Subordinate Legislation Committee

9th Report, 2012 (Session 4)

Long Leases (Scotland) Bill

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Subordinate Legislation Committee

Remit and membership

Remit:

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

(a) any—

(i) subordinate legislation laid before the Parliament;

(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.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

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Nigel Don (Convener)
James Dornan (Deputy Convener)
Mike MacKenzie
Michael McMahon
John Pentland
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Subordinate Legislation Committee

9th Report, 2012 (Session 4)

Long Leases (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 7 and 21 February 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Long Leases (Scotland) Bill at Stage 1. The Committee submits this report to the Rural Affairs, Climate Change and Environment Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Long Leases (Scotland) Bill was introduced on 12 January 2012. It is a Government Bill. A Bill in similar terms was introduced in the final year of Session 3 but fell due to lack of time.

3. The Bill provides for the conversion of the right of lease in relation to certain ultra-long leases into a right of ownership. For the purposes of the Bill, “ultra-long leases” were let for over 175 years and have over 100 years to run from the appointed day laid down in the Bill. The Bill does not apply to leases which are considered to be let on commercial terms. Leases with a rent of £100 per year or more are therefore excluded. Under the Bill, compensatory and additional payments are payable by tenants to landlords upon conversion of the tenant’s interest into ownership. Some leasehold conditions will be preserved and will become real burdens in the title deeds. Landlords will also be able to preserve sporting rights.

4. The accompanying documents provided along with the Bill at introduction describe it as representing the last element in the systematic programme of land reform which, over recent years, has resulted in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003, and the Tenements (Scotland) Act 2004. It is stated that “the underlying ethos of the Bill is that property held on ultra-long leases is akin to ownership in practical terms and
the (outdated) property law is being reformed to convert such leases to ownership.”

5. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

6. In the consideration of the memorandum at its meeting on 7 February, the Committee agreed to write to the Scottish Government to raise questions on a number of the delegated powers.

7. This correspondence is reproduced in the Annex.

8. The report considers each of the delegated powers on which questions were raised in turn, and provides the Committee’s conclusions on these matters.

9. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in the following sections (as they are listed in the DPM)—section 8(2), 14(3)(a), 17(4)(a), 23(3)(a), 24(2)(a), 25(2)(a), 26(2)(a), 27(3)(a), 28(3)(a), 45(2), 45(4)(b), 50(4)(b) and (c), 54(3)(b) and (c), 56(3)(a) and (c), 57(2)(a) and (b), 63(b), 64(2)(a), 67(1)(b), 68(2)(b), 74(3)(a) and (b), 75(2)(b), 71(1)(c)(ii), and 83(2).

Delegated powers provisions

Section 78(5) – Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts or the Tribunal must be made within a specified period for the notices and agreements to be registrable

- Power conferred on: The Scottish Ministers
- Power exercisable by: Order made by SSI
- Parliamentary procedure: Negative procedure

10. Section 78 allows the late registration of documents which had been rejected by the Keeper where a court rules that they were in fact registrable. Section 78(5) enables the Scottish Ministers to specify a date or period after which notices and agreements which the courts rule as competent can no longer be registered. The power also allows the Scottish Ministers to provide that the registration of such notices and agreements could only take place if the application to the court or Lands Tribunal had been made during a period specified in the order.

11. The Scottish Government considers that a time limit for registration of notices and agreements which have been referred to the court is required in the interests of longer-term certainty and to underpin reliance on the land registers as definitive of ownership rights. It describes this arrangement as procedural and on this basis recommends the negative procedure as a suitable level of scrutiny. However, as the Government recognises in its response to the Committee, the exercise of the power can also impact on the exercise of individual rights. The Committee

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1 Long Leases (Scotland) Bill. Delegated Powers Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Long%20Leases%20(Scotland)%20Bill/DPM.pdf
therefore considers it important that there is full consultation prior to the setting of any time limits to ensure that the practical effect on individuals is considered carefully. The Committee also considers it necessary for there to be sufficient opportunity for parliamentary scrutiny of the instrument before it takes effect.

12. The Scottish Government outlines the manner in which it proposes to consult before making an order under this section. It does not consider that anything would be added by placing a legal requirement to consult in the Bill itself. The Committee acknowledges the commitment made by the Scottish Government to following best practice in relation to consultation prior to making this order. However, the Committee observes that through such a commitment the Scottish Government cannot bind future administrations and how they might approach the issue were there to be a change of administration prior to the power being exercised. The way in which to ensure similar adherence to good practice by any future administration is, of course, to provide a requirement to consult in the Bill itself.

13. Nevertheless, the Committee recognises that this is not a power intended to be exercised repeatedly and accepts that it is likely that this power will be exercised prior to the end of this Session of the Parliament. On that basis it accepts the Scottish Government’s undertaking to follow best practice when consulting on its subject matter. The Committee would expect the same approach to be adopted in the event of a change in administration prior to that point.

14. The Committee considers the subject matter of this power to be of more importance than other procedural matters given the effect of its exercise is to prevent individuals from enforcing notice and agreements which the courts have declared to be registrable under the Bill. Whether this is considered sufficiently important in policy terms is ultimately a matter for the lead committee to consider.

15. However, the Committee accepts that the negative procedure provides sufficient opportunity for the Parliament to object to the Scottish Government’s proposals provided that the instrument is laid at least 40 days in advance of the date on which it is proposed that it come into force. While the Committee understands that the Scottish Government’s aims to afford the full 40 days scrutiny prior to the commencement of negative instruments, this is not universally what happens in practice. If the lead committee considers that the negative procedure is appropriate, then the Committee gives notice to the Scottish Government that it would expect the full 40 days to be observed in this case.

Section 81(1) – Power to make supplementary, incidental, consequential, transitional, transitory or saving provision

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Section 82 – Bolt on powers to make ancillary provision in relation to the exercise of all powers to make regulations and the power under section 78(5)

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16. The Committee acknowledges that it is frequently considered appropriate to confer power on the Scottish Ministers to make ancillary provision of this nature. At the time the Bill is being considered it may already be clear that further provisions will be required in order to implement the Bill once it is enacted. The precise detail may quite properly be left to subordinate legislation subject to an appropriate level of parliamentary scrutiny. In some cases it will also be desirable to have such a mechanism available to deal with any additional provisions which are subsequently found to be necessary to give proper effect to the Bill but which were not foreseen.

17. Nevertheless the Committee considers it should examine whether the particular scheme of ancillary powers proposed in any Bill is appropriate to the particular circumstances. In particular, the Committee considers carefully what level of scrutiny is to be applied to the exercise of the powers and whether different options for the exercise of ancillary powers are proposed.

18. In this Bill there are three separate mechanisms by which ancillary powers can be exercised. Section 81 contains a freestanding power to make supplementary, incidental, consequential, transitional, transitory or saving provision necessary or expedient for the purposes of or in connection with the Act. The exercise of this freestanding power will be subject to the negative procedure unless the order makes textual amendments to primary legislation. Such orders are subject to the affirmative procedure. Section 83(2) provides a power to make transitional, transitory or saving provision in a commencement order provided it is necessary or expedient in connection with the provisions being commenced. Such orders are not subject to parliamentary control but will be laid before the Parliament. Finally, section 82(1) allows any other instrument made under the Act to include incidental, consequential, supplementary, transitional, transitory or saving provision which is necessary or expedient in connection with the provision being made in the instrument.

19. The Committee sought further information from the Scottish Government about the intended use of these powers, further justification for the use of the negative procedure in all cases under section 81 which do not make textual amendments to primary legislation and why it was considered necessary to provide for all three means by which ancillary provision could be made.

20. The Scottish Government has identified that consequential amendments and transitional provision will be required to integrate the Bill with alterations being made to the functions of the Keeper of the Registers of Scotland proposed to be made by the Land Registration (Scotland) Bill currently before the Parliament. It may be possible to include these in the Bill by amendment at a later stage but that
will depend on the parliamentary timetable. Flexibility is required should it not be possible to do so or to deal with incidental matters which arise in the course of consideration of how the two bills operate in practice.

21. The Government considers that any ancillary provision which is required is likely to be of a technical nature, describing the bill as “raising a number of detailed technical issues.” The Committee agrees that there are very technical aspects to the Bill but the central premise is the adjustment of the balance of interests between tenants and landlords of ultra-long leases. The effect of the technical scheme is determinative of property rights: to ownership on the one hand and to compensatory measures on the other. The Committee therefore considers that given the potential scope of ancillary powers available, particularly to make incidental and supplementary provision, it can be foreseen that there is the potential for such provision to materially affect those property rights.

22. The Committee must have regard to all the foreseeable effects of the exercise of the power when considering whether the power is appropriate in the circumstances and whether the appropriate level of parliamentary scrutiny is applied. However, the Committee also accepts the Scottish Government’s assertion that the exercise of ancillary powers would be strictly construed and could not undermine any provision in the Bill.

23. The Scottish Government considers that all three mechanisms for making ancillary provision are appropriate because it considers including ancillary provision and the relative substantive provision in the same instrument “provides greater transparency and ease of use for the users of legislation”. The Committee is supportive of drafting which improves transparency and clarity for the end user and agrees that this is another matter which should be taken into account. However, this factor should not of itself dictate the appropriate level of parliamentary scrutiny to be applied.

24. Taking all of these factors into account the Committee finds the scheme proposed under the Bill acceptable in principle and the parliamentary procedure applied appropriate.

25. However, where there is a choice available to the Scottish Government as to which of the three mechanisms to use to make a particular provision it should have regard to the complexity and effect of the provision proposed and should afford the Parliament the opportunity for a higher level of parliamentary scrutiny in complex cases or where the exercise of the power affects individual rights. Given the importance attached to amendments made to primary legislation the Committee would also expect such provision to be made under section 81 rather than under the other ancillary powers.
Correspondence with the Scottish Government

Section 78(5) – Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts or the Tribunal must be made within a specified period for the notices and agreements to be registrable

The Committee asks the Scottish Government—

The Government states that it considers the powers relate to “straightforward matters” and that therefore the negative procedure provides “an appropriate balance”.

The Committee therefore asks the Scottish Government, in regard to the delegated powers in section 78(5)—

(a) Can the Government give further justification for the negative procedure being an appropriate level of scrutiny given that the effect of the power is to specify deadlines for the exercise of rights under the Bill?

(b) Will the Government clarify how it would propose to consult on any order that is to be made under the power? In particular, would it consider providing that consultation must be undertaken before such an order is made?

The Scottish Government responds as follows—

You asked about how we would intend to consult on any proposed order to be made under this power. When carrying out consultations, the Government follows its consultation good practice guidance: http://www.scotland.gov.uk/About/FOI/19260/18512. In line with the consultation good practice, we would on this issue:

- Draw up a list of consultees and send the consultation to them. (We would expect to send the consultation to the Keeper of the Registers of Scotland, the Clerk to the Lands Tribunal for Scotland, the Law Society of Scotland, and bodies representing property law interests);
- Publish the consultation on the Scottish Government website;
- Allow consultees at least 12 weeks to respond;
- Publish responses, subject to any requests for confidentiality and, in line with usual practice, redacting any comments which may be defamatory; and
- Publish an analysis of the responses and the Government response to the consultation.

You asked whether we would consider providing that consultation must be undertaken before such an order is made. We have considered this and do not
consider such provision is necessary. The Government would intend to consult on any order and, in light of the Government’s consistent practice on consultation and the existence of good practice guidance, we do not consider that there is anything to be gained by adding a specific consultation requirement on the face of the Bill.

You also asked about the use of the negative procedure. The Bill allows individuals to apply to the court or Lands Tribunal to overturn a refusal by the Keeper of the Registers of Scotland of certain applications for registration. It is in the interests of longer-term certainty and those relying upon the land registers to prescribe a final time limit before which these judicial applications and any subsequent registration must be made. As indicated above, before making any order prescribing this time limit (or period), the Government will consult key bodies on the provision to be made. This will ensure that relevant bodies are given information about these deadlines, which are procedural but which can also impact on the exercise of individual rights. We consider that negative procedure provides the appropriate degree of Parliamentary scrutiny against this background and it would, of course, still be possible for any Member of the Parliament to lay a motion proposing that a negative SSI should be annulled.

**Section 81(1) – Power to make supplementary, incidental, consequential, transitional, transitory or saving provision**

The Committee asks the Scottish Government—

*Exercise of this power is subject to the negative procedure except where it is used to amend any part of the text of an Act, which can include the new Act, in which case the affirmative procedure applies.*

The Committee therefore asks the Scottish Government—

(a) Will the Government explain what further incidental or supplemental provision might be required?

(b) Given that such provision is likely to affect substantive property rights and so involve important questions of social policy, why is the negative procedure considered to be a sufficient level of parliamentary scrutiny of the exercise of such powers?

(c) Could the examples of transitional, transitory and saving provision given in the Delegated Powers Memorandum also fall within the scope of the power in section 83(3)? If so, why is the further power in section 83(3) required?

The Scottish Government responds as follows—

You asked what further incidental or supplemental provision might be required.

Paragraph 35 of the Delegated Powers Memorandum notes that this Bill will need to interact with existing legislation. In addition, paragraph 62 of the Policy Memorandum notes that some consequential and transitional provision will need
to be amended into this Bill at a later stage or put in place by ancillary order as a consequence of the Land Registration etc. (Scotland) Bill which is currently before the Parliament. While it is intended to put these provisions in this Bill by amendment, it is possible that incidental or supplemental provision could be required to provide flexibility, given that the Bills on long leases and land registration both impact on the functions of the Keeper of the Registers of Scotland and will need to work together operationally.

The Government considers that the negative procedure provides the appropriate degree of Parliamentary scrutiny of ancillary provision which does not amend primary legislation. The Government expects that any orders making supplementary, incidental, consequential, transitional, transitory or saving provision are likely to be of a technical nature, given that the Bill raises a number of detailed technical issues. Furthermore, any exercise of this power would be strictly construed and could not undermine any provisions in the Bill. Clearly, as provided for in the Bill, any statutory instruments which amend primary legislation will be subject to the affirmative procedure.

The Government does not consider that all of the examples of transitional, transitory and saving provision covered by section 81, including those given in the Delegated Powers Memorandum, necessarily fall within the scope of the power of section 83(3). Section 83(3) is specifically limited to transitional, transitory or saving provisions in connection with the commencement of the Bill provisions. The power in section 81(1) is broader. The Government will consider in each case whether section 81 or 83 is the appropriate power to be exercised depending upon the nature of the transitional, transitory or saving provision that is required and the link that the particular provision has with commencement of the Act – see also below.

The power in section 83(3) is required for this Bill because, having regard to the nature of the Bill, it is almost certain that there will require to be a range of transitional and saving provisions associated with commencement and the Government takes the view that it is generally appropriate for such provision to be included in the relevant commencement order.

Section 82 – “bolt on” powers to make ancillary provision in relation to the exercise of all powers to make regulations and the power under section 78(5)

The Committee asks the Scottish Government—

This provision is not treated separately in the DPM, and no commentary is provided on the need for the power in relation to the individual powers to which the “bolt-on” provision applies.

The Committee ask the Scottish Government for an explanation as to why the power in section 82(1)(a) is required in addition to a separate stand-alone power to make ancillary provision provided in section 81 and the further power to make transitional, transitory or saving provision in connection with commencement provided in section 83(3)?
The Scottish Government responds as follows—

The Committee seeks an explanation of why this “bolt-on” power is justified. This power enables ancillary provision (incidental, consequential, supplementary, transitional, transitory or saving provision) to be made in an order under section 78(5) or any regulations under the Bill if the Scottish Ministers are satisfied that it is necessary or expedient to make this provision in making that order or those regulations.

It is considered that this power is justified, in addition to the powers in section 81(1)(a) (a free-standing ancillary provision power) and section 83(3) (power to make transitional, transitory or saving provision on commencement, to which section 82(1)(a) does not apply) as it enables the Scottish Ministers to make provision ancillary to the exercise of a specific delegated power in the Bill. Each use of the “bolt-on” ancillary provision must be ancillary to the exercise of a specific delegated power.

For example, when notices and explanatory notes are prescribed under the delegated powers in the Bill, it may, depending on views from consultees, be appropriate to include reference to other matters such as information on fees payable which would go beyond prescribing the content of any notice or explanatory note.

This will allow the instrument to be made under one of the specific delegated powers conferred by the Bill without in some cases having to make a separate instrument (it will not be possible to combine regulations and orders under the Interpretation and Legislative Reform (Scotland) Act 2010). It is considered that the ability to make any necessary ancillary provision in an instrument, rather than having to make a separate order to make ancillary provision, provides greater transparency and ease of use for the users of legislation. Any order under section 78(5) or any regulations under the Bill using this “bolt-on” ancillary provision will attract the negative procedure.
Members who would like a printed copy of this Numbered Report to be forwarded to them should give notice at the Document Supply Centre.