify persons who may make an application to the Private Rented Housing Panel in respect of the repairing standard. (Inserts new section 22(1B) in the Housing (Scotland) Act 2006)
- Section 24(7) – Power to make further provision about the procedure for the making or determination of applications under section 22(1A) of the 2006 Act (third party applications). (Amends paragraph 8(1) of schedule 2 to the 2006 Act)
- Section 26(2)(b) – Power to prescribe the information which is to be contained in the public register of letting agents in relation to each person on the register
- Section 27(2)(f) – Power to prescribe further information that must be supplied in an application for registration in the register of letting agents
- Section 30(4) – Power to modify the material that must be taken into account when deciding if a person is a fit and proper person to be entered on the register of letting agents
- Section 32(2)(c) – Power to specify any additional type of document or communication in which a registered letting agent must include their letting agent registration number

- Section 47(1) – Power to provide that the functions and jurisdiction of the sheriff in relation to actions between letting agents and landlords or tenants are transferred to the First-tier Tribunal
- Section 51(3) – Power to modify the meaning of “letting agency work” in relation to Part 4 of the Bill
- Section 54 – Power to make regulations concerning the charging of fees for site applications. (Inserts section 32C into the Caravan Sites and Control of Development Act 1960 (“the 1960 Act”))
- Section 56 – Power to change the time period for which a site licence is valid.(Inserts section 32J into the 1960 Act)
- Section 61 – Power to make an order varying the material a local authority must have regard to in applying the fit and proper person test.(Inserts section 32O into the 1960 Act)
- Section 66 – Power to make regulations about the appointment of an interim manager.(Inserts section 32Y into the 1960 Act)
- Section 77 – Power by order to disapply the right conferred under section 11 of the Land Tenure Reform (Scotland) Act 1974 (“the 1974 Act”) to redeem a heritable security after 20 years.(Inserts subsections (3D) to (3F) in section 11 of the 1974 Act)
- Section 83 – Ancillary provision
- Section 85(3) – Commencement
- Schedule 1, paragraph 26 – Rules as to procedure (Court of Session) (Amends section 104 of the Rent (Scotland) Act 1984)

6. The Committee agreed to write to Scottish Government officials to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

7. The Committee’s comments and, where appropriate, recommendations on those delegated powers in the Bill are detailed below.

Powers to issue guidance

(i) Section 4(2) – Power to issue guidance regarding the making or altering of social landlords’ rules on allocation of housing (inserts new subsection (3A) in section 21 of the Housing (Scotland) Act 1987).

(ii) Section 7(2) – Power to issue guidance on the maximum period preceding an application for housing during which a social landlord may take account of certain circumstances, and on the maximum period for which a landlord may make an applicant ineligible for the allocation of

housing as a result of those circumstances (inserts new section 20B(3) in the Housing (Scotland) Act 1987).

(iii) Section 8(1) – Power to issue guidance regarding the creation of, or conversion of a tenancy to, a short Scottish secure tenancy on the grounds of antisocial behaviour (inserts new section 34(9) in the Housing (Scotland) Act 2001).

Powers conferred on:	the Scottish Ministers
Powers exercisable by:	guidance
Parliamentary procedure:	none

Provisions

(i) Section 4(2)

8. Section 21 of the Housing (Scotland) Act 1987 (“the 1987 Act”) concerns rules made by social landlords regarding the priority of allocation of houses. New subsection (3B), inserted by section 4(2) of the Bill, confers power on the Scottish Ministers to make regulations prescribing persons of a description or type who social landlords must include in their rules governing the priority of allocation of housing. In addition, section 4(2) also inserts new subsection (3A), which requires a social landlord, in making or altering its rules governing the priority of allocation of houses, to have regard to (a) any local housing strategy for its area, and (b) any guidance issued by the Scottish Ministers.

(ii) Section 7(2)

9. Section 7(2) of the Bill inserts new section 20B in the 1987 Act. Section 20B(1) provides that a social landlord may impose a minimum period before an applicant is eligible for the allocation of housing, if certain circumstances apply. The circumstances are set out in subsection (5) and include antisocial behaviour, rent arrears, tenancy abandonment and making a false statement in applications for housing.

10. Section 20B(4) provides that Ministers may by regulations prescribe the maximum period preceding the application for which a social landlord may take account of any of the circumstances in subsection (5), and the maximum period that a landlord may make an applicant ineligible for the allocation of housing as a result of the circumstances in subsection (5). The regulations may set different maximum periods for different circumstances.

11. In addition, new section 20B(3) requires a social landlord, in considering whether to impose a requirement as to the minimum period before an applicant is eligible for the allocation of housing, to have regard to any guidance issued by the Scottish Ministers. Guidance may be issued on the same matters as may be prescribed in regulations under subsection (4), i.e. the maximum period preceding an application for housing during which a social landlord may take account of certain circumstances, and the maximum period for which a landlord may make an applicant ineligible for the allocation of housing as a result of the circumstances in subsection (5).

(iii) Section 8(1)

12. Section 8 of the Bill makes various amendments to the provisions in the Housing (Scotland) Act 2001 (“the 2001 Act”) on the grant of short Scottish secure tenancies, to extend the circumstances for granting such a tenancy to include where a tenant or applicant has acted in an antisocial manner or has harassed another person. Section 8(1) inserts new section 34(9) in the 2001 Act, which provides that a landlord must have regard to any guidance issued by the Scottish Ministers regarding the creation of a short Scottish secure tenancy on the new antisocial behaviour grounds.

Comment

13. In light of the potential significant effects of the exercise of each power on individuals, the Committee queried whether the Scottish Ministers intended to publish the guidance.

14. Further, in relation to the first 2 powers, the Committee sought an explanation from the Scottish Government of the intended interaction between the powers to make guidance and the powers to make regulations conferred by each section. The Government clarified the policy intention to give social landlords discretion and flexibility with regard to their rules on allocation of housing, and on eligibility periods. It therefore intends to rely primarily on the power to issue guidance to social landlords in these matters. The response explains that Ministers plan only to exercise the powers to make regulations if some groups of prospective tenants are being consistently overlooked in allocation policies, or if landlords are not having appropriate regard to the guidance on eligibility periods.

15. The Scottish Government’s response also acknowledges the potentially significant effects on individuals of the matters which the guidance may relate to. It indicates in each case that the Scottish Government will consult widely on draft guidance, and that the finalised guidance will be published on the Scottish Government website, where it will be available to tenants, prospective tenants and landlords.

16. The Committee notes, however, that there are no requirements in the Bill for consultation on, or publication of, the guidance. Whilst the Committee notes the current Government’s clear commitment to consultation and publication, the Committee requires to consider how the powers might be exercised from time to time by future administrations. In this case, the proposed guidance will supplement the law on allocation of and eligibility for social housing, and on the nature of the tenancies which may be offered to prospective tenants.

17. The Committee reports that it is content with the powers in principle, and is satisfied that they are exercisable by guidance. The Committee is also content, in light of the Scottish Government’s explanation, that it is appropriate in the circumstances for sections 4(2) and 7(2) to confer powers to make regulations as well as guidance

18. The Committee also welcomes the Scottish Government’s commitment to consult on and publish any guidance issued under the powers conferred by sections 4(2), 7(2) and 8(1) of the Bill. However, the

Committee asks the Scottish Government to consider bringing forward amendments at Stage 2 to require consultation on, and publication of, any guidance issued by the Scottish Ministers under the powers conferred by those sections.

Section 41(1) – Power to set out a code of practice which makes provision about the standard of practice of persons who carry out letting agency work.

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

19. Section 41 provides for the Scottish Ministers, by regulations, to set out a code of practice which makes provision about the standards of practice of persons who carry out letting agency work. Before finalising the code, the Scottish Ministers must consult on a draft of it under section 41(3).

20. The code of practice will have two principal legal effects. Firstly, consideration of whether a person has complied with the code of practice forms part of the fit and proper person considerations applied to applications for registration (section 30 of the Bill). Where the Scottish Ministers are satisfied that a person is no longer a fit and proper person, their registration may be revoked (section 35).

21. Secondly, where the First-tier Tribunal, on an application by a tenant or landlord, determines that a letting agent has failed to comply with a code of practice, it must issue an enforcement order under section 43. Failure to comply with such an enforcement order without reasonable excuse constitutes a criminal offence.

Comment

22. The Committee noted that the consequences of failure to comply with the code are similar to the consequences of failure to comply with the code of conduct under the Property Factors (Scotland) Act 2011, to which the affirmative procedure applies. It asked the Scottish Government to explain why it is considered appropriate for the regulations setting out the letting agent code of practice to be subject to the negative procedure.

23. The Scottish Government's response distinguishes the Property Factors (Scotland) Act on the basis that it was the result of a Private Member's Bill, and accordingly the Scottish Government was not directly involved in choosing the Parliamentary procedure to which that code of conduct was subject. It repeats the Government's view that the requirement in the Bill for consultation on the code of conduct prior to it being finalised means that the negative procedure affords sufficient Parliamentary scrutiny.

24. The Committee does not consider that the requirement for consultation of itself renders the negative procedure appropriate. Further, the Committee is of the view that, irrespective of the origin of the Bill for the Property Factors (Scotland) Act, Parliament took the view that the affirmative procedure was the

appropriate level of scrutiny for the code of conduct under that Act. In this case, where the legal consequences as regards revocation of registration and enforcement are similar to those for property factors, the Committee sees no reason to depart from that level of scrutiny.

25. **The Committee therefore asks the Scottish Government to consider further in advance of Stage 2 of the Bill whether the significance of the legal consequences of failure to comply with a Letting Agent Code of Conduct are such that the affirmative procedure is a more suitable level of Parliamentary scrutiny of the exercise of the power in section 41(1) than the negative procedure.**

26. **The Committee asks the Scottish Government to comment on this matter further in its response to this report.**

Section 60 – Power to make provision concerning the procedure to be followed in relation to the application and transfer of site licences, and appeals relating to site licences (Inserts section 32N in the Caravan Sites and Control of Development Act 1960).

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure

Provision

27. Part 5 of the Bill creates a new licensing regime for permanent residential mobile homes sites. The relevant provisions are inserted in the Caravan Sites and Control of Development Act 1960 (“the 1960 Act”). New section 32N of the 1960 Act gives the Scottish Ministers the power, by regulations, to make provision in relation to the procedures to be followed for an application for a site licence, an application for consent to transfer a site licence, and the transfer of a site licence on death. It also allows Ministers to make provision in relation to appeals against a decision by a local authority to refuse a licence application, to transfer a licence, to refuse consent to transfer a licence, or to revoke a licence.

28. Section 32N(2) gives an indicative list of matters which the regulations may make provision for or in connection with. These are largely procedural matters, although not exclusively so. They include the circumstances in which the reasons for a local authority’s decision on a licence or transfer application must be given (subsection (2)(f)), and the determination and consequences of an appeal (subsection (2)(i)).

Comment (Appeals)

29. The reason given in the DPM for taking the power is that it is a power to set out procedures and time limits in relation to the site licensing system, and that this level of procedural detail is best dealt with through regulations. The Committee notes however that the power, as drafted, is not restricted to enabling provision to be made about procedural matters. In particular, subsection (1)(d) enables provision to be made in relation to appeals generally, and not merely in relation to the procedure for appeals.

30. The Scottish Government has indicated to the Committee that, in addition to making provision about procedures and timescales for appeals, it may in its view also be necessary to make provision about the effects and consequences of an appeal. For example, where a local authority has decided not to renew a licence, and the licence holder appeals, the Government considers that provision will need to be made on the status of the licence while such an appeal is underway, and on what would happen if such an appeal was successful.

31. The Scottish Government accordingly informed the Committee that Ministers will consider further whether the drafting in section 60 of the Bill needs to be refined, as the intention would be to use the power to make provision as to effects and consequences of appeals, not just in relation to appeal procedures.

32. The Committee welcomes the Scottish Government's commitment to consider the drafting of section 60 further, and asks the Scottish Government to confirm its conclusions on the matter (including whether or not an amendment is proposed) in its response to this report.

33. The Committee adds that, in its view, section 60 should be redrawn to reflect more clearly the proposed purpose of new section 32N(1)(d) of the 1960 Act, which is to make provision about the procedure for, and the determination, consequences and effect of, an appeal, rather than to make provision about appeals generally.

Comment (Reasoned decisions)

34. Section 32N(2)(f) expressly enables provision to be made in regulations about the circumstances in which the reasons for a local authority's decision on a licence or transfer application, or its decision to transfer a licence in the absence of an application, must be given.

35. The Bill inserts various provisions in the 1960 Act regarding the giving of reasons. Under section 32D (licence applications) a local authority is required, *before* refusing to issue or renew a licence, to provide an applicant with the reasons why it is considering refusing the application, and to give the applicant at least 28 days to make written representations in response. Similar requirements apply where a local authority is considering transferring a licence of its own accord under section 32G. However, there is no such requirement for the giving of reasons or seeking representations before a local authority refuses an application under section 32E to transfer a licence.

36. In each of the three cases, there is no requirement on the face of the Bill to give reasons *after* the decision is made. A local authority will only be required to give reasons after its decision in the circumstances provided for in regulations made under section 32N(1), if any. By contrast, new section 32L of the 1960 Act (which concerns revocation of a licence) requires a local authority to give reasons for its decision to revoke a licence after the decision is made, *in addition to* the requirement to give reasons and seek representations during the consideration period.

37. The Committee considers that the giving of reasons is a significant aspect of procedure. In this case, the reasons for a local authority's decision could

be expected to inform the decision of anyone with a right to appeal under new section 32M of the 1960 Act regarding whether to exercise that right. The Committee accordingly asked the Scottish Government why it is considered appropriate that the giving of reasons is subject to provision made in delegated legislation, rather than set out on the face of the Bill, and why the negative procedure is considered appropriate.

38. The Scottish Government's response indicates that the policy is not to place a duty on a local authority to provide reasons for all of its decisions. For example where a licence application is granted, the giving of reasons may not be necessary. In the Government's view, this is an area of administrative procedure and therefore something best covered in regulations, rather than set out on the face of the Bill.

39. The Committee accepts that provision about the giving of reasons can, in some circumstances, properly be made in subordinate legislation and that the negative procedure could be considered appropriate for the making of procedural rules, which may include provision about the giving of reasons for a local authority's decision. However, in this particular case, the Committee notes the apparent discrepancy between the provisions in the Bill for the giving of reasons under new sections 32D (licence applications) and 32G (licence transfer without application), and the provisions under new section 32E (transfer applications).

40. The discrepancy appears to be that there are no requirements on the face of the Bill for the giving of reasons under section 32E, or for written representations to be sought. Furthermore, the giving of reasons in such cases is subject only to provision which may or may not be made in subordinate legislation under section 32N(1). This is in contrast to the position under new sections 32D and 32G. The Committee is accordingly concerned in relation to these provisions that the appropriate balance may not have been struck between the provision made on the face of the Bill, which is a matter for the Parliament, and the provision which may be made by the Scottish Ministers in the exercise of delegated powers.

41. **The Committee asks the Scottish Government to explain, in its response to this report, why the absence of requirements under new section 32E (application to transfer a site licence) of the 1960 Act (i) to provide an applicant with the reasons why the local authority is considering refusing an application, and (ii) to permit an applicant to make written representations in response, is considered appropriate. In this regard, the Committee is mindful that the giving of reasoned decisions contributes to ensuring that the determination process meets the requirements of Article 6(1) ECHR. The Committee also notes the contrast between the position under section 32E and the requirements under new sections 32B (licence applications) and 32G (licence transfer without application) of the 1960 Act.**

42. **Similarly, the Committee asks the Scottish Government to explain why it is considered appropriate that the giving of reasons under section 32E is subject only to provision which may or may not be made in subordinate legislation under section 32N(1) (inserted by section 60).**

43. **These questions reflect the Committee's concern that an appropriate balance may not have been struck between the provision made on the face of the Bill and the provision which may be made in the exercise of delegated powers under the Bill.**

Section 63 - Power to vary maximum fine. (Inserts section 32T in the Caravan Sites and Control of Development Act 1960).

**Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure**

Provision

44. Sections 63 and 64 of the Bill insert new sections 32R, 32S and 32V into the 1960 Act. These provisions set the maximum fine on conviction of operating a caravan site without a licence (£50,000), the maximum fine on conviction of breaching licence conditions (£10,000), and the maximum fine on conviction of failure to comply with an improvement notice (£10,000). New section 32T of the 1960 Act gives the Scottish Ministers the power to amend these maximum fine levels, through an order subject to the affirmative procedure.

Comment

45. The reason given in the DPM for taking the power in new section 32T is to enable adjustment of the maximum fines imposed in line with inflation and other relevant factors. However, the power is not expressed as being restricted in that way.

46. A comparative power in section 226 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") enables Ministers to amend enactments passed after 1 April 1996 to substitute a new sum for a maximum fine specified in such an enactment. That power enables the substitution of a new sum only where Ministers consider that that sum is justified by inflationary changes, or to reflect the fact that the standard scale which applies to other (lesser) offences is being increased.

47. The Committee asked the Scottish Government whether, in the absence of express restrictions similar to those in the 1995 Act, the power taken in section 32T accurately reflects the policy intention. In its response, the Scottish Government explained that there may be reasons why Ministers might wish to adjust the level of maximum fines in the future other than to reflect changes in inflation or other fine levels. It gives the example of a potential sharp increase in prices in the mobile home sector, which would also require fine levels to be raised to continue to provide suitable sanction. The Scottish Government accordingly considers that restriction of the power in new section 32T would be inappropriate.

48. However the Committee remains concerned that the power is drafted more widely than is necessary to achieve the stated policy intention. It considers that the factors which may cause the Scottish Ministers to wish to vary the maximum fine for these offences should be capable of specification on the face of the Bill. This would allow the Parliament, in scrutinising the Bill, to consider

whether variation of the maximum fine on these grounds could be justified in policy terms.

49. **The Committee does not consider that section 32T(1) of the 1960 Act (inserted by section 63 of the Bill) should confer an unlimited discretion to vary the maximum fine for conviction in respect of the offences listed. It considers that the circumstances under which the maximum fine may be varied are matters for Parliament. The Committee accordingly considers that the power in section 32T should be restricted to permit variation of the maximum fine only where it appears to the Scottish Ministers that particular circumstances apply. These circumstances should reflect the specific policy intention in taking the power.**

50. **To that end, the Committee recommends that the Bill provide for the power in section 32T(1) to be exercised only where the Scottish Ministers consider it appropriate in light of inflationary changes, or where they consider that other relevant factors apply. The Bill should set out what these other relevant factors are. The Committee offers no view on what the relevant factors might be, this being a policy matter for consideration by the lead committee.**

51. **The Committee accordingly asks the Scottish Ministers to consider bringing forward a suitable amendment at Stage 2. The Committee asks the Scottish Government to comment on this matter further in its response to this report.**

ANNEX

Correspondence with the Scottish Government

On 21 January 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 4(2) – Power to issue guidance regarding the making or altering of social landlords’ rules on allocation of housing.

Inserts new subsection (3A) in section 21 of the Housing (Scotland) Act 1987

Power conferred on:	the Scottish Ministers
Power exercisable by:	guidance
Parliamentary procedure:	none

1. Section 21 of the Housing (Scotland) Act 1987 (“the 1987 Act”) concerns rules made by social landlords regarding the priority of allocation of houses. In addition to the power conferred on the Scottish Ministers to make regulations, section 4(2) of the Bill also inserts new subsection (3A), which requires a social landlord, in making or altering its rules governing the priority of allocation of houses, to have regard to (a) any local housing strategy for its area, and (b) any guidance issued by the Scottish Ministers.

2. The power to issue guidance to which a social landlord must have regard is not discussed in the delegated powers memorandum as it is not a power to make subordinate legislation.

3. **The Committee therefore asks the Scottish Government:**

- **For an explanation of the purpose of the power in section 21(3A)(b) of the 1987 Act, as that provision is inserted by section 4(2) of the Bill?**
- **In particular, whether it is expected that Ministers will use the power to make guidance regarding the same matters as could be prescribed in regulations under new section 21(3B) – and if so, what considerations will inform the choice of guidance or regulations?**
- **Whether it intends to publish the guidance, in light of the potentially significant effect on individuals of a social landlord’s rules on housing allocation?**

Section 7(2) – Power to issue guidance on the maximum period preceding an application for housing during which a social landlord may take account of certain circumstances, and on the maximum period for which a landlord may make an applicant ineligible for the allocation of housing as a result of those circumstances.

Inserts new section 20B(3) in the Housing (Scotland) Act 1987

Power conferred on: the Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: none

4. The Bill inserts new section 20A(3) into the 1987 Act which requires a social landlord, in considering whether to impose a requirement as to the minimum period before an applicant is eligible for the allocation of housing, to have regard to any guidance issued by the Scottish Ministers. The power conferred on Ministers is to issue guidance on the same matters as may be prescribed in regulations under section 20A(4) of the 1987 Act.

5. The provision in Section 20B(3) of the 1987 Act, as inserted by section 7(2) of the Bill, confers power on the Scottish Ministers to issue guidance to which a social landlord must have regard in considering whether to impose a requirement as to the minimum period before an applicant is eligible for the allocation of housing (where the circumstances in section 20B(5) apply).

6. The provision confers power on the Scottish Ministers to issue guidance on the same matters as may be prescribed in regulations under section 20A(4) of the 1987 Act (as inserted by section 7(2) of the Bill).

7. **The Committee therefore asks the Scottish Government:**

- **In what circumstances is it envisaged that guidance will be issued, as opposed to regulations being made?**
- **Whether it intends to publish the guidance, in light of the potentially significant effect on individuals of a social landlord's rules on eligibility periods?**

Section 8(1) – Power to issue guidance regarding the creation of, or conversion of a tenancy to, a short Scottish secure tenancy on the grounds of antisocial behaviour.

Inserts new section 34(9) in the Housing (Scotland) Act 2001

Power conferred on: the Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: none

8. Section 8(1) of the Bill amends section 34 of the Housing (Scotland) Act 2001 on the creation of short Scottish secure tenancies. It inserts new subsection (9), which provides that a landlord must have regard to any guidance issued by the Scottish Ministers regarding the creation of a short Scottish secure tenancy on the new antisocial behaviour grounds. As before, the power to issue guidance is not discussed in the delegated powers memorandum, nor is it explained in any of the supporting documents accompanying the Bill.

9. The Committee therefore asks the Scottish Government the following:

- **What is the purpose of the power to issue guidance in section 34(9) of the Housing (Scotland) Act 2001 (inserted by section 8(1) of the Bill)?**
- **Why is it considered appropriate for the power to be exercised by way of guidance rather than in subordinate legislation?**
- **Whether it intends to publish guidance issued under this power?**

Section 41(1) – Power to set out a code of practice which makes provision about the standard of practice of persons who carry out letting agency work

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure

10. Section 41 of the Bill provides for the Scottish Ministers, by regulations, to set out a code of practice which makes provision about the standards of practice of persons who carry out letting agency work. Before finalising the code, the Scottish Ministers must consult on a draft of it under section 41(3). The Delegated Powers Memorandum explains that it is considered appropriate for the code to be set out in regulations rather than on the face of the Bill, as it may require a detailed set of requirements to be developed.

11. The Bill proposes that compliance with the code of practice will have important legal consequences. Failure to comply could lead to revocation of a letting agent's registration under section 35, or imposition of a letting agent enforcement order under section 43. Failure to comply with a letting agent enforcement order, without reasonable excuse, is an offence in terms of section 46.

12. Failure to comply with the code of conduct issued under section 14 of the Property Factors (Scotland) Act 2011 has similar legal consequences in relation to property factor registration and enforcement, but the order bringing that code into force is subject to the affirmative procedure.

13. The Committee therefore asks the Scottish Government to explain why it is considered appropriate for the regulations setting out the letting agency code of practice under section 41(1) to be subject to the negative procedure?

Section 60 – Power to make provision concerning the procedure to be followed in relation to the application and transfer of site licences, and appeals relating to site licences.

Inserts section 32N into the 1960 Act

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

14. New section 32N of the Caravan Sites and Control of Development Act 1960 (“the 1960 Act”) gives the Scottish Ministers the power, by regulations, to make provision in relation to the procedures to be followed for an application for a site licence, an application for consent to a transfer, and the transfer of a site licence on death. It also allows Ministers to make provision in relation to appeals against a decision by a local authority to refuse a licence application, to transfer a licence, to refuse consent to a licence transfer, and to revoke a licence. Subsection (2) gives an indicative list of matters which the regulations may make provision for or in connection with.

15. The power allows Ministers to set out procedures and time limits in relation to the site licensing system and that this level of procedural detail is best dealt with through regulations. The power is to be subject to negative procedure. It would appear, however, that the power, as drafted, is not restricted to enabling provision to be made about procedural matters. In particular, subsection (1)(d) enables provision to be made in relation to appeals generally, and not merely in relation to the procedure or time limits for appeals. While the list in subsection (2) indicates some matters relating to appeals about which provision may be made, the power is not restricted to that extent.

16. There is also no requirement on the face of the Bill for a local authority to give reasons for its decisions to determine a relevant permanent site application or an application for consent to transfer a licence under section 32E, or its decision to transfer a licence under section 32G.

17. The Committee therefore asks the Scottish Government the following questions:

- **Regarding appeals, if the power in section 32N is intended to enable provision to be made about the procedure and time limits for appeals, why is it drawn more widely than that?**
- **What sort of provision regarding appeals is it anticipated the power will be used to make?**

18. Section 32I of the Bill requires a local authority to notify its decisions under the licensing regime (to determine applications or to transfer licences). However, an authority is only required to give reasons for its decisions in the circumstances provided for in regulations made under section 32N(1), if any. The giving of reasons is a significant aspect of procedure, and could be expected to inform the decision of anyone with a right to appeal under section 32M regarding whether to exercise that right.

19. The Committee therefore asks the Scottish Government the following questions:

- **Why is it considered appropriate that these circumstances are subject to provision made in delegated legislation, rather than set out on the face of the Bill?**
- **Why is the negative procedure considered to provide an appropriate level of scrutiny for the exercise of such a power?**

Section 63 – Power to vary maximum fine.

Inserts section 32T in the 1960 Act

Power conferred on:	the Scottish Ministers
Power exercisable by:	order
Parliamentary procedure:	affirmative procedure

20. Sections 63 and 64 of the Bill insert new sections 32R, 32S and 32V into the Act 1960 Act. These provisions set the maximum fine on conviction of operating a caravan site without a licence the maximum fine on conviction of breaching licence conditions, and the maximum fine on conviction of failure to comply with an improvement notice. New section 32T of the 1960 Act gives the Scottish Ministers the power to amend these maximum fine levels, through an order subject to the affirmative procedure.

21. The reason given in the Delegated Powers Memorandum for taking the power in new section 32T is to enable adjustment of the maximum fines imposed in line with inflation and other relevant factors. However, although subject to affirmative procedure, the power is not expressed as being restricted in that way.

22. A comparative power in section 226 of the Criminal Procedure (Scotland) Act 1995 enables Ministers to amend enactments passed after 1 April 1996 to substitute a new sum for a maximum fine specified in such an enactment. That power enables the substitution of a new sum only where the Ministers consider that that sum is justified by inflationary changes, or to reflect the fact that the standard scale which applies to other (lesser) offences is being increased.

23. The Committee therefore asks the Scottish Government:

- **Whether it considers that it might be appropriate for similar restrictions to apply to the exercise of the power in section 32T?**
- **And, in the absence of such restrictions, whether it considers that the power taken in section 32T reflects the policy intention in taking such a power?**

On 28 January 2014, the Scottish Government responded as follows:

Section 4(2) – Power to issue guidance regarding the making or altering of social landlords’ rules on allocation of housing. Inserts new subsection (3A) in section 21 of the Housing (Scotland) Act 1987.

The purpose of section 21(3A)(b) of the 1987 Act, as inserted by section 4(2) of the Bill, is to enable Scottish Ministers to issue guidance to social landlords on how the landlords make and alter the rules they apply when allocating houses to tenants. Because of the significant effect that social landlords’ rules on allocation can have on individuals, the Scottish Government intends to issue such guidance before commencing the provisions of section 4. Before doing so, it will consult social landlords, tenants and other stakeholders on draft guidance. Subject to the outcome of the consultation, the Government expects the guidance to cover issues such as:

- Definition of unsatisfactory housing conditions
- Factors to consider in assessing whether persons have housing needs which are not capable of being met by housing options which are available
- Identification of groups to which a social landlord will give priority
- Definition of property and related issues such as evidence of ownership, issues relating to properties that have been rented out and ability to access a property.

The Scottish Government hopes that this guidance will help social landlords to make rules on allocations that provide a basis for them to respond to the housing needs of local people and to ensure that affordable housing goes to those who need it most. It would only make regulations in respect of the same matters as the guidance covered if it appeared that the guidance was not achieving its desired effect and if, for example, some groups of prospective tenants were being consistently overlooked in social landlords’ rules. This approach reflects the Scottish Government’s wish to give social landlords discretion and flexibility in these matters and to use the regulation making power only where it appears that guidance is not being successful. The guidance will be published on the Scottish Government website, so that it will be available to tenants, prospective tenants as well as landlords.

Section 7(2) – Power to issue guidance on the maximum period preceding an application for housing during which a social landlord may take account of certain circumstances, and on the maximum period for which a landlord may make an applicant ineligible for the allocation of housing as a result of those circumstances. Inserts new section 20B(3) in the Housing (Scotland) Act 1987.

Because of the significant effect that a social landlord’s rules on eligibility periods can have on individuals, the Scottish Government intends to issue guidance to social landlords on this matter before commencing the provisions of section 7. Before doing so, it will consult social landlords, tenants and other stakeholders on draft guidance. It would only make regulations in respect of this if it appeared that landlords were not having appropriate regard to the guidance when imposing a requirement as to the minimum period before an applicant is eligible for the

allocation of housing. This approach reflects the Scottish Government's wish to give social landlords discretion and flexibility in this matter to use the regulation making power only where it appears that the guidance is not being successful. The guidance will be published on the Scottish Government website, so that it will be available to tenants, prospective tenants as well as landlords.

Section 8(1) – Power to issue guidance regarding the creation of, or conversion of a tenancy to, a short Scottish secure tenancy on the grounds of antisocial behaviour.

Inserts new section 34(9) in the Housing (Scotland) Act 2001.

The purpose of section 34(9) of the Housing (Scotland) Act 2001, as inserted by section 8(1) of the Bill, is to allow the Scottish Government to issue guidance to social landlords to assist them in determining the type of circumstances where a Short Scottish Secure Tenancy on the new antisocial behaviour ground, inserted as paragraph 2A of schedule 6 to that Act by section 8(4) of the Bill, may or may not be appropriate.

The Scottish Government does not wish to be prescriptive about how social landlords use this new Short Scottish Secure Tenancy for antisocial behaviour. Therefore, it considers it more appropriate for the power to be exercised by way of guidance rather than subordinate legislation. The Scottish Government does however wish to encourage best practice and may wish to highlight particular factors that landlords should take into account when considering the use of the new tenancy. Guidance will give social landlords more flexibility to address antisocial behaviour in their communities than would regulations. There is already a power to issue guidance as to what might be appropriate housing support services for the purposes of section 34 of the Housing (Scotland) Act 2001 at section 34(8).

The Scottish Government intends to issue such guidance before commencing the provisions for the new Short Scottish Secure Tenancy for antisocial behaviour, inserted as paragraph 2A of schedule 6 of the Housing (Scotland) Act 2001. Before doing so, it will consult social landlords, tenants and other stakeholders on draft guidance. The guidance will be published on the Scottish Government website, so that it will be available to tenants, prospective tenants, as well as landlords.

Subject to the outcome of the consultation, the Government expects the guidance to cover issues such as:

- applying the policy consistently
- actions taken by the tenant to address their behaviour or the behaviour of their household/visitors
- evidence (level and quality of evidence of antisocial behaviour); and
- the provision of housing support services by landlords.

Section 41(1) – Power to set out a code of practice which makes provision about the standard of practice of persons who carry out letting agency work.

The Committee asked the Scottish Government to explain why it is considered appropriate for the regulations setting out the letting agency code of practice under section 41(1) to be subject to the negative procedure.

As the Committee mentions, the consequences of failure to comply with the code are similar to provisions in the Property Factors (Scotland) Act 2011, to which affirmative procedure applies. The Property Factors (S) Act 2011 was a private member's Bill and the Scottish Government therefore had no direct influence over the procedure it adopts for its Code of Practice. Under section 41(3) of the Housing Bill, the Scottish Ministers must consult on a draft Code of Practice for Letting Agents before finalising that Code. Given these consultation requirements the Scottish Government is of the view that negative procedure is sufficient.

Section 60 – Power to make provision concerning the procedure to be followed in relation to the application and transfer of site licences, and appeals relating to site licences. Inserts section 32N into the 1960 Act.

This power allows Ministers to make regulations relating to appeals under the reformed site licensing system the Bill would introduce. These regulations would cover the procedure and timescales relating to such appeals, but the Scottish Government believes it is also likely to be necessary to make provisions about the effect and consequence of such appeals. For example where a local authority has decided not to renew a licence, and the licence holder appeals, provision will need to be made on the status of the licence while such an appeal is underway, and what would happen if such an appeal was successful. However, in light of the Committee's comments, Ministers will consider further whether the drafting in section 60 needs full refinement, as the intention would be to use the power to make provision as to effects and consequences of appeals, not just in relation to appeal procedures.

The Committee has also asked about the provisions in the Bill that will require local authorities to give reasons for their decisions under the new site licensing regime (under sections 32I and 32N, which would be inserted into the 1960 Act by sections 55 and 60 of the Bill). For background, in relation to providing reasons section 55 of the Bill would insert new section 32D(4) into the 1960 Act. This would require a local authority, before refusing to issue or renew a licence, to provide an applicant with the reasons that it is considering for refusing an application, and giving the applicant at least 28 days to make written representations in response.

However the Scottish Government does not want to place a duty on a local authority to provide reasons for all of its decisions. For example, in cases where a local authority has granted a licence, or consented to the transfer of a licence, it would be unnecessary and disproportionate to require it to provide reasons, at least unless they are requested. It is the Scottish Government's view that this is an area of administrative procedure, and therefore something best covered in regulations, rather than set out on the face of the Bill. Negative procedure seems to the Scottish Ministers to provide an appropriate level of scrutiny for such matters, given the limited intention for use of the power.

Section 63 – Power to vary maximum fine. Inserts section 32T in the 1960 Act.

Section 32T of the 1960 Act, which would be inserted by section 63 of the Bill, gives Scottish Ministers the power to amend fine levels in relation to specific offences related to mobile home site licensing. The Scottish Government has considered the Committee's suggestion that it restrict the provision in a manner similar to that under section 226 of the Criminal Procedure (Scotland) Act 1995. However, the Scottish Government believes that there could be reasons Ministers might wish to adjust the level of maximum fines other than to reflect changes in inflation or other fine levels.

For example, it may be that the prices of mobile homes sharply increase, meaning that fine levels might also need to be raised to continue to provide a suitable sanction. Given the greater level of scrutiny that the affirmative procedure would provide, the Scottish Government believes that restriction of this provision is inappropriate.

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