

PRIVATE RENTED HOUSING (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Private Rented Housing (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

PART 3 – OVERCROWDING STATUTORY NOTICES

Section 17(7) – Overcrowding in private rented housing: statutory notice

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

2. Local authorities currently have very limited powers to deal with overcrowding in the private rented sector other than licensable HMOs. The statutory definition of overcrowding is contained in sections 135 to 137 of the Housing (Scotland) Act 1987.

3. Section 17 of the Bill gives a local authority the power to serve an overcrowding statutory notice on the landlord of a house which is statutorily overcrowded, where the local authority considers that the overcrowding is contributing or connected to an adverse effect on the health or wellbeing of any person, or on the amenity of the house or its locality. This will allow enforcement action to be taken in the worst cases of overcrowding in the sector, where it is creating severe problems for occupants, neighbours and others in the locality. The notice will set out the steps to be taken by the landlord to rectify the situation (that is, to reduce the occupancy level to the maximum permitted by the 1987 Act), the period within which the steps must be taken, and any other conditions considered appropriate by the local authority.

4. Section 17(7) allows the Scottish Ministers to prescribe by order the form of an overcrowding statutory notice, such other information to be included in the notice as they see fit, and the persons who must be given a copy of the notice by the local authority.

5. A Scottish Government amendment at Stage 2 inserted new section 17(7A), which provides that, before making an order under section 17(7), the Scottish Ministers are required to consult local authorities, representatives of landlords and occupiers of houses, and other appropriate stakeholders.

Reason for taking power

6. Ministers wish to be able to prescribe the form of an overcrowding statutory notice in order to ensure that a landlord is clearly informed of the obligations it places on him or her and, if necessary, to ensure that the landlord is given any other information – for example, about rights to make representations or to appeal – that is considered appropriate.

7. The details of the form, including any information to be provided, and the persons to receive a copy of the notice may require to be amended in the light of experience, so this matter is most appropriately dealt with by an order-making power rather than primary legislation.

8. The requirement for Ministers to consult before issuing an order under section 17(7) will ensure that stakeholders have an opportunity to express their views on the content of any order.

Choice of procedure

9. The Scottish Government does not consider that the content of the notice and the persons to whom it must be copied for the purposes of this provision, which is a technical matter, should merit a higher degree of Parliamentary scrutiny than negative resolution procedure. This position is further strengthened by the addition of the requirement to consult.

Section 17B – Information and advice for occupiers

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

10. This section imposes duties on a local authority to give certain information and advice to the occupier of, and other people living in, a house, in relation to which it serves an overcrowding statutory notice. The local authority may also give such further information as it considers appropriate. The section replaces section 18 of the Bill as introduced, which gave a local authority a discretionary power to give appropriate information and advice to the occupier of the house.

11. Subsection (2) requires the local authority, at the same time as it serves an overcrowding statutory notice, to serve on the occupier a notice containing prescribed information and advice in connection with the overcrowding statutory notice. Subsection (5) states that such

information and advice will be prescribed by order made by the Scottish Ministers and subsection (6) states that an order may also prescribe the form of the notice containing the information and advice.

Reason for taking power

12. At Stage 1 of the Bill, some stakeholders and MSPs expressed concerns about the impact of the service of an overcrowding statutory notice on those living in the house. The Scottish Government therefore lodged an amendment to ensure that information and advice would be provided to them. The duty to serve on the occupier a notice containing information and advice will ensure that every occupier of an affected house will receive the contents of that notice as a minimum level of information and advice. It is therefore considered necessary that the content of that notice should be prescribed by Ministers in order to ensure that every affected occupier receives the same, appropriate information and advice.

Choice of procedure

13. Before making an order under section 17B, the Scottish Ministers are required by subsection (7) to consult local authorities, representatives of landlords and occupiers of houses, and other appropriate stakeholders. Given this requirement for consultation, and the fact that the content of the information and advice notice is a technical matter, it is considered that negative procedure will provide the appropriate level of Parliamentary scrutiny.

Section 26A – Guidance on Part 3

Power conferred on: The Scottish Ministers
Power exercisable by: Issue of guidance
Parliamentary procedure: None

Provision

14. This section provides that a local authority must have regard to guidance issued by the Scottish Ministers in relation to the discharge of its functions under Part 3 or related matters. The section replaces section 17(8) of the Bill as introduced, which provided that a local authority had to have regard to guidance issued by the Scottish Ministers in relation to overcrowding statutory notices.

15. Subsection (2) requires the Scottish Ministers to consult local authorities, representatives of landlords and occupiers of houses, and other appropriate stakeholders before issuing guidance under this section.

Reason for taking power

16. The power is being taken, not to enable the Scottish Ministers to issue guidance (which they could do without any legislative basis), but to require that local authorities have regard to it. As the notices are an innovation, it is thought likely that guidance will be useful in promoting good practice and consistency where the provisions are used. The power to issue guidance is considered preferable to, for example, a power to issue directions, as this will allow local

authorities the flexibility to determine how to exercise the power to require private landlords to take steps to address overcrowding, in light of conditions in their areas.

17. The Scottish Government lodged Stage 2 amendments to remove section 17(8) and add section 26A in order to make clear that guidance may go beyond overcrowding statutory notices themselves to cover any aspect of a local authority's discharge of its functions under Part 3 and matters connected with that discharge. The requirement for Ministers to consult before issuing such guidance will ensure that stakeholders have an opportunity to express their views on the best way for local authorities to use their new powers.

Choice of procedure

18. Given the very limited effects of any guidance, which has no directive effects on any local authority or person, it is not considered that there is a need for any formal provision as to the making of guidance, such as laying before Parliament. The operation of the notices, in terms of their form, content and who must receive them, will be covered separately, by order, and the consultation requirement will ensure that stakeholder views will be taken into account. Guidance will simply assist local authorities in considering how to use their powers.

PART 4 – MISCELLANEOUS

Section 31(4) (inserts section 28B into the Housing (Scotland) Act 2006) – Landlord application to private rented housing panel: further provision

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative or negative resolution of the Scottish Parliament

Provision

19. Section 31(4) amends the Housing (Scotland) Act 2006 by inserting new section 28A to make provision for a landlord to apply to the Private Rented Housing Panel for assistance in exercising the right of entry under section 181(4). This is a right to enter a house to determine whether it meets the Repairing Standard or to carry out work to comply with the landlord's repairing duty or with a Repairing Standard Enforcement Order.

20. Section 31(4) also inserts new section 28B, giving Ministers power to make by regulations further provision about applications made under section 28A. Such provision may relate to the form and content of applications and notices, the prescription of a fee to accompany applications, the procedure to be followed by applicants and the panel member, and the determination of applications and action following determination, among other matters. In the Bill as introduced, such regulations were to be subject to negative procedure.

Stage 2 amendment

21. During its Stage 1 scrutiny, the Subordinate Legislation Committee asked the Scottish Government whether the power to make further provision about the making or deciding of landlord applications could be used to deal with a range of matters which could potentially go

beyond administrative detail, and whether it would therefore be appropriate that it should be subject to affirmative procedure.

22. The Scottish Government agreed that the power could potentially address more than administrative detail and subsequently put forward a Stage 2 amendment to add section 31(8) to the Bill.

Choice of procedure

23. Section 31(8) inserts into the 2006 Act new section 191(4A), which states that regulations made under section 28B(1) are to be subject to affirmative procedure, except where they contain provision only under section 28B(2)(b). This means that regulations that make provision only in relation to the application fee will be subject to negative procedure, whereas those dealing with wider matters will be subject to affirmative procedure. It is considered that negative procedure is appropriate for regulations dealing only with application fees – as is commonly the case – given the administrative nature of this matter and, in particular, the frequency with which levels of fees may require to be updated.

Section 31A – Relaxation of residential restriction on leases of more than 20 years

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

24. This section amends the lease provisions at section 8 of the Land Tenure Reform (Scotland) Act 1974. It supplements recent amendments made to the 1974 Act in the Housing (Scotland) Act 2010 which exempted local authorities, housing associations (registered social landlords) and rural housing bodies from the 20 year limit on residential leases.

25. Subsection (3A) has been amended in order to widen the organisations that can be exempted from restrictions on 20 year leases to bodies other than social landlords or rural housing bodies. It introduces a new power for Scottish Ministers to prescribe other bodies or types of body. Subsection (3B) gives Ministers the option of placing conditions or restrictions on the additional bodies to be exempted, the leases they may enter into and what is to happen if any specified conditions or restrictions are breached. This includes making provision for the protection of interests of any tenants or residents who may occupy the property. It also enables an order to modify legislation – e.g. tenancy legislation – which might be required in the event that conditions or restrictions are breached and the interests of tenants are placed at risk.

Reason for taking power

26. Taking a power, rather than legislating directly, is preferable because it offers the most flexible route for recognising bodies other than social landlords and rural housing bodies who can enter into residential leases for periods in excess of 20 years. The alternative would have required extremely complex drafting which anticipated the types of body and types of leasing arrangements which it would be appropriate to permit and that would result in a very inflexible provision, which could not be applied proportionately nor take account of specific

circumstances. It is important that prescription of bodies or types of body takes into account the specific circumstances of applicants not only because they are expected to be of very different types – they may be a single private landlord body, or a class of body such as “public limited companies” – but also because bodies using this provision are unlikely to be subject to the same controls over disposal of assets or assignation of head leases which characterise the social landlord sector. This power complements the power provided by the amendment in section 31B and enables the introduction of combined leasing and funding arrangements which may draw on institutional and similar forms of long-term investment.

Choice of procedure

27. The new subsection (3D)(b) provides for an affirmative procedure which is considered appropriate given the substantive nature of the provision that may be made in exercise of this delegated power, including the power to modify enactments and to prescribe widely-defined types of body. It is also considered that Parliament would welcome the opportunity to scrutinise the restrictions and conditions which the Scottish Ministers may wish to place on prescribed bodies, the tenancy agreements they intend to offer and the protections to be afforded to tenants and residents.

Section 31B – Restriction of right to redeem heritable securities after 20 years

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

28. This section amends the standard security (heritable security) provisions at section 11 of the Land Tenure Reform (Scotland) Act 1974. It follows recent amendments made to the 1974 Act in the Housing (Scotland) Act 2010 which enables local authorities, housing associations (registered social landlords) and rural housing bodies to give up their right to repay debt early which is secured on residential property after 20 years, if that is what they wish to do.

29. Subsection (3A)(b) is amended to allow for bodies other than social landlords and rural housing bodies to choose to give up their right to redeem debt early. The amendment introduces a power for Scottish Ministers to prescribe additional bodies or types of body. The new subsection (3B) also gives Ministers the option of placing conditions or restrictions on bodies they prescribe, on the types of heritable security that the prescribed body or bodies may elect not to repay early and circumstances in which the prescription will no longer apply.

Reason for taking power

30. Taking a power, rather than legislating directly, is preferable because it offers the most flexible route for recognising bodies other than social landlords and rural housing bodies who can opt out of their right to redeem debt early. The alternative would have required extremely complex drafting which anticipated the types of body and funding arrangements secured on residential property on which it would be appropriate to permit early repayment. This approach offers a focussed solution which allows landlords to seek to be exempted from the standard security rule and for any exemption granted to them to reflect their specific circumstances, whilst

retaining the right for all other bodies and individuals with loans of over 20 years secured on residential property to repay debt early, if that is what they wish to do. This power complements the power provided by the amendment in section 31A and enables the introduction of combined leasing and funding arrangements which may draw on institutional and similar forms of long-term investment.

Choice of procedure

31. The new subsection (3C) provides for a negative procedure. This is considered entirely appropriate given the more limited scope of this power as compared to the new power inserted by section 31A, especially as there is no scope to modify enactments in this power.

*This document relates to the Private Rented Housing (Scotland) Bill as amended at Stage 2
(SP Bill 54A)*

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