



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

63rd Report, 2014 (Session 4)

Community Empowerment (Scotland) Bill at Stage 1

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the 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;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
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63rd Report, 2014 (Session 4)

Community Empowerment (Scotland) Bill at Stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 19 August, 30 September, 28 October and 4 November the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Community Empowerment (Scotland) Bill (“the Bill”) at Stage 1¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF BILL

2. This Government Bill was introduced by John Swinney MSP on 11 June 2014. The lead Committee is the Local Government and Regeneration Committee. The Bill makes wide-ranging provision in relation to various types of community body and their rights. It is divided into 9 parts.

3. Part 1 places a duty on the Scottish Ministers to develop, consult on and publish a set of national outcomes for Scotland, to be reviewed every 5 years. Public authorities are to have regard to the national outcomes in carrying out their functions, as are all persons carrying out functions of a public nature. The Scottish Ministers are obliged to prepare and publish reports about the extent to which the national outcomes have been achieved.

4. Part 2 concerns community planning. Section 4(1) provides that local authorities, the bodies listed in schedule 1 of the Bill and community bodies must participate with each other in community planning. ‘Community planning’ is defined as planning that is carried out with a view to improving the achievement of outcomes in relation to the area of a local authority resulting from, or contributed to by, the provision of services delivered by or on behalf of the local authority or the persons listed in schedule 1 to the Bill. Schedule 1 lists bodies such as National Park authorities, Scottish Enterprise and the Scottish Fire and Rescue Service.

¹ Community Empowerment (Scotland) Bill [as introduced] available here:
[http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20\(Scotland\)%20Bill/b52s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52s4-introd.pdf)

5. Part 2 of the Bill also makes provision in relation to local outcomes improvement plans. These are plans prepared and published by community planning partnerships setting out local outcomes to which the partnership must give priority with a view to improving the achievement of the outcome, as well as a description of the proposed improvement action and the time period within which the improvement is to be achieved. The local outcomes improvement plan is to be kept under review by the community planning partnership.

6. Part 3 of the Bill relates to participation requests. A participation request is a request made by a community controlled body to a public authority to permit the body to participate in an outcome improvement process. In making a request, the community body must set out details of any knowledge, expertise and experience the body has in relation to the specified outcome. The Bill also sets out the process to be followed by an authority where it receives a participation request.

7. Part 4 of the Bill does two things. Firstly, sections 27-47 make amendments to Part 2 of the Land Reform (Scotland) Act 2003 (“the 2003 Act”). The principal amendment is an extension of the community right to buy (currently available in respect of rural land only) to all land in Scotland. Sections 27-47 of the Bill also make various other changes to Part 2 of the 2003 Act so as to improve the working of those provisions.

8. Secondly, Part 4 creates a new community right to buy in respect of abandoned or neglected land. Section 48 of the Bill introduces a new Part 3A into the 2003 Act. The provisions set up a process whereby community bodies may apply to the Scottish Ministers to exercise their right to buy land which is abandoned or neglected. The new right to buy differs from the existing rights in Part 2 of the 2003 Act in one important respect, which is that the right to buy abandoned or neglected land may be exercised in circumstances where the owner of the land does not wish to sell.

9. Part 5 of the Bill relates to asset transfer requests. An asset transfer request is a request made by a community controlled body to a ‘relevant authority’ which seeks permission to buy, lease or otherwise acquire rights in respect of property owned by that relevant authority. A ‘relevant authority’ is a body listed in schedule 3 to the Bill, and includes local authorities, the Scottish Ministers, SEPA and the Scottish Court Service. Part 5 sets out the requirements to be met by a community body before it can make a request, the process to be followed in making a request and the rights of appeal that are available in the event that a request is refused.

10. Part 6 of the Bill relates to common good property. “Common good” refers to assets originally acquired from former burghs to which local authorities have taken title. The Bill requires each local authority to establish and maintain a common good register which must be available to members of the public for inspection. The Bill also imposes requirements on local authorities to publish details of any decision it proposes to take to dispose of common good assets or to change their use. The authority is required to have regard to any representations it receives in relation to the proposed disposal of common good assets.

11. Part 7 of the Bill concerns allotments. It replaces the provisions of the Allotments (Scotland) Acts of 1892, 1922 and 1950 which are repealed in their entirety. The Bill also repeals some provisions of the Land Settlement (Scotland) Act 1919. The Bill creates a new definition of ‘allotment’ and ‘allotment site’, and it places a duty on local authorities to hold and maintain waiting lists for allotments and to take reasonable steps to provide more allotments if the waiting list exceeds key trigger points. The Bill creates compensation rights in favour of tenants of allotments for disturbance, deterioration of an allotment site or loss of crops.

12. Part 8 concerns non-domestic rates. It amends the Local Government (Financial Provisions etc.) (Scotland) Act 1962 and the Local Government Finance Act 1992. The effect of the amendments is that local authorities are given power to grant localised relief from business rates. Any relief granted is to form part of a relief scheme which is funded by the authority. Before creating such a scheme, the authority is required to have regard to the interests of persons liable to pay council tax which is set by that authority.

13. Part 9 of the Bill makes general provision in relation to subordinate legislation, ancillary provision, commencement and short title.

DELEGATED POWERS

14. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)². Due to the volume of powers in the Bill the Committee adopted a staged approach to its scrutiny. At its first consideration of the Bill, the Committee delegated authority to its legal advisers to ask written questions of the Scottish Government. The questions issued and the responses received from the Scottish Government are included in this report at **Annex B**.

15. At its meeting on 30 September, the Committee took oral evidence from Scottish Government officials on a number of powers in the Bill following receipt of the Scottish Government’s answers to the written questions.

16. The Committee makes no recommendation in respect of the powers listed at **Annex A** to this report. These powers are divided into powers with which the Committee was initially content; powers with which the Committee was content following written evidence from the Scottish Government; and powers with which the Committee was content following both written and oral evidence from the Scottish Government.

17. The Committee’s comments and recommendations on the remaining delegated powers in the Bill are detailed below. Before considering the individual powers, the Committee makes the following general observations:

² The Delegated Powers Memorandum is available here: http://www.scottish.parliament.uk/S4_Bills/CE_DPM.pdf

- i. The reasons advanced in the DPM for taking many powers in the Bill were not sufficiently detailed so as to enable the Committee to reach a view on whether those powers were acceptable in principle. With regard to several powers, the necessary information was only obtained following both written and oral evidence.**
- ii. The quality of some of the written answers provided by the Scottish Government in response to the Committee's questions was inadequate, requiring the Committee to explore a number of issues further with Scottish Government officials in oral evidence. In relation to some key powers in the Bill, for example the power in the new section 97C(3)(a) of the 2003 Act, the answers given by the officials in oral evidence failed to provide the information sought by the Committee.**
- iii. In relation to the power in the new section 97C(3)(a) of the 2003 Act, the Committee remains in a position, having considered both written and oral evidence, whereby it is unable to form a view as to how this power is intended to be used. The Government has not provided an explanation for taking this power beyond a need to retain flexibility within the Bill. The Committee considers that explanation to be inadequate in light of the significance of this power and what it appears to permit. The Committee further finds it concerning that the thinking behind a power of such significance to the scope and application of the Bill appears still to be in the early stages of development. The Scottish Government may wish to reflect on its reasons for taking this power as the Bill progresses through the Parliament and the lead Committee may wish to explore the power further when it takes oral evidence from the Minister for Local Government and Planning.**
- iv. More generally, the Committee finds it unsatisfactory that the Parliament is being asked to confer certain wide-ranging powers on the Scottish Ministers in circumstances where the Scottish Government has not informed the Parliament in sufficient detail of its plans for using those powers or of the reasons for taking a particular approach to the framing of certain powers. The Committee considers that there is a clear need for delegated powers to be fully explained, their terms appropriately framed and their scope clearly delineated.**
- v. The points made above are concerning to the Committee given the significance of many of the powers in this Bill. The quality of delegated powers memoranda in particular is an issue that the Committee is monitoring on an ongoing basis, and will continue to raise in its annual and quarterly reports and, as appropriate, with the Minister for Parliamentary Business.**

Recommendations

Sections 1 and 2 – National outcomes

Powers conferred on:	the Scottish Ministers
Powers exercisable by:	published determination
Parliamentary procedure:	none

Scrutiny procedure for setting and review of national outcomes

18. Section 1(1) of the Bill places a duty on the Scottish Ministers to determine national outcomes in relation to Scotland that result from, or are contributed to by, the carrying out of functions of Scottish public authorities, cross-border public authorities, and other persons carrying out functions of a public nature. Such bodies are required to have regard to the national outcomes in carrying out their functions.

19. Section 1(2) of the Bill places a requirement on the Scottish Ministers to consult on the national outcomes and section 1(3) requires Ministers to publish the outcomes. There is no provision for Parliamentary scrutiny of the outcomes prior to their publication, or for the outcomes to be laid before Parliament once published. The Committee sought written explanation as to why it is considered appropriate for the power to decide on national outcomes to be exercisable by informal published determination as opposed to by, for example, Scottish statutory instrument.

20. The Scottish Government's written response to the Committee indicated that Parliamentary scrutiny will focus on progress toward the national outcomes, not the setting of the outcomes. The response also indicated that it may be that the Parliament would wish to debate the outcomes set out by Ministers, and that the arrangements put forward by the Bill do not prevent that.

21. The Committee explored these issues further with the Scottish Government officials at its meeting on September 30th. Anne-Marie Conlong of the Scottish Government's Performance Unit explained that—

“The Scottish Government believes that what we have set out in the provisions reflects the current separation of powers between the Scottish Government and the Parliament. It would be for the Scottish Ministers to co-ordinate Government business and to set out the strategic direction for Government – within its overall accountability to the Parliament, of course - and the Parliament would exercise a scrutiny function, holding ministers to account on progress toward the national outcomes and objectives.”³

22. Furthermore, officials indicated that they were—

³ *Delegated Powers and Law Reform Committee, Official Report, 30 September 2014, Col.3*

“...more than happy to take back for further consideration with Ministers the Committee’s views on the respective roles of the Parliament and the Government in setting the outcomes.”⁴

23. There is recent comparable provision for national outcomes to be set out in subordinate legislation. Section 3(2) of the Public Bodies (Joint Working) (Scotland) Act 2014 requires that a local authority and a health board must, in preparing an integration plan, have regard to the national health and wellbeing outcomes in section 5 (and the integration planning principles in section 4). Section 5(1) enables the Scottish Ministers to prescribe the national health and wellbeing outcomes by regulations which are subject to the affirmative procedure.

24. In the DPM for the 2014 Bill, the Scottish Government explained why it was considered appropriate that the health and wellbeing outcomes should be prescribed by regulations subject to the affirmative procedure: “By allowing Ministers to set national outcomes, it provides for a consistent focus nationally. It is appropriate that outcomes are set by regulations as this requires a process of consultation to be followed, contemporaneously with integration plans being prepared, to inform the outcomes. It also provides flexibility for the Scottish Ministers to amend outcomes in the future, in response to innovation locally and changing circumstances, and in order to support continuous improvement.... This is subject to affirmative procedure as the national outcomes are fundamental to health and social care integration in that they express its practical purpose. Whilst this level of scrutiny involves more parliamentary time, it is considered that the national outcomes are sufficiently important to justify this, and it is not anticipated that they will be regularly amended.”

25. The Committee considers that there is a clear comparison to be drawn between the health and wellbeing outcomes for Scotland as provided for by the Public Bodies (Joint Working) (Scotland) Act 2014, and the national outcomes under this Bill. The Committee also observes that the national outcomes set under the Bill will be applicable to a wider range of bodies than the health and wellbeing outcomes therefore the requirement for Parliament to have a role in the process of setting or reviewing the outcomes is, in the Committee’s view, greater.

26. The Committee acknowledges, however, that there are alternative ways to afford the Parliament an opportunity to scrutinise the national outcomes. By way of example, the Committee notes the provision in section 16 of the Judiciary and Courts (Scotland) Act 2008. Section 16 relates to guidance issued by the Scottish Ministers or the Lord President as to the manner of exercise by the Judicial Appointments Board for Scotland of its functions. Section 16 provides that before issuing guidance, the Scottish Ministers or, as the case may be, the Lord President, must lay a draft of the proposed guidance before the Parliament. The guidance must not be issued until 21 days after it has been laid before Parliament, and the Parliament may by resolution make recommendations in relation to the draft guidance to which the Government or the Lord President must have regard. The Parliament does not, however, have power to prevent the guidance from being issued.

⁴ *Delegated Powers and Law Reform Committee, Official Report, 30 September 2014, Col.3*

27. While the Committee acknowledges that the Parliament would not be prevented from debating such outcomes as are set by the Scottish Government, the Committee considers that a more active scrutiny role for the Parliament in relation to the outcomes would be appropriate and should be set out on the face of the Bill. One clear way to enable Parliament to scrutinise the outcomes would be for the outcomes to be prescribed in regulations subject to scrutiny by the affirmative procedure, although as noted above, the Committee acknowledges that there may be alternative ways in which the Parliament could be afforded a role in considering the outcomes and that the formulation of such a role is ultimately a matter for the Scottish Government.

Consultation on the national outcomes

28. Sections 1(2) and 2(5) of the Bill provide that before determining or revising the outcomes, the Scottish Ministers must consult such persons as they consider appropriate. The Committee explored in the oral evidence session why, in principle, the provision does not specify any persons or bodies which (at a minimum) the Scottish Ministers would need to consult.

29. It was explained in the oral evidence session that the intention is to leave the potential scope for consultation as broad as possible, which has been favoured by stakeholders. In some cases consultation would be very wide, but in other cases focussed. The intention is not to limit or narrow the scope of the persons who may be consulted. It was indicated that if the Committee was of the view that the Bill should include a minimum list of bodies that suggestion would be considered further, however the Scottish Government would not want to limit the scope of potential consultation in any future review.

30. Sections 1(2) and 2(5) provide that the consultation on the national outcomes will be with such persons as (subjectively, at the particular time) the Scottish Ministers consider appropriate. The Committee accepts that this approach keeps the scope for consultation as broad as possible, but observes that, equally, it does not offer any guarantee of consultation at a minimum level, where the outcomes are to be set or revised.

31. The Committee also notes that, by comparison, section 5 of the Public Bodies (Joint Working) (Scotland) Act 2014 specifies a minimum level of required consultation before the national health and wellbeing outcomes are prescribed by regulations. Ministers must consult in advance local authorities, Health Boards, each integration joint board at the time established, and in respect of various groups set out in section 5(4) involved in health and social care provision, such persons appearing to be representative of the group as the Ministers think fit.

32. The Committee considers that a list of persons or bodies that, at a minimum, the Scottish Ministers must consult when national outcomes are set or reviewed should be adopted in the Bill. Such an approach could be tailored to ensure a minimum base for consultation while leaving it open to Ministers to consult such other bodies as they think fit in the particular circumstances, having regard to the nature of the outcomes being set or revised.

33. The Committee has concerns that the process for setting and reviewing national outcomes under Part 1 of the Bill leaves no role for the Parliament to scrutinise the outcomes that are proposed to be set or, as the case may be, revised, before they are published.

34. The Committee considers that it would be appropriate for the setting and review of the national outcomes to be subject to the scrutiny of Parliament, possibly through scrutiny of regulations subject to the affirmative procedure. A more active scrutiny role for the Parliament appears to be justified having regard to the significance of the national outcomes, the discretion afforded to the Scottish Ministers in deciding how the outcomes are presented and measured, and the fact that all public bodies and other persons carrying out functions of a public nature as described in section 1(1) would require to have regard to the outcomes.

35. Sections 1(2) and 2(5) provide that before exercising the power to determine or revise the national outcomes, the Scottish Ministers must consult such persons as they consider appropriate. The Committee recognises that the determination of which bodies and persons ought to be consulted is a policy matter. The Committee draws to the attention of the Local Government and Regeneration Committee however that sections 1(2) and 2(5) keep the scope for consultation as broad as possible, but equally they do not guarantee any minimum level of consultation that might be suitable, depending on whether it is proposed to set or change the outcomes generally or to have a more focussed review.

Sections 4(6), 8(3), 16(2) and 51(3) – power to add or remove bodies

Powers conferred on:	the Scottish Ministers
Powers exercisable by:	regulations (sections 4(6) and 8(3)); order (sections 16(2) and (3) and 51(2) and (3))
Parliamentary procedure:	negative

36. Section 4(6) allows Ministers to modify schedule 1 of the Bill to expand the list of community planning partners to which Part 2 of the Bill applies. The power also enables Ministers to remove bodies from the list, thereby reducing the scope of Part 2 of the Bill. Section 8(3) provides a similar power in respect of the list of community planning partners which have governance requirements in relation to community planning as set out in section 8(2).

37. Sections 16(2) and (3) provide powers to expand or reduce the list of public service authorities to which a participation request may be made in terms of Part 3 of the Bill (the list is contained in schedule 2). Sections 51(2) and (3) create similar powers in respect of the list of relevant authorities to whom an asset transfer request may be made under Part 5 (the list of relevant authorities is set out in schedule 3).

38. These powers are subject to the negative procedure. The Committee sought explanation from the Scottish Government as to why that was considered appropriate as opposed to the affirmative procedure, which would afford the

Parliament a greater measure of scrutiny over the exercise of these powers which not only permit the modification of primary legislation, but which could also have a considerable impact on the scope and application of Parts 2, 3 and 5 of the Bill.

39. In response, the Scottish Government explained that the negative procedure was considered appropriate for the exercise of these powers, as adding or removing bodies from a list in one of the schedules to the Bill is unlikely to be controversial. The response also drew a parallel with section 4(1) of the Freedom of Information (Scotland) Act 2002 (“the 2002 Act”) where a power to amend a list of bodies is subject to the negative procedure. In oral evidence, the officials explained that these powers provide flexibility to make changes to the relevant lists should that be considered necessary.

40. The Committee considers that the exercise of these powers is capable of having a considerable impact on the scope and applicability of some of the key provisions in the Bill. For example, the power in section 4(6) could in theory be used to considerably expand the application of Part 2 of the Bill by adding large numbers of bodies to the list of community planning partners contained in schedule 1. Conversely, it could also be used to reduce the application of Part 2 of the Bill by removing bodies from the schedule 1 list.

41. The Scottish Government draws a parallel with section 4(1) of the Freedom of Information (Scotland) Act 2002 as a similar provision to add or remove bodies to or from a list which is also subject to the negative procedure. The Committee observes, however, that more recent powers to make amendments to lists of bodies have adopted a different procedural approach. For instance, section 25 of the Public Services Reform (Scotland) Act 2010 provides that an order which adds a body to the list in schedule 5 is subject to the affirmative procedure, but to the negative procedure where a body is removed from the list. A similar example pertains in section 7 of the Regulatory Reform (Scotland) Act 2014 (power to modify the list of regulators).

42. These examples, which post-date the 2002 Act, suggest that where bodies are added to lists, the powers should be subject to the affirmative procedure. Conversely, where the application of the Bill is shrunk and bodies are removed from lists, the negative procedure may be appropriate. Standing the absence of reasons why the present Bill should not follow these more recent examples, the Committee recommends that the Scottish Government amend the Bill at Stage 2 so as to require these powers to be subject to the affirmative procedure where they add bodies to the lists, but to the negative procedure where they are exercised so as to remove bodies from the lists.

43. **The Committee calls on the Scottish Government to amend the Bill at Stage 2 so as to make the powers in sections 4(6) and 8(3) subject to the affirmative procedure when exercised so as to add bodies to the lists in schedule 1 or section 8(2) respectively. The Committee also recommends that the powers in sections 16(3) and 51(3) be made subject to the affirmative procedure.**

Section 10 – Power to issue guidance

Power conferred on:	the Scottish Ministers
Power exercisable by:	guidance (published)
Parliamentary procedure:	none

44. Section 10(1) provides that each community planning partnership must comply with any guidance issued by the Scottish Ministers about the carrying out of functions conferred on the partnership by Part 2 of the Bill. Section 10(2) provides that each community planning partner must comply with any guidance issued by the Ministers about the carrying out of functions conferred on the partner by Part 2. Before issuing either set of guidance, the Ministers must consult such persons as they think fit. Section 95 provides that the guidance will be published on issue, in such manner as the Scottish Ministers think fit.

45. The Committee explored two aspects of the power to issue guidance in the oral evidence session: a) why the guidance is proposed to be binding on community planning partnerships and partners, rather than there being a requirement that they will have regard to it; and b) why there is no provision for any Parliamentary procedure to apply to the guidance or for it to be laid before Parliament.

46. As to a), the proposed automatically binding nature of the guidance is a change to the provision in section 18 of the Local Government in Scotland Act 2003. That section provides that every person initiating, maintaining, facilitating or participating in community planning shall, in doing so, have regard to any guidance provided by the Scottish Ministers about community planning. The consultation requirement in section 10(3) is similar to that already in section 18(2) of the 2003 Act.

47. The Committee explored in oral evidence the considerations underlying the proposal that the guidance should be binding. A key aspect as outlined by the Scottish Government officials was that the policy intention is that there should be local discretion and local innovation in how community planning is approached and dealt with, but there may be some matters that the Scottish Government feels are fundamental enough to apply on a national level, where the guidance could specify binding requirements on community planning partnerships and partners.

48. In reply to the question how it is foreseen that this power of binding guidance would be utilised, the officials responded—

“It is hard to know at the moment...the guidance will be subject to quite a lot of consultation before we put it out...It is hard to say what particular provisions will be used for, but that will emerge from the process.”⁵

49. The Committee considers that a power to issue guidance which is automatically binding according to its terms is highly unusual, and might be expected to require particular explanation as to why the power is needed. A binding requirement in such guidance would in law be binding in the same way as if the provision was contained in a statutory instrument or in an Act. The Bill

⁵ *Delegated Powers and Law Reform Committee, Official Report, 30 September 2014, Col.9*

appears to put no enforcement mechanism in place for compliance with the guidance. The guidance must cover matters “about the carrying out of functions conferred on community planning partners and partnerships under part 2 of the Bill.” But this is a broad requirement, and there is no enforcement or scrutiny mechanism proposed in the Bill to review whether matters required by the guidance are properly covered as concerning the various functions conferred in Part 2.

50. It was explained to the Committee in evidence that the policy intention is that some matters covered by the guidance should be matters which would be binding on a national level, while others would permit local discretion. However, the scope of the power in section 10 makes no such distinction, for instance by specifying a range of matters or requirements which possibly could be included as binding.

51. The Committee accordingly draws to the attention of the Local Government and Regeneration Committee that it has concerns, in principle, as to the proposal that the guidance should be binding on community planning partnerships and partners. This concern has a number of factors, and a power of this nature is unusual.

52. The Scottish Government officials were not clear in their oral evidence to the Committee as to the reasons why this power was being taken and how it could be exercised. It was indicated that there is a policy intention that some matters would be fundamental enough to be binding on a national level, while others would not and could permit local discretion and innovation. This distinction, however, is not provided for in section 10.

53. The Bill also makes no provision for an enforcement mechanism, to enforce compliance with the guidance. The guidance must cover matters “about the carrying out of functions conferred on community planning partners and partnerships under Part 2 of the Bill”. This is a broad requirement and the Bill makes no provision for a scrutiny or review mechanism, to review whether any automatically binding matters which may be specified in the guidance are properly included, because they concern the carrying out of functions conferred in Part 2 of the Bill.

54. These concerns would not apply if, in a similar way to the existing provision for guidance in section 18 of the Local Government in Scotland Act 2003, there was provision that community planning partners and partnerships would “have regard to” the guidance.

Section 48 inserting section 97C(3)(a) into the 2003 Act – Eligible land

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

55. The new Part 3A of the 2003 Act as inserted by Part 4 of the Bill will apply only in respect of “eligible land”. Eligible land is defined in the new section 97C(1) of the 2003 Act as land which the Scottish Ministers consider is wholly or mainly abandoned or neglected. The remainder of the new section 97C provides further detail as to the meaning of eligible land.

56. Section 97C(3)(a) provides that eligible land does not include land on which there is a building or structure which is an individual’s home, unless the building or structure falls within such class or classes as may be prescribed. The word ‘prescribed’ adopts the definition set out in section 98(1) of the 2003 Act, meaning “prescribed in regulations made by the Scottish Ministers”. The effect of section 97C(3)(a), therefore, is that Ministers may make regulations prescribing buildings or structures which are eligible for acquisition by a Part 3A community body notwithstanding the fact that such buildings or structures may constitute an individual’s home.

57. The DPM states that the policy intention is that eligible land should not include an individual’s home. It also states that this power will enable there to be flexibility as to exactly what buildings or structures constitute an individual’s home. The power is subject to the affirmative procedure and the DPM states that this is considered appropriate, given that what constitutes “eligible land” is fundamental to the scope and application of the new Part 3A.

58. While the Committee agrees that this power is fundamental to the scope and application of the new Part 3A of the 2003 Act, it does not consider that the DPM provides a sufficiently detailed explanation as to how it is intended to be used. The Committee accordingly sought written clarification from the Scottish Government as to what this power enables the Scottish Ministers to do and how it is intended that the power will be used.

59. In its written answer, the Scottish Government confirmed that section 97C(3)(a) enables Ministers to add prescribed classes of building back into the pool of eligible land to which the new Part 3A applies. The Government explained that it was unable to provide examples of the kinds of building or structure which may be prescribed using this power, but that the power “allows for flexibility”. The Government also stated in its written answer that it would be happy to consider changes to the provision should the Committee be of the view that that would be of benefit to the Bill.

60. At the oral evidence session on 30 September, Members sought further information from the Scottish Government officials as to why this power was being taken, standing the lack of detailed explanation in the Government’s written response and the DPM. Members also asked what factors – other than flexibility – were taken into account in framing this power.

61. In oral evidence Dave Thomson from the Scottish Government’s Land Reform and Tenancy Unit repeated that the power was required to allow for flexibility—

“The flexibility on those powers is the key part at the moment. The policy intent is not to take people’s homes away in any circumstances, but still to allow community bodies to take control of assets. Essentially, the powers that we are looking to take on through that provision are simply to allow that flexibility to set out in detail the types of buildings or assets that can be included or excluded. At the moment, we do not have specific examples, hence the current need for flexibility in those powers.”⁶

62. Rachel Rayner of the Scottish Government Legal Directorate also commented on this power:

“[A]ny regulations made by Ministers would have to comply with the European Convention on Human Rights. As you will be aware, Article 8 of the ECHR provides a right to respect for private and family life, which would include respect for a person’s home, and that would have to be taken into account were the power to be used.”⁷

63. The Committee finds it concerning that the taking of a power as significant as that proposed in section 97C(3)(a) of the 2003 Act has not been justified by the Scottish Government, either in written or oral evidence, beyond the apparent need for flexibility. While the Committee accepts that some flexibility in the available powers could be appropriate to ensure that the scheme envisaged by the new Part 3A of the 2003 Act is capable of operating effectively in practice, it considers that flexibility is not in and of itself sufficient explanation for the taking of such an important power. The Committee also observes that any regulations made by the Scottish Ministers in exercise of this power - or indeed any power - require to be ECHR-compatible.

64. In oral evidence, the Scottish Government officials explained that the policy intent underpinning these provisions is not to take individuals’ homes away in any circumstances. The power appears, however, to directly contemplate making buildings and structures available for compulsory acquisition by community bodies despite the fact that those buildings and structures are an individual’s home. If it is not the Government’s intention to make homes available for acquisition by Part 3A community bodies as the officials explained in oral evidence, the Committee finds it difficult to decide what this power is intended to do.

65. The Committee further finds it unsatisfactory that the Parliament is being asked to confer this power upon the Scottish Ministers without having received satisfactory answers to questions asked about its intended use. When asked to give examples to demonstrate how the power might be used in practice, the Scottish Government did not do so either in written or in oral evidence. The Committee considers it unsatisfactory that the Parliament is being asked to approve powers where the thinking behind them appears still to be in the early stages of development and where officials are unable to offer a detailed explanation of the circumstances in which it is planned that they will be used.

⁶ *Delegated Powers and Law Reform Committee, Official Report, 30 September 2014, Col.10*

⁷ *Delegated Powers and Law Reform Committee, Official Report, 30 September 2014, Col.12*

66. The Committee draws the power in the new section 97C(3)(a) of the 2003 Act to the attention of the Local Government and Regeneration Committee on the basis that it has concerns about the scope of the power and its intended use.

67. The power permits the Scottish Ministers to make regulations prescribing buildings or structures which are eligible for acquisition by a Part 3A community body notwithstanding the fact that such buildings or structures may be described as an individual's home. The Committee's questions of the Scottish Government, both written and oral, did not elicit a clear explanation from the Scottish Government as to its reasons for taking this power, or how the power is intended to be exercised. The Scottish Government also did not provide the Committee with any examples of the kinds of building or structure that may be prescribed in regulations made in exercise of this power.

68. The Committee finds it unsatisfactory that the Parliament is being asked to confer a power of this significance upon the Scottish Government in the absence of a detailed explanation as to why it is necessary or what it is for and in circumstances where the thinking underpinning the power appears to be in the early stages of development. Together with the lack of examples of the kinds of building or structure which may be prescribed using this power, the Committee finds it difficult to reach a view as to whether the power is acceptable in principle and recommends that the lead Committee explore the power further as part of its further consideration of the Bill.

69. The Scottish Government may wish to reflect on its reasons for taking this power as the Bill progresses through the Parliament and the lead Committee may wish to explore the power further when it takes oral evidence from the Minister for Local Government and Planning.

Section 97N(1) and (3) – Effect of Ministers' decision on right to buy

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

70. New section 97N(1) of the 2003 Act provides that Ministers may, by regulations, make provision for or in connection with prohibiting prescribed persons from transferring or otherwise dealing with land which is the subject of an application under Part 3A during the prescribed period. Section 97N(2) provides that those regulations may in particular include provision prescribing transfers or dealings which are not prohibited; requiring or enabling prescribed persons to register prescribed notices in the Register of Community Interests in Abandoned or Neglected land; and in prescribed circumstances, requiring information to be incorporated into prescribed deeds relating to the land.

71. Section 97N(3) provides that Ministers may, by regulations, make provision for or in connection with suspending, during the prescribed period, such rights in or over land in respect of which a Part 3A community body has made an application as may be prescribed. Section 97N(4) provides that such regulations may in particular include provision specifying rights to which the regulations do not apply, and rights to which the regulations do not apply in prescribed circumstances.

72. The Committee considers that it may be appropriate for the Scottish Ministers to make regulations for the purpose of suspending rights in or over land for the duration of the period within which Ministers are considering a Part 3A community body's application. The Committee also considers it appropriate that these powers are subject to the higher level of scrutiny afforded by the affirmative procedure. Despite these conclusions, the Committee considers that there are issues of clarity with the drafting of these powers. The Committee explored these issues with the Scottish Government both in written and oral evidence.

73. Section 97N uses the word "prescribed" a number of times. "Prescribed" has a specific definition in section 98(1) of the 2003 Act, meaning "prescribed in regulations made by the Scottish Ministers". The Committee wrote to the Scottish Government to ask whether the word "prescribed" as used multiple times in section 97N is intended to attract the definition of that term set out in section 98(1) with the effect that section 97N in fact creates a new power to make subordinate legislation each time that word is used, in addition to the two free-standing powers conferred by sections 97N(1) and (3).

74. In its written response, the Scottish Government confirmed that the use of the word "prescribed" in section 97N is intended to attract the definition of that term set out in section 98(1). The Government also stated, however, that its view is that section 97N confers only two powers to make subordinate legislation: the power in section 97N(1) and that in section 97N(3). Sections 97N(2) and (4) are intended to provide further detail of the matters which regulations made under subsections (1) and (3) may cover, and the use of the word "prescribed" in those subsections does not have the effect of conferring separate powers to make subordinate legislation.

75. The Committee considers that if the word "prescribed" as used in section 97N is intended to adopt the definition in section 98(1) of the 2003 Act, it seems clear that multiple powers are being conferred. The existence of the definition means that wherever the word "prescribed" appears in the 2003 Act, including where it appears as a result of amendments made to that Act by this Bill, it is an instruction to the reader to construe the word as conferring a power upon the Scottish Ministers to make regulations unless contrary provision is made.

76. The Committee therefore asked the Scottish Government officials for further explanation of the power when it took oral evidence on 30 September. The Scottish Government officials reiterated their position, which is that section 97N confers only two powers to make subordinate legislation. The officials offered to write to the Committee following the meeting to explain further their position. A letter dated 8 October 2014 is attached at **Annex C**.

77. This is a technical drafting point. The Committee does not object to the powers in sections 97N in principle, not to the selection of the affirmative procedure as the appropriate level of Parliamentary scrutiny over the powers. Nevertheless, the Committee finds that the use of the word “prescribed” in section 97N is apt to cause confusion when construed in accordance with section 98(1), and, as such, draws the conclusion that the Bill should be clarified at Stage 2.

78. The Scottish Government’s intention is that section 97N confers only two powers to make subordinate legislation: the power to make regulations prohibiting the transfer of land pending a decision on a Part 3A application in section 97N(1); and the similar power to suspend other rights e.g. rights of pre-emption or redemption that is set out in section 97N(3). The Committee considers, however, that this intention is not readily compatible with the use of the word “prescribed” in section 97N and its definition in section 98(1) of the 2003 Act. Other provisions in the Bill use the word “prescribed” and rely on the definition of that term in section 98(1) to create a free-standing power to make subordinate legislation. It is not clear from the evidence received from the Scottish Government why that same reliance does not apply in the case of the word as used in section 97N.

79. **The Committee calls on the Scottish Government to clarify the new section 97N of the Land Reform (Scotland) Act 2003 as inserted by section 48 of the Bill. Section 97N makes repeated use of the word “prescribed”, and the Scottish Government has explained to the Committee, both in written and oral evidence, that while the use of the word “prescribed” in section 97N is intended to adopt the definition of that term in section 98(1) of the 2003 Act meaning “prescribed in regulations made by the Scottish Ministers”, section 97N is considered to confer only two powers to make subordinate legislation: the power in section 97N(1) and the power in section 97N(3).**

80. **The Committee considers that if the use of the word “prescribed” in section 97N is not intended to confer separate and free-standing powers to make subordinate legislation, the Bill should be clarified for Stage 2 so as to remove the scope for doubt over the interpretation of the section and the powers it confers by re-drafting the provision so as to remove the references to “prescribed”.**

Annex A

The Committee was content with the following powers on first consideration of the Bill:

- | | |
|------------------|---|
| Section 7(3) | - local outcomes improvement plan: progress report |
| Section 12(2)(d) | - power to prescribe other matters to be addressed in an application for incorporation |
| Section 15(2) | - meaning of “community participation body” |
| Section 18(1) | - regulations (further provision about participation requests) |
| Section 19(7)(a) | - participation requests: decisions |
| Section 19(8) | - participation requests: decisions |
| Section 21(6) | - power to specify information to be published about the outcome improvement process |
| Section 24(3) | - modification of outcome improvement process |
| Section 25(4) | - reporting (of outcome improvement process) |
| Section 28(2) | - power to prescribe bodies that are “community bodies” |
| Section 28(7) | - power to define a “community” |
| Section 33 | - power to specify the description of land |
| Section 37 | - power to prescribe the information to be provided to the ballotter by the Scottish Ministers |
| Section 37 | - power to prescribe information to be provided to the ballotter by a community body |
| Section 38 | - power to make regulations which set out the information a community body must provide to the Scottish Ministers |
| Section 40 | - ballot not conducted as prescribed |
| Section 48 | - power to prescribe that eligible land does not include certain land for the purposes of Part 3A |

- Section 48 - power to approve/direct the transfer of property on winding up
- Section 48 - power to set out the definition of a “community”
- Section 48 - payment of charges for copies of entries in the Part 3A Register of Community Interests in Abandoned or Neglected Land
- Section 48 - power to prescribe the application form for Ministers to consent to a Part 3A community body’s right to buy
- Section 48 - power to prescribe the manner in which an application under Part 3A is given public notice
- Section 48 - power to prescribe how the ballot of the community is undertaken and the form of the ballot return to Ministers
- Section 48 - Ministers’ notification of their decision on an application under Part 3A
- Section 48 - power to direct that community body’s right to buy is extinguished
- Section 48 - power to make provision in relation to compensation
- Section 48 - power to make grants towards Part 3A community bodies’ liabilities to pay compensation
- Section 48 - rules affected by Ministers in relation to the Lands Tribunal Act 1949
- Section 50(2)(a) - designation of a community transfer body
- Section 50(2)(b) - designation of a class of bodies as community transfer bodies
- Section 53 - power to approve or direct the transfer of property on winding up
- Section 54(3) - power to make provision about information relating to land in respect of which an asset transfer request is proposed
- Section 55(8) - power to prescribe a time for a decision notice to be given
- Section 55(9) - power to make provision regarding the information contained in a decision notice and the manner in which it is to be given

- Section 56(7)(b)(ii) - power to direct an extended period within which a contract is to be concluded
- Section 56(10) - power to make provision about a direction to extend the period within which a contract is to be concluded
- Section 58(5)(c) and (d) - power to issue directions following an appeal
- Section 64(1) - guidance about common good registers
- Section 66(1) and (2) - guidance about disposal etc. of common good property
- Section 68(d) - meaning of “allotment”
- Section 70(2)(b) - request to lease allotment
- Section 72(4) and (5) - duty to provide allotment
- Section 77(3)(d) - duty to prepare food-growing strategy
- Section 79(2)(n) - annual allotments report
- Section 81(3)(b)(ii) - delegation of management of allotment sites
- Section 83(10) - termination of lease of allotment or allotment site
- Section 87(1) - sale of surplus produce
- Section 89(4) - compensation for disturbance
- Section 90(4) - compensation for deterioration of allotment
- Section 91(3) - compensation for loss of crops
- Section 97(1) - ancillary provision
- Section 99(2) - commencement

The Committee was content with the following powers after receiving written evidence from the Scottish Government:

- Section 12 - power to establish a body corporate for community planning purposes
- Section 28(6) - meaning of “community”
- Section 48 (inserting sections 97C(2), 97C(3)(b) and 97C(4) - eligible land

into the 2003 Act

- Section 48 - register of Community Interests in Abandoned or Neglected Land
- Section 48 - right to buy: application for consent
- Section 73(1) - allotment site regulations: additional provision

The Committee was content with the following powers after receiving both written and oral evidence from the Scottish Government:

- Section 48 - provisions supplementary to section 97D
- Section 54(1) - power to make further provision about asset transfer requests
- Sections 58(3) and 59(3) - appeal or review of decisions on asset transfer requests
- Section 80(7) - power to remove unauthorised buildings from allotment sites

Annex B – Written Correspondence

Part 1 – National Outcomes

1. Sections 1-3 – publication of national outcomes

a) Sections 1(3), 2(4) and 3(1) provide for the publication of the national outcomes that are determined by the Scottish Ministers, and reports about the extent to which they have been achieved. The Scottish Government is asked to explain why it has been considered appropriate that the power to decide on the national outcomes should be exercisable by informal published determination, and not by Scottish statutory instrument which could be subject to Parliamentary scrutiny and procedure.

The decision was taken not to use Statutory Instruments as we envisage the primary role of Parliament to be scrutiny of progress towards the national outcomes. It may well be that the Scottish Parliament may wish to debate on the national outcomes set by the Scottish Ministers and the arrangements proposed do not prevent that.

b) Section 1(2) states that before determining the national outcomes, the Ministers must consult such persons as they consider appropriate. The Scottish Government is asked to explain why this provision does not specify any persons or bodies which (as a minimum requirement) the Ministers would consult.

The intention here is to leave the potential scope for consultation as broad as possible. In some cases, e.g. where a review is of a technical nature and focuses on specialist or statistical issues, it may be more appropriate to limit the scope of consultation to those who have expertise and experience in that area. In other cases, the review may be of a more general nature and in those cases, it would be appropriate to consult more widely. Consultation with appropriate people would also include consultation with the public as a whole if appropriate.

Part 2 – Community Planning

2. Section 4(6) – power to modify schedule 1

The power in section 4(6) is capable of being used to considerably expand the list of community planning partners to which Part 2 of the Bill applies, or alternatively to considerably reduce the scope by removing bodies that are listed in schedule 1.

The Scottish Government is asked to explain therefore why it is considered more suitable that any regulations made under section 4(6) should be scrutinised by the negative procedure - rather than by the affirmative procedure where regulations add or remove persons from the schedule 1 list, and the negative procedure for regulations which amend an entry (which could adjust an entry on a change of name of a body).

This power provides flexibility to make future changes to the list of community planning partners in schedule 1. The power to amend the primary legislation is restricted to amending the list of public bodies who are members of a community planning partnership. Adding a body to, or removing it from, the list is unlikely to generate controversy. An example of a power to amend a list of public bodies in a schedule to primary legislation which is subject to negative procedure can be found in section 4(1) of the Freedom of Information (Scotland) Act 2000. In these circumstances it is considered that subjecting the exercise of the power to negative procedure is appropriate.

3. Section 8(3) – power to modify section 8(2)

The power in subsection (3) of section 8 is capable of being used to considerably expand the list of community planning partners in subsection (2) which have governance requirements in relation to community planning, or alternatively to considerably reduce the scope by removing bodies from that list.

The Scottish Government is asked to explain therefore why it is considered more suitable that any regulations made under section 8(3) should be scrutinised by the negative procedure - rather than by the affirmative procedure where regulations add or remove persons from the schedule 1 list, and the negative procedure for regulations which amend an entry (which could adjust an entry on a change of name of a body).

The power relates to making changes that may be required as the nature and practice of community planning evolves and the provisions of this part of the Bill take effect. It is restricted to allowing the Scottish Ministers to amend a list of public bodies who are partners in a community planning partnership so that they are also subject to a governance role. As with the power in section 4(6), it is not considered that the exercise of this power would generate controversy. It is considered that the negative procedure offers an appropriate level of parliamentary scrutiny.

4. Section 10 – power to issue guidance

The Scottish Government is asked to explain why the powers to issue guidance in section 10 are appropriate, and how the powers could be used. In particular an explanation is sought as to-

a) why the guidance is proposed to be binding on community planning partnerships and partners, rather than there being a requirement that they will have regard to it; and

b) why there is no provision for any Parliamentary procedure to apply to the guidance or for it to be laid before Parliament.

With regard to the request for an explanation as to why the powers to issue guidance are appropriate, the Scottish Ministers have inherent power to issue

guidance and the Bill does not confer express powers to that effect. The purpose of section 10 is to confer a status on any guidance Ministers may issue regarding the carrying out of functions by the Community Planning Partnership. Section 10(3) requires that any guidance must be the subject of consultation before it is issued.

a) The Scottish Government believes that this section will help to enable the dissemination of best practice in community planning across Scotland and is necessary to support the process by which public bodies work together and with community bodies to plan for, resource and provide services which improve local outcomes in the area. With regard to the obligation to comply with guidance, we would of course be happy to consider amending this to an obligation to have regard to the guidance if the Committee feel it would be of benefit to the Bill.

b) There is currently no provision for any Parliamentary procedure to apply to the guidance or for it to be laid before Parliament as it was considered that the guidance would deal with a range of issues in some detail, including administrative issues as necessary and that this was not a necessary or appropriate use of valuable Parliamentary time and resources.

5. Section 12 – power to establish bodies corporate

a) **The Scottish Government is asked to explain why the wide power to specify any other matters in section 12(3)(h) is required, and how this power could be used.**

b) **What additional matters would this power enable, beyond the ancillary powers to make incidental, supplementary or consequential provisions contained in sections 96(1) and 97?**

Section 12(3)(h) is in the same terms as, and replaces, section 19(3)(h) of the Local Government in Scotland Act 2003. The inclusion of 12(3)(h) provides the necessary flexibility to deal with any new development which may need to be addressed when exercising the power in section 12(1). It also makes it clear that the provision that can be included in the regulations made under section 12(1) is not restricted to the matters listed in section 12(3)(a) to (g).

Part 3 – Participation Requests

6. Section 16 – meaning of “public service authority”

a) **The powers in section 16(2) and (3) are capable of being used to considerably expand the list of “public service authorities” to which participation requirements could be made in accordance with Part 3 of the Bill, or alternatively to considerably reduce the scope by removing bodies (or types of body) from the list in schedule 2.**

The Scottish Government is asked to explain therefore why it is considered more suitable that any order made under sections 16(2) and (3) should be scrutinised by the negative procedure - rather than by the affirmative

procedure where the order proposes to remove persons from the schedule 2 list and/or designate more persons or classes of person as “public service authorities” and the negative procedure for an order which amends an entry in schedule 2 (which could adjust an entry on a change of name of a body).

b) The Delegated Powers Memorandum (“DPM”) states in relation to section 16(2) that the Scottish Ministers are included in schedule 2, but this is not the case. Clarification is sought as to whether there is any intention to include the Ministers in the schedule.

a) These powers provide flexibility to make future changes to the list of public service authorities in schedule 2. The power to amend the primary legislation is restricted to amending the list of public bodies to whom a community participation body may make a participation request. Adding a body to, or removing it from, the list is unlikely to generate controversy. An example of a power to amend a list of public bodies in a schedule to primary legislation which is subject to negative procedure can be found in section 4(1) of the Freedom of Information (Scotland) Act 2000. In these circumstances it is considered that subjecting the exercise of the power to negative procedure is appropriate.

b) The reference to the Scottish Ministers in the Delegated Powers Memorandum in relation to section 16(2) was an error.

Part 4 – Community Right to Buy Land

7. Section 28(6) – duty to provide information about community right to buy

The power in the new section 34(4B) of the 2003 Act, as inserted by section 28(6) of the Bill, appears to be subject to the negative procedure while the DPM refers to the power being subject to the affirmative procedure. Section 98(5) of the 2003 Act, as amended by paragraph 4 of schedule 4 to the Bill, provides that regulations made under the new section 34(4A) will be subject to the affirmative procedure, but there is no reference to regulations made under the new section 34(4B), the effect of which would appear to be to leave such regulations to take the negative procedure.

Can the Scottish Government explain whether this is an error or, if the Scottish Government intends the power to be subject to the negative procedure, can it explain why this is considered appropriate?

The Scottish Government agree that the new section 34(4B) of the 2003 Act, as inserted by section 28(6) of the Bill, is subject to the negative procedure but that it would be appropriate for this power to be subjective to affirmative procedure, as stated in the DPM.

8. New section 97C of the 2003 Act – eligible land

a) Can the Scottish Government provide more information as to how it envisages using the power in the new section 97C(2) of the Land Reform

(Scotland) Act 2003 (“the 2003 Act”)? The DPM refers only to the power being used to prescribe matters which are “too detailed to include in the primary legislation”. Can the Scottish Government provide any examples of matters which it is intended will be prescribed in regulations made in exercise of this power so as to inform the Committee’s consideration of the power?

b) The Scottish Government is asked for a fuller explanation as to the relationship between the powers in the new section 97C(3)(a), 97C(3)(b) and 97C(4) of the 2003 Act, as inserted by section 48 of the Bill. How is it considered that these powers will interact?

c) Does the Scottish Government agree that the power in section 97C(3)(a) enables Ministers to add prescribed classes of building back into the ‘pool’ of eligible land to which the new Part 3A applies despite the fact that such buildings may constitute an individual’s home? Can the Scottish Government provide any examples of classes of building or structure which it intends to prescribe in regulations made in exercise of this power?

(a) The matters that Ministers should take account of in considering whether land is wholly or mainly abandoned or neglected is currently under discussion with stakeholders. Some examples of matters might include the physical condition of land, environmental or historic designations affecting the land and the extent to which the land is having a detrimental effect on the local environment, where environment can be physical or social.

(b) The relationship between the various powers is that that section 97C(3)(a) provides that land on which there is an individual’s home is not eligible land but this doesn’t apply to classes or descriptions of land set out in regulations. This will enable exceptions to be made should this be considered appropriate in the future. Section 97C(3)(b) will enable regulations to provide that land associated with an individual’s home such as private gardens and land forming the curtilage of the home will not be eligible land, and section 97C(4) allows regulations to be made treating buildings or structures as homes and so the land which these are situated on will not be eligible land. For example a house that is used just for holidays and which doesn’t constitute an individual’s home could be treated as a home and so the land which it is on would not be eligible land.

(c) Section 97C(3)(a) enables Ministers to add prescribed classes of building back into the ‘pool’ of eligible land to which the new Part 3A applies. At this point in time, we are not able to give specific examples, but this power allows for flexibility. We would of course be happy to consider changes if the Committee feel it would be of benefit to the Bill.

9. Section 97E(4) - power to make an order relating to matters connected with the acquisition of the land

Can the Scottish Government explain how the power in the new section 97E(4) is intended to be exercised and why it requires to be drawn in such wide terms? Can the Government provide any examples of the kinds of

modifications to primary legislation that the Scottish Government anticipates making in exercise of this power as permitted by the provision in section 97E(5)?

The underlying reason behind the power in section 97E(4) is to ensure that the process for buying back land from a community body is open and transparent as well as robust. There are examples of similar powers e.g. sections 1 and 2 of the Transport and Works (Scotland) Act 2007.

10. Section 97F(6) – power to modify the information and documents that are to be contained in the Register of Community Interests in Abandoned or Neglected Land

The Scottish Government is asked to explain further its reasons for taking the power to modify new sections 97F(3) and (4) of the 2003 Act as inserted by section 48 of the Bill. In particular, can the Government explain the circumstances in which it considers that it may be appropriate to modify those subsections given that they exempt, in circumstances where a Part 3A community body requires it, any information or documents relating to the raising or expenditure of money by that body from being entered in the Register of Community Interests in Abandoned or Neglected Land?

There is already a similar power in respect of the Register of Community Interests in Land in Part 2 of the Land Reform (Scotland) Act 2003 (section 36(6)) so the power in section 97F(6) ensure that Parts 2 and 3A are consistent. It allows the Register to be kept relevant should there be any changes to the requirements of community bodies, or the information that they are required, by law, to provide.

11. Section 97G(5)(c) – power to prescribe information in an application form for Ministers to consent to a Part 3A community body’s right to buy

a) The Scottish Government is asked to justify the power in section 97G(5)(c) as distinct from the power in section 97G(5)(a). The DPM provides the same information in respect of both powers, however the power in section 97G(5)(a) is a power to prescribe the form of an application under Part 3A of the 2003 Act, whereas the power in section 97G(5)(c) is a power to prescribe kinds of information to be included in such a form, or to accompany such a form.

b) Can the Scottish Government explain why this power is necessary, and can it provide examples of the types of information it intends to prescribe in regulations made in exercise of this power?

These powers allow the style of the form, and the information contained in that form, to be set out in regulations. These are two separate things, hence the need for the two powers. There are examples of the sort of form (both in terms of style and content) anticipated in The Community Right to Buy (Prescribed Form of Application and Notices) (Scotland) Regulations 2009.

12. Sections 97N(1) and 97N(3) – effect of Ministers’ decision on right to buy

a) The Scottish Government is asked whether the word “prescribed”, as used multiple times in the drafting of the new section 97N of the 2003 Act is intended to capture the definition of that term as set out in section 98(1) of the 2003 Act with the effect that new section 97N confers multiple powers to make subordinate legislation, or whether the matters which may be “prescribed” as referred to in that new section are intended to form specific aspects of the two standalone powers expressly conferred by sections 97N(1) and 97N(3).

b) If the Scottish Government does not intend for the word “prescribed” to adopt the definition in section 98(1) of the 2003 Act when it is used in section 97N, can it explain how the Bill prevents this?

Section 98(1) of the 2003 Act defines “prescribed” for the Act and provides that it means “prescribed by regulations made by Ministers”. We agree that the use of “prescribed” in section 97N attracts that definition.

Each time the expression is used in section 97N it effectively confers power to specify something in regulations. These powers operate in the context of the powers in section 97N(1) and (3). For example, in section 97N(1) “prescribed period” means the period set out in regulations made by Ministers prohibiting the transfer or other dealing in certain land.

Part 5 – Asset Transfer Requests

13. Section 51(2) – power to modify schedule 3

The Scottish Government is asked whether, given that the power in section 51(2) of the Bill permits the modification of primary legislation, this power should be subject to the affirmative procedure.

This powers provides flexibility to make future changes to the list of relevant authorities in schedule 3. The power to amend the primary legislation is restricted to amending the list of public bodies to whom a community transfer body may make an asset transfer request. Adding a body to, or removing it from, the list is unlikely to generate controversy. An example of a power to amend a list of public bodies in a schedule to primary legislation which is subject to negative procedure can be found in section 4(1) of the Freedom of Information (Scotland) Act 2000. In these circumstances it is considered that subjecting the exercise of the power to negative procedure is appropriate.

14. Section 54(1) – power to make further provision about asset transfer requests

The Scottish Government is asked why this power requires to be drawn in such wide terms. The specification of particular matters about which regulations may be made in exercise of this power does not appear to restrict the overall width of the power, and consequently the power would

appear to be capable of being used to make different provision, subject only to the requirement that that provision be “about asset transfer requests”. The Government is invited to explain why such a wide power is considered to be necessary.

Section 54(2) sets out some of the general scope of the matters which it is envisaged that the regulations relating to asset transfer requests will deal with and the wording of section 54(1) is to ensure flexibility so that other matters which it may be appropriate to include could be included if necessary. As the Committee point out the power is limited by the requirement that the regulations only enable provisions to be made in relation to asset transfer requests and, as the Delegated Powers Memorandum states, the further provision that may be required regarding process and procedure is a largely administrative matter.

15. Section 58(3) and 59(3) – power to prescribe asset transfer request appeal and review procedures, time limits and the manner in which appeals and reviews are to be conducted

a) **The Scottish Government is asked for further explanation of the meaning of sections 58(4) and 59(4) of the Bill, which provide that the provision that may be made by virtue of the powers in section 58(3) or 59(3) to prescribe the procedure to be followed in an appeal against or a review of a decision on an asset transfer request includes provision that the manner in which an appeal or review, or any stage of an appeal or review, is to be conducted is to be at the discretion of, respectively, the Scottish Ministers or the local authority.**

b) **The Scottish Government is asked to explain what aspects of an appeal or review it considers might be made subject to the discretion of the Scottish Ministers or the local authority in exercise of these powers, and why the Government considers that that would be appropriate, as opposed to specifying the appeals procedure in the subordinate legislation that is made under sections 58(3) or 59(3).**

Section 58(4) and 59(4) follow the approach taken in relation to appeal processes in planning (see section 267(1C) of the Town and Country Planning (Scotland) Act 1997). The intention is that the regulations setting out appeal processes would enable the choice of appeal procedure to be flexible and selected in particular cases to meet the needs of that case. It is envisaged, as with planning appeals, that the selection of the appropriate process for conducting the appeal, for example, by written submission or a form of hearing, or mix of procedures would be determined by the Scottish Ministers in the light of the circumstances of each case.

Part 7 – Allotments

16. Section 73(1) – Allotment site regulations: additional provision

Can the Scottish Government explain why the power in section 73(1) is proposed to be exercised by the local authority by way of regulations rather

than, for example, by way of byelaws subject to confirmation by the Scottish Ministers (as under section 202 of the Local Government (Scotland) Act 1973)? If it is considered appropriate for the power to be exercised by the local authority by regulations, can the Scottish Government explain why there are no proposals for the regulations to be confirmed by the Scottish Ministers or laid before Parliament, or otherwise to be subject to scrutiny?

The Scottish Government does not consider that the power in section 73(1) falls within the scope of byelaws. Section 201 of the Local Government (Scotland) Act 1973 (“the 1973 Act”) confers power on local authorities to make byelaws, “for the good rule and government of the whole or any part of their area, and for the prevention and suppression of nuisances therein”. Contravention of byelaws is generally dealt with by summary prosecution. The current approach has been taken since the Regulations are not principally intended to address nuisance and as such carry no criminal sanctions. The sanctions are that the lease holder would be given notice to quit the allotment.

The Scottish Government does not consider it necessary for the regulations proposed under section 73(1) to be confirmed by the Scottish Ministers, laid before Parliament, or otherwise subject to scrutiny. The Scottish Government notes that byelaws made under the 1973 Act have no effect until confirmed (section 202(3)), however contravention of byelaws will generally carry criminal sanctions. Management rules under the Civic Government (Scotland) Act 1982 (to which the Scottish Government considers the proposed regulations more similar) are not subject to confirmation or other scrutiny. In line with the procedure for making management rules, section 74 of the Bill requires local authorities to consult interested persons and provides for a period of notice with an opportunity for representations before regulations under section 73(1) are made. Given the relatively narrow purpose of such regulations and the absence of offences relating to their contravention, the Scottish Government does not consider scrutiny by the Scottish Ministers or Parliament to be required.

17. Section 80(7) – power to remove unauthorised buildings from allotment sites

Can the Scottish Government explain further the intended purpose of the power in section 80(7) and in particular what further provision, standing the procedural requirements already contained in section 80(5) and (6), the power in section 80(7) might be used to make?

Section 80(7) permits, but does not require, the Scottish Ministers to expand upon the detail of the procedure set down in sections 80(5) and 80(6). At this point in time, we are unable to give specific examples of what further provision this power might be used to make, but the power allows for flexibility. We would of course be happy to consider changes if the Committee feel it would be of benefit to the Bill.

Annex C – Letter from the Scottish Government:

CLARIFICATION OF POWERS CREATED BY NEW SECTION 97N OF THE LAND REFORM (SCOTLAND) ACT 2003.

Section 97N(1) and (3) of new Part 3A of the Land Reform (Scotland) Act 2003 (“2003 Act”) (to be inserted by section 48 of the Bill) confers powers on the Scottish Ministers to make regulations. Section 98(1) of the 2003 Act defines “prescribed” for the purposes of the 2003 Act and provides that it means “prescribed by regulations made by [the Scottish] Ministers”. The use of “prescribed” in section 97N has, and is intended to have, the meaning given in section 98(1) of the 2003 Act.

Regulations made under section 97N(1) and (3) will be subject to the affirmative procedure (see paragraph 2(5)(a)(ii) of schedule 4 to the Bill which will amend section 98(5) of the 2003 Act).

Section 97N(1) confers powers on the Scottish Ministers to make regulations prohibiting the transfer of land or otherwise dealing with land if a Part 3A community body has made an application under section 97G for consent from the Scottish Ministers to exercise the right to buy that land. Subsection (1) further provides that those regulations can specify: (a) the period of the prohibition; and (b) the persons who are prohibited from transferring or otherwise dealing with the land during that period.

Subsection (2) sets out particular matters that may be included in any regulations made under subsection (1). Subsection (2) is not a free-standing power. It provides some detail of the provision that may be made in regulations made under section 97N(1).

So for example, the power conferred by section 97N(1) would enable the Scottish Ministers to make regulations setting out that, from when the landowner has received notice of an application made by a Part 3A community body until the Scottish Ministers have determined the application, the landowner is prohibited from transferring or otherwise dealing in the land that is the subject of the application. The regulations could also make provision for exceptions to this prohibition. The regulations would be made under section 97N(1) and would specify the period of the prohibition and also specify the persons to whom the prohibition applies. In making exceptions to the prohibition, the Scottish Ministers would still be making use of the power in subsection (1) as further described in subsection (2).

Section 97N(3) confers power on the Scottish Ministers to make regulations making provision for suspending rights in or over land in respect of which a Part 3A community has made an application under section 97G. This subsection further provides that the regulations may specify: (a) the period during which the rights are to be suspended; and (2) the rights that are to be suspended during that period. Subsection (4) provides that any regulations made under subsection (3) may include provision specifying any rights that are not to be suspended and any

rights to which the regulations do not apply in certain circumstances. These are examples of the kind of provision that may be made in regulations made under subsection (3). Subsection (4) is not a free-standing power. It provides some detail of the provision that may be made in regulations made under section 97N(3).

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