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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Housing (Amendment) (Scotland) Bill at Stage 1**



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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 the following (and any additional matter added under Rule 6.1.5A)—

- (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;
- (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.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Introduction

1. At its meetings on 8<sup>th</sup> and 28<sup>th</sup> November 2017, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Housing (Amendment) (Scotland) Bill at Stage 1. The Committee submits this report to the lead committee for the Bill (the Local Government and Communities Committee) under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.<sup>i</sup>

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<sup>i</sup> The Delegated Powers Memorandum is available [here](#).

# Overview of the Bill

3. In this Report—
  - “the 2010 Act” means the Housing (Scotland) Act 2010,
  - “DPM” means the Scottish Government’s Delegated Powers Memorandum for the Bill,
  - “the ONS” means the Office for National Statistics,
  - “the Regulator” means the Scottish Housing Regulator,
  - “RSL” means registered social landlord,
  - “social landlords” includes registered social landlords, local authority landlords, and local authorities providing housing services.
4. This Government Bill was introduced by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 4<sup>th</sup> September 2017.<sup>ii</sup>
5. In general terms the Bill makes several technical amendments of the 2010 Act in respect of powers that the Regulator exercises over RSLs (and in the case of part of section 1 in respect of social landlords generally). It also enables the Scottish Ministers, by regulations, to modify the functions of the Regulator, and to reduce local authority influence over RSLs.
6. The Regulator independently regulates RSLs and local authority housing services, and has an objective to safeguard the interests of tenants of social landlords. Its board was established under the 2010 Act. It is an office-holder within the Scottish Administration.
7. 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 ONS as private sector bodies, in the UK’s national accounts.
8. The Policy Memorandum for the Bill explains that the ONS is responsible for determining how individual sectors within the economy should be classified in the 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. It also noted that further public sector controls might exist, through the relationships between RSLs and local government.
9. The Policy Memorandum also explains that 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

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<sup>ii</sup> The Bill as introduced is available [here](#).

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 Provisions

10. At its meeting on Tuesday 8th November 2017, the Committee considered the delegated powers in the Bill. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions—
  - Section 3(6)
  - Section 3(8)(c)
  - Section 4(5)
  - Section 6(5), (6), (10), (11) and (12)
  - Section 10.
11. At the same meeting, the Committee agreed to write to the Scottish Government to raise questions in relation to the remaining delegated powers in the Bill, in sections 8 and 9. The Committee's questions, and the responses received from the Scottish Government, are included in the **Annexes**.

### Recommendations

12. The Committee's comments and recommendations on the delegated powers in sections 8 and 9 are noted below.

### Section 8 – power to modify functions of the Regulator

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: affirmative**

#### Provisions

13. This section enables the Scottish Ministers to modify the functions of the Regulator which relate to social landlords (including RSLs).
14. The Regulations may make different provision for different purposes, may include ancillary provisions as Ministers consider appropriate, and may modify any enactment (section 8(2)).
15. Before laying the draft Regulations, Ministers must consult the Regulator, social landlords or their representatives, and secured creditors of RSLs or their representatives. They may also consult such other persons, as considered appropriate.

#### Comments

16. The DPM indicates that the Scottish Government intends to use the power in this section only for the purpose of providing the ONS with the basis for classifying

RSLs as private sector bodies in the U.K. national accounts, if the Bill when enacted does not achieve that.

17. However section 8(1) enables the modification of the functions of the Regulator which relate to social landlords, which does not limit the powers by reference to the purpose or aim of securing the re-classification of RSLs to the private sector in the national accounts. Section 8(2)(a) also expressly enables different provision for different purposes.
18. The Committee therefore asked the Scottish Government why it has been considered appropriate to draw the scope of the power in section 8(1) and (2) in that more general way, or whether the power could be drawn more narrowly while at the same time implementing the policy intentions.
19. The Scottish Government has responded to the Committee that the purpose of the Bill is to enable the ONS to reclassify RSLs to the private sector. The various amendments of the 2010 Act proposed by sections 1 to 7 are intended to achieve that outcome, in respect of the Regulator, by amending those of the Regulator's powers which have been cited by the ONS. The Government is seeking the power in section 8 as a precaution against the preceding sections failing to achieve the intended outcome. It has been considered prudent to propose a general power that could be exercised flexibly in response to any issue which the ONS may identify once the Bill provisions have been commenced.
20. The Committee considers initially that the Government's response does not add any new information in justification of the power, beyond that at paragraph 11 of the DPM. The Committee also notes, in relation to the proposed powers to modify the functions of the Regulator which relate to social landlords, that the general functions of the Regulator are set out in section 3 of the 2010 Act.
21. Those general functions are—
  - (a) to keep a publicly available register of social landlords, and
  - (b) to monitor, assess and report regularly on (and where appropriate make regulatory interventions relating to) social landlords' performance of housing activities, and RSL's financial well-being and standards of governance.
22. Accordingly the scope of the power as drawn in section 8(1) and (2) is capable of being exercised to modify by regulations those general functions of the Regulator (which relate to social landlords), and other specific functions which are contained in the 2010 Act as proposed to be amended by the Bill. While at paragraph 28 of the Policy Memorandum, the Scottish Government indicates that it intends to use this power to make any further adjustments to the Regulator's functions that might be necessary to secure reclassification, this is a statement of present intentions which does not affect the scope of the enabling powers as drawn in section 8(1) and (2).
23. The Committee made a supplemental enquiry in the correspondence, to obtain an explanation why the Scottish Government has considered it appropriate that section 8(1) enables the modification of the functions of the Regulator which relate to "social landlords". This includes local authority landlords and local authorities providing housing services, in addition to RSLs.

24. The Scottish Government's response on that aspect is set out in its letter dated 20 November at paragraph 58 of Annex B. The Committee considers that, while this provides useful clarification as to why it is proposed that section 8(1) extends also to local authorities, this does not affect the following recommendation.

### Recommendation

25. **In relation to the powers conferred by section 8(1) and (2), the Bill has a specific, clear objective. This is to ensure that the influence which the Regulator can exercise over RSLs is compatible with RSLs being classified by the ONS as private sector bodies in the United Kingdom national accounts (paragraph 4 of the DPM).**
26. **The scope of those powers extends to permitting any modification of the functions of the Regulator which relate to social landlords. The power is therefore drawn more broadly than is required to achieve the policy objective. The Committee considers that, in principle, the power could be framed more narrowly in accordance with the policy objective. It recommends that the Scottish Government consider this further in advance of Stage 2.**
27. **The Committee accepts that the exercise of the power is subject to scrutiny by the affirmative procedure.**

### Section 9 – power to reduce local authority influence over RSLs

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: affirmative**

#### Provisions

28. Section 9 enables Ministers to make provision for the purpose of limiting or removing the ability of local authorities to exert influence over RSLs, through—
- (a) appointing or removing officers of RSLs,
  - (b) exercising or controlling voting rights.
29. Section 9(2) specifies what the Regulations may do, in particular. They may override or modify any contractual or other rights, or anything in an RSL's constitution. They may also confer a power on an RSL to amend its constitution in consequence of provision made by the regulations, or make provision about the procedure for exercising that power (section 9(3) and (4)). The Regulations could include ancillary provisions, as described in section 9(5).

#### Comments

30. The DPM provides an explanation of how the Scottish Government intends to use this power. In classifying RSLs as public bodies, the ONS indicated to the 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 officers of the RSL, or by having certain voting rights (or by having both powers).

31. 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. So in the first instance, 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. They intend to use the power subsequently, if other forms of local authority control that amount to public sector control over RSLs come to light, or if the criteria the ONS apply to determine public sector control changes, and such changes require the powers of local authorities to be amended further, to ensure that RSLs can continue to be classified to the private sector.
32. However section 9(1) enables any provisions for the purpose of limiting or removing the ability of local authorities to exert influence over RSLs, through (a) appointing or removing officers of RSLs, and (b) exercising or controlling voting rights. Section 9(5)(a) enables different provision for different purposes. Similarly to the powers in section 8, the powers are not limited by reference to the purpose or aim of securing the re-classification of RSLs to the private sector in the national accounts.
33. The Committee therefore in the correspondence sought explanation why it has been considered appropriate to draw the scope of the powers in section 9 in that more general way, or whether the powers could be drawn more narrowly while at the same time implementing the policy intentions. The Committee also asked why it has been considered inappropriate to set out the initial intentions for the exercise of the power on the face of the bill, as set out at paragraph 31 above.
34. In relation to the scope of the power, the Scottish Government has responded on similar terms to the response on section 8. The power is considered to be precautionary. It is considered that "it needs to be drawn widely if it is to be capable of being used in circumstances that are at present unknown."
35. In relation to the possibility of putting the initial intentions for the exercise of these powers on the face of the bill, the Government has considered that it is appropriate or sufficient that subsection (2) of section 9 specifies the types of limit on the influence of local authorities over RSLs that may be included in the regulations.
36. The Committee notes however, that despite the further detail set out in subsection (2), the scope of the powers as framed in subsection (1) enables by regulations any provisions which may either limit or wholly remove the ability of local authorities to exert influence over RSLs, through either—
  - (a) appointing or removing officers of RSLs, or
  - (b) exercising or controlling voting rights.

## **Recommendation**

37. In relation to the powers conferred by section 9(1), again the Bill has a specific, clear objective. This is to ensure that the influence which Scottish local authorities can exercise over RSLs is compatible with RSLs being classified by the ONS as private sector bodies in the United Kingdom national accounts.
38. The scope of the powers as drawn extends to permitting any provisions for the purpose of limiting, or wholly removing, the ability of local authorities to exert influence over RSLs through appointing or removing officers of RSLs, or exercising or controlling voting rights. Similarly to the powers in section 8, the scope is drawn more broadly than is required to achieve the policy objective. The Committee considers that, in principle, the powers could be framed more narrowly, in accordance with the policy objective. It therefore recommends that the Scottish Government consider this further in advance of Stage 2.
39. The Committee has also not been persuaded that the initial intentions for the exercise of the power could not be set out on the face of the Bill, subject to a power of amendment should that be required in future. The initial intentions would then be clear to readers of the provisions.
40. The Committee accepts that the exercise of the power is subject to scrutiny by the affirmative procedure.

# Annex A: Letter from the Delegated Powers and Law Reform Committee to the Scottish Government (8 November 2017)

41. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 8th November and seeks an explanation of the following matters:

## Section 8 – power to modify functions of the Regulator

- **Power conferred on: the Scottish Ministers**
  - **Power exercisable by: Regulations**
  - **Parliamentary procedure: affirmative**
42. The Delegated Powers Memorandum (DPM) indicates that the Scottish Government intends to use the power in this section only for the purpose of providing the Office of National Statistics (ONS) with the basis for classifying RSLs as private sector bodies in the national accounts, if the Bill when enacted does not achieve that.
43. However section 8(1) enables the modification of the functions of the Regulator which relate to social landlords, which does not limit the powers by reference to the purpose or aim of securing the re-classification of RSLs to the private sector in the national accounts. Section 8(2)(a) also expressly enables different provision for different purposes.
44. **The Committee therefore asks the Scottish Government to explain why it has considered it appropriate to draw the scope of the power in section 8(1) and (2) in that more general way, or whether the power could be drawn more narrowly while at the same time implementing the policy intentions?**
45. The DPM indicates that the power in section 8 would be used only for the purpose of providing the ONS with the basis for classifying *RSLs* as private sector bodies.
46. **The Committee therefore asks the Scottish Government to explain why it is appropriate that section 8(1) enables the modification of the functions of the Regulator which relate to *social landlords*, which includes local authority landlords and local authorities providing housing services, in addition to RSLs. How is it anticipated the power would be used, in relation to social landlords apart from RSLs?**

## Section 9 – power to reduce local authority influence over RSLs

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: affirmative**

47. The DPM indicates how, specifically, the Scottish Government intends to use the power in section 9. In the first instance, it intends 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.
48. The Scottish Government intends to use the power subsequently if other forms of local authority control that amount to public sector control over RSLs come to light, or if the criteria the ONS applies to determine public sector control changes and such changes require the powers of local authorities to be amended further, to ensure that RSLs can continue to be classified to the private sector.
49. However section 9(1) enables any provisions for the purpose of limiting or removing the ability of local authorities to exert influence over RSLs, through (a) appointing or removing officers of RSLs, and (b) exercising or controlling voting rights. Section 9(5)(a) enables different provision for different purposes. Similarly to the powers in section 8, the powers are not limited by reference to the purpose or aim of securing the re-classification of RSLs to the private sector in the national accounts.
50. **The Committee therefore asks why the Scottish Government has considered it appropriate to draw the scope of the powers in section 9 in that more general way, or whether the powers could be drawn more narrowly while at the same time implementing the policy intentions?**
51. **Furthermore, the Committee asks the Scottish Government why has it been considered not appropriate to set out the initial intentions for the exercise of the power on the face of the bill, i.e., that the regulations may specify that local authorities may nominate up to a maximum of 24% of the board members of an RSL, and may not exercise forms of control over RSLs such as the power to veto changes in an RSL's constitution?**

# Annex B: Letter from the Scottish Government to the Delegated Powers and Law Reform Committee (20 November 2017)

In response to your letter to James Hynd of 8 November, I provide responses by the Scottish Government to the matters in relation to the Housing (Amendment) (Scotland) Bill on which the Delegated Powers and Law Reform Committee sought explanations.

## Section 8 – power to modify functions of the Regulator

- **Power conferred on: the Scottish Ministers**
  - **Power exercisable by: Regulations**
  - **Parliamentary procedure: affirmative**
52. **The Committee asked the Scottish Government to explain why it has considered it appropriate to draw the scope of the power in section 8(1) and (2) in a more general way, and whether the power could be drawn more narrowly while at the same time implementing the policy intentions?**
53. *The Scottish Government responds as follows:*
54. *ONS cited specific powers that the Regulator, and also local authorities, may exercise over RSLs as the grounds for its decision to classify RSLs to the public sector. The purpose of the Bill is to enable the ONS to reclassify RSLs to the private sector. Sections 1–7 of the Bill are intended to achieve that outcome, in respect of the Regulator, by amending those of the Regulator’s powers cited by the ONS. The Scottish Government is seeking the power at section 8 as a precaution against sections 1-7, for some reason, failing to achieve the intended outcome. Any such failure, and the means of remedying it, would become known only after the Bill had been enacted and commenced, and its provisions reviewed by the ONS. Consequently, the Scottish Government considers it prudent to have a general power that could be exercised flexibly in response to any issue that the ONS might identify. The Scottish Government does not consider that a more narrowly drawn power would provide such flexibility.*
55. *The Scottish Government would also draw the Committee’s attention to paragraph 28 of the Policy Memorandum and the commitment there to use the power under section 8 only for the purpose of further adjusting the Regulator’s functions to the extent necessary to secure reclassification.*
56. **The Committee asked the Scottish Government to explain why it is appropriate that section 8(1) enables the modification of the functions of the Regulator which relate to *social landlords*, which includes local authority landlords and local authorities providing housing services, in addition to RSLs. How is it anticipated the power would be used, in relation to social landlords apart from RSLs?**



57. *The Scottish Government responds as follows:*
58. *For the most part, sections 1-7 of the Bill amend provisions in the Housing (Scotland) Act 2010 in relation only to the powers that the Regulator may exercise over RSLs. The exception is section 1(2) of the Bill, which amends section 57 of the 2010 Act. That section gives the Regulator powers to appoint a manager to any social landlord – i.e. a RSL or local authority landlord. The Scottish Government concluded, in the interests of maintaining consistency in the regulation of the two classes of social landlord, that the effect of section 1(2) – to reduce the Regulator’s power to appoint a manager - should apply equally to all social landlords. In the event of it being necessary to use the power under section 8 to amend section 57, or any other section of the 2010 Act that also touched on the regulation of local authority landlords, the Scottish Government would want to be able to continue this approach by treating RSLs and local authority landlords consistently. Section 8(1) as drafted provides for that.*

### **Section 9 – power to reduce local authority influence over RSLs**

- **Power conferred on: the Scottish Ministers**
  - **Power exercisable by: Regulations**
  - **Parliamentary procedure: affirmative**
59. **The Committee asked why the Scottish Government has considered it appropriate to draw the scope of the powers in section 9 in a more general way, and whether the powers could be drawn more narrowly while at the same time implementing the policy intentions?**
60. *The Scottish Government responds as follows:*
61. *As described at paragraph 16 of the DPM, the Scottish Government envisages that the power may be required if, once the initial regulations have been made, new instances of local authority control over RSLs were to emerge. In such an eventuality, the power would be used to amend further the powers of local authorities that are described at section 9(1). In this context, therefore, the power is precautionary and needs to be drawn widely if it is to be capable of being used in circumstances that at present are unknown. Consequently, the Scottish Government does not consider that the power could be drawn more narrowly while at the same time serving its precautionary purpose.*
62. *The Scottish Government would also draw the Committee’s attention to paragraph 30 of the Policy Memorandum. As well as explaining the Scottish Government’s initial intentions for using the power at section 9, the paragraph confirms that the Scottish Government envisages using the power only if placing further limits on the influence of local authorities over RSLs became necessary to secure, or subsequently retain, reclassification.*
63. **Furthermore, the Committee asked the Scottish Government why has it been considered not appropriate to set out the initial intentions for the exercise of the power on the face of the bill, i.e., that the regulations may specify that local authorities may nominate up to a maximum of 24% of the board members of an RSL, and may not exercise forms of control over RSLs such as the power to veto changes in an RSL’s constitution?**

64. *The Scottish Government responds as follows:*
65. *Section 9(2) specifies the types of limit on the influence of local authorities over RSLs that may be included in regulations made under this section. The Scottish Government considers that it is appropriate to describe these types of limit on the face of the Bill and to provide the detail of its initial policy intentions in the DPM and the Policy Memorandum.*

