

BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of David Stewart MSP, to assist the Delegated Powers and Law Reform Committee ('the Committee') in its consideration of the Buildings (Recovery of Expenses) (Scotland) Bill. It may be noted, in passing, that the title of this Bill has been amended at Stage 2, from the 'Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill', to the 'Buildings (Recovery of Expenses) (Scotland) Bill'.

2. The memorandum refers to provisions in the Bill conferring power to make subordinate legislation which were amended, introduced or removed at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

Outline of Bill provisions

3. 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 under Part 3, Compliance and Enforcement, and Part 4, Defective and Dangerous Buildings, under the 2003 Act.

4. 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, and for the form of a charging order, and a discharge, to be prescribed.

5. The Bill as amended at Stage 2 contains two new powers to make subordinate legislation which are delegated to the Scottish Ministers, one of these replacing a power in the Bill as introduced, the other being wholly new. The one other power in the Bill as introduced has been removed. All of these powers are commented on below.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 1(b) (inserting section 46A(1A) (form of charging orders) into the Buildings (Scotland) Act 2003)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative

Provision

6. New section 46A(1A) provides that a charging order, and a discharge of a charging order, are to be in the form prescribed under section 36 of the Building (Scotland) Act 2003 ('the 2003 Act'). Section 36 relates to forms used under the 2003 Act. It enables the Scottish Ministers, by means of regulations, to make provision as to the form and content of any application, warrant, certificate, notice or document authorised or required to be used under the 2003 Act. Such items, if used, must be used in the form provided for in the relevant regulations.

Reason for taking this power

7. This provision effectively replaces the order making power contained within the Bill at introduction, in terms of which charging orders (and discharges) were to be in such form as the local authority determined to give effect to, and to state the information required by, Schedule 5A to the Bill. This schedule, which is removed from the Bill in consequence of the approach now taken at section 46A(1A), set out detailed provision about the contents of charging orders (and discharges). In addition, provision was included to enable the Scottish Ministers, by order, to make alternative provision in regard to the form which charging orders (and discharges) are to be in.

8. At Stage 1 the Delegated Powers and Law Reform Committee ("the Committee") sought clarification as to how this power might be exercised. The Committee considered that it would be clearer and simpler 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.

9. Having taken account of the Committee's concerns, the member indicated that in the event of the Bill proceeding further an appropriate amendment would be brought forward to address them. It is considered that the amendment which has now been provided deals with those concerns, while adopting a different route to achieve that outcome. The amended provision reflects input provided by the Registers of Scotland, which expressed a preference for the use of standard forms, and relies on the powers already contained within section 36 of the 2003 Act. This will ensure the use of standard forms, rather than local authorities being responsible for developing their own forms. In consequence, the Bill is simplified, with Schedule 5A no longer required, and having been removed by means of related Stage 2 amendments.

10. The intention is that the Building (Forms) (Scotland) Regulations 2005 (SSI 2005/172), made under section 36 of the 2003 Act and covering a number of existing notices and forms, will

be amended to provide for the forms required under the Bill in regard to charging orders (and discharges).

Choice of procedure

11. Regulations made under section 36 are subject to the negative procedure, in terms of section 54(5) of the 2003 Act. That is considered to afford an appropriate level of scrutiny in relation to the form of a charging order (and discharge), in line with that applied to any other regulations which are brought forward under the power contained within section 36.

Section 1A –Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative if amending an Act, otherwise negative

Provision

12. New section 1A enables the Scottish Ministers to make a range of ancillary provisions considered appropriate for the purposes of, in consequence of, or for giving full effect to any provision in the Bill. The power can be used to modify the new Act and any other existing legislation, primary or secondary.

Reason for taking this power

13. The power to make ancillary provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. This power has been taken to ensure that there is adequate flexibility to give effect to the provisions of the new legislation. It is possible that unforeseen issues will arise which require further provision to be made or that consequential amendments to the existing law will be required which have not yet been identified. In the absence of such provision there might otherwise be a need to return to the Parliament, by means of subsequent primary legislation, to deal with a matter of an ancillary nature, which is plainly within the policy intentions of the legislation. It is considered that this would not be an effective use of the resources of the Parliament.

14. The power, while potentially wide, is limited to the extent that it can only be used as the Scottish Ministers consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of the new Act. Any supplementary use of the power would be strictly construed. This represents an important control on the use of the power. It is however considered important to ensure workability in practice.

Choice of procedure

15. Where the power is used to add to, replace or omit any part of an Act then exercise of it is subject to the affirmative procedure. It is considered that in such circumstances the highest level of Parliamentary scrutiny is appropriate. In other circumstances, the negative procedure will

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apply, again ensuring that the Parliament has an appropriate opportunity to consider any exercise of this power.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION REMOVED AT STAGE 2

Section 1 on introduction (inserting section 46D(4) (repayment or early redemption of amounts payable under a charging order) into the Buildings (Scotland) Act 2003)

Power conferred on – the Scottish Ministers

Power exercisable by –order made by statutory instrument

Parliamentary procedure –affirmative

Provision

16. This order making power has been removed, following amendment of the Bill at Stage 2. The power concerned enabled the Scottish Ministers by order to determine the repayable amount under a charging order, where the building owner is unable to agree this with the local authority, and to make further provision about the repayment or early redemption of amounts repayable under a charging order.

17. The Bill as amended at Stage 2 removes the role of the Scottish Ministers in relation to the process of agreeing the redeemable amount, that now being a matter which can be agreed between the owner and the local authority, only. There is accordingly no requirement now for the power conferred on the Scottish Ministers and it has therefore been removed by virtue of amendments made to section 46D of the Bill at Stage 2.

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