

# **HOUSING (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Housing (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

### **OUTLINE OF BILL PROVISIONS**

3. The purpose of the Housing (Scotland) Bill is to abolish the right to buy social housing; to provide additional safeguards for tenants in the private rented sector (PRS) and permanent residents of mobile home sites; to introduce a regulatory framework for letting agents to help improve overall levels of service and professionalism within the industry; to support improvements in housing quality in the private rented and privately-owned sectors; to make better use of the existing stock of social rented homes; and to provide more efficient access to justice for landlords and tenants in the private rented sector.
4. The Bill is structured in the following parts:
  - **Part 1** contains provisions which will abolish the right to buy.
  - **Part 2** makes provision in relation to social housing allocations; the extension of the term of the short Scottish secure tenancy; the right to assign or sublet a tenancy, to establish a joint tenancy and to succeed to a secure tenancy.
  - **Part 3** and schedule 1 transfers jurisdiction for civil cases relating to the private rented sector from the sheriff court to the First-tier Tribunal. Part 3 also contains some further changes to private rented housing legislation, containing provisions which deem a landlord as being registered on the landlord register where an application has not been determined by a local authority within 12 months; which allow third party reporting to the Private Rented Housing Panel (PRHP); and for enforcement of landlord's repairing standard.

- **Part 4** makes provision for the registration of letting agents (including a fit and proper person test); creates an offence of operating as a letting agent without being registered; sets out the process for handling disputes between letting agents and landlords or tenants and allows Scottish Ministers to provide for a Letting Agent Code of Practice by regulations.
- **Part 5** makes provision for the licencing of permanent mobile home sites in Scotland; (including a fit and proper person test); offences relating to permanent sites and local authority enforcement of statutory requirements, including powers of entry and recovery of expenses in relation to enforcement action.
- **Part 6** amends local authority powers to enforce repairs and maintenance in private homes.
- **Part 7** makes a number of miscellaneous amendments: granting Ministers powers to exempt certain schemes, such as shared equity schemes from the right to redeem a heritable security after 20 years in relation to private dwellings; providing for delegation of certain functions of the president of the Private Rented Housing Panel; amending the Scottish Housing Regulator's powers to transfer assets following inquiries; and repealing provisions in the Housing (Scotland) Act 1987 that permit designation of certain houses as defective.
- **Part 8** sets out various supplementary and final provisions.

## **APPROACH TO USE OF DELEGATED POWERS**

5. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

## **DELEGATED POWERS**

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

## **PART 2 – SOCIAL HOUSING**

**Section 4(2) – inserts new subsections (3A) to (3C) into section 21 of the Housing (Scotland) Act 1987 – subsection (3B) Power to prescribe persons of a description or type who social landlords must include in their allocation policy.**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure

*Provision*

7. Section 4(2) inserts subsections (3A) to (3C) into section 21 of the Housing (Scotland) Act 1987 (“the 1987 Act”). New subsection (3B) provides that Ministers may by regulations prescribe persons of a description or type who social landlords must include in their allocations policies.

*Reason for taking the power*

8. The Scottish Government wishes to give social landlords more flexibility in the allocation of their housing. New section 20(1) to (1AB) as inserted into the 1987 Act by section 3 of the Bill replaces a prescriptive list of persons to whom social landlords must give reasonable preference when allocating their housing, with a more general requirement to give reasonable preference to persons who are homeless or threatened with homelessness and persons who are living under unsatisfactory housing conditions, in both cases where they have housing needs which are not capable of being met by other housing options which are available.

9. The Scottish Government considers that there may, however, be a need to ensure that social landlords have regard to groups or categories of persons that are routinely being omitted from allocation policies. The regulation making power seeks to allow for a prompt and effective change to be made to the list of types of persons who should be in landlords’ rules governing the priority of allocation of housing in order to respond to changes in future practice in the social housing sector.

*Choice of procedure*

10. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a high level of scrutiny, given the potential effect of the use of the power on those types of person who must be included in landlords’ rules governing the priority of allocation of social housing.

**Section 7 inserts new section 20B into the Housing (Scotland) Act 1987 – section 20B(4) - Power to prescribe a maximum period preceding the application for which a social landlord may take account of any of the circumstances in subsection (5) and a power to prescribe a maximum period that a landlord may make an applicant ineligible for the allocation of housing as a result of the circumstances in subsection (5).**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure

*Provision*

11. Section 7(2) inserts new section 20B into the 1987 Act. New subsection (4) of section 20B provides that Ministers may by regulations prescribe a maximum period preceding the

application for which a social landlord may take account of any of the circumstances in subsection (5) and a power to prescribe a 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 make different maximum periods for different circumstances.

*Reason for taking the power*

12. The Scottish Government considers that it may be appropriate to make certain applicants ineligible for the allocation of housing for a period of time where the circumstances set out in new section 20B(5) of the 1987 Act apply. However, it is considered that the time for which such circumstances are relevant should be limited. The Scottish Government, therefore, may wish to prescribe a maximum period of time preceding the application that the circumstances in section 20B(5) may be taken into account by a social landlord, if it appears that such landlords are inappropriately using the discretion that section 20B provides. The Scottish Government may also wish to prescribe a maximum period of time during which an applicant can be considered ineligible for an offer of housing.

*Choice of procedure*

13. The Scottish Government considers that the maximum periods for the purposes of this provision should merit a higher level of Parliamentary scrutiny, as they may significantly affect the use of the discretion being given to social landlords. They also could significantly affect the rights of applicants, with historical conduct issues, to be considered for allocation of housing. The Scottish Government therefore considers that affirmative procedure is appropriate for any regulations.

**Section 7 inserts section 20B into the Housing (Scotland) Act 1987 – section 20B(7) - Power to modify the circumstances under which social landlords may make an applicant ineligible for the allocation of housing**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure

*Provision*

14. Section 7 inserts section 20B into the 1987 Act. New section 20B(7) provides that Ministers may by regulations modify the circumstances under which social landlords may make an applicant ineligible for the allocation of housing and allows modification of the definitions in subsection (6).

*Reason for taking the power*

15. The Scottish Government may wish to vary the circumstances which may cause applicants to be made ineligible for the allocation of housing. Section 7 of the Bill inserts new section 20B into the 1987 Act which sets out these circumstances, these include antisocial behaviour, rent arrears, tenancy abandonment and making a false statement in applications for housing. The regulation-making power in subsection (7) will allow prompt change to be made to these

circumstances if that is required to meet changing needs and future practice in the social housing sector, or to take account of changes in the legislation referred to in the subsection.

*Choice of procedure*

16. It is considered appropriate that this power should be subject to affirmative procedure both because of the significance of the provision that could be made for social landlords and applicants for tenancies with such landlords, and because the power is to modify primary legislation.

**Section 12 – amends section 36 of the Housing (Scotland) Act 2001 – section 36(4C) - 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**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Regulations made by statutory instrument**  
**Parliamentary procedure: Negative procedure**

*Provision*

17. Section 12(c) amends section 36 of the Housing (Scotland) Act 2001 by inserting subsections (4A) to (4C). New subsection (4C) provides that Ministers may by regulations make provision about the procedure that social landlords should follow when reviewing a decision to seek recovery of possession of a property.

*Reason for taking the power*

18. The Scottish Government considers that regulations are required to make provision about the procedure to be followed in reviewing a decision to seek recovery of possession of a house which is subject to a tenancy, following an application by the tenant, given the level of detail that is likely to be required. It is considered that regulations should include provision for who should be involved in the review, oral hearings, timescales for the review and communication with tenants.

*Choice of procedure*

19. The Scottish Government considers that the use of this power can be left to the level of Parliamentary scrutiny attached to the negative procedure. The making of procedural rules for social landlords to follow when reviewing their decisions to seek recovery of possession is an administrative matter.

**PART 3 – PRIVATE RENTED HOUSING**

**Section 21 – Power to transfer civil cases relating to Houses in Multiple Occupation from the sheriff to the First-tier Tribunal.**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Regulations made by statutory instrument**  
**Parliamentary procedure: Affirmative procedure**

### *Provision*

20. Section 21 provides that Ministers may by regulations transfer jurisdiction for cases relating to Houses in Multiple Occupation (HMO) from the sheriff to the First-tier Tribunal (FTT). The cases which could be transferred under the power arise under specific provisions in Part 5 of the Housing (Scotland) Act 2006. These cases relate to:

- Appeals by landlords against decisions of local authorities regarding HMO licensing (for example, decisions to grant, revoke or refuse licences);
- Requests by local authorities to extend the 12 month period for considering applications for HMO licences; and
- Powers to ensure that work required under an HMO amenity notice can go ahead.

### *Reason for Taking Power*

21. The Scottish Government wishes to improve the consistency and efficiency of decision making for cases relating to the private rented sector by transferring civil cases from the courts to the FTT.

22. The HMO licensing regime plays an important role in the regulation of the private rented sector and, given that most other PRS cases are to be transferred to the FTT, the consistent approach would be to transfer HMO licensing cases to the FTT as well. However, the possible transfer of cases relating to HMOs was not explored in the consultation '*Better Dispute Resolution in Housing*'. The Scottish Government view is that further consideration is required before a decision is taken on whether jurisdiction for these cases should be transferred.

23. In addition, the HMO licensing regime is also relevant to properties under different tenures, including some social rented sector properties. Consideration needs to be given to whether it would be appropriate to transfer all HMO licensing cases to the FTT and whether it would be practicable to transfer only those cases which relate to the PRS.

### *Choice of Procedure*

24. As this power will require the amendment of primary legislation the Scottish Government considers that affirmative procedure would be appropriate. This would allow the Parliament the opportunity for full consideration of provision it is proposed to make.

**Section 23(1)(a) amends section 22 of the Housing (Scotland) Act 2006 by inserting new subsection (1B) – Power to specify persons who may make an application to the Private Rented Housing Panel in respect of the Repairing Standard.**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Negative procedure**

*Provision*

25. New subsection (1B)(b) of section 22 of the Housing (Scotland) Act 2006 (“the 2006 Act”) as inserted by section 23(1)(a) of the Bill provides that the Scottish Ministers may by order specify a person who may make an application to the Private Rented Housing Panel (PRHP) for a determination of whether a landlord has complied with the repairing standard.

*Reason for Taking Power*

26. The Scottish Government wishes to expand access to the PRHP for the purposes of further enhancing local authority powers to tackle the problem of substandard housing. Subsection (1B)(a) therefore allows local authorities to apply to the PRHP for a determination regarding compliance with the repairing standard.

27. The Scottish Government recognises that there may be parties other than local authorities with an interest in ensuring minimum standards of property condition are met and consider that those parties may seek to enforce the repairing standard through a local authority application to the PRHP. However, the power to specify persons who may apply to the PRHP could be exercised in the future if there is evidence that there are such interested parties, that might require a direct route of access to the PRHP to enforce the repairing standard.

*Choice of Procedure*

28. The Scottish Government considers that the power to specify those persons, other than local authorities, who may apply to the PRHP for a determination of whether a landlord is meeting their repairing standard duties would not warrant Parliamentary debate. The power does not allow for the amendment of primary legislation and therefore, negative procedure is appropriate.

**Section 24(7) amends paragraph 8(1) of schedule 2 to the Housing (Scotland) Act 2006 by inserting reference to new subsection 22(1A) - Power to make further provision about the making or determination of applications made under section 22(1) and 22(1A).**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Regulations made by statutory instrument**  
**Parliamentary procedure: Negative procedure**

*Provision*

29. Paragraph 8(1) of Schedule 2 to the 2006 Act, as amended by section 24(7) of the Bill, provides that the Scottish Ministers may, by regulations, make further provision about the making or determination of applications made under section 22(1A) of that Act. Section 22(1A) enables an application by a third party to be made to the PRHP to enforce the repairing standard.

*Reason for Taking Power*

30. The Scottish Government wishes to expand access to the Private Rented Housing Panel (PRHP) by enabling third party applications for the purpose of determining compliance with the

repairing standard. Section 22(1A) provides that local authorities and other persons specified by order may make such applications to the PRHP.

31. The existing power under paragraph 8(1) of Schedule 2 to the 2006 Act to make provision about repairing standard applications to the PRHP is extended so that the Scottish Ministers may, by regulations, make further provision about the making or determination of applications made by local authorities and third party applicants.

#### *Choice of Procedure*

32. The Scottish Government considers that the making of further provisions on the procedure relating to determination of applications made under section 22(1A) is an administrative matter which should not merit a higher degree of scrutiny than that which already applies to applications under section 22(1). Therefore negative procedure is appropriate.

### **PART 4 – LETTING AGENTS**

**Section 26(2)(b) – Power to prescribe the information that is to be contained in the public register of letting agents in relation to each person on the register.**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative procedure

#### *Provision*

33. Section 26 requires Scottish Ministers to establish and maintain a register of letting agents. The register must contain an entry for each person in the register. The entry must set out the letting agent's name and address. Section 26(2)(b) confers upon Scottish Ministers a power to prescribe further information that will appear on the public register relating to the letting agent, if they consider this information appropriate.

#### *Reason for Taking Power*

34. The power allows flexibility when developing the detail of the register. The purpose of making the register publicly available is so that all interested parties can see if a letting agent has been entered on the register. It will be important for the register to provide sufficient information so that each entry can be clearly identified. Section 26(2)(a) provides that at present this should be the name and address of the person. However, as the detail of the register is developed it may be considered appropriate to include additional information.

#### *Choice of Procedure*

35. In the Bill, it is provided that the information contained in the register of letting agents should be publicly available. What, if any, further information requires to be contained in the register and made publicly available is an administrative matter to provide flexibility on the

detail of the register for which the Scottish Government considers that negative procedure is appropriate.

**Section 27(2)(f) – Power to prescribe further information that must be supplied in an application for registration in the register of letting agents.**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by statutory instrument**

**Parliamentary procedure: Negative procedure**

*Provision*

36. Section 27 sets out a list of information that must be supplied in an application for registration in the register of letting agents. Section 27(2)(f) confers upon the Scottish Ministers a power, by regulations, to prescribe additional information that must be supplied.

*Reason for Taking Power*

37. Section 27(2) sets out the basic information that must be supplied in an application for registration. However, as the operational detail of the register is developed, it may become apparent that certain additional information would assist the administration of the register. This power allows this to be required. Any additional information which the Scottish Ministers prescribe does not require to be made publicly available, unless it is also prescribed in regulations under the section 26(2)(b) power.

*Choice of Procedure*

38. The Scottish Government considers that the power is concerned with operational matters relating to the administration of the register and does not merit any scrutiny higher than negative procedure.

**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.**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Order made by statutory instrument**

**Parliamentary procedure: Affirmative procedure**

*Provision*

39. Section 30 sets out the material which the Scottish Ministers must take into account when determining if a person is a fit and proper person to be a registered letting agent. These materials include convictions for certain offences, contraventions of housing law, statutory codes, and failures to comply with the regulatory regime set up by this Bill. Section 30(4) confers upon the Scottish Ministers a power, by order, to modify the list of materials.

*Reason for Taking Power*

40. The power enables the list of relevant convictions, contraventions and failures to comply to be modified if this is considered appropriate in light of experience. If the nature of the letting agency industry and its practices change over time, it may be appropriate to alter the list of relevant offences, contraventions and failures. In addition, future legislation which creates new offences or modifies existing ones may be considered relevant, and this power would allow adaptations to reflect such relevant changes.

*Choice of Procedure*

41. As the power involves the modification of primary legislation, the Scottish Government considers that affirmative procedure is appropriate for any adaptation of the requirements.

**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.**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative procedure

*Provision*

42. Section 32(2) requires registered letting agents to include their letting agent registration number in certain documents and communications. The power at section 32(2)(c) allows the Scottish Ministers to add to the list of types of documents or communications in which the registration number must be included.

*Reason for Taking Power*

43. The register of letting agents is likely to be in place for many years. This power will allow flexibility in the future, in relation to potential changes in the way that letting agents carry out communications with clients and the public – for example in relation to changes in communications technology and methods or in industry practices.

*Choice of Procedure*

44. The basic principle that requires the inclusion of the letting agent registered number in communications is set out in the Bill. This power relates only to the detail of which documents and communications are included and therefore the Scottish Government considers that negative procedure is appropriate.

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

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative procedure

*Provision*

45. Section 41 provides for Scottish Ministers to set out, by regulations, a code of practice with which all persons carrying out letting agency work must comply. Before finalising the code, Ministers must carry out consultation on a draft of it under section 41(3).

*Reason for Taking Power*

46. The code of practice will contain standards to which all persons carrying out letting agency work must adhere. This may require a detailed set of requirements to be developed, which the Scottish Government considers is most appropriately dealt with by regulations, rather than in the Bill itself. This will also allow for flexibility should the code of practice need to be adjusted in light of experience and having regard to any changes within the industry.

*Choice of Procedure*

47. The Scottish Government considers negative procedure is appropriate, particularly in view of the obligation to consult with key stakeholders on a draft version of the code before regulations are made under section 41(3).

**Section 47(1) – Power to provide that the functions and jurisdictions of the sheriff in relation to actions between letting agents and landlords/tenants are transferred to the First-tier Tribunal.**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Regulations made by statutory instrument**  
**Parliamentary procedure: Negative procedure**

*Provision*

48. Section 47(1) provides that the Scottish Ministers may, by regulations, transfer jurisdiction for cases relating to letting agents from the sheriff courts to the First-tier Tribunal. The cases which could be transferred are those between letting agents and tenants or letting agents and landlords, relating to the carrying out of letting agency work.

*Reason for Taking Power*

49. The Scottish Government wishes to improve the consistency and efficiency of decision making for cases relating to the private rented sector by transferring civil cases from the courts to the First-tier Tribunal. Section 43 of the Bill provides that cases relating to alleged breaches of the code of practice (established by section 41) will be heard by the First-tier Tribunal. It is therefore consistent that other cases relating to letting agency work, which are currently within the jurisdiction of the sheriff courts, may also be transferred to the First-tier Tribunal at an appropriate point. Consideration needs to be given to matters of timing, volume and type of cases to be transferred before final decisions about transferring cases are taken.

*Choice of Procedure*

50. The Scottish Government considers that negative procedure is appropriate for the section 47(1) power, because the principle that letting agency disputes will be considered in the First-tier Tribunal is contained in the Bill, and therefore will have been subject to full Parliamentary scrutiny. The power to regulate transfers is an administrative matter and is in keeping with the principle that the First-tier Tribunal is the appropriate place for letting agency disputes.

**Section 51(3) – Power to modify the meaning of “letting agency work” in relation to Part 4 of this Bill.**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure

*Provision*

51. Section 51(1) and (2) defines “letting agency work”. Section 51(3) confers upon the Scottish Ministers a power to modify, by order, this meaning.

*Reason for Taking Power*

52. The provisions in Part 4 of the Bill are likely to regulate the letting agency sector for many years. The private rented housing sector has changed over time, and may continue to change in the future. This power provides flexibility to adapt in light of these changes or other experience the definition of what is considered as “letting agency work” and therefore who and what is covered by the regulatory regime.

*Choice of Procedure*

53. The meaning of “letting agency work” is central to the provisions of Part 4. In effect, it defines which persons are considered to be letting agents, and therefore which persons are required to comply with the regulatory regime set out. For that reason, the Scottish Government considers that affirmative procedure is appropriate.

**PART 5 – MOBILE HOME SITES WITH PERMANENT RESIDENTS**

**Section 54 - (inserts section 32C into the Caravan Sites and Control of Development Act 1960) – Power to make regulations concerning fees for site licence applications**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative procedure

*Provision*

54. New section 32C of the Caravan Sites and Control of Development Act 1960 (“the 1960 Act”) gives a local authority the power to charge a fee for a site licence application for a permanent caravan site. Subsections (3) and (4) allow the Scottish Ministers to make regulations about the charging of such fees, which can include specifying matters a local authority must take into account when setting such a fee, and specifying the maximum fee that can be charged.

*Reason for Taking Power*

55. It is expected that local authorities will charge a fee that reflects the cost of processing and deciding on site licence applications, including carrying out a routine inspection during the licence period. The Scottish Government is aware that stakeholders have a range of views on whether fees should be fixed nationally or at local level. It is likely that the costs of carrying out licensing functions will vary between local authorities. It is therefore considered appropriate for the fee level to vary between different authorities. However, there should be clarity and consistency in the matters to be taken into account by all local authorities in setting reasonable fees. Excessively high fees could have a significant impact on site owning businesses. It is therefore considered appropriate to take the power to make more detailed provisions about the factors that a local authority must take into account when deciding on such a fee and a power set a maximum fee if that should prove necessary.

*Choice of Procedure*

56. It is considered appropriate that this power is subject to negative procedure. The principle that such fees can be charged is contained in the Bill, and therefore will have been subject to full Parliamentary scrutiny. Any regulations made under this power will provide details that supplement the operation of the fee provided for in the Bill, and are therefore appropriately dealt with through the negative procedure.

**Section 56 - (inserts section 32J into the Caravan Sites and Control of Development Act 1960) – Power to make an order to change the time period for which a site licence, when issued, is valid.**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Affirmative procedure**

*Provision*

57. Section 56 inserts section 32J into the 1960 Act. This section makes provision for the duration of site licences for relevant permanent sites. Under subsection (1)(b)(ii) a site licence remains in force for 3 years. Subsection (2) allows the Scottish Ministers to change that period to a different number of years.

### *Reason for Taking Power*

58. The Bill replaces the existing system where site licences are valid in perpetuity with one where site licences are valid for a fixed number of years. A 3 year licence period received significant support in consultation responses and is considered an appropriate period between reviews of whether a licence holder continues to meet the fit and proper person test. However, there are also reasonable arguments in favour of longer licensing periods. The move from perpetual to fixed term licences is a significant change from previous practice and, once the new licensing regime becomes established, it may be desirable to review whether 3 years remains the most appropriate licence period. It is considered appropriate to take the power to vary the licence period in secondary legislation, rather than requiring a further Bill to adjust licence periods.

### *Choice of Procedure*

59. This power allows the Scottish Ministers to change the period for which a site licence, when issued, is valid. As this would change the licence period set out in the Bill, exercise of this power would be a significant measure. It is therefore considered appropriate that it is subject to the level of Parliamentary scrutiny that the affirmative procedure would provide.

**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: Scottish Ministers**  
**Power exercisable by: Regulations made by statutory instrument**  
**Parliamentary procedure: Negative procedure**

### *Provision*

60. New section 32N of the 1960 Act gives the Scottish Ministers the power to make provision in relation to the procedures to be followed in relation to 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 Scottish to make provision regarding appeals relating to 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.

61. Regulations can include provision in relation to the procedures to be followed by a person following the transfer of a licence, information to be provided by a person making an application for a site licence application or an application for renewal of the same, and the procedure to be followed after an application is determined. It allows the Scottish Ministers to set in regulations time limits relating to a site licence application, a transfer of a site licence, the determination or consideration by the local authority, and appeals. It enables the Scottish Ministers to set out the circumstances in which the notification of a decision on an application for a site licence or on an application for consent to transfer a licence must include reasons. It further allows the Scottish Ministers to make provision regarding the procedure to be followed by the person making the appeal and the determination and consequence of appeals.

*Reason for Taking Power*

62. This provision enables Ministers to set out the procedures and time limits to be followed in relation to parts of the site licensing system. It is considered that this level of procedural detail is best dealt with through regulations, as these procedures will sit within the broad framework for site licensing that is created by the Bill.

*Choice of Procedure*

63. 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.

**Section 61 - (inserts section 32O into the Caravan Sites and Control of Development Act 1960) – Power to make an order varying the material a local authority must have regard to in applying the fit and proper person test.**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order made by statutory instrument</b>
<b>Parliamentary procedure:</b>	<b>Affirmative procedure</b>

*Provision*

64. Section 61 inserts section 32O into the 1960 Act. This section sets out the material a local authority must have regard to when deciding if someone is a fit and proper person when considering issuing, renewing, or transferring a site licence. This material includes convictions for specified offences, and breaches of specified areas of law (such as the law relating to caravans). Subsection (6) allows the Scottish Ministers to make an order subject to the affirmative procedure to amend the list of material a local authority must take into account.

*Reason for Taking Power*

65. The Scottish Government wants to ensure that a local authority is able to take into account all the relevant information when applying the fit and proper person test. It is therefore appropriate to allow for a mechanism to amend that test, to reflect developments in the law and to take into account material that in the future is deemed relevant to the decision on whether someone is a fit and proper person to hold a site licence.

*Choice of Procedure*

66. The Scottish Government believes the affirmative resolution procedure is appropriate in this case. It gives the Scottish Ministers power to vary the list of material without the need for another Bill, but with a level of Parliamentary scrutiny which is suitable to amending primary legislation.

**Section 63 - (inserts 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 conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure

*Provision*

67. Section 63 of the Bill inserts new sections 32R and 32S into the 1960 Act and section 64 inserts section 32V. These 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.

*Reason for Taking Power*

68. The Bill specifies maximum fine levels which are significantly above level 5 on the standard scale set under the Criminal Procedure (Scotland) Act 1995. These maximum fines are not expressed by reference to a point on the standard scale and will therefore be unaffected by future changes to the fines on that standard scale. It is therefore considered appropriate to allow for maximum fines under these Bill provisions to be amended by order in the future. The licensing system established by the Bill may potentially be in place for many years (the previous system was established in 1960), and it is considered sensible to provide a mechanism to change the fine levels, enabling them to be adjusted in line with inflation and other relevant factors without the need for new primary legislation.

*Choice of Procedure*

69. Changing the maximum fine a court can impose following conviction for an offence is an important measure, and therefore requires a suitable level of Parliamentary scrutiny. The Scottish Government therefore believes the affirmative procedure is appropriate in this case.

**Section 66 - (inserts section 32Y into the Caravan Sites and Control of Development Act 1960) – Power to make regulations about the appointment of an interim manager**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative procedure

*Provision*

70. Section 66 inserts section 32Y into the 1960 Act. This section allows a local authority, in certain situations, to apply to a sheriff to appoint an interim manager for a mobile home site. Subsection (5) allows the Scottish Ministers to make further provision in regulations about the

appointment of an interim manager. Subsection (6) lists particular matters which could be covered in such regulations. These include the powers of an interim manager, the qualifications an interim manager must hold, and the actions an interim manager must carry out. Regulations may also make provision for criminal offences which are to apply to failures to comply with any regulations relating to interim managers. This could be used, for example, to make it an offence for a site licence holder to refuse to provide the necessary assistance to an interim manager, or for the interim manager to be prevented from entering a site.

#### *Reason for Taking Power*

71. The Bill includes provisions on the appointment of an interim manager. However many of the issues that flow from an interim manager's appointment, such as an interim manager's powers, qualifications, and the way they handle property in their care, are areas that are likely to require detailed provisions. It is considered that this level of detail is most appropriately dealt with in regulations, rather than in the Bill itself. This will also allow greater flexibility to adjust procedural requirements in relation to the appointment of interim managers.

#### *Choice of Procedure*

72. The Scottish Government believes the negative procedure provides the appropriate level of scrutiny for these measures, as they will set out detailed matters that are likely to be necessary as a result of the Bill's provisions around interim managers. Many of the matters such regulations would be likely to cover are also explicitly set out in section 32Y(6), which would be inserted into the 1960 Act by the Bill.

## **PART 7 – MISCELLANEOUS**

**Section 77 – inserts subsections (3D) to (3F) into section 11 of the Land Tenure Reform (Scotland) Act 1974 – new subsection (3D) - Power by order to disapply the right conferred under section 11 of the Land Tenure Reform (Scotland) Act 1974 to redeem a heritable security after 20 years, in relation to securities of debts of specified descriptions.**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Negative procedure**

#### *Provision*

73. Section 77 confers on the Scottish Ministers a power by order to disapply the right to redeem a heritable security after 20 years conferred by section 11 of the Land Tenure Reform (Scotland) Act 1974 in relation to a heritable security which is in security of a debt of a description specified in the order.

#### *Reason for taking the power*

74. Section 11 of the Land Tenure Reform (Scotland) Act 1974 (“the 1974 Act”) gives the debtor under a heritable security over a dwelling house the right to redeem the security from 20 years

after the date of its creation. The statutory redemption terms allow borrowers to redeem a loan at its original value. They therefore do not fit situations where the creditor wishes to secure payment of a share in the equity value of the property.

75. Existing equity share schemes run by the Scottish Government have a break clause at year 19 of the agreement. If a shared equity owner fails to grant a replacement standard security in favour of the Scottish Ministers (a new agreement which is essentially the existing agreement agreed between parties afresh), the break clause obliges the shared equity owner to repay the Scottish Ministers' equity share.

76. However, the Council of Mortgage Lenders and some of its members have expressed an unwillingness to participate in the Scottish Government's new Help to Buy scheme and its Low Cost Initiative for First Time Buyers (LIFT) shared equity schemes. This is because an impending change to Financial Conduct Authority rules will require them to consider the affordability of their first charge loans taking into account any break clauses. Without lender participation in these schemes, they will not be viable.

77. The current power in section 11 of the 1974 Act to allow borrowers to waive the right of redemption could not be used to address this problem, because it relates to bodies of debtors (such as registered social landlords), as opposed to types of creditors or types of heritable securities. The new order making power being inserted into the 1974 Act by the Bill will allow the Scottish Ministers to disapply the right to redeem a heritable security over a dwelling house, in relation to specified securities and specified creditors (for example the Scottish Government) under particular schemes.

#### *Choice of procedure*

78. It is considered appropriate that this power is subject to negative procedure following the same approach as the order making power under section 11(3C) of the 1974 Act. It is not considered that using the power to disapply the right to redeem heritable securities in relation to descriptions of debt specified in the order requires more detailed scrutiny by Parliament on each occasion the power is used.

## **PART 8 – GENERAL**

### **Section 83 – Ancillary provision**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order made by statutory instrument</b>
<b>Parliamentary procedure:</b>	<b>Affirmative procedure if adding to, replacing or omitting text in an Act, otherwise negative procedure</b>

#### *Provision*

79. Section 83 confers a power on the Scottish Ministers, by order, to make such supplementary, incidental, consequential, transitional, transitory or saving provision as they

consider necessary or expedient for the purposes of, or in connection with, the provisions in the Bill.

*Reason for taking power*

80. As with any new body of law, the Bill may give rise to a need for a range of ancillary provision. The power to make ancillary provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, it is possible that unforeseen issues will arise which require further provision to be made or the further modification of the existing law. This power would allow such provision to be made without the need to make further primary legislation.

81. The Bill already includes a number of consequential amendments to related legislation (see **schedules 1 and 2**) but the power would allow the Scottish Ministers to make further changes should a need be identified, or change be expedient. It may, however, be that further provision is necessary in order fully and properly to implement the Bill's provisions. The Scottish Government considers that the order-making power is necessary to allow for this flexibility, especially in light of previous operational experience. Without this power, it might be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Parliament or the Scottish Government.

82. The power, while potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, or in connection with, provision made by the Bill.

*Choice of procedure*

83. Any order made under section 83 which textually amends any Act is subject to the affirmative procedure. Where such an order does not seek to textually amend any Act, it is considered by the Scottish Government that negative procedure provides an appropriate degree of scrutiny.

**Section 85(3) – Commencement of the Bill**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order made by statutory instrument</b>
<b>Parliamentary procedure:</b>	<b>Laid, no procedure</b>

*Provision*

84. Section 85(3) confers a power on the Scottish Ministers, by order, to bring the provisions of the Bill into force on such day or days as the Scottish Ministers appoint. Section 85(5) provides that such an order may include any necessary or expedient transitional, transitory or saving provision. It is usual to allow such provision in conjunction with a power to commence the provisions of a Bill.

*Reason for taking power*

85. Some formal sections of the Bill are commenced on the day of Royal Assent. The Scottish Ministers consider it appropriate for the substantive provisions of the Bill to be commenced at such a time as they appoint to be suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation.

86. An exception is made for an order-making power at section 77 of the Bill, which it is intended to exercise soon after the Bill receives Royal Assent. A limitation is imposed in relation to commencement of the abolition of the right to buy social housing, to ensure that those who are in a position to exercise the right have an opportunity to do so.

*Choice of procedure*

87. As is usual for commencement orders, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies.



*This document relates to the Housing (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 21 November 2013*

# **HOUSING (SCOTLAND) BILL**

## **DELEGATED POWERS MEMORANDUM**