

# **PRIVATE RENTED HOUSING (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Private Rented Housing (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **BACKGROUND**

3. The purpose of the Private Rented Housing (Scotland) Bill is to address more effectively the problems caused by rogue landlords, and to support responsible landlords, by strengthening the regulation of the private rented sector. This involves improvements to the operation of the systems for registration of private landlords and licensing of houses in multiple occupation (HMOs). The Bill also includes provisions to deal with problems caused by overcrowding in the private rented sector and to improve the working of the private sector tenancy regime and related matters, so that the sector can continue to grow and improve.

### **OUTLINE OF BILL PROVISIONS**

4. The Bill is structured in the following Parts:
  - Part 1 amends the system of registration of private landlords contained in Part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004. This is in relation to expanding the criteria of the fit and proper person test; allowing a local authority to require a criminal record certificate to verify information; fees for certain agents; public access to information on applications not yet determined and persons found not to be fit and proper to act as landlords; requiring landlord registration numbers in advertisements of properties to let; an increase in the maximum fine for offences and the power of a court to impose a ban of up to five years; powers for a local authority to obtain information to enable or assist it to carry out its landlord registration functions, including requiring an agent to provide details of properties managed; a requirement for a local authority to take account of guidance on its registration functions; and

requiring the Private Rented Housing Panel to pass information on landlords to local authorities so that their registration status can be checked.

- **Part 2** makes changes to the system of HMO licensing in Part 5 of the Housing (Scotland) Act 2006 to give Ministers a power to bring by order additional types of multi-occupancy property within the scope of HMO licensing; to give a local authority power to refuse to consider an application for an HMO licence if it considers any requisite planning permission has not been obtained; to increase the maximum fine for offences; and to remove a requirement for a local authority to issue a statement of reasons for every HMO licensing decision.
- **Part 3** gives a local authority power to serve an overcrowding statutory notice on the landlord of a privately rented house which is statutorily overcrowded, where the local authority considers that the overcrowding is linked to an adverse effect on the health or wellbeing of any person or on the amenity of the house or its locality.
- **Part 4** makes changes to the tenancy regime and related matters in the Housing (Scotland) Act 2006, the Rent (Scotland) Act 1984 and the Housing (Scotland) Act 1988 in order to clarify the right to make pre-tenancy charges and the level of such charges; to require a private landlord to issue specified documents to a new tenant; to clarify the notices to be served when a landlord seeks possession of a house after a short assured tenancy has reached its contractual end; and to allow a private landlord to seek the assistance of the Private Rented Housing Panel in gaining entry to a house for purposes related to the Repairing Standard.
- **Part 5** sets out supplementary and final provisions.

## **APPROACH TO USE OF DELEGATED POWERS**

5. When deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has had regard to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

## **DELEGATED POWERS**

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

## **PART 1 - REGISTRATION OF PRIVATE LANDLORDS**

### **Section 1 (inserts section 85(9) into the Antisocial Behaviour etc. (Scotland) Act 2004) - Fit and proper person**

**Power conferred on:           The Scottish Ministers**

**Power exercisable by:       Order made by statutory instrument**

**Parliamentary procedure: Affirmative resolution of the Scottish Parliament**

#### *Provision*

7. Section 85 of the Antisocial Behaviour etc. (Scotland) Act 2004 specifies the material which must be taken into account by the local authority in assessing whether or not a person is fit and proper, including any material showing that a person has committed a listed offence or contravened provisions of the law relating to specified matters. The offences and relevant contraventions are listed in subsection (2) and regulations made under section 83 of the 2004 Act require the declaration of relevant listed offences and contraventions to be included in any application for landlord registration. The new provision in the Bill has extended the list of offences in subsection (2) to include any offence involving firearms (within the meaning of section 57(1) of the Firearms Act 1968) and sexual offences (within the meaning of section 210A(10) of the Criminal Procedure (Scotland) Act 1995). The new section 85(9) gives Ministers power to modify section 85(2) by order.

#### *Reason for taking power*

8. Following analysis of the consultation responses it was apparent from some stakeholders that there were a number of other offences which could also be considered relevant in relation to the fit and proper person test. Although there was no overarching consensus on any single specific offence at this time, it is recognised that there may be future circumstances where other types of offence or contraventions of the law may give cause for concern, especially if there happened to be an incident involving an offence or contravention which was not specified in the provision. The order-making power that has therefore been inserted will allow Scottish Ministers to modify subsection (2), for example by adding, amending or removing offences or specifying other relevant contraventions of the law should they consider it necessary. This would update the list of offences and contraventions to which the local authority must have regard.

#### *Choice of procedure*

9. As the alterations to subsection (2) would modify primary legislation, it is considered that any order proposed to be made under this power should be subject to affirmative resolution procedure.

**Section 4 (inserts section 88(2C) into the Antisocial Behaviour etc. (Scotland) Act 2004) – Appointment of agents**

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

*Provision*

10. Section 4 amends section 88 of the Antisocial Behaviour etc. (Scotland) Act 2004 by means of new subsection (2A) to make provision for a local authority to charge a registered landlord a fee when the landlord subsequently nominates an unregistered agent. There is currently no power for the local authority to charge a fee for such an addition to the landlord's register entry, although assessing whether the agent is a fit and proper person will involve expense to the local authority. Setting a fee will be fairer for local authorities, who will be able to recover costs, and for those landlords and agents who pay fees because they register at an earlier stage. New subsection (2B) ensures that no fee is payable if the fit and proper test has already been carried out on the agent. Section 88(2C) gives Ministers powers to prescribe by regulations the fees, how fees are to be arrived at, and circumstances in which no fee is payable.

*Reason for taking power*

11. The power that is being taken matches the existing power at section 83(3) of the 2004 Act to set fees for applications for registration in the system. It will allow Ministers to set fees, which may be set at the same level as those set in regulations under section 83(3), as appropriate; to vary them if circumstances change, so that, for example, they remain at an appropriate level; and to make further provision, if necessary, on how fees are calculated and situations in which a fee will not be charged. It would not be suitable to make such provision by means of primary legislation, given the anticipated need to update the fees from time to time, in response to changing circumstances.

*Choice of procedure*

12. It is considered appropriate that this power is subject to negative resolution procedure because it would be used to provide details of fees in order to add administrative detail. There will be no impact on the policy or the provisions of the Bill such as would mean that a higher level of scrutiny would be necessary or appropriate. The Scottish Government would draw the Committee's attention to the similar power at section 83(3) of the 2004 Act, which also attracts negative resolution procedure.

**Section 10 (inserts section 99A into the Antisocial Behaviour etc. (Scotland) Act 2004) – Guidance**

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

*Provision*

13. Section 10 inserts section 99A into the Antisocial Behaviour etc. (Scotland) Act 2004 to make provision for a local authority to have regard to any guidance issued by the Scottish

Ministers on the discharge of its functions under Part 8 of that Act, and on matters arising in connection with those functions. There is currently no such requirement for a local authority to have regard to such guidance (the Scottish Ministers could, of course, issue guidance if they wished, and it is only the requirement to have regard to it that attracts the need for legislation).

*Reason for taking power*

14. The power that is being taken is broadly similar to powers at sections 1, 16, 23, 39, 52, 62, 115, 119 and 139 of the 2004 Act. Only section 23 requires guidance to be laid before the Parliament; it relates to dispersal of groups. A similar power exists in relation to HMO licensing, at section 163 of the Housing (Scotland) Act 2006 (which comes into force next year), again with no Parliamentary procedure attached to it. It is considered that the power will be especially useful in relation to the encouragement of best practice with regard to enforcement of the landlord registration requirements, as well as a consistent approach across local authority areas, though the power has been drafted more generally as it may have broader uses.

*Choice of procedure*

15. Before issuing any guidance the Scottish Ministers must consult with local authorities and such other persons as they think fit. Given the limited effects of any guidance, which has no binding effects on any local authority or person, it is not considered that there is a need for any more formal requirement or for Parliamentary procedure.

**PART 2 – AMENDMENT OF PART 5 OF HOUSING (SCOTLAND) ACT 2006**

**Section 13 (inserts paragraph (b) into section 125(1) of the Housing (Scotland) Act 2006) – Amendment of HMO licensing regime**

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

*Provision*

16. Section 125 of the Housing (Scotland) Act 2006 defines a house in multiple occupation (HMO). Section 13 inserts into section 125(1) a new paragraph (b), which confers on Ministers a power to designate by order additional categories of multi-occupancy accommodation, specified by type or manner of occupation, as licensable HMOs. Any such category must meet the usual requirement of a licensable HMO that there are three or more occupants being members of more than two families. However, it does not necessarily have to be a house or premises in terms of the 2006 Act, nor does it have to be the only or main residence of the occupants.

17. Section 13 also inserts into the 2006 Act subsection 125(1A), which requires Ministers, before using this power, to consult local authorities and also such tenants (or their representatives) and landlords (or their representatives) as they think fit.

*Reason for taking power*

18. Concerns have been raised by some local authorities and other stakeholders that some categories of multi-occupancy accommodation are not covered by HMO licensing, either by definition or because of difficulties in establishing their status. This power would enable Ministers to bring additional categories of multi-occupancy accommodation, where physical, safety or management standards were giving rise to concern, within the protection of HMO licensing, which sets conditions in relation to these standards. This could be done in a focussed way, to avoid bringing within the scope of licensing types of accommodation that were operating satisfactorily and were not considered to require regulation. A focussed approach will also minimise the need for exemptions, which could provide loopholes for unscrupulous landlords.

19. Examples of the kind of situations that could be addressed include some substandard properties occupied by migrant workers. Local authorities have identified the problem of migrant workers being moved from house to house before action can be taken to establish whether each house is a licensable HMO. An order could designate houses used for this purpose as licensable HMOs, without the need to prove the usual only or main residence requirement, which can be particularly difficult when occupants may have other residences outside the UK.

20. A number of local authorities have also called for HMO licensing to be extended to situations of multi-occupancy beyond those contained in buildings, such as mobile homes and caravans, in order to regulate them, and the Gangmasters Licensing Authority has indicated that many migrant workers are accommodated in Portacabins and similar structures. The order-making power could be used to extend HMO licensing to multi-occupancy accommodation that is not in buildings, but is presenting problems relating to physical standards, safety, or management.

21. Some of the problems identified have resulted from the increase in migrant workers in recent years. The order-making power will allow Ministers the flexibility to address other issues that arise in the future in relation to multi-occupancy properties that fall outside the HMO licensing system, because of difficulties with either definitions or effective enforcement, or because of attempts by landlords at the lower end of the market to evade licensing. Primary legislation would not give this flexibility.

*Choice of procedure*

22. The use of the order-making power is subject to a statutory duty to consult, which will ensure that the views of stakeholders are taken into account in its application. Furthermore, since the use of this power could have a significant impact on the sectors affected and involves a change in the effect of primary legislation, it is considered appropriate that it is subject to affirmative procedure.

**Section 16 (extends section 163(1) of the Housing (Scotland) Act 2006) – HMO guidance**

**Power conferred on:** The Scottish Ministers

**Power exercisable by:** Issue of guidance

**Parliamentary procedure:** None

*Provision*

23. Section 16 inserts a reference to section 186 of the Housing (Scotland) Act 2006 into section 163 of that Act. The effect is to enable guidance to be issued by the Scottish Ministers regarding the local authority's power to require information in relation to HMO licensing matters to be provided by certain people connected with land or premises. The current power in section 163 is limited to the functions contained in Part 5 of the Act, and the power to require information is located in Part 10, as it relates to other more general matters as well as to HMO licensing. Local authorities must have regard to guidance issued under section 163, but are not required to follow it if they consider that the circumstances merit a different approach.

*Reason for taking power*

24. The power is being taken to remove a lacuna in what may be covered by HMO guidance. A possible use of it relates to tenants living in HMOs. At Stage 1 of the Housing (Scotland) Bill, some stakeholders expressed concerns about the position of vulnerable tenants who might refuse to provide information relating to landlord registration, because of fears of retaliation from their landlords, and therefore might be subject to prosecution. These concerns were reflected in the Local Government and Communities Committee's Stage 1 report on that Bill, which extended them to the operation of section 186 of the 2006 Act as it affects tenants in HMOs and recommended that protection should be provided for such tenants. The power being taken will allow Ministers, among other things, to provide guidance on the use of the section 186 power to obtain information from tenants in HMOs, which could set out how a local authority would be expected to take account of the circumstances of a tenant.

*Choice of procedure*

25. Before issuing any guidance the Scottish Ministers must consult with local authorities and such other persons as they think fit. Given the limited effects of any guidance, which does not require that a local authority or person adopt a particular approach, it is not considered that there is a need for the extension of the provision to observe any more formal requirements than the current provision or for Parliamentary procedure to be involved.

### **PART 3 – OVERCROWDING STATUTORY NOTICES**

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

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

##### *Provision*

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

27. Section 17 of the Bill gives a local authority the power to serve an overcrowding statutory notice on the landlord of a house which is statutorily overcrowded, where the local authority considers that the overcrowding is contributing or connected to an adverse effect on the health or wellbeing of any person, or on the amenity of the house or its locality. This will allow enforcement action to be taken in the worst cases of overcrowding in the sector, where it is creating severe problems for occupants, neighbours and others in the locality. The notice will set out the steps to be taken by the landlord to rectify the situation (that is, to reduce the occupancy level to the maximum permitted by the 1987 Act), the period within which the steps must be taken, and any other conditions considered appropriate by the local authority. Section 18 allows the local authority to provide such advice and assistance to the occupants of the house as it considers appropriate.

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

##### *Reason for taking power*

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

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

##### *Choice of procedure*

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

### **Section 17(8) – Overcrowding guidance**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Issue of guidance**

**Parliamentary procedure: None**

#### *Provision*

32. Section 17(8) provides that a local authority must have regard to guidance issued by the Scottish Ministers in relation to overcrowding statutory notices.

#### *Reason for taking power*

33. The power is being taken, not to enable the Scottish Ministers to issue guidance (which they could do without any legislative basis), but to require that local authorities have regard to it. As the notices are an innovation, it is thought likely that guidance will be useful in promoting good practice and consistency where the provisions are used. However, it is also considered appropriate that the guidance should only require local authorities to have regard to it, rather than direct them as to what they must do, since ultimately it is for local authorities to determine how to exercise the power to require private landlords to take steps to address overcrowding.

#### *Choice of procedure*

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

## **PART 4 – MISCELLANEOUS**

### **Section 28(2) (inserts new section 89A into the Rent (Scotland) Act 1984) – Premiums: regulations**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by statutory instrument**

**Parliamentary procedure: Affirmative resolution of the Scottish Parliament**

#### *Provision*

35. Section 82 of the Rent (Scotland) Act 1984 prohibits a person from requiring the payment of any premium or the making of any loan, in addition to the rent, as a condition of the grant, renewal or continuance of a protected tenancy. It makes the making of such a requirement an offence. The section also makes it an offence to receive any premium in addition to the rent in connection with the grant, renewal or continuance of a protected tenancy.

36. Section 82 and some related provisions in Part VIII of the 1984 Act (including, with one modification, sections 86 to 90) also apply to assured tenancies (including short assured tenancies) by virtue of section 27 of the Housing (Scotland) Act 1988.

37. Despite the prohibition on the charging of premiums, there is evidence of some confusion about what this means in practice and a variety of charges are made to tenants, some of which may be excessive. Various stakeholders, including members of the Private Rented Sector Strategy Group, have called for the position to be regularised and clarified. There is a widespread feeling that it is legitimate for agents and landlords to make certain reasonable charges to tenants, although views on what these should be vary. Suggestions have included charges for credit checks and reasonable administrative charges.

38. Section 28(2) of the Bill inserts into the 1984 Act, new section 89A, which gives the Scottish Ministers power to make by regulations, provision about sums that it will be permissible to charge in connection with the grant, renewal or continuance of a protected tenancy. The regulations will be able to specify categories of payment that are not to be treated as premiums in terms of section 82 and to set a maximum limit to the amount of any such payment that could be charged. Ministers must, before making regulations, consult representatives of tenants, private landlords and landlords' agents, as well as such other persons (which may include tenants, private landlords and landlords' agents) as they consider appropriate.

39. Any such regulations may also apply to assured tenancies (including short assured tenancies) because new section 89A will constitute part of the sequence of sections 86 to 90 of the 1984 Act referred to in section 27 of the 1988 Act.

#### *Reason for taking power*

40. The Scottish Ministers consider that it is appropriate to deal with this matter by the use of regulations. This will allow a considered view to be developed, based on consultation, of which charges should be permitted and what maximum limits should be set on them. If it becomes clear, due to changes in the future, that amendments are required – for example, that additional charges should be allowed, that abuses require certain charges to be disallowed, or that maximum levels of charge should be adjusted – it will be possible to do this efficiently and quickly by subordinate legislation, instead of having to wait for an opportunity of new primary legislation.

#### *Choice of procedure*

41. Specifying what charges may legally be made to tenants by agents and landlords and what the maximum amount of such charges may be will be a significant matter for the private rented sector, with implications for business models and for the costs of obtaining a tenancy in the sector. Therefore, as well as the duty to consult stakeholders before using the regulation-making power, it is considered appropriate that such regulations should also be subject to the level of scrutiny involved in affirmative resolution procedure.

**Section 29 (inserts new section 30B into the Housing (Scotland) Act 1988) – Duty of landlord to provide certain information: further provision**

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

*Provision*

42. The Scottish Government's *Review of the Private Rented Sector* highlighted a widespread lack of knowledge of housing legislation and regulation among private tenants (and, to a lesser extent, landlords). The Private Rented Sector Strategy Group suggested that a statutory duty should be placed on a landlord to provide specified documents and information to a tenant at the beginning of the tenancy. Section 29 of the Bill inserts into the Housing (Scotland) Act 1988 new section 30A, which places a duty on a person who is to be the landlord under an assured tenancy (whether or not it is a short assured tenancy) to provide the person who is to be the tenant with specified documents. Failure to do so (without reasonable excuse) is an offence.

43. New section 30B gives the Scottish Ministers the power to specify by order, what these documents will be. They may, for example, include documents containing information about the tenancy (such as a tenancy agreement), about the house (such as the permitted level of occupancy), about the landlord (such as his or her landlord registration number), and about the rights and responsibilities of tenants and landlords. They may include documents that the landlord is already required to provide under other sections of the 1988 Act or other legislation. An order may make further provision, including about the form of the documents and the information to be included in (or expressly excluded from) any of them. It may make provision where there is another statutory obligation to give a document, so as to avoid unnecessary duplication. It may provide for documents to be provided separately or at the same time. Section 30B(2) requires the Scottish Ministers, before using the order-making power, to consult representatives of tenants, private landlords and landlords' agents, as well as such other persons (which may include tenants, private landlords and landlords' agents) as they consider appropriate.

*Reason for taking power*

44. The Scottish Ministers want to ensure that tenants are given all the information that they need in order to be aware of their general and specific rights and responsibilities and those of their landlords. They therefore want to consult with the relevant stakeholders to ensure that the documents to be given by landlords include all of those that are essential for this purpose, without imposing unnecessary burdens on the sector. Furthermore, as legislative changes are introduced in the future or as new issues in the private rented sector are identified, it will be necessary to update the list of documents specified. It would be appropriate to do this by order, rather than by primary legislation.

*Choice of procedure*

45. The statutory duty to consult before using the order-making power will ensure that the views of stakeholders are taken into account. The Scottish Ministers consider that this provides protection for the sector regarding the specific requirements placed on landlords. Given that the

nature of the documents is a technical issue, Ministers consider that negative resolution procedure is appropriate.

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

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

*Provision*

46. Section 14 of the Housing (Scotland) Act 2006 places a duty on a landlord in certain tenancies to ensure that the house meets the Repairing Standard (set out in section 13 of the Act) at the start of, and throughout the tenancy. A tenant who considers that the landlord has failed to comply with this duty may, under section 22 of the 2006 Act, apply to the Private Rented Housing Panel for a determination of the matter.

47. Section 181(4) of the 2006 Act gives a landlord, or a person authorised by the landlord, the right to enter the house for the purpose of determining whether the house meets the Repairing Standard or carrying out work required to comply with the landlord's duty to ensure the house meets the Repairing Standard or with a Repairing Standard Enforcement Order. However, many landlords consider that, where they are unable to exercise the right of entry, they should be able to apply for assistance to the Private Rented Housing Panel rather than, as at present, having to take court action or to wait for the tenancy to end.

48. Section 31(4) amends the 2006 Act by inserting new section 28A to make provision for a landlord to apply to the Private Rented Housing Panel for assistance in exercising the right to enter a house under section 181(4). Such an application will be considered by a single member of the Panel.

49. New section 28B gives Ministers power to make by regulations, further provision about applications made under section 28A. Such provision may relate to the form and content of applications and notices, the prescription of a fee to accompany applications, the procedure to be followed by applicants and the panel member, and the determination of applications and action following determination, among other things.

*Reason for taking power*

50. The Bill makes such provision for the making and determination of applications as is necessary to ensure that the panel member has sufficient information and powers to make reasonable decisions based on sound evidence. However, it would not be desirable to set out all the details of the process involved on the face of the Bill. It may prove necessary to amend such details in the light of experience or changed circumstances, and it is considered that regulations are an appropriate way of doing this. For example, if a fee to accompany applications is set, it may be necessary to alter this in future, and such alteration could be made more easily and quickly by amending regulations than by primary legislation.

*Choice of procedure*

51. Given that regulations will deal with administrative detail, the Scottish Government considers that negative resolution would be the appropriate procedure. By comparison, existing powers to make regulations under paragraph 8 of schedule 2 to the 2006 Act, making further provision about the making or determination of applications by tenants to the Private Rented Housing Panel under section 22(1) of that Act, are also subject to negative resolution.

**Section 31(4) (inserts section 28C(11) into the Housing (Scotland) Act 2006) – Panel member to arrange suitable time for access**

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

*Provision*

52. New section 28C, inserted into the 2006 Act by section 31(4), sets out the procedure for a panel member, having decided to assist a landlord who has made an application, to try to arrange with the tenant and landlord a suitable date and time for the right of entry to be exercised. If the tenant fails to respond or does not agree a suitable date and time, the panel member may fix the date and time for entry. Provision is also made for changing dates and times, the provision of information by the panel member, attendance by the panel member at the house and the delegation of functions by the panel member.

53. New section 28C(11) gives Ministers power to make by regulations, further provision about the action to be taken by the panel member under section 28C.

*Reason for taking power*

54. New section 28C makes such provision for a panel member to make arrangements for the exercise of the landlord's right of entry, as is necessary to ensure that the right can be exercised effectively, unless the tenant still refuses to allow entry. However, it may prove necessary to set out how the action required by the Bill is to be undertaken, in the light of experience or changed circumstances. It is considered that regulations are an appropriate and flexible way of doing this.

*Choice of procedure*

55. Given that regulations will deal with administrative detail of the action that the Bill requires, the Scottish Government considers that negative resolution would be the appropriate procedure. The power is more limited than that at inserted section 28B, for which negative procedure is proposed.

## **PART 5 – GENERAL**

### **Section 33 – Ancillary provision**

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

#### *Provision*

56. Section 33 confers on Ministers a power to make by order, such consequential, supplementary, incidental, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for the purposes of giving full effect to any provision of the Bill. Such an order may modify any enactment, instrument or document.

#### *Reason for taking power*

57. Ministers may need to make provision by order to support the full implementation of the Bill. This will ensure that the policy intentions of the Bill are achieved. For example, when implementing the Bill, unforeseen issues may arise which require supplementary provision. The supplementary power would allow changes to be made without the need for further primary legislation. Also, whilst a number of consequential modifications have been identified in the schedule, it may be that not all of the consequences have been identified. The Scottish Government considers the order-making power to be necessary to allow for flexibility to address these issues.

58. Provision may also be needed to ensure a smooth transition from the current law to that in the enacted Bill. Issues may arise at the time of implementation which require transitional or transitory provision, or the saving of repealed or amended provisions.

59. Without the power, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of resources by Parliament or the Scottish Government.

#### *Choice of procedure*

60. Ancillary provisions frequently deal with minor issues, and in general are subject to negative resolution procedure. An exception is made where the order adds to, omits or replaces any part of the text of an Act (see section 34(2)). In that case, affirmative resolution procedure applies. This approach on procedure is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

## **Section 35 – Commencement**

**Power conferred on:**            **The Scottish Ministers**  
**Power exercisable by:**       **Order made by statutory instrument**  
**Parliamentary procedure:** **None**

### *Provision*

61. Section 35 of the Bill provides that the provisions of the Bill (except sections 32 to 35, which come into force at the beginning of the day following the day on which the Bill receives Royal Assent) will come into force on the day determined by order, made by Ministers. Such an order may make transitional, transitory or saving provision.

### *Reason for taking this power*

62. It is considered proper for the Bill to be commenced at such times as Ministers consider appropriate or expedient. It is standard practice for such commencement provisions to be dealt with by subordinate legislation. Such provisions may require to make transitional or transitory provision, or the saving of repealed or amended provisions.

### *Choice of procedure*

63. In line with general practice, commencement orders will not be subject to any Parliamentary procedure.

*This document relates to the Private Rented Housing (Scotland) Bill (SP Bill 54) as introduced  
in the Scottish Parliament on 4 October 2010*

# **PRIVATE RENTED HOUSING (SCOTLAND) BILL**

## **DELEGATED POWERS MEMORANDUM**