

This document relates to the Housing (Amendment) (Scotland) (SP Bill 20) as introduced in the

Scottish Parliament on 4 September 2017

Housing (Amendment) (Scotland) Bill

Delegated Powers Memorandum

Introduction

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 (Amendment) (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 this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of bill provisions

3. The Bill amends certain provisions of the Housing (Scotland) Act 2010 ("the 2010 Act") in respect of powers that the Scottish Housing Regulator ("the Regulator") exercises over registered social landlords (RSLs) (and in the case of part of section 1 in respect of social landlords generally). It also provides for Scottish Ministers, in regulations, to modify the functions of the Regulator, and to reduce local authority influence over RSLs.

4. The purpose of the Bill is to ensure that the influence the Regulator and local authorities can exercise over RSLs is compatible with RSLs

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being classified by the Office for National Statistics (ONS) as private sector bodies in the United Kingdom national accounts.

5. The ONS is responsible for determining how individual sectors within the economy should be classified in the UK's national accounts. On 28 September 2016, it informed the Scottish Government that it had reviewed the classification of RSLs in Scotland and, in view of certain of powers that the Regulator can exercise over RSLs, had determined that they should be classified as public bodies for the purposes of the national accounts. (RSLs had previously been classified as private bodies in the national accounts.) It also noted further public sector controls might exist through the relationships between RSLs and local government.

6. If left unchanged, the classification of RSLs as public sector bodies in the national accounts would mean that all new net borrowing by RSLs would count against the Scottish Government's borrowing limits. To avoid that outcome, the Scottish Government's policy is to reduce the powers that the Regulator and local authorities can exercise over RSLs to the extent necessary for the ONS to be able classify RSLs as private sector bodies.

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Rationale for subordinate legislation

7. The Scottish Government has had regard, when deciding what subordinate legislation powers and respective Parliamentary procedures are appropriate for the Bill and whether provisions should be in primary or in subordinate legislation, to: the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example changes in the criteria used by the ONS to determine the classification of RSLs); and the need to make proper use of valuable parliamentary time.

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8. 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.

Delegated powers

Section 8 – power to modify functions of the Regulator

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

9. Section 8 of the Bill allows the Scottish Ministers, by conferring on them a regulation making power, to further modify the functions of the Regulator in relation to social landlords (including registered social landlords).

Reason for taking power

10. The Scottish Government has discussed with the ONS the provisions that the Bill needs to include to enable the ONS to classify RSLs as private sector bodies in the national accounts. In light of these, it considers that the Bill does provide the basis for the ONS to make such a classification of RSLs. However, in the discussions, the ONS stressed that any decision on the classification of RSLs rests with the Director of National Accounts and Economic Statistics, who will be advised by the Economic Statistics Classification Committee of the ONS. The Director can only make a decision on the basis of legislation that has been enacted and brought into force. Consequently, the ONS has not been able to confirm definitively that the Bill will achieve its stated objective.

11. The regulation-making power is a precaution against the Bill failing narrowly to achieve its objective, for example if the ONS were to identify further relatively minor changes to the powers of the Regulator that would be required before it could reclassify RSLs to the private sector. In such circumstances, the Scottish Government considers that having a further Bill to achieve such changes would not be a good use of parliamentary time. It proposes instead that such changes should be made through a

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regulation-making power. The Scottish Government intends to use this power only if the Bill, when enacted and brought into force, does not provide the ONS with the basis for classifying RSLs as private sector bodies. It will do so only for the purpose of providing the ONS with that basis in light of any reasons given by the ONS for it not having been able to make the classification.

Choice of procedure

12. Such regulations will be subject to the affirmative procedure in the Scottish Parliament.¹ Given the potentially wide-ranging nature of this regulation-making power, including the fact that it can be used to modify primary legislation, this level of parliamentary scrutiny and control is considered appropriate.

13. Before Ministers lay the draft of any regulations under this section before the Parliament, they must consult the Regulator, tenants of social landlords or their representatives, social landlords or their representatives and secured creditors of registered social landlords or representatives of such creditors (primarily being UK Finance, formerly the Council of Mortgage Lenders).

Section 9 – power to reduce local authority influence over RSLs

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

14. Section 9 of the Bill will allow the Scottish Ministers, through the exercise of a regulation-making power, to limit or remove the ability of local authorities to exert influence over RSLs. This section is similar to

¹ So laid in draft and approved by a resolution of the Scottish Parliament before final regulations are made – see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). ² For the meaning of “officer” in relation to an RSL, see section 165 of the 2010 Act.

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section 93 of the Housing and Planning Act 2016, enacted at Westminster as part of the UK Government's response to the classification, by the ONS, of private registered providers of social housing ("housing associations") in England as public bodies.

Reason for taking power

15. In classifying RSLs as public bodies, the ONS indicated to the Scottish Government that another aspect of public sector control over RSLs was the potential involvement in them of local authorities and the ability of local authorities in some cases to exert a degree of influence over RSLs by having either the ability to appoint officers² of the RSL or by having certain voting rights, or by having both powers. In particular, the power of a local authority to appoint 25% or more of the board members of an RSL is considered by the ONS to constitute public sector control. The Scottish Government is aware of a small number of RSLs where a local authority has such power. The regulation-making power will enable the Scottish Ministers to limit these powers.

16. In the first instance, the Scottish Ministers intend to specify in regulations that local authorities may only nominate up to a maximum of 24% of the board members of an RSL, and may not exercise control over RSLs, for example through a power to veto changes in an RSL's constitution. They may use the power subsequently if other forms of local authority control that amount to public sector control over RSLs come to light, or if the criteria the ONS apply to determine public sector control in this context changes, and such changes require the powers of local authorities to be amended further to ensure that RSLs can continue to be classified to the private sector.

Choice of procedure

17. Regulations under this section will be subject to the affirmative procedure.² As for the regulation-making power in section 8 of the Bill, this level of parliamentary scrutiny and control is considered appropriate given

² So laid in draft and approved by a resolution of the Scottish Parliament before final regulations are made – see section 29 of ILRA.

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the potentially wide-ranging nature of this regulation-making power, including the fact that it can be used to modify primary legislation.

Section 10 – power to commence sections 1 to 9 of the Bill

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid before the Scottish Parliament, not subject to affirmative or negative procedure

Provision

18. Section 10 of the Bill provides for it and section 11 (the Bill's short title) to come into force on the day after Royal Assent, and for the Scottish Ministers, through the exercise of regulationmaking powers, to commence the Bill's remaining provisions at later dates.

Reason for taking power

19. The regulation-making power is the means by which the Scottish Ministers will bring the substantive provisions of the Act into force following Royal Assent. The Scottish Government expects commencement to happen in two stages. Section 9 will be commenced first. This will enable the Scottish Ministers to seek the Parliament's approval of the regulations, under that section, to limit the influence of local authorities over RSLs as described at paragraph 14 above. Once the regulations have been approved, all of the remaining provisions will be commenced. The Scottish Ministers will not commence the remaining provisions until at least two months after Royal Assent.

Choice of procedure

20. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. This is typical for commencement regulations.

Powers analogous to delegated powers

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Section 3(6) – powers to remove the requirement for RSLs to notify the Regulator of disposals, and to extend the period of notification

Powers conferred on: the Regulator

Parliamentary procedure: none

The provisions

21. Section 3(6) inserts section 109(2)(a) and (b) into the 2010 Act. Section 109(2)(a) replicates the existing power at section 109(2) and gives the Regulator a power to determine that RSLs need not comply with the requirement, at section 109(1) of the Act, to notify it of disposals of land or other assets. Section 109(2)(b) gives the Regulator a new power to increase beyond 28 days the maximum period of time within which an RSL must notify the Regulator of any disposal that results in a change of landlord for any tenants of the RSL.

Reason for taking power

22. The power under section 109(2)(a) is intended to give the Regulator the flexibility to remove the duty of notification on RSLs in any cases where it considers that the notification of disposals that it receives in such cases does not contain information that it requires to regulate RSLs effectively. The power under section 109(2)(b) is intended to give the Regulator the flexibility to extend the period within which an RSL must provide notification of a disposal having happened where it considers that such notification is required less urgently.

Choice of procedure

23. The exercise of these powers by the Regulator does not require any parliamentary procedure. Section 109(2)(a) simply restates an existing power and section 109(2)(b) is an equivalent power consequential on the introduction into section 109(1) of a duty on RSLs in some cases to notify disposals to the Regulator within 28 days. The Scottish Government considers that it is appropriate for the Regulator to have these powers to provide the Regulator with some flexibility around what are relatively minor, operational matters.

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Section 3(8)(c) – duty on the Regulator to issue guidance in relation to consultation of tenants and other persons

Duty conferred on: the Regulator

Parliamentary procedure: none

Provision

24. Section 3(8)(c) of the Bill inserts section 110(3) into the 2010 Act to require the Regulator to issue guidance to RSLs about the consultation under section 110(2) of the Act with tenants and other persons.

Reason for imposing the duty on the Regulator

25. Section 110(2) requires an RSL to consult its tenants before making a disposal of assets that would not result in a change of landlord for any of the RSL's tenants. In addition, the Regulator may, under section 110(2)(b)(ii), require the RSL to consult other people. The Scottish Government wishes such consultation to be undertaken on a broadly consistent basis by all RSLs. The guidance that the Regulator will produce under this duty, to which RSLs must (under section 100(4) of the 2010 Act) have regard, will provide that basis.

Choice of procedure

26. The performance of this duty by the Regulator does not require any parliamentary procedure. While the Scottish Government desires some consistency in how such consultation is done, it considers that this is best left to the Regulator rather than, for example, conferring a power on the Scottish Ministers to issue such guidance. That is in keeping with the Regulator being independent of Government.

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Section 4(5) – duty to issue guidance in relation to consultation of tenants and in relation to seeking tenant approval

Duty conferred on: the Regulator

Parliamentary procedure: none

Provisions

27. Section 4(5) inserts new section 115B into Part 10 of the 2010 Act to require the Regulator to issue guidance about the tenant consultation required under section 115 and about the seeking of tenant approval (by ballot or written agreement) under section 115A of the Act. These sections apply where an RSL is seeking to dispose of land and section 107(4) applies, that is, where as a result of the disposal secure tenants of the RSL will cease to be tenants of the RSL. By virtue of sections 96A, 100A and 104A of the 2010 Act (as inserted, respectively, by sections 6(3) and (8) and 7(2) of the Bill), sections 115, 115A and 115B will also apply to certain proposed organisational changes to RSLs which would also result in secure tenants of the RSL ceasing to be tenants.

Reason for imposing the duty on the Regulator

28. Sections 96A, 100A(3), 104A(3) and 115 of the 2010 Act provide for an RSL to consult any tenants whose landlord would be changed as the result of a disposal of any assets or restructuring by the RSL or as a result of the RSL becoming a subsidiary of another body. Those sections (and, in the case of disposals of land to which section 107(4) applies, section 115A) also require the RSL to seek the approval of such tenants (by ballot or written agreement). The Scottish Government wishes such consultation and the seeking of tenant approval to be undertaken on a broadly consistent basis by all RSLs. The guidance that the Regulator will produce under this duty, to which RSLs must have regard, will provide that basis.

Choice of procedure

29. The performance of this duty by the Regulator does not require any parliamentary procedure. While the Scottish Government desires some

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consistency in how consultation is carried out and tenant approval sought, it considers that this is best left to the Regulator rather than, say, conferring a power on the Scottish Ministers to issue such guidance. That is in keeping with the Regulator being independent of Government.

Section 6(5), (6), (10), (11) and (12) – duty to issue guidance in relation to consultation of tenants

Duty conferred on: the Regulator

Parliamentary procedure: none

Provisions

30. Section 6(5), (6), (10), (11) and (12) insert new sections 98(5), 99(5), 102(6), 103(5) and 104(5) respectively into the 2010 Act to require the Regulator to issue guidance about the tenant consultation required under sections 98, 99, 102 and 104 of the Act.

Reason for imposing the duty on the Regulator

31. Sections 98, 99, 102, 103 and 104 of the 2010 Act provide for an RSL to consult its tenants before it undertakes a voluntary winding-up, dissolution, conversion from a company to a registered society or before it enters into a voluntary arrangement under the Insolvency Act 1986. The Scottish Government wishes such consultation to be undertaken on a broadly consistent basis by all RSLs. The guidance that the Regulator will produce under this duty, to which RSLs must have regard, will provide that basis.

Choice of procedure

32. The performance of this duty by the Regulator does not require any parliamentary procedure. The Scottish Government considers that the regulation of tenant consultation is best left to the Regulator rather than, say, conferring a power on the Scottish Ministers to issue such guidance. That is in keeping with the Regulator being independent of Government.

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