Delegated Powers and Law Reform Committee

Community Empowerment (Scotland) Bill as amended at Stage 2
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Delegated Powers and Law Reform Committee

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.

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Introduction

1. At its meeting on 9 June 2015, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Community Empowerment (Scotland) Bill as amended at Stage 2 (“the Bill”)\(^i\). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill was introduced by the Cabinet Secretary for Finance and Deputy First Minister on 11 June 2014. The Bill makes wide-ranging provision in relation to various types of community body and their rights.

3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”)\(^ii\).

4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its 63\(^{rd}\) report of 2014.

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\(^i\) Community Empowerment (Scotland) Bill as amended at Stage 2 available here: [http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52as4-stage2-rev.pdf](http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/b52as4-stage2-rev.pdf)

\(^ii\) Community Empowerment (Scotland) Bill as amended at Stage 2 Supplementary Delegated Powers Memorandum available here: [http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/Supplementary_Delegated_Powers_Memorandum_-_5_June.pdf](http://www.scottish.parliament.uk/S4_Bills/Community%20Empowerment%20(Scotland)%20Bill/Supplementary_Delegated_Powers_Memorandum_-_5_June.pdf)
Delegated Powers and Law Reform Committee
Community Empowerment (Scotland) Bill as amended at Stage 2, 36th Report, 2015 (Session 4)

Delegated Powers Provisions

5. The Committee considered each of the new, removed or substantially amended delegated powers provisions in the Bill after Stage 2.

6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the substantially amended or new delegated powers provisions listed below, and that it is content with the Parliamentary procedure to which they are subject:

- Section 1(1) – National outcomes
- Section 4(6) – Community planning
- Section 8(3) – Governance
- Section 10 – Guidance
- Section 16(2) – Meaning of “public service authority”
- Section 16(3) – Meaning of “public service authority”
- Section 18(1) – Regulations
- Section 18(2) – Regulations
- Section 24A (3) – Appeals
- Section 25B – Guidance
- Section 29A – inserting new section 37(4A) into the Land Reform (Scotland) Act 2003 – Public notice of certain applications
- Section 30 (2B) – inserting new sections 38(2A) and 38(2B) into the Land Reform (Scotland) Act 2003 – Period for indicating approval under section 38 of 2003 Act
- Section 47A(2) – inserting new section 71(A) of the Land Reform (Scotland) Act 2003 – Crofting community bodies
- Section 47A(6) – inserting new section 71(4A) and 71(4B) into the Land Reform (Scotland) Act 2003 – Crofting community bodies
- Section 47A(7)(b)(ii) – inserting new section 71(5)(a)(iv) subsections 5 1A(a) into the Land Reform (Scotland) Act 2003 – Crofting community bodies
- Section 47B(2) – amending section 72 of the Land Reform (Scotland) Act 2003 – Crofting community bodies
- Section 47C(2) – amending section 73 of the Land Reform (Scotland) 2003 Act – Application: information about rights and interest in land

- Section 47C(4) – amending section 73 of the Land Reform (Scotland) 2003 Act – application: information about rights and interest in land

- Section 47E(3) – inserting new section 75(6) into the Land Reform (Scotland) 2003 Act – Ballot: information and expenses

- Section 47I – inserting new section 89(4) into the Land Reform (Scotland) 2003 Act – Compensation

- Section 48 – inserting new section 97C into the Land Reform (Scotland) 2003 Act – Eligible land

- Section 48 – inserting new section 97D into the Land Reform (Scotland) 2003 Act – Part 3A Community bodies

- Section 48 – inserting new section 97G into the Land Reform (Scotland) 2003 Act – Right to buy: application for consent

- Section 48 – inserting new section 97J into the Land Reform (Scotland) 2003 Act – Ballot to indicate approval for purposes of section 97H

- Section 48 – inserting new section 97N into the Land Reform (Scotland) 2003 Act – Effect of Ministers’ decision on right to buy

- Section 51(2) – Meaning of “relevant authority”

- Section 51(3) – Meaning of “relevant authority”

- Section 58 (2) – Appeals

- Section 59(7) – Review by local authority

- Section 59A(3) – review of decisions by the Scottish Ministers

- Section 59C(4) – Decisions by relevant authority specified under section 58(2)(c): reviews

- Section 61A (4) – Duty to publish register of land

- Section 61A (5) – Duty to publish register of land

- Section 61C – Guidance

- Section 62O(7) – Procedure for buying
- Section 73 – Allotment site regulations

- Section 93A(1) – Participation in decisions of certain persons exercising public functions

- Schedule 4 2(5) – amending section 98(5) of the Land Reform (Scotland) 2003 Act – Minor and consequential amendments
Recommendations

7. The Committee’s comments and, where appropriate, recommendations on the remaining substantially altered delegated powers in the Bill as amended are detailed below.

Section 48 inserting new section 97D(1)(b) into the Land Reform (Scotland) Act 2003 – Part 3A Community bodies (Part 4)

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

Provision
8. New section 97D of the 2003 Act, as inserted by section 48 of the Bill, sets out the types of legal entity that may be a “Part 3A community body” and therefore eligible to make an application to buy abandoned or neglected land under the new Part 3A of the 2003 Act. This section has been amended at Stage 2, and a power conferred upon the Scottish Ministers to specify additional types of entity which may be a Part 3A community body in regulations.

9. When the Bill was introduced, a Part 3A community body was required to be constituted as a company limited by guarantee. As amended, such a body may also be a Scottish Charitable Incorporated Organisation (“SCIO”), a Community Benefit Society or such other body as may be prescribed in regulations and which meets prescribed requirements.

Comment
10. The SDPM explains that the changes to section 97D of the 2003 Act are intended to reflect changes made to the other rights to buy contained in Parts 2 and 3 of the 2003 Act so as to achieve consistency across the three different parts and the three different rights to buy. SCIOs and Community Benefit Societies are considered by Ministers to be bodies suitable to exercise the right to buy abandoned or neglected land, and Ministers also consider it prudent to take a power to add new types of entity which may be created in the future, should those entities also be considered suitable to exercise the right.

11. Parts 2 and 3 of the 2003 Act contain similar powers to the power inserted in the new section 97D(1)(b). Those powers are subject to the affirmative procedure. This power is, however, subject to the negative procedure. The SDPM states that the Scottish Government will give consideration to amending the Bill at Stage 3 to make this power subject to the affirmative procedure for the purposes of consistency. The Committee wishes to encourage the Scottish Government to amend the power at Stage 3 so that it is subject to the affirmative procedure.

12. The Committee calls on the Scottish Government to amend the Bill at Stage 3 so that the power in the new section 97D(1)(b) of the 2003 Act is subject to the affirmative procedure.
Section 62C(2) – Meaning of “Scottish Professional Football League Club” (Part 5B)

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

Provision
13. New section 62C of the Bill provides that for the purposes of the new Part 5B, and the right to buy conferred on supporters’ trusts, a “Scottish Professional Football League Club” means a football club which is for the time being a member of the Scottish Professional Football League or any successor body recognised as the senior competitive league by the Scottish Football Association. Section 62C(2) provides that the Scottish Ministers may by regulations modify the meaning of a football club in subsection (1). Before making such regulations, the Scottish Ministers are required to consult such persons as they consider appropriate.

Comment
14. This power is subject to the negative procedure. The SDPM states that this will achieve the best balance between use of Parliamentary time and resource on one hand and the purpose of the regulations on the other.

15. In the Committee’s view, the power to modify the meaning of Scottish Professional Football League Club is a significant power which, on its face, appears to merit the higher level of Parliamentary scrutiny afforded by the affirmative procedure. The power appears to be capable of having a significant effect on the scope and application of the new Part 5B of the Bill. The fact that the Bill specifies on its face that the power may not be exercised without prior consultation provides, in our view, an indication of its significance.

16. The Committee considers that the SDPM does not provide sufficient justification for the choice of negative procedure for this power, other than to say that in the Scottish Government’s view, the negative procedure represents the best balance between use of Parliamentary time and resource on one hand, and the purpose of the regulations on the other. In the absence of more substantive explanation as to why a power of this nature is properly subject to the negative procedure, and given the apparent significance of the power, the Committee calls on the Scottish Government to amend the Bill at Stage 3 so as to make the power in section 62C(2) of the Bill subject to the affirmative procedure.

17. The Committee calls on the Scottish Government to amend the power in section 62C(2) of the Bill at Stage 3 so that it is subject to the affirmative procedure.
Sections 62E, 62F, 62I, 62K, 62P – provisions regarding a supporters’ trust’s right to buy a Scottish Professional Football League Club (Part 5B)

Provisions
18. New section 62E permits the Scottish Ministers to prescribe additional bodies that may hold a controlling interest in a football club for the purposes of the definition of ‘ownership’. Section 62F provides that a supporters’ trust’s interest in buying a football club may be registered only upon an application being made to the Scottish Ministers in the prescribed form and accompanied by information of the prescribed kind.

19. Section 62I provides that a notification of an intention to transfer ownership of a football club or that the club has entered insolvency, for the purposes of activating a supporters’ trust’s right to buy, is to be given in such form and otherwise in accordance with such provisions as are prescribed. Section 62K provides that Scottish Ministers must send a notice in the prescribed form to a supporter’s trust, seeking confirmation that the trust will exercise its right to buy, and to the owner of the football club concerned, indicating Ministers’ compliance with that requirement. Section 62P provides that the Scottish Ministers may prescribe additional conditions to be met by a supporter’s trust which applies to them for funding to enable it to make an offer to buy a football club.

Comment
20. The word ‘prescribed’ is commonly used in legislation in order to confer a delegated power however it is usually accompanied by an interpretative provision defining the word in such manner so as to specify who is to prescribe the matters referred to and how they are to do so. For example, ‘prescribed’ can be defined to mean “prescribed in regulations made by the Scottish Ministers”. Such a definition appears in section 98 of the Land Reform (Scotland) Act 2003, and has been relied upon for many of the powers in this Bill that insert new provision into that Act.

21. Use of the words ‘prescribe’ or ‘prescribed’ alone is insufficient to confer a delegated power, as they do not specify who the power is to be conferred upon, or how it is to be exercised (e.g. by regulations, order etc.). It appears that the intention in respect of these provisions of the new Part 5B of the Bill is to confer a number of delegated powers. It appears therefore that a definition of the term ‘prescribed’ is required in order to provide clarity as to whom the powers in these sections are conferred upon (e.g. the Scottish Ministers) and how they are intended to be exercised (e.g. by regulations). While sections 62E and 62P refer to the Scottish Ministers prescribing the matters specified therein, they do not indicate the form of exercise of the powers. Sections 62F, 62I and 62K make no reference to the Scottish Ministers as the body upon which the powers are conferred or to the manner in which they are to be exercised. The Committee considers that the SDPM, which addresses only sections 62F, 62I and 62K, does not clarify the point.

22. The Committee is content in principle with the substance of the powers in sections 62E, F, I, K and P. Further, given that the powers deal with largely administrative matters such as the specification of forms of notice, the Committee considers that it would be appropriate for each of the powers to be subject to the negative procedure. The Committee, however, calls on the Scottish Government to clarify the Bill at Stage 3 and, if it is intended that sections 62E, F, I, K and P confer
delegated powers to make regulations upon the Scottish Ministers, to insert an appropriate definition of the terms ‘prescribe’ and ‘prescribed’ so that those powers are properly constituted on the face of the legislation.

23. The Committee calls on the Scottish Government to amend the Bill at Stage 3 in order that the powers in sections 62E, F, I, K and P are fully cast as powers to make subordinate legislation subject to the negative procedure and to clarify – through defining the terms ‘prescribe’ and ‘prescribed’, or by such other means as they consider appropriate - whom the powers are conferred upon, and what form the subordinate legislation made in their exercise is intended to take. In the event that the Government’s Stage 3 amendments do not cover this recommendation, the Committee authorises the Convener and Deputy Convener to table suitable amendments.

Section 69A – Regulations as to the size of allotments (Part 7)

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<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>negative</td>
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Provision

24. New section 69A of the Bill requires the Scottish Ministers to make regulations for or in connection with the size or sizes of an allotment, but without affecting section 68(1)(d). Section 68(1)(d) defines “allotment” for the purposes of Part 7 as, among other things, land that meets one of the requirements as to size set out in sections 68(2) and (3). The power to make regulations as to the size of allotments in section 69A cannot be exercised unless Ministers have consulted with each local authority and such other persons as they consider appropriate.

Comment

25. The SDPM states that this power was taken to require the Scottish Ministers to make provision about the size or sizes of allotments for the purposes of Part 7. It further provides, however, that the Scottish Government considers that the requirement may be impractical in the light of amendments made to section 68(1)(d) at Stage 2.

26. Section 68(1)(d) provides that an “allotment” means, among other things, land that meets one of the requirements as to size set out in sections 68(2) and (3). Section 68(2) sets a requirement to the effect that the land is of a size approximately 250 square metres. Section 68(3) provides that the land is of such size (being a size smaller than that set out in section 68(2)) as has been requested by the person leasing or intending to lease the land from the authority.

27. Section 69A confers power on the Scottish Ministers to make regulations for or in connection with the size of an allotment, without affecting section 68(1)(d). In our view, it is not clear what provision those regulations are intended to make or how any such regulations could make provision about the size of allotments without affecting the requirements as to size of an allotment that are specifically set out on the face of the Bill. Given the Scottish Government’s stated intention to bring forward further amendments at Stage 3, the Committee wishes to encourage the Scottish Government to do so in order to clarify how the provisions on allotment size are intended to operate.
28. The Committee calls on the Scottish Government to amend the Bill at Stage 3 so as to clarify the manner in which the power in section 69A regarding allotment size is intended to operate.