



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

**58th Report, 2012 (Session 4)**

**High Hedges (Scotland) Bill**

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Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

### **Remit and membership**

#### **Remit:**

The remit of the Subordinate Legislation Committee is to consider and report on—

- (a)
  - (i) subordinate legislation laid before the Parliament;
  - (ii) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of 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;

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

#### **Membership:**

Nigel Don (Convener)  
Jim Eadie  
Mike MacKenzie  
Hanzala Malik  
John Pentland  
John Scott  
Stewart Stevenson (Deputy Convener)

#### **Committee Clerking Team:**

**Clerk to the Committee**  
Euan Donald

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Elizabeth White

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Daren Pratt



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## Subordinate Legislation Committee

**58th Report, 2012 (Session 4)**

### **High Hedges (Scotland) Bill**

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. At its meetings on 27 November and 11 December 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the High Hedges (Scotland) Bill at Stage 1 (“the Bill”)<sup>1</sup>. The Committee submits this report to the Local Government and Regeneration Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

#### OVERVIEW OF THE BILL

2. The High Hedges (Scotland) Bill is a Member’s Bill introduced by Mark McDonald MSP on 2 October 2012. Mr McDonald was assisted in introducing the Bill by the Scottish Government.

3. The Bill introduces a dispute resolution mechanism in relation to high hedges.

4. Mr McDonald has provided a Delegated Powers Memorandum (“DPM”)<sup>2</sup> setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.

5. In the consideration of the memorandum at its meeting on 27 November, the Committee agreed to write to Mr McDonald to raise questions on the delegated powers. This correspondence is reproduced in the Annex.

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<sup>1</sup> High Hedges (Scotland) Bill available at:  
<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/55315.aspx>

<sup>2</sup> High Hedges(Scotland) Bill Delegated Powers Memorandum available at:  
[http://www.scottish.parliament.uk/S4\\_Bills/High%20Hedges%20Bill%20\(Scotland\)%20Bill/DPM\\_.pdf](http://www.scottish.parliament.uk/S4_Bills/High%20Hedges%20Bill%20(Scotland)%20Bill/DPM_.pdf)

## DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers provisions in the Bill.

7. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections 31 (Guidance) and 35 (Ancillary provision).

8. The Committee's comments and, where appropriate, recommendations on the other delegated powers are detailed below.

### **Section 34 – Power to modify meaning of “high hedge”**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations

**Parliamentary procedure:** affirmative procedure

#### *Background*

9. Section 34(1) enables the Scottish Ministers to make regulations which modify the meaning of “high hedge”, as set out in section 1 of the Bill. As the Bill will only apply to hedges which are high hedges within the meaning of section 1, this power enables the Scottish Ministers to vary the applicability of the Bill by making subordinate legislation.

#### *Comment*

10. The Committee was concerned about the breadth of the power being conferred by this section, particularly as modifying the meaning of “high hedge” will modify the scope of the entire Bill. It appeared to the Committee that the examples of possible modification mentioned in paragraph 9 of the DPM could all be achieved by means of a less-expansive power simply to vary the conditions in paragraphs (a) to (c) of subsection (1) of section 1. It accordingly asked the Member to explain why the wider power to modify section 1 as a whole was considered necessary.

11. The Member, in his response, indicates that in his view a power simply to modify paragraphs (a) to (c) would be insufficient to achieve all of the changes which might be necessary. He suggests that it might be necessary to add further conditions. The Member indicates that he does not envisage the power being used to remove in its entirety any of the conditions in paragraphs (a) to (c). While this explanation is helpful, the Committee observes that neither the Member nor the present administration is in a position to bind any future administration as to how these powers would be exercised. It has made this point in relation to a number of Bills recently, for example the Social Care (Self-directed Support) (Scotland) Bill.

12. In principle, the Committee accepts that it is reasonable to delegate power to modify the meaning of high hedge given the competing views on just how far the Bill should extend. In doing so, however, it recognises that this is potentially a matter of substantial interest to stakeholders. It continues to have concerns over the conferral

of power to modify the definition without any real restriction on the terms of that modification. That wide discretion could allow a future administration to amend the definition and so to alter the scope of the Bill very substantially, so that it would operate in a manner which was quite different to the one which the Parliament agreed to (assuming that the Bill successfully completes its Parliamentary passage).

13. The Committee notes that the exercise of this power will be subject to the affirmative procedure. It considers that, as the exercise of this power is likely substantively to affect the application of the Bill, the affirmative procedure provides an appropriate opportunity for Parliamentary scrutiny, given that the Parliament will have expressly to approve any draft regulations made under this power.

14. **The Committee draws the power in section 34 to modify the definition of high hedge in section 1 to the attention of the lead Committee as it considers it to be particularly broad in its scope, and observes that it appears to be possible for that power to be used in the future so as significantly to alter the scope of the Bill (either by narrowing the definition to the point that it defeats the ends of the Bill, or by widening the definition so that it extends beyond anything that may have been considered by the Parliament).**

15. **The Committee is content that the exercise of the power in section 34 is subject to the affirmative procedure.**

#### **Section 37 – Commencement**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order**

**Parliamentary procedure: laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010**

#### *Background*

16. Section 37(2) allows the Scottish Ministers to appoint a day for the coming into force of certain provisions of the Act. By virtue of section 37(3), such an order may contain transitional, transitory or savings provisions.

#### *Comment*

17. The Committee observes that it is not unusual for powers to be conferred so that the Scottish Ministers may by order appoint a day for the coming into force of a new enactment. Nor is it unusual for powers to be conferred so that such an order may contain transitional, transitory or savings provisions. The Committee is in principle content that it is appropriate to confer the powers found in section 37 of the Bill. In principle, it is also content that orders made using the section 37 power be laid before the Parliament, but are not subject to any further Parliamentary procedure.

18. However, the DPM indicates at paragraph 25 that “[i]t is intended to use the power in subsection (3) to make the necessary transitory provision *amending* section 12 of the Land Registration (Scotland) Act 1979 [...]”. It appeared to the Committee

to be unusual that a power which is not subject to any Parliamentary procedure apart from laying could be used to amend primary legislation. The Committee accordingly asked the Member to explain whether he considered that the section 37(3) power permitted the modification, and the basis for that view.

19. The Member's response shortly indicates that it is not intended to use this power in order to textually amend section 12 of the Land Registration (Scotland) Act 1979. He advises that stand-alone provision would instead be made which would modify the application of legislation for a limited period. He states that this is considered to be within the scope of section 37.

20. The Committee accepts that it may be possible to achieve the intended modification to section 12 of the Land Registration (Scotland) Act 1979 without textual amendment. However, it seems clear to the Committee that this will necessarily involve the disapplication in part of that section. It is concerned by the suggestion that the modification of primary legislation would only attract Parliamentary scrutiny were it to require textual amendment. The Committee considers that the effect to be achieved – disapplication of section 12 – is the same regardless of what drafting technique is used to achieve it. It does not consider that adequate Parliamentary scrutiny can be given to an instrument modifying primary legislation when it is laid but not subject to further Parliamentary scrutiny. The Parliament would not have to agree to such an order, and it would have no power to annul it.

21. In consequence, the Committee does not consider that it is appropriate for the power in section 37 to be used in the way which is suggested in paragraph 25 of the DPM. It observes that, if provision of this nature were made using the stand-alone ancillary powers provision in section 35 of the Bill, it would be subject to the negative procedure, and to the affirmative procedure if it textually amended primary legislation. It considers that this would be a more appropriate route to achieved the intentions specified in paragraph 25 of the DPM.

**22. Subject to the following recommendation, the Committee finds the powers in section 37 to be acceptable in principle, and is content that they are laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 but are not subject to any further Parliamentary scrutiny.**

**23. So far as the proposed modification of section 12 of the Land Registration (Scotland) Act 1979 is concerned, the Committee does not consider that it would be appropriate to exercise the powers in section 37(3) for this purpose, given that this entails the modification of primary legislation. It observes that such provision would more appropriately be made under the powers in section 35 of the Bill, in order that the resulting instrument would be subject either to the negative procedure or (if it textually amends that Act) the affirmative procedure.**

ANNEX

**Correspondence with the Member in charge of the Bill**

**On 27 November 2012, the Subordinate Legislation Committee wrote to Mark McDonald MSP as follows:**

**High Hedges (Scotland) Bill at Stage 1**

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 27 November and seeks an explanation of the following matters:

**Section 34 – Power to modify meaning of “high hedge”**

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

2. Section 34(1) enables the Scottish Ministers to make regulations which modify the meaning of “high hedge”, as set out in section 1 of the Bill. As the Bill will only apply to hedges which are high hedges within the meaning of section 1, this power enables the Scottish Ministers to vary the applicability of the Bill by making subordinate legislation.

3. The Committee asks for an explanation as to:

- why it is considered necessary to take a power to modify section 1 as a whole? This appears to include the possibility of removing entirely the conditions in paragraphs (a) to (c) of subsection (1), when a power simply to modify those conditions would appear to be sufficient to achieve the changes envisaged in the DPM; and
- whether the power could be used to modify the definition of “high hedge” in such a way that it extends to include individual trees or shrubs, and – if so – why this is considered to be appropriate in a Bill relating to hedges?

**Section 37 – Commencement**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

4. Section 37(2) allows the Scottish Ministers to appoint a day for the coming into force of certain provisions of the Act. By virtue of section 37(3), such an order may contain transitional, transitory or savings provisions.

5. In relation to the power in section 37(3) to make transitional, transitory or saving provision in consequence of that commencement, the Committee asks for clarification on:

- whether – standing the example in paragraph 25 of the delegated powers memorandum – it is considered that the power in section 37(3) permits the modification of primary legislation?;
- if so, the basis for that view?; and
- if not, how it is proposed to deliver the amendment to the Land Registration (Scotland) Act 1979 referred to in that paragraph of the delegated powers memorandum?

**Mark McDonald MSP responded as follows:**

**Section 34 – Power to modify meaning of “high hedge”**

You ask why it is considered necessary to take a power to modify section 1 as a whole and whether a power simply to modify the conditions in paragraphs (a) to (c) of subsection 1 would be sufficient to achieve the changes envisaged in the Delegated Powers Memorandum. My view is that a power simply to modify conditions (a) to (c) is not sufficient to achieve the changes envisaged.

Section 1 is all about what the meaning of a high hedge is. Therefore the power taken to modify is the power to modify the meaning of a high hedge. For example, it may be that other conditions require to be added - for example, to include a high hedge which forms a barrier to access. While that power could be used to add to the list of conditions or modify them, it is not envisaged that it would be used to remove entirely the conditions in paragraphs (a) to (c) of subsection (1).

You also ask whether the power could be used to modify the meaning of "high hedge" in such a way that it extends to include individual trees or shrubs. My view, is that it does not. The power is to amend the meaning of a high hedge. The power would only be capable of capturing hedges, not single trees.

**Section 37 – Commencement**

You ask whether these powers permit the modification of primary legislation. The power in section 37 will not be used to modify primary legislation by textual amendment but rather the power will be used to make stand-alone provision which would modify the application of legislation for a limited period. The view taken is that this is within the scope of the power in section 37 to make transitory and transitional provisions.

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