HOUSING (SCOTLAND) BILL

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 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 Housing (Scotland) Bill is to safeguard social housing for future generations by reforming the Right to Buy and modernising social housing regulation to provide improved value for tenants and taxpayers. It also includes provisions to ensure that veterans are treated equally with other homeless applicants by amending the definition of “local connection”; to strengthen local authority powers to deal with disrepair in privately-owned housing; and to improve the operation of the systems for private landlord registration and licensing of houses in multiple occupation.

OUTLINE OF BILL PROVISIONS

4. The Bill is structured in the following parts:

- **Part 1** establishes the Scottish Housing Regulator (referred to in this document as the SHR or the regulator) as an independent regulator with the objective of safeguarding and promoting the interests of tenants, prospective tenants, homeless people and others using housing services provided by social landlords.

- **Part 2** requires the regulator to keep a register of social landlords (the registered bodies are referred to in this document as RSLs; other “social landlords” are local authorities but these are not included in the register) and sets out the criteria for registration and the circumstances in which a body may be removed from the register.
Part 3 provides for Ministers to specify the outcomes social landlords must aim to achieve in a Social Housing Charter, and for the regulator to set performance improvement targets and assess and report on their performance. Part 3 also requires the regulator to set out standards of governance and financial viability for registered social landlords (RSLs).

Part 4 provides the regulator with powers to carry out inquiries and obtain information from social landlords.

Part 5 gives the regulator a range of powers to intervene where it has concerns about a social landlord’s performance, governance arrangements or financial viability. It also requires the regulator to issue a code of practice explaining how it will use its intervention powers.

Part 6 provides for the regulator to set accounting requirements for RSLs.

Part 7 provides the regulator with powers to deal with an insolvent RSL.

Part 8 deals with the constitution, rule changes, amalgamation and dissolution of RSLs.

Part 9 sets out requirements for the disposal of land by RSLs.

Part 10 makes special provision, including approval by tenants, for the change of landlord from a local authority landlord.

Part 11 reforms the Right to Buy.

Part 12 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 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; an increase in the maximum fine for offences; and a power for a local authority to obtain information to enable or assist it to carry out its landlord registration functions.

Part 13 makes changes to the powers available to local authorities under the Housing (Scotland) Act 2006 in relation to housing conditions. This relates to maintenance powers, the scheme of assistance, repayment charges, and enforcement powers. Part 13 also makes changes to the system of HMO licensing to give Ministers a power to bring by order additional types of multi-occupancy property within the scope of HMO licensing and to give local authorities a power to refuse to consider an application for an HMO licence if it considers that there would be a breach of planning control.

Part 14 includes miscellaneous amendments on protection of unauthorised tenants and local authorities duties on homelessness (armed forces).

Part 15 sets out supplementary and final provisions.

**APPROACH TO USE OF DELEGATED POWERS**

5. The Scottish Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:
This document relates to the Housing (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 13 January 2010

- 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 2 – REGISTERED SOCIAL LANDLORDS

Section 24(1)(b) – Power to prescribe legislative registration criteria to be eligible for inclusion in the register of social landlords.

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Provision

7. Section 24(1)(b) provides that Ministers may by order set criteria for bodies to be eligible to be included in the register of social landlords. The criteria set may relate to purposes or objects, legal status, and governance arrangements of a body. Ministers also have powers to set different criteria for different types of bodies. When modifying the criteria for eligibility for registration Ministers must have regard to the likelihood of these criteria increasing the level or quality of housing services provided by RSLs. Ministers must consult the SHR, tenants of social landlords, or their representatives and social landlords, or their representatives, before setting criteria.

8. Where Ministers set criteria allowing bodies other than industrial and provident societies or registered companies to be eligible for inclusion in the register, section 24(4) and (5) provide that they can make new provisions or amend or modify existing provisions in the Bill to allow for the effective regulation of those new types of bodies.

Reason for taking the power

9. The Scottish Government wishes to encourage improvements in the level and quality of social housing by allowing for a wider range of non-profit distributing bodies to be registered and regulated by the SHR. The policy is that eligibility for registration should not be dependent on a fixed structure and status of the body as is the case in the Housing (Scotland) Act 2001, which restricts eligibility to industrial and provident societies and limited companies. The Scottish Government believes that setting eligibility by an order-making power provides a greater degree of flexibility than exists in current legislation. This power could be used to determine that bodies, other than industrial and provident societies and limited companies, would
be eligible for registration as a registered social landlord. Or that only certain types of industrial and provident society or company are eligible.

10. The order making power seeks to allow for a prompt and effective change to the legislative registration criteria in response to changing needs and circumstances in the social housing sector. Any changes to the criteria will be subject to consultation with stakeholders and Parliamentary approval.

Choice of procedure

11. It is considered appropriate that the power is subject to affirmative procedure to enable Parliament to consider fully and decide on each occasion whether the criteria that are being proposed as legislative registration criteria are proportionate and likely to encourage improvements in the level and quality of social housing.

PART 3 – PERFORMANCE OF SOCIAL LANDLORDS

Section 31 – Ministers must set out in the Scottish Social Housing Charter (the Charter) standards and objectives which social landlords should aim to achieve when performing housing activities.

Power conferred on: Scottish Ministers
Power exercisable by: Ministerial power under section 31
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

12. Section 31 of the Bill requires Ministers to set standards and objectives which social landlords should aim to achieve when performing housing activities (‘outcomes’). Section 33(2) requires Ministers to consult key stakeholders (the SHR, tenants of social landlords or their representatives, social landlords or their representatives, secured creditors of RSLs or their representatives and the Accounts Commission for Scotland). Section 33(3) provides that the proposed Charter must be laid before and approved by a resolution of the Scottish Parliament in order to have effect.

13. The Charter is a new departure in social housing policy in Scotland. It will provide, for the first time, a single statement of the value that all tenants should be receiving from their landlords.

Reason for taking the power

14. The Scottish Government considers that the duty to set, through a consultative process, outcomes that social landlords should be delivering for their tenants will have the effect of driving up overall standards of services over time. The rationale for setting these out in a Charter rather on the face of the Bill is that it will allow for these standards to be changed periodically to reflect changes in the priorities of tenants, taxpayers and the Scottish Government.
15. The process of setting the Charter, led by Ministers, will be highly consultative. In providing a broad description of what social landlords should be achieving, the Charter will serve a number of connected purposes. It will:

- Give tenants across the country a clear understanding of what they should expect from their landlords.
- Give those in housing need a clear understanding of what they can expect from prospective landlords.
- Give landlords clarity and certainty over what they should be achieving over the medium term.
- Give communities, other stakeholders and taxpayers an appreciation of the value that social housing should be delivering in return for public investment in it.
- Establish the modernised framework within which the new SHR will assess and report on landlords’ performance, which in turn will (i) give landlords the information they need to identify areas where they can improve their performance and (ii) give tenants the information they need to hold their landlords to account and to drive improvements in their landlords’ performance.
- Enable the SHR to highlight strong performance among good landlords and, where necessary, provide the basis for it to require poorer landlords to improve their performance and to set targets for improved performance within the sector more generally.

16. Once approved by the Parliament, the Charter would be binding on social landlords and provide the basis for the SHR’s assessment and reporting of landlords’ performance until the Parliament approves a new Charter. The length of time the Charter remains in force will be a factor that could be determined in the consultation process. At present, given the substantial effort that would go into the process for preparing the Charter and the intention that the Charter should provide clarity and certainty for landlords and tenants over the medium term, the Scottish Government envisages the first Charter running for a period of four years.

Choice of procedure

17. It is considered appropriate that the power is subject to the requirement for a resolution by the Parliament, to enable the Parliament to consider fully and decide whether the Charter proposed by Ministers sets appropriate outcomes that social landlords should be delivering for their tenants.
PART 11 RIGHT TO BUY: REFORMS

Section 131 (inserts section 61F(2)(d) into the Housing (Scotland) Act 1987) – Prescribed form

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

Provision

18. Section 131 inserts a new section 61F into the Housing (Scotland) Act 1987 to restrict the right to buy over new supply social housing (houses let under a Scottish secure tenancy after commencement which let before 25 June 2008). In order for the new supply social house to be excluded from the right to buy, the landlord has to give the tenant notice of the restriction at least 7 days before the creation the tenancy. The notice is to be in the form prescribed by Ministers.

Reason for taking power

19. The Scottish Government aims to ensure that new supply social housing should never be available for sale under right to buy and therefore should always remain available for renting as social housing. It intends that this should apply to properties first let under a Scottish secure tenancy after commencement when they were not so let on, or after, 25 June 2008, which was the date of the Parliamentary announcement intended to end right to buy on new social housing. The tenant should, however, be made aware of the restriction before moving into the new supply social house, and the power is taken so that a standard form of notice can be set out by Ministers and used by landlords, for the purposes of informing tenants of the restrictions.

Choice of procedure

20. We do not anticipate that the content of the form for the purposes of this provision should merit a higher degree of scrutiny than negative resolution procedure.

PART 12 - REGISTRATION OF PRIVATE LANDLORDS

Section 133 - (inserts section 88(2C) into of the Antisocial Behaviour etc. (Scotland) Act 2004) – Prescribed fees for appointment of agents

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

Provision

21. Section 133 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

22. 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 changes by means of primary legislation.

Choice of procedure

23. 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 supplement and update the provisions of the Bill. The same procedure applies to the similar power at section 83(3) of the 2004 Act.

PART 13 – AMENDMENT OF HOUSING (SCOTLAND) ACT 2006

Section 141 - (inserts paragraph (b) into section 125(1) of the Housing (Scotland) Act 2006) – Amendment of HMO licensing regime

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

Provision

24. Section 125 of the Housing (Scotland) Act 2006 defines a house in multiple occupation (HMO). Section 141 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.

25. Section 141 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

26. 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.

27. Examples of the kind of situations that could be addressed include some sub-standard 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.

28. 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.

29. 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

30. 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, it is considered appropriate that it is subject to affirmative procedure.
PART 14 – MISCELLANEOUS

Section 142 – Protection of unauthorised tenants

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

Provision

31. The Scottish Government has been consulting on whether to strengthen protection for unauthorised tenants, that is tenants unauthorised in the sense that they are living in a property where the landlord does not have the consent of a security holder to a tenancy. Protection is being considered for the situation where the landlord is in default under the standard security causing the lender to exercise remedies for default, such as repossession. Such tenants are vulnerable to being made homeless with little notice, through no fault of their own, where their landlord gets into financial difficulties. In the light of responses to this consultation exercise, the Scottish Government will decide whether protection should be strengthened and, if so, how best to do that, and whether to seek an amendment to the Home Owner and Debtor Protection Bill or an amendment to this Bill. The purpose of including the provision in this Bill is to allow the Committee to seek and hear full evidence on the general principles of the issue at stage 1 and to report to the Parliament accordingly. The Government can then use the Committee’s report and the responses to its own consultation exercise to help frame an appropriate amendment for consideration at Stage 2 if the Government decides to proceed to deal with the issue in this Bill.

32. Section 142 of the Bill therefore contains a very broad power to facilitate the matter being investigated by the lead Committee at Stage 1 in advance of amendments containing much more detailed provision for the protection of unauthorised tenants.

Reason for taking power

33. The provision is intended simply to allow this matter to be investigated by the lead Committee at Stage 1. The Government intends that the provision will either be removed or replaced by much more detailed provision for the protection of unauthorised tenants.

Choice of Procedure

34. The power is subject to negative procedure. That can likewise be amended if appropriate. However the more specific, focussed provisions might not need any order making provisions.

Section 148 – Ancillary provision

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

Provision

35. Section 148(1) confers on Ministers a power to make by order such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate
for the purposes of, in connection with, or for the purposes of giving full effect to any provision of the Bill. Such an order may modify any enactment.

Reason for taking power

36. 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 supplemental 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 Schedule 2, it may be that not all of the consequences have been identified. We consider the order making power to be necessary to allow for flexibility to address these issues.

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

38. 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

39. We consider that most possible uses of the ancillary powers are unlikely to justify affirmative procedure. Where orders are more limited in scope and effect, such as those containing incidental, consequential, transitional, transitory or savings provisions, the negative resolution procedure is considered appropriate. However, supplementary provision could have a wider scope and effect and have a more significant impact. It is therefore considered appropriate that use of the supplementary power to add to, replace, or omit any part of the text of any Act should attract a higher level of parliamentary scrutiny. This gives a clear dividing line for determining what procedure should be used. By tying it only to the potentially wider supplementary power, it avoids minor textual amendments being subject to affirmative procedure.

Section 151 – Commencement

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

Provision

40. Section 151 of the Bill provides that the provisions of the Bill (except sections 146, 148 and 150-152, which come into force on Royal Assent) will come into force on the day determined by order, made by Ministers.
Reason for taking this power

41. It is considered appropriate 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.

Choice of procedure

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

SCHEDULE 2

Paragraph 2 of Schedule 1 - power to transfer assets and liabilities to the Regulator

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Provision

43. Paragraph 2 of Schedule 1 provides that assets of Ministers held or used by them in connection with the purposes of the existing Agency, may be transferred by order to the SHR. The corresponding liabilities may also be transferred.

Reason for taking the power

44. An order may be necessary to give the SHR full control over and responsibility for property and liabilities which are currently held by the Executive Agency. Once the SHR becomes a separate entity within the Scottish Administration, it would be inappropriate for Ministers to retain control over its assets or retain responsibility for its liabilities. Relevant property and liabilities may only be identified during the detailed work on the implementation of the Bill.

Choice of procedure

45. An order made under this paragraph will be subject to negative resolution procedure. This is considered appropriate for such an administrative matter within the framework established by the Bill.
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