

This document relates to the Housing (Amendment) (Scotland) Bill as amended at Stage 2

(SP Bill 20A)

Housing (Amendment) (Scotland) Bill

[As amended at stage 2]

Supplementary delegated powers memorandum

Introduction

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7 of the Parliament's Standing Orders. It describes provisions in the Housing (Amendment) (Scotland) Bill conferring power to make subordinate legislation which have been substantially affected by amendments made to the Bill at Stage 2.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill when it was introduced, and with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

3. The Bill amends certain provisions of the Housing (Scotland) Act 2010 ("the 2010 Act") in respect of powers that the Scottish Housing Regulator ("the Regulator") exercises over registered social landlords (RSLs) (and in the case of part of section 1 in respect of social landlords generally). It also provides for Scottish Ministers, in regulations, to modify the functions of the Regulator, and to reduce local authority influence over RSLs. Following amendment of the Bill at Stage 2, such regulations can only be made in the period of 3 years beginning with the day after the Bill receives Royal Assent.

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4. The purpose of the Bill is to ensure that the influence the Regulator and local authorities can exercise over RSLs is compatible with RSLs being classified by the Office for National Statistics (ONS) as private sector bodies in the United Kingdom national accounts.

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

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

Delegated Powers

Section 8 – power to modify functions of the Regulator

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: section 8 itself is unamended, but is affected by new section 9A

Parliamentary procedure: affirmative

Provision

7. Section 8 of the Bill allows the Scottish Ministers, by conferring on them a regulation-making power, to further modify the functions of the

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Regulator in relation to social landlords (including registered social landlords). Section 9A provides that this regulation making power may only be used up until 3 years beginning with the day after the Bill receives Royal Assent. After that period no new regulations may be made under section 8 but any existing regulations made under that power remain in force.

Reason for taking power

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

9. The regulation-making power is a precaution against the Bill failing narrowly to achieve its objective, for example if the ONS were to identify further relatively minor changes to the powers of the Regulator that would be required before it could reclassify RSLs to the private sector. In such circumstances, the Scottish Government considers that having a further Bill to achieve such changes would not be a good use of parliamentary time. It proposes instead that such changes should be made through a regulation-making power. The Scottish Government intends to use this power only if the Bill, when enacted and brought into force, does not provide the ONS with the basis for classifying RSLs as private sector bodies. It will do so only for the purpose of providing the ONS with that basis in light of any reasons given by the ONS for it not having been able to make the classification.

10. The time limit on the exercise of the power in section 9A provides certainty that the functions of the Scottish Housing Regulator in relation to social landlords may not be modified after that period.

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Choice of procedure

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

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

Section 9 – power to reduce local authority influence over RSLs

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: section 9 itself is unamended, but is affected by new section 9A

Parliamentary procedure: affirmative

Provision

13. Section 9 of the Bill will allow the Scottish Ministers, through the exercise of a regulation-making power, to limit or remove the ability of local authorities to exert influence over RSLs. This section is similar to section 93 of the Housing and Planning Act 2016, enacted at Westminster as part of the UK Government’s response to the classification, by the ONS, of private registered providers of social housing (“housing associations”) in

¹ So laid in draft and approved by a resolution of the Scottish Parliament before final regulations are made – see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”).

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England as public bodies. Section 9A also applies the same time limit to this regulation making power as to the power under section 8.

Reason for taking power

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

15. The Scottish Ministers intend to specify in regulations that local authorities may only nominate up to a maximum of 24% of the board members of an RSL, and may not exercise control over RSLs, for example through a power to veto changes in an RSL's constitution.

16. The time limit on the exercise of this power means that Scottish Ministers have a maximum period of 3 years in which to achieve this reduction in local authority influence and ensure the correct balance. It provides certainty that the influence of local authorities in terms of appointing officers of RSLs and voting rights as set out in regulations may not be changed after this period.

Choice of procedure

17. Regulations under this section will be subject to the affirmative procedure.³ As for the regulation-making power in section 8 of the Bill, this

² For the meaning of "officer" in relation to an RSL, see section 165 of the 2010 Act.

³ So laid in draft and approved by a resolution of the Scottish Parliament before final regulations are made – see section 29 of ILRA.

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