



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

**6th Report, 2014 (Session 4)**

### **Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill**

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## **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  
Stewart Stevenson

**Committee Clerking Team:**

**Clerk to the Committee**

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## Delegated Powers and Law Reform Committee

### 6th Report, 2014 (Session 4)

#### Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. At its meetings on 3 December 2013 and 21 January 2014 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill at stage 1 (“the Bill”).<sup>1</sup> The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Member in charge provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).<sup>2</sup>

#### OVERVIEW OF BILL

3. The Bill was introduced in the Scottish Parliament on 30 October 2013. The Bill is a Member’s Bill, introduced by David Stewart, MSP.
4. The Bill makes provision, by way of amendments to the Building (Scotland) Act 2003 (“the 2003 Act”), to enable local authorities to recover costs incurred in carrying out repairs to defective or dangerous buildings by imposing a charging order on the property concerned. A charging order is an order made by a local authority which provides for the amount due in respect of works the authority has carried out to a defective or dangerous building to be repaid in instalments over a period of 30 years.

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<sup>1</sup> Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill [as introduced] available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/Defective%20and%20Dangerous%20Buildings/b39s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Defective%20and%20Dangerous%20Buildings/b39s4-introd.pdf)

<sup>2</sup> Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill Delegated Powers Memorandum available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/DDB\\_DPM\\_final.pdf](http://www.scottish.parliament.uk/S4_Bills/DDB_DPM_final.pdf)

5. At present, expenses incurred by a local authority in carrying out works to a defective or dangerous building are recoverable as a personal debt owed to the authority by the owner of the property. The charging orders for which the Bill makes provision will represent an additional cost-recovery option for the local authority in circumstances where it has had to undertake work to a defective or dangerous building. The expenses to be recovered (known as “qualifying expenses”) are payable under the charging order together with any fee in respect of the costs of registering or discharging a charging order, any administrative expenses and interest at a rate to be determined by the local authority.

6. A charging order is registered against the property concerned either in the Land Register or the Register of Sasines. Once it is registered, the order is enforceable against anyone deriving title to the property with the exception of those who derives title to the property in good faith and for value prior to the registration of the order in the appropriate land register.

#### DELEGATED POWERS PROVISIONS

7. There are two delegated powers in the Bill. The Committee considered both of these powers at its meeting on 3 December 2013. At that meeting, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated power:

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

8. The Committee also agreed at its meeting on 3 December 2013 to write to the Member in charge of the Bill to raise questions on the remaining delegated power in the Bill (Section 46A(3) of the 2003 Act as inserted by section 1 of the Bill – Form of charging orders and discharges of charging orders). This correspondence is reproduced at the **Annex**. The Committee’s comments on this power are set out in the following paragraphs:

#### **Section 46A(3) of the 2003 Act as inserted by section 1 of the Bill – Form of charging orders and discharges of charging orders**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>order</b>
<b>Parliamentary procedure:</b>	<b>negative procedure</b>

9. The Bill inserts a new section 46A(2) into the 2003 Act which provides that, unless otherwise required by an order made under section 46A(3), charging orders and discharges of charging orders are to be in such form as the local authority determines so as to give effect to, and state the information required by, schedule 5A.

10. The Bill inserts schedule 5A into the 2003 Act which provides the information referred to in section 46A(2). This includes the postal address of the building to be charged, the name and address of the local authority making the order, the repayable amount, and the amount of the annual instalment due under the charging order. Section 46A(3) of the 2003 Act, as inserted by the Bill, provides

that the Scottish Ministers may by order specify the form which charging orders and discharges of charging orders are to take. This power is subject to the negative procedure.

11. At its meeting on 3 December 2013, the Committee agreed to seek an explanation from the Member in charge of the Bill as to the manner in which the power in the new section 46A(3) was intended to be exercised by the Scottish Ministers. The Committee also queried whether, if it was envisaged that the power would be used to make amendments to the new schedule 5A, the negative procedure was appropriate, given that this would entail textual amendments being made to primary legislation.

12. In his response to the Committee's questions, the Member in charge of the Bill has explained that the information included in schedule 5A would ordinarily have been set out in subordinate legislation made using powers granted by the Bill. Given, however, that the Bill is a Member's Bill, it was considered necessary to make sufficient provision on the face of the Bill itself so as to enable the scheme it sets up to operate without requiring the making of any subordinate legislation by the Scottish Ministers. Nevertheless, should the Scottish Ministers consider it necessary to make further provision in relation to the information required to be contained in a charging order or a discharge, this power will afford them the flexibility to do so.

13. In this instance, it is not the Member in charge of the Bill who will have responsibility for the exercise of this power, but the Scottish Ministers. The Member can give no guarantee as to the manner in which the power will be exercised, nor that it will be exercised at all, if the provisions already made by the Bill appear to the Scottish Ministers to operate effectively in practice.

14. In response to the Committee's questions, the Member has indicated that he would expect the power in section 46A(3) to be used to make replacement provision within subordinate legislation for the form and content of charging orders, rather than to amend schedule 5A itself. The Member also makes reference to the narrow focus of the power, and its essentially administrative nature to justify the use of the negative procedure.

15. The Committee accepts that the manner of exercise of this power is ultimately a matter for the Scottish Ministers, and not the Member in charge of the Bill. In light of the Member's explanation the Committee finds conferring the power to modify the information required in charging orders and discharges of charging orders on Ministers acceptable in principle. However, the Committee has some reservations as to the current drafting of the power in that the information contained in schedule 5A could be supplemented by further provision made in separate subordinate legislation. Were the power to be exercised in this way, the result would be that the information required to be contained in a charging order or a discharge of a charging order would be contained in two places: schedule 5A of the 2003 Act and the subordinate legislation that is made using this power. Given the wording of section 46A(2) disputes could arise as to the extent to which the effect of schedule 5 had been altered by any order.

16. The Committee considers that it would be undesirable for users of the legislation to be required to consult two separate legislative sources in order to gain a complete picture of what is required to be specified in a charging order or a discharge. The Committee considers it important that the legislation is accessible to those who require to use it, as well as those who may be affected by it, and as such, that it should be clear from the terms of the power how that power is to be exercised, given that the Member cannot guarantee the manner in which the Scottish Government would choose to operate it.

17. The Committee considers that it would be clearer and simpler, having regard to the context of the Bill, to provide the Scottish Ministers with an express power to amend schedule 5A, rather than to allow the schedule to be supplemented by subordinate legislation. The Committee considers that this would ensure that the scheme set up by the Bill was not fragmented by the making of subordinate legislation. The Committee accepts the Member's comments regarding the narrow focus of the power and its essentially administrative nature and accordingly considers that the negative procedure would afford the appropriate level of Parliamentary scrutiny over the power in the new section 46A(3), even if that power was amended to provide in express terms for textual amendments to be made to schedule 5A.

**18. The Committee accordingly draws the power in section 46A(3) of the Building (Scotland) Act 2003 as inserted by section 1 of the Bill to the attention of the Parliament on the basis that the Committee considers that the power should be amended to provide a power to amend new schedule 5A to the 2003 Act, as inserted by section 1 of the Bill.**

## **ANNEX**

**Correspondence with the David Stewart MSP (Member in charge of the Bill) dated**

**On 3 December 2013, the Delegated Powers and Law Reform Committee wrote to David Stewart MSP, the member in charge of the Bill, as follows:**

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

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

1. The Bill inserts a new schedule 5A into the Building (Scotland) Act 2003 ("the 2003 Act") which specifies the content of both charging orders and discharges of charging orders.

2. The inserted section 46A(2) to the 2003 Act provides that, unless otherwise required by an order made under section 46A(3), a charging order is to be in such form as the local authority may determine to give effect to, and state the information required by, schedule 5A. Section 46A(3) provides that the Scottish Ministers may by order specify the form which charging orders and discharges of charging orders are to take.

**3. The Committee asks for further explanation as to the manner in which this power is to be exercised. In particular, the Committee asks whether it is expected that Ministers will use the power to amend the terms of the new schedule 5A to the 2003 Act?**

**4. The Committee also asks, if it is expected that the power will be used to make textual amendments to primary legislation, why the negative procedure is considered to afford the appropriate level of scrutiny over the exercise of this power?**

**On 10 December 2013, David Stewart MSP, the member in charge of the Bill, responded as follows:**

The context for Schedule 5A, and the power set out at section 46A(3), is that of a Member's Bill. The information included in the Schedule would ordinarily have been set out in subordinate legislation; however as it is a Member's Bill it was considered necessary to specify a level of detail which would enable the Bill to be operated independently without reliance on Ministers making subordinate legislation. These considerations have informed the approach taken here.

As indicated at paragraphs 5 to 7 of the Delegated Powers Memorandum, Schedule 5A itself sets out the detail of what information is to be included within a charging order (and discharge), and is concerned with matters of form and

content. It is considered that what has been provided for within Schedule 5A is sufficient to enable the new legislation to be operated effectively. However, it is also recognised that the Scottish Ministers might take the view, possibly after a period of operating the legislation, that it would be desirable to make alternative provision so far as the form and content of such orders is concerned. This instrument making power has therefore been included within the Bill to afford the Scottish Ministers some flexibility in their approach to the form and content of orders.

So far as it is possible to give an indication of how it is expected that Ministers will use the power, we would envisage it being exercised to make replacement provision within subordinate legislation for the form and content of charging orders, rather than to amend Schedule 5A itself. On that basis, and given that the focus of any order made under the power set out at section 46A(3) is a narrow one, dealing with the administrative detail of the form and content of charging orders and discharges, it is considered that the negative procedure affords an appropriate, and proportionate, level of scrutiny over the exercise of this power.

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