

HOUSING (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Housing (Scotland) Bill (the Bill). It describes provisions in the Bill conferring power to make subordinate legislation which were introduced, removed or amended at Stage 2¹. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced².

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

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

PART 2 – SOCIAL HOUSING

Section 4: Rules on priority of allocation of housing: consultation

Section 7: Determination of minimum period for application to remain in force

Section 8: Creation of short Scottish secure tenancy: antisocial behaviour

Section 15: Grounds for eviction: antisocial behaviour

3. Although not related to subordinate legislation powers, the Committee may wish to be aware that amendments have been made to these provisions of the Bill relating to the publication of guidance on social housing. Amendments have been made to require all the guidance issued on social housing under powers in Part 2 to be consulted on and published, in line with the Committee's recommendations in its Stage 1 report on the Bill³.

4. The powers to issue guidance under Part 2 of the Bill have also been extended to address issues raised at Stage 1. A requirement to consult such persons as Ministers consider appropriate has been added to guidance enabled by section 4, relating to a social landlord's rules governing the priority of allocation of social housing. Guidance issued under section 7 can now cover any matter relating to the provisions in that section. Guidance issued under section 8 can now cover steps relating to extending the term of a short Scottish secure tenancy for 6 months and raising proceedings for recovery of possession of a short Scottish

¹ [http://www.scottish.parliament.uk/S4_Bills/Housing%20\(Scotland\)%20Bill/b41as4-stage2-amend.pdf](http://www.scottish.parliament.uk/S4_Bills/Housing%20(Scotland)%20Bill/b41as4-stage2-amend.pdf)

² http://www.scottish.parliament.uk/S4_Bills/Housing_DPM_final.pdf

³ http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/DPLR_Com_report.pdf

secure tenancy. A power to issue guidance has also been included in section 15, relating to eviction on the grounds of antisocial behaviour.

PART 3 – PRIVATE RENTED HOUSING

Section 22C – (inserts new section 20A after section 20 of the Housing (Scotland) Act 2006.

Power conferred on: The Scottish Ministers.

Power exercisable by: Regulations made by statutory instrument.

Parliamentary procedure: Affirmative procedure.

Amended or new power: New

Provision

5. New section 20A provides that Ministers may by regulations vary or extend the repairing standard and a landlord's duty to ensure a house meets that standard. This includes the power to modify Chapter 4 of Part 1 of the 2006 Act, which sets out standards that private rented housing must meet both before and during any tenancy.

Reason for taking this power

6. A new requirement that let property must have carbon monoxide detectors was added at Stage 2, and the standard relating to electrical safety was in effect extended by a requirement for regular electrical safety inspections (in both cases, by non-Government amendment). The Scottish Government wishes to ensure that any future changes required to quality standards within the private rented sector can, where necessary, be addressed as quickly as possible, while remaining subject to parliamentary scrutiny. The power to modify legislation is necessary to ensure that any changes can be made to fit effectively within existing provision.

Reason for choice of procedure

7. It is considered appropriate that this power is subject to affirmative procedure, as the Stage 2 amendment has provided for, to allow Parliament a higher level of scrutiny. This is appropriate because of the potential effect of the use of the power on private landlords and the private rental market, and the power to modify primary legislation. As the new provisions in relation to electrical safety inspections demonstrate, to craft an effective requirement may need a significant amount of related detail to be included within the legislation, and the Parliament will wish to consider whether to approve such detail.

PART 4 – LETTING AGENTS

Section 29(2A) – Training requirement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: New

Provision

8. Section 29 of the Bill makes provision for the Scottish Ministers to determine applications for registration as a letting agent and renewal of registration. Section 29(2)(c) was inserted at Stage 2 and creates a power for the Scottish Ministers to prescribe training requirements which letting agents must meet before they can be entered on the register or have their entry renewed. Section 29(2A) (also added at Stage 2) further sets out what these regulations may prescribe including: the matters on which training must be undertaken; the persons who must have undertaken it; qualifications which must be held by the applicant or other persons; the period within which training must have taken place.

Reason for taking this power

9. The power is being taken to allow for further consultation with the industry on the detail of the training requirements required for registration. Furthermore, a delegated power allows flexibility for the Scottish Ministers to modify training requirements to reflect the future development of the sector.

Reason for choice of procedure

10. The power will be used to set out the technical detail of training requirements, related timings and the persons upon whom the requirements are placed. The power is also likely to be used to reflect any future changes in practice and law for the letting agent sector. It is considered that the negative procedure provides appropriate flexibility for changes to be made expeditiously and that a more detailed level of Parliamentary scrutiny is not required for provisions of this nature.

Section 41(1) and Section 82(2)(ba) – Code of Practice

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure for the first Code and any replacement Code and negative procedure for revisions to the Code

Amended or new power: Amended

Provision

11. Section 41(1) of the Bill currently provides that the Scottish Ministers may, by regulations, set out a Code of Practice for letting agents. As drafted at introduction, the negative procedure would apply to the regulations setting out the Code. At Stage 2, an amendment inserted a new section 82(2)(ba) so that the affirmative procedure will now apply to the first Code of Practice or any subsequent replacement code. Any revisions to the Code will be by regulations subject to the negative procedure.

12. An amendment to Section 41 at Stage 2 added in sections 41(1)(b) and (c) which provide that in addition to the Code of Practice setting out standards of practice (section 41(1)(a)), the Code will also now include the handling of tenants' and landlords' money; and professional indemnity arrangements. The amendment responds to concerns expressed at

Stage 1 by stakeholders and the Infrastructure and Capital Investment Committee concerning a lack of detail about the Code on the face of the Bill.

Reason for taking this power

13. The Code of Practice will contain standards to which all persons carrying out letting agency work must adhere. As stated in the Delegated Powers Memorandum provided at introduction⁴, the Scottish Government considers it to be appropriate for the detailed set of requirements needed in the Code to be developed in regulations subject to consultation. Furthermore, a delegated power allows the Scottish Ministers the flexibility to amend the Code at a later date to reflect changes in practice and the law as it relates to the letting agent sector.

Reason for choice of procedure

14. At introduction, the intention was that the Code would be subject to the negative procedure. The Delegated Powers and Law Reform Committee indicated in its stage 1 Report⁵ that it considered the affirmative procedure to be a more suitable level of Parliamentary procedure for the power in section 41(1). This was in light of the serious consequences for letting agents should they breach the Code such as possible de-registration and or potential for prosecution. The Scottish Government accepts this and, to reflect the severity of these legal consequences whilst ensuring an appropriate level of Parliamentary scrutiny, is applying the affirmative procedure to the first Code and any replacement Code. This will enable a high level of Parliamentary scrutiny to be applied to the full details of the Code and any future replacement Code. To ensure a proportionate process and an appropriate use of Parliamentary time, the negative procedure is being applied to revisions of the Code.

Section 46A(2) – Monitoring Compliance – Power to obtain information

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: New

Provision

15. New Section 46A was introduced at Stage 2 to give the Scottish Ministers the power to serve notice on a person who appears to be a letting agent, requiring the information specified in the notice to be provided to them. This process for obtaining information is for the purpose of enabling the Scottish Ministers to monitor compliance with the provisions in Part 4 of the Bill. The power is qualified at subsection (3) to make it clear that it only extends to requiring information which can be legally disclosed.

16. Subsection (2) allows the Scottish Ministers to make further provision in regulations about the requiring of information, in particular about:

⁴ http://www.scottish.parliament.uk/S4_Bills/Housing_DPM_final.pdf

⁵ http://www.scottish.parliament.uk/S4_InfrastructureandCapitalInvestmentCommittee/DPLR_Com_report.pdf

- a) the form of the notice and manner of service
- b) the time within which information must be provided.

Reason for taking this power

17. This power has been taken to provide the Scottish Ministers with some flexibility on the form of the notice and manner of service, and the time within which information must be provided, to allow these to be developed further to take account of any modifications to the process that may become apparent or be required in the future once implementation of the provisions has been completed and the national register and associated processes established.

Reason for choice of procedure

18. The power relates to the administration and procedure associated with the giving of notices requiring information to be provided to the Scottish Ministers. The Scottish Ministers are being given the power to obtain information for the purposes of monitoring compliance with the regulations. Section 46A(3) sets out that the Scottish Ministers are not authorised to require this information if this would make the person holding it liable for prosecution for doing so. It is common for details about administration and procedure to be prescribed by secondary legislation. It is considered that the level of Parliamentary scrutiny afforded by the negative procedure provides an appropriate balance between expedition and the need for scrutiny of provisions of this nature.

Section 51(3)(a) – Meaning of letting agency work

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: Addition of new element to existing power

Provision

19. Section 51(1) and (2) of the Bill set out the meaning of “letting agency work” for the purposes of Part 4 of the Bill. Subsection (3) confers delegated powers on the Scottish Ministers to modify the meaning of “letting agency work” by order.

20. Subsection (3) has been amended at Stage 2 to confer the new delegated powers contained in paragraph (a) on the Scottish Ministers. They are an addition to what was in the Bill at introduction, which now form paragraph (b) of the subsection. The new powers enable the Scottish Ministers to provide by order that specified bodies or schemes of a specified description are excluded from the definition of “letting agency work” applying to Part 4 of the Bill. The power to specify a description of a scheme is qualified in subsection (4) so that only a description of a scheme which is operated by a body which does not carry out the scheme for profit and which is for the purpose of assisting persons to enter into leases or occupancy agreements can be specified.

21. Subsection (3)(b) restates the delegated power to modify the meaning of “letting agency work” by order which was section 51(3) in the Bill at introduction. This power has

not been modified. A consequential amendment has been made to section 82(2)(c) of the Bill to retain the affirmative procedure for this power.

Reason for taking this power

22. The Scottish Government considers it appropriate to enable the Scottish Ministers to exempt bodies and descriptions of schemes from the scope of the regulatory regime set out in Part 4 of the Bill. This will allow specified bodies and schemes carrying out work which falls within the description of “letting agency work” but which the Scottish Ministers consider should not be subject to the regulatory regime because, for example, they carry out not for profit work to assist vulnerable tenants to access tenancies in the private rented sector, to be exempted from the requirements of the letting agent regulatory regime.

Reason for choice of procedure

23. This power will be used to specify bodies and descriptions of schemes which are not to be covered by the provisions in Part 4 of the Bill. Its future use may include adding newly created bodies or descriptions of schemes from time to time. In contrast to the power at section 51(3)(b) which is subject to affirmative procedure, this power cannot be used to modify primary legislation. The Scottish Government therefore considers the level of Parliamentary scrutiny involved with the negative procedure to strike an appropriate balance between the need for Parliamentary scrutiny and appropriate use of Parliamentary time.

PART 5 – MOBILE HOME SITES WITH PERMANENT RESIDENTS

Section 55 (inserts section 32F into the Caravan Sites and Control of Development Act 1960) – Power to specify time limits for the determination of applications

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: New

Provision

24. Section 32F(2A) of the Caravan Sites and Control of Development Act 1960 (the 1960 Act), inserted through amendment 91 at Stage 2, places a duty on the Scottish Ministers that they must, by regulations, specify a time limit for a local authority to determine a site licence application. Under section 32F(3) of the 1960 Act if a local authority does not determine an application in that timescale it is deemed to be approved.

Reason for taking this power

25. The Bill as introduced⁶ would have required a local authority to determine an application for a site licence, or to decide on the transfer a site licence, within 12 months of receiving an application. If the application was not decided in this timeframe, then it would be deemed to be approved. This provision was included in the Bill to prevent an application being left undetermined.

⁶ [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)

26. However in light of views expressed during the Stage 1 consideration of the Bill, an amendment was introduced that required Scottish Ministers to set the timescales in Regulations. This would allow the Scottish Government to discuss realistic timescales with local authorities and the industry, and set them out in Regulations in due course. The amendment also allows Ministers to specify different limits for different types of application. This could be used if (for example) after discussion with local authorities and others, it was clear that it was appropriate for a licence renewal to have a shorter time limit for a decision than the handling of an initial site licence application.

Reason for choice of procedure

27. This power will be used to set out the administrative time limits for local authorities to make decisions on applications and it is therefore considered that the level of Parliamentary scrutiny afforded by the negative procedure is sufficient.

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: Amended

Provision

28. As it stands following Stage 2 consideration, new section 32N of the 1960 Act gives the Scottish Ministers the power to make provision in relation to the procedure to be followed in relation to the issue, renewal, transfer, transmission and revocation of a Part 1A site licence, the procedure to be followed in relation to appeals under section 32M of the 1960 Act (inserted by section 59 of the Bill) and also to make provision in relation to the determination and consequences of an appeal under section 32M.

Reason for taking this power

29. During its examination of the Bill at Stage 1 the Delegated Powers and Law Reform Committee recommended that the power included in the Bill at introduction should be more tightly focussed. The Scottish Government responded to that recommendation by tabling amendments to this provision at Stage 2, which were agreed by the Infrastructure and Capital Investment Committee. Section 32N, as amended, now gives the Scottish Ministers the power to make regulations in relation to the procedure to be followed in relation to:

- the issue, renewal, transfer, transmission and revocation of a permanent site licence,
- appeals relating to a site licence under new section 32M.

30. The Scottish Ministers can also make provision for the determination and consequences of an appeal under section 32M. The amended section reflects the policy

intention that Regulations under this section should be able to cover only the procedure to be followed for, and determination and consequences of, appeals.

Reason for choice of procedure

31. It is considered appropriate that this power is subject to negative procedure because it will be used to set details of procedure and timescales. These will supplement the overarching framework for handling site licences set out in the Bill. The Bill was accordingly amended at Stage 2.

Section 63 (former insertion of section 32T into the Caravan Sites and Control of Development Act 1960) – Power to make regulations concerning maximum fines for having a site without a licence, and breaching licence conditions.

Power removed

32. At introduction, the Bill included a power which would have given the Scottish Ministers the power to amend, by order subject to the affirmative procedure, the maximum fines which can be imposed for operating a mobile home site without a licence, for breaching a licence condition, and for failure to comply with an improvement notice.

33. The Delegated Powers and Law Reform Committee expressed some concerns about that power, and these were endorsed by the Infrastructure and Capital Investment Committee in its stage 1 report on the Bill.

34. The Scottish Government considered the Committee's suggestion that it should amend section 32T as inserted by section 63 to include a provision that specifies the circumstances in which Ministers would be able to vary the maximum fine levels. However it was not clear how such a provision could be made to work as the Committee intended. In view of that the Scottish Government sought to remove the power to vary maximum fine levels from section 63, by an amendment that was agreed by the Infrastructure and Capital Investment Committee at Stage 2.

PART 6 – PRIVATE HOUSING CONDITIONS

Section 72A(1) (inserts new subsections (3A) and (3B) into section 10A of the Title Conditions (Scotland) Act 2003 – Notice of potential liability for costs: notice of discharge.

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish Statutory Instrument

Parliamentary procedure: Negative procedure

Provision

35. The power provides that a notice of discharge must be in a form prescribed by order made by the Scottish Ministers. The form of notice of potential liability for costs is laid down in schedule 1A to the Title Conditions (Scotland) Act 2003. It is considered that taking a power to prescribe the notice of discharge form is preferable to including it in the Bill itself as there may be a need for flexibility to respond to changing circumstances.

Reason for taking this power

36. The amendment provides a statutory discharge procedure for homeowners where the sums under a notice of potential liability for costs registered against a property have been paid.

37. This statutory discharge procedure replaces a non-statutory procedure currently operated by Registers of Scotland.

38. The amendment includes a power for Ministers to prescribe the form for the statutory discharge notice. It is common practice for forms to be prescribed through secondary legislation.

Reason for choice of procedure

39. It is considered appropriate that this power is subject to the negative procedure. The existing form for notice of potential liability for costs is at schedule 1A to the 2003 Act and may be amended by an order subject to the negative procedure. The negative procedure provides an appropriate balance between expedition and convenience on the one hand and the need for scrutiny of a provision of this nature on the other hand. It is common for secondary legislation prescribing forms to be subject to the negative procedure. While the 2003 Act has a form for notice of potential liability for costs, that approach may be considered in the context of the Bill which introduced the form and established a new procedure, as opposed to an amendment modifying the operation of an existing scheme.

Section 72A(2) (inserts new subsections (3A) and (3B) into section 13 of the Tenements (Scotland) Act 2004 – Notice of potential liability for costs: notice of discharge.

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish Statutory Instrument

Parliamentary procedure: Negative procedure

Provision

40. The power provides that a notice of discharge must be in a form prescribed by order made by the Scottish Ministers. The form of notice of potential liability for costs is laid down in schedule 2 to the Tenements (Scotland) Act 2004. It is considered that taking a power to prescribe the notice of discharge form is preferable to including it in the Bill itself as there may be a need for flexibility to respond to changing circumstances.

Reason for taking this power

41. The amendment provides a statutory discharge procedure for flat owners where the sums under a notice of potential liability for costs registered against a flat have been paid. Analogous provision in respect of burdened properties other than flats is made in the power considered at paragraphs 33 to 37 above.

42. This statutory discharge procedure replaces a non-statutory procedure currently operated by Registers of Scotland.

43. The amendment includes a power for Ministers to prescribe the form for the statutory discharge notice. It is common practice for forms to be prescribed through secondary legislation.

Reason for choice of procedure

44. It is considered appropriate that this power is subject to the negative procedure. The existing form for notice of potential liability for costs is at schedule 2 to the 2004 Act and may be amended by an order subject to the negative procedure. The negative procedure provides an appropriate balance between expedition and convenience on the one hand and the need for scrutiny of a provision of this nature on the other hand. It is common for secondary legislation prescribing forms to be subject to the negative procedure. While the 2004 Act has a form for notice of potential liability for costs, that approach may be considered in the context of the Bill which introduced the form and established a new procedure, as opposed to an amendment modifying the operation of an existing scheme.

PART 7 – MISCELLANEOUS

Section 77A First-tier Tribunal: disqualification of members from exercise of certain functions

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: New

Provision

45. Section 77A provides that elected and certain other politicians are disqualified from hearing cases transferred to the First-tier Tribunal (FTT). Section 77A provides that the Scottish Ministers may by order amend the list of disqualified offices.

Reason for taking this power

46. The Bill confers responsibility for certain cases directly on the FTT which will be set up following the Tribunals (Scotland) Act 2014, which creates the broad framework for the operation of FTT. On introduction, the Tribunals (Scotland) Bill contained a provision which set out that the holders of certain offices would have been disqualified from also being a member of the FTT. However, these were removed during the passage of that Bill to allow

the policy for disqualifications to be a matter for the founding legislation for each individual tribunal jurisdiction.

47. In relation to cases transferred from the jurisdiction of the sheriff and letting agents redress cases, the Scottish Government is of the view that the disqualification of certain offices will safeguard the independence of those jurisdictions and will reduce the potential for conflicts of interest.

48. The list includes elected and certain other politicians but it may also be considered appropriate to, for example, include other office holders in continuing to safeguard the independence of the tribunal. Jurisdictions within the FTT for cases transferred from the sheriff and letting agents redress cases could also be placed into a chamber alongside other jurisdictions within the FTT. The Scottish Ministers consider that an order making power will allow the flexibility to consider both how disqualifications work in practice when more detail about the structure of the FTT is available and to take account of any future changes.

Reason for choice of procedure

49. The principle of enabling certain specified offices to be disqualified has been set out and considered as part of the Bill process. The Scottish Government considers negative procedure is appropriate to amend the listed offices. Negative procedure is used in other tribunal jurisdictions, such as the Mental Health Tribunal Scotland, the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel to vary the list of disqualified offices and so is considered to be appropriate for these jurisdictions.

Section 77B - Private rented housing panel: disqualification from membership

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative procedure

Amended or new power: New

Provision

50. Section 77B provides that elected and certain other politicians are disqualified from being appointed as, or remaining, a member of the Private Rented Housing Panel/Homeowner Housing Panel (PRHP/HOHP). Section 77B also provides that the Scottish Ministers may by order amend the list of disqualified offices.

Reason for taking this power

51. On introduction, the Tribunals (Scotland) Bill (now passed) contained a provision which set out that the holders of certain offices would have been disqualified from also being a member of the First-tier Tribunal (FTT). These disqualifications would have applied to members of the PRHP/HOHP when those jurisdictions are transferred into the FTT under provisions in the Tribunals (Scotland) Bill. However, they were removed during the passage of that Bill to allow the policy for disqualifications to be a matter for the founding legislation for each individual tribunal jurisdiction.

52. In relation to the PRHP/HOHP, the Scottish Government is of the view that the disqualification of certain offices will safeguard the independence of those jurisdictions and will reduce the potential for conflicts of interest.

53. The list includes elected and certain other politicians but it may also be considered appropriate to, for example, include other office holders in continuing to safeguard the independence of the tribunal. The PRHP/HOHP could also be placed in a chamber alongside other jurisdictions within the FTT. The Scottish Government considers that an order making power will allow the flexibility to consider both how disqualifications work in practice when more detail about the structure of the FTT is available and to take account of any potential future changes.

Reason for choice of procedure

54. The principle of enabling certain specified offices to be disqualified has been set out and considered as part of the Bill process. The Scottish Government considers negative procedure is appropriate to amend the listed offices. Negative procedure is used in other tribunal jurisdictions, such as the Mental Health Tribunal Scotland, the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel, to vary the list of disqualified offices and so is considered to be appropriate for the PRHP/HOHP tribunals.

This document relates to the Housing (Scotland) Bill as amended at Stage 2 (SP Bill 41A)

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
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ISBN 978-1-78392-453-0