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

Non-Domestic Rates (Scotland) Bill : as amended at Stage 2



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on 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 14 and 28 January 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Non-Domestic Rates (Scotland) Bill as amended at Stage 2.
2. The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
3. This Government Bill was introduced by the Cabinet Secretary for Finance, Economy and Fair Work, Derek Mackay MSP, on 25 March 2019. The lead Committee is the Local Government and Communities Committee.
4. The Committee published its Stage 1 Report on the Bill on 27 March 2019.ⁱ In this, the Committee indicated a number of concerns.
5. The Bill completed Stage 2 on 4 December 2020. The Scottish Government lodged a Supplementary Delegated Powers Memorandum covering the new and revised delegated powers in the Bill after Stage 2.ⁱⁱ

ⁱ [Delegated Powers and Law Reform Committee, 36th Report 2019 \(Session 5\): Non-Domestic Rates: Stage 1](#)

ⁱⁱ [Non-Domestic Rates, Supplementary Delegated Powers Memorandum](#)

Bill Overview

6. The Bill is the legislative vehicle to deliver some of the recommendations of the “Barclay review” of non-domestic rates that require primary legislation. The report from the review was published in August 2017, with 30 individual recommendations on how the rates system could be reformed in Scotland.
7. The Bill is in 5 parts: the main operative provisions are in Parts 2 to 4. Part 2 makes a range of changes relating to the administration and enforcement of non-domestic rates. Part 3 includes powers to allow assessors and local authorities to require persons to provide information for the purpose of carrying out functions, such as valuing lands and heritages and sending out demands for payment of non-domestic rates. Part 4 gives Ministers regulation-making powers to prevent or minimize advantages gained from artificial non-domestic rates avoidance arrangements.

Delegated Powers

8. The Committee considered the Bill at its meeting on 14 January 2020 and determined that it was content with the following new or amended delegated powers:
 - Section 3A – Power of remove the exempt status of lands and heritages
 - Section 5B – Draft valuation roll and valuation notices
 - Section 7 – Appeals against entries in the valuation roll: procedure
 - Section 11 – Guidance on reduction or remission of rates for certain organisations
 - Section 13A – Electronic communication of information; and
Section 13B – Procedure for regulations under section 13A
 - Section 13C – Procedure for power to prescribe amount of non-domestic rates
 - Sections 18(10) – Power to make further provision about civil penalty notices
 - Section 19A – Payment of penalties into the Scottish Consolidated Fund
 - Section 21A – Penalties under section 20: enforcement
9. The Committee's Stage 1 report made a number of observations in relation to the ancillary powers provisions in the Bill as introduced. The Committee is content with the following amendments made at Stage 2 to the ancillary powers:
 - the removal of sections 19(7)(d) and 21(6)(d) of the Bill which addressed the Committee's concern about these powers to make provision ancillary to other provision.
 - the amendments made to section 29 at Stage 2 which clarify and appropriately restrict the scope of the ancillary power in this section.
10. The Committee agreed to seek further information from the Scottish Government in relation to the following provisions:
 - Section 7 – Proposals to alter valuation roll
 - Section 8C – Levying of rates
 - Section 9A – Contribution to net-zero emissions target: rates relief
 - Sections 23 and 27 – Power to make provision to prevent or minimise non-domestic rates avoidance and procedure for anti-avoidance regulations
11. The Committee reconsidered these powers at its meeting on 28 January 2020 after receiving a response from the Scottish Government to its questions. This correspondence can be found in the Annex.

12. The matters considered by the Committee, and its conclusions, are discussed below.

Section 7 – Proposals to alter valuation roll

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: Revised

Parliamentary procedure: Affirmative making provision about fees; otherwise negative

Provision

13. Section 7 of the Bill inserts new sections 3ZA and 3ZB into the Local Government (Scotland) Act 1975 (“the 1975 Act”). It sets a procedure for proprietors, tenants and occupiers to make proposals to assessors to alter the valuation roll (including the rateable value).
14. Section 7(4), inserting new section 3ZA(6) into the 1975 Act, allows Scottish Ministers by regulations to make provision about the period within which a proposal may be made; the form in which it is to be made; information to be included in, and documents to be submitted with, a proposal; notices to be given to the proposer by the assessor; and other matters in connection with a proposal that Ministers consider appropriate.
15. The regulations can make different provision for different purposes, and incidental, supplementary, consequential, transitional, transitory or saving provision.
16. At Stage 2 a non-government amendment (Alexander Stewart MSP) supported by the Minister for Public Finance and Digital Economy (Kate Forbes MSP) was agreed. Section 7(4) is amended to the effect that the power in new section 3ZA(6) now allows the regulations to make provision about fees payable in connection with a proposal (including provision about circumstances in which a fee may be repaid), among other things. Regulations containing provision about fees are subject to the affirmative procedure; but otherwise are subject to the negative procedure.

Committee Consideration

17. The Committee accepted at Stage 1 that this power covers relatively administrative matters, and that scrutiny of the regulations through the negative procedure could be suitable.
18. However, a similar power in section 3ZB(6) of the 1975 Act inserted by section 7(4) of the Bill is also relevant. The Bill as amended at Stage 2 now provides at new section 3ZB(6A) that before making regulations under that power about fees payable in connection with an appeal relating to a proposal, the Scottish Ministers must consult local authorities, assessors, representatives of the business sector and such other persons as they consider appropriate. Paragraph 14 of the Supplementary DPM explains that this extension to that power is seen as an opportunity to gather evidence on the impact appeal fees might have on organisations, individuals, the business sector and others.

19. The Committee asked the Scottish Government why there is no such consultation requirement in relation to the similar power in section 3ZA(6) of the 1975 Act in relation to the fees payable in respect of the initial proposal to alter an entry in the valuation roll.
20. The Scottish Government agreed that there should be a similar consultation requirement to maintain consistency and is considering an amendment to section 7 of the Bill to include this in new section 3ZA(6) of the 1975 Act.
21. The Scottish Government is also considering some minor drafting issues with the requirement in section 3ZB(6A) of the 1975 Act, as inserted by section 7 of the Bill. As currently drafted, the requirement is to consult before regulations are made. However, given that this consultation requirement applies in respect of fees regulations made under the affirmative procedure, the Scottish Government intends to lay an amendment at Stage 3 which would refer instead to the consultation requirement applying before regulations are laid in draft for approval.
22. The Committee welcomes the Scottish Government's proposals in relation to these issues.

Section 8C – Levying of rates

Power conferred on: Scottish Ministers

Power exercisable by: (1) regulations made by Scottish statutory instrument (new section 7ZA(1)); (2) order made by Scottish statutory instrument (new section 7ZA(3))

Revised or new power: Revised

Parliamentary procedure: (1) affirmative procedure; (2) no Parliamentary procedure

Provision

23. New section 8C of the Bill, which was agreed at Stage 2, inserts new section 7ZA into the 1975 Act. Section 7ZA(1) requires Scottish Ministers to make regulations making such provision as they consider appropriate with a view to giving full effect to section 7 of the 1975 Act as amended by the Bill as enacted, by the year 2024.
24. New section 7ZA(3) of the 1975 Act provides that if a rating authority do not choose to discharge their power under section 7, the “Scottish Minister” (sic) may prescribe a rate which will be the non-domestic rate to be levied throughout Scotland. This applies in respect of the financial year following that in which the power in section 7ZA(1) has come into force and each subsequent financial year.
25. Regulations made under new section 7ZA(1) of the 1975 Act are subject to the affirmative procedure. An order made under new section 7ZA(3) is laid before the Parliament but not subject to any parliamentary procedure.
26. Section 8C also repeals section 110 of the Local Government Finance Act 1992 (the “1992 Act”) and section 153 of the Local Government etc. (Scotland) Act 1994 (the “1994 Act”). Section 110 of the 1992 Act requires Scottish Ministers to set the

non-domestic rate to be levied throughout Scotland each financial year. Section 153 of the 1994 Act allows Scottish Ministers to prescribe in regulations the amount payable as non-domestic rate in accordance with prescribed rules.

Committee Consideration

27. This was a non-government amendment laid by Andy Wightman MSP. During the Stage 2 debate in the lead Committee he explained that in the 1990s the UK Government took away the non-domestic rate-setting power from local government and centralised the power with the Secretary of State for Scotland. The Scottish Ministers inherited the power by virtue of devolution. The purpose of the amendment is to hand the power to set the rate back to local authorities.
28. The change can take place as late as 2024. That allows four years for it to be implemented. Furthermore, proposed subsection (3) would allow any council that does not want to set the rate to ask Scottish Ministers to do so on its behalf.
29. The Supplementary DPM explains that section 8C was introduced “with the intention of devolving responsibility for setting the non-domestic rate to local authorities. It places a duty on Scottish Ministers to make regulations to effect that devolution.”
30. Section 7ZA of the 1975 Act makes reference to giving full effect to section 7 of the 1975 Act as amended by the Bill as enacted. However, the Bill does not appear to amend section 7 of the 1975 Act itself. The Committee therefore asked the Scottish Government whether the duty to make regulations is properly framed.
31. The Bill removes the provisions in section 110 of the 1992 Act and section 153 of the 1994 Act allowing Scottish Ministers to set the non-domestic rate. However, it does not appear to amend or remove the power in section 7B of the 1975 Act conferred on Scottish Ministers to set the non-domestic rate to be levied throughout Scotland each financial year. The Committee therefore also asked the Scottish Government whether section 7B of the 1975 Act should also be repealed in order to meet the intended policy outcome.
32. Furthermore, a power is conferred on Scottish Ministers in new section 7ZA of the 1975 Act, inserted by new section 8C(1) of the Bill, to set a non-domestic rate to be levied throughout Scotland, which would apply to a rating authority that does not propose to set a rate. However, it appears that the exercise of this power would not be subject to any parliamentary procedure. Contrastingly, the current power in section 7B of the 1975 Act is exercisable by order subject to negative procedure.
33. The Committee asked the Scottish Government for its view on whether no parliamentary procedure in relation to setting a default non-domestic rate offered sufficient opportunity for the Parliament to conduct oversight.
34. The Scottish Government agreed that there are various drafting issues with section 8C. It stated that it did not consider that section 8C as drafted implements the policy intention, and that, more generally, it did not support that policy intention. The Scottish Government said that it therefore intended to bring forward an amendment at Stage 3 to remove section 8C from the Bill.
35. More generally, the Scottish Government considered that the devolution of rate-setting to local authorities would require various amendments to existing legislation,

and that this ought to be the subject of consultation with stakeholders and full Parliamentary scrutiny. It considered that primary legislation rather than subordinate legislation would be more appropriate for this sort of change.

36. The Committee agrees with the Scottish Government that section 8C as drafted raises various technical issues.
37. The Committee is of the view that it would be inappropriate for subordinate legislation, rather than primary legislation, to devolve rate-setting to local authorities.
38. The Committee considers that it would be inappropriate that no parliamentary procedure would apply to regulations made by the Scottish Ministers in new section 7ZA(3) of the 1975 Act to set a default rate that would apply where a rating authority does not set its own rate.
39. The Committee notes that the Scottish Government has lodged an amendment removing section 8C at Stage 3.

Section 9A – Contribution to net-zero emissions target: rates relief

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: New

Parliamentary procedure: Affirmative procedure

Provision

40. New section 9A of the Bill, which was agreed at Stage 2, inserts new section 153(3)(c) into the “1994 Act” (i.e. the Local Government etc. (Scotland) Act 1994). This extends the power of the Scottish Ministers to prescribe the amount of non-domestic rates by allowing them to prescribe rules setting out different categories of contribution to the net-zero emissions target, including through investment in district heating.
41. As a result of new section 13C of the Bill, the regulations made under this power would be subject to the affirmative procedure.

Committee Consideration

42. Section 8C(3) of the Bill purports to repeal section 153 of the 1994 Act. New section 9A would therefore be inserting text into section 153 which no longer exists. The Committee asked the Scottish Government about this contradictory provision.
43. In its response, the Scottish Government agreed that section 8C(3) makes provision that appears to contradict other provisions in the Bill. As noted above, the Scottish Government has lodged an amendment to remove section 8C in its entirety.

44. The Committee again notes the Scottish Government’s Stage 3 amendment to remove section 8C from the Bill. If the amendment is agreed to by the Parliament this would have the effect of ensuring that section 153 of the 1994 Act is not repealed.
45. In its response on this issue, the Scottish Government also indicated that it does not support section 13C of the Bill and intends to bring forward an amendment at Stage 3 to remove it.
46. Section 13C applies the affirmative procedure to regulations made under section 153 of the 1994 Act. The negative procedure currently applies to such regulations.
47. The Committee recognises that there will be instruments made under the power in section 153 that make provision which is relatively minor in nature. However, regulations under this power are also capable of making provision for significant public expenditure. For example, as was observed in the Stage 2 debate on this Bill, the Non-Domestic Rates (Levying) (Scotland) Regulations 2019 were made under section 153 of the 1994 Act, subject to the negative procedure, and provided for this financial year’s small business bonus scheme, which it is understood amounted to £270 million of public expenditure.
48. The Committee therefore welcomes the change made by section 13C of the Bill as it would apply the affirmative procedure to regulations that are capable of making provision for significant public expenditure.

Sections 23 and 27 – Power to make provision to prevent or minimise non-domestic rates avoidance and procedure for anti-avoidance regulations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: Revised

Parliamentary procedure: Enhanced form of affirmative

Provision

49. Part 4 of the Bill confers power on Scottish Ministers to make “anti-avoidance regulations”. Such provision as is considered appropriate may be made with a view to preventing or minimising “advantages” arising from “non-domestic rates avoidance arrangements” that are “artificial”. Those quoted terms are defined in the Bill, but the measures to counter the avoidance of rates would be left to the regulations.
50. Section 23(3) enables regulations to modify enactments (except for Part 4 itself), to make different provision for different purposes, and to make ancillary provision.
51. Section 27 sets out the procedure where draft regulations are proposed. Ministers must consult such persons representing local authorities or assessors as considered appropriate and may consult more generally. The consultation must be

accompanied by proposed regulations, and the Parliament must be notified of the consultation (subsection (4)).

52. After having regard to consultation representations, when laying the draft regulations, Ministers must submit an explanatory document explaining why they consider it appropriate to make the regulations, details of the consultation, representations made, and changes (if any) made to the proposed regulations as a result.
53. An amendment was agreed at Stage 2 which provides that the Scottish Ministers must, as soon as reasonably practicable after consultation has begun, notify the Scottish Parliament about the consultation.

Committee Consideration

54. In its Stage 1 report, the Committee recommended that the Scottish Government considers how further specification could be provided in section 23 of the types of provision that may be made in anti-avoidance regulations.
55. This proposed power can be contrasted with sections 66 to 71 of the Revenue Scotland and Tax Powers Act 2014 (“the 2014 Act”), which apply to the devolved taxes which are the subject of that Act. These sections do not provide for delegated powers, but instead specify the powers of Revenue Scotland to counter tax advantages, and how court or tribunal proceedings in relation to tax avoidance arrangements are to be conducted.
56. The Committee noted in its Stage 1 report that the Scottish Government had indicated in [correspondence to the Committee \(28 May 2019\)](#) that the types of provision which could be made under this power may include provision:
 - for the calculation of a single assessment of a ratepayer’s liability;
 - about when a relief should be made available or withdrawn;
 - for resetting periods for reliefs, and
 - for how local authorities could treat arrangements that involve unreasonable business conduct.
57. In its Stage 1 report, the lead Committee asked the Scottish Government to respond to the Delegated Powers and Law Reform Committee’s view that there should be more specification as to the parameters of the power in section 23 on the face of the Bill.
58. Section 23 was not amended at Stage 2. The Scottish Government’s [response to the Committee \(27 October 2019\)](#) argued that Revenue Scotland as a non-Ministerial department of the Scottish Government operates in a different way from how the Scottish Government (and the Barclay Review) envisage anti-avoidance being tackled through the provisions in Part 4 of the Bill.
59. The Scottish Government argued that it is neither appropriate nor possible to proceed in the way envisaged under the 2014 Act. It explained that the power has been drafted by reference to what the aim of anti-avoidance regulations must be; i.e. to prevent or minimise advantages arising from non-domestic rates avoidance

arrangements that are artificial. It states that specifying types of provision risks unintended effects on the breadth that this power is intended to confer. The Scottish Government's position is that the breadth should be controlled through the scrutiny arrangements set out in section 27; i.e. a form of super-affirmative procedure.

60. The Committee sought further information from the Scottish Government on why it is considered not "possible" to provide further specification of the scope of the power to make anti-avoidance regulations on the face of section 23 of the Bill without prejudice to the breadth of the power overall.
61. The Scottish Government maintained its position that it would be inappropriate to make further specification about the type of provision that can be made in anti-avoidance regulations under section 23. It argued that the only effect of setting examples on the face of the Bill would be to limit the scope of such a wide power, rather than, as could be the case with a narrower power, clarifying that provision of the sort set out in the examples could be made. In its view it would be inappropriate to narrow the scope of the power.
62. The response also reiterates that the definitions contained in sections 24 to 26 govern the use of the power in section 23; i.e. there has to be an "advantage", that obtaining an advantage is the main purpose of the "arrangement", and that the avoidance arrangement must be "artificial".
63. The Scottish Government referred to additional constraints on the power. This includes that the Scottish Ministers can only act where they consider it is appropriate to do so, the application of a super-affirmative procedure, and the requirement to notify the Parliament when Scottish Ministers begin consulting on anti-avoidance regulations.

64. The Committee is to some extent reassured that a form of super-affirmative procedure applies to the power to make anti-avoidance regulations in section 23. However, it remains concerned that this power is particularly broad in its scope, particularly where regulations may make such provision as is considered appropriate, rather than such provision as is considered necessary.
65. More generally, the Committee considers that any delegation of power should, as a matter of principle, be strictly defined in order to ensure that an appropriate balance is struck between the Parliament's power to legislate and powers exercisable by Scottish Ministers.

66. The Committee also reported at Stage 1 that section 27(4) could be made clearer by providing that the Parliament must be notified when the Scottish Ministers begin the consultation.
67. The Scottish Government accepted this recommendation. An amendment was agreed at Stage 2 which provides that the Scottish Ministers must, as soon as reasonably practicable after consultation on anti-avoidance regulations has begun, notify the Scottish Parliament about the consultation.

68. The Committee welcomes the amendment to section 27(4) of the Bill agreed at Stage 2.

Annex

Letter to the Scottish Government

Non-Domestic Rates (Scotland) Bill at Stage 2

The Delegated Powers and Law Reform Committee considered the above Bill on 14 January 2020 and seeks an explanation of the following matters:

Section 7 – Proposals to alter valuation roll

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: Revised

Parliamentary procedure: Affirmative making provision about fees; otherwise negative

Section 7(4) inserts sections 3ZA and 3ZB(6) into the Local Government (Scotland) Act 1975 (“1975 Act”).

The Bill as amended at Stage 2 now provides at new section 3ZB(6A) that before making regulations under that power about fees payable in connection with an appeal relating to a proposal, the Scottish Ministers must consult local authorities, assessors, representatives of the business sector and such other persons as they consider appropriate. There is no such requirement in relation to the similar power in new section 3ZA(6) (relating to the fees payable in respect of the initial proposal to alter an entry in the valuation roll).

1. Does the Scottish Government consider that, to maintain consistency with the powers in new sections 3ZB(6) and (6A) of the 1975 Act, there should be a requirement on Scottish Ministers to consult local authorities, assessors, representatives of the business sector and such other persons as they consider appropriate in respect of the power to make regulations about the procedure for proposals in new section 3ZA(6) of the 1975 Act?

Section 8C – Levying of rates

Power conferred on: Scottish Ministers

Power exercisable by: (1) regulations made by Scottish statutory instrument (new section 7ZA(1)); (2) order made by Scottish statutory instrument (new section 7ZA(3))

Revised or new power: Revised

Parliamentary procedure: (1) affirmative procedure; (2) no Parliamentary procedure

Section 7ZA of the 1975 Act (inserted by section 8C of the Bill) makes reference to giving full effect to section 7 of the 1975 Act as amended by the Bill as enacted. However, the Bill does not appear to amend section 7 of the 1975 Act itself.

1. Does the Scottish Government consider that the duty to make regulations in new section 7ZA(1) of the 1975 Act, inserted by section 8C of the Bill, is properly framed insofar as it makes reference to giving full effect to section 7 of the 1975 Act as amended by the Bill as enacted, despite the Bill not amending section 7 of the 1975 Act?

The Bill removes the provisions in section 110 of the 1992 Act and section 153 of the 1994 Act allowing Scottish Ministers to set the non-domestic rate. However, it does not appear to amend or remove the power in section 7B of the 1975 Act conferred on Scottish Ministers to set the non-domestic rate to be levied throughout Scotland each financial year.

1. Does the Scottish Government consider that section 7B of the 1975 Act should be explicitly repealed in order to meet the intended policy outcome?

A power is conferred on Scottish Ministers in new section 7ZA of the 1975 Act, inserted by new section 8C(1) of the Bill, to set a non-domestic rate to be levied throughout Scotland, which would apply to a rating authority that does not propose to set a rate. However, it appears that the exercise of this power would not be subject to any parliamentary procedure.

1. Does the Scottish Government consider that this affords the Parliament sufficient opportunity to conduct oversight of such provision, particularly where an order under section 7B of the 1975 Act is subject to the negative procedure?

Section 9A – Contribution to net-zero emissions target: rates relief

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: New

Parliamentary procedure: Affirmative procedure

Section 9A inserts text into section 153 of the Local Government etc. (Scotland) Act 1994 (“the 1994 Act”). However, section 8C(3) of the Bill purports to repeal section 153 of the 1994 Act. New section 9A would therefore be inserting text into section 153 which no longer exists.

1. Does the Scottish Government consider that section 8C(3) of the Bill makes provision that is contradictory to the amendment to section 153 of the Local Government etc. (Scotland) Act 1994 made by section 9A (and contradictory to section 13C, which applies the affirmative procedure to regulations made under section 153 of the 1994 Act) insofar as section 8C(3) of the Bill repeals section 153 of the 1994 Act?

Sections 23 and 27 – Power to make provision to prevent or minimise non-domestic rates avoidance and procedure for anti-avoidance regulations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: Revised

Parliamentary procedure: Enhanced form of affirmative

The Committee welcomes the amendment to section 27(4) of the Bill agreed at Stage 2 to make it clearer that the Parliament must be notified of the consultation on anti-avoidance regulations when the Scottish Ministers begin the consultation.

Although the Committee is to some extent reassured that a form of super-affirmative procedure applies to the power to make anti-avoidance regulations in section 23, it nevertheless remains concerned that this power is particularly broad in its scope.

The Committee would appreciate further explanation, following the Scottish Government's response to the Committee's Stage 1 report (27 October 2019), on the reasons why it is considered not possible to provide further specification in section 23 of types of provision that could be made in anti-avoidance regulations. The response indicates that "specifying types of provision risks unintended effects on the breadth that this power is intended to give".

The Scottish Government's response (28 May 2019) to the Committee's Stage 1 questions on the delegated powers in the Bill set out examples of the sort of provision that could be made in anti-avoidance regulations under the power in section 23(1); e.g., provision about calculation of a single assessment of the taxpayer's liability, when a relief should be made available or withdrawn, reset periods for reliefs and the way in which local authorities can treat arrangements that involve unreasonable business conduct.

1. Please consider whether section 23 could be amended to set out examples of types of provision that could be made in anti-avoidance regulations, without prejudice to the breadth of the power overall.

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on Monday 20 January 2020.

Thank you.

Response from the Scottish Government

Delegated Powers and Law Reform Committee

Non-Domestic Rates (Scotland) Bill: Stage 2

Thank you for your letter of 14 January 2020 to my colleague James Hynd, Head of Cabinet, Parliament and Governance Division within the Scottish Government regarding the Committee's consideration of the above Bill on 14 January.

The Scottish Government would like to respond to the matters raised in the Committee's letter as set out below:

Section 7 – Proposals to alter valuation roll

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: Revised

Parliamentary procedure: Affirmative making provision about fees; otherwise negative

1. Does the Scottish Government consider that, to maintain consistency with the powers in new sections 3ZB(6) and (6A) of the 1975 Act, there should be a requirement on Scottish Ministers to consult local authorities, assessors, representatives of the business sector and such other persons as they consider appropriate in respect of the power to make regulations about the procedure for proposals in new section 3ZA(6) of the 1975 Act?

The Scottish Government agrees that, to maintain consistency, there should be a similar requirement to that in section 3ZB(6) inserted into section 3ZA(6) of the 1975 Act, and is considering an amendment to achieve that effect. The Scottish Government is also considering some minor drafting issues with the requirement in section 3ZB(6A), such as whether it should apply before regulations are laid in draft for approval made, rather than before regulations are made.

Section 8C – Levying of rates

Power conferred on: Scottish Ministers

Power exercisable by: (1) regulations made by Scottish statutory instrument (new section 7ZA(1)); (2) order made by Scottish statutory instrument (new section 7ZA(3))

Revised or new power: Revised

Parliamentary procedure: (1) affirmative procedure; (2) no Parliamentary procedure

2. Does the Scottish Government consider that the duty to make regulations in new section 7ZA(1) of the 1975 Act, inserted by section 8C of the Bill, is properly framed insofar as it makes reference to giving full effect to section 7 of the 1975 Act as amended by the Bill as enacted, despite the Bill not amending section 7 of the 1975 Act?

3. Does the Scottish Government consider that section 7B of the 1975 Act should be explicitly repealed in order to meet the intended policy outcome?

4. Does the Scottish Government consider that this affords the Parliament sufficient opportunity to conduct oversight of such provision, particularly where an order under section 7B of the 1975 Act is subject to the negative procedure?

In relation to questions 2 to 4, the Scottish Government agrees that there are substantial difficulties with the drafting of this provision.

The Scottish Government does not support the policy underlying this section, nor does it consider that the section as drafted properly implements that policy. The Scottish Government intends to bring forward a Stage 3 amendment to remove section 8C from the Bill.

To effect devolution of rate-setting to local authorities would require a series of amendments to existing legislation, which the Scottish Government considers ought to be the subject of consultation with stakeholders and full Parliamentary scrutiny, including the taking of evidence on both the principle of the proposal and the detail of how it might be effected, if thought desirable. Primary legislation would seem appropriate, rather than subordinate legislation.

Section 9A – Contribution to net-zero emissions target: rates relief

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: New

Parliamentary procedure: Affirmative procedure

5. Does the Scottish Government consider that section 8C(3) of the Bill makes provision that is contradictory to the amendment to section 153 of the Local Government etc. (Scotland) Act 1994 made by section 9A (and contradictory to section 13C, which applies the affirmative procedure to regulations made under section 153 of the 1994 Act) insofar as section 8C(3) of the Bill repeals section 153 of the 1994 Act?

The Scottish Government agrees that section 8C(3) makes provision that appears to contradict other provisions in the Bill. In addition to proposing an amendment to remove section 8C from the Bill, as mentioned above, the Scottish Government does not support section 13C and intends to bring forward an amendment at Stage 3 to remove it from the Bill.

Sections 23 and 27 – Power to make provision to prevent or minimise non-domestic rates avoidance and procedure for anti-avoidance regulations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Revised or new power: Revised

Parliamentary procedure: Enhanced form of affirmative

6. Please consider whether section 23 could be amended to set out examples of types of provision that could be made in anti-avoidance regulations, without prejudice to the breadth of the power overall.

The Scottish Government has considered again whether further specification can be provided in section 23 as to the types of provision that could be made in anti-avoidance regulations, without prejudice to the breadth of the overall power. The Scottish Government remains of the view that this would be inappropriate. Specifying examples of types of provision risks narrowing the breadth that this power is intended to provide, to address whatever artificial avoidance arrangements are identified. The Scottish Government regards the broad scope of the power as sufficiently controlled through: -

- the criteria provided in sections 24 to 26 that govern its use (see section 23(1)),
- the requirement that the Scottish Ministers notify the Parliament when they begin consultation on anti-avoidance regulations, and
- the potential for detailed scrutiny by the Parliament that is provided by the super-affirmative procedure

The risk of specifying potential uses is that it may be argued to reduce the ways in which the power can be used, by persons who have an interest in preventing its use. Indeed, it is difficult to see what other purpose specifying potential uses could serve; if it does not narrow the power then there is no reason to provide examples. For a narrow power

examples could serve to clarify that particular uses are within its scope, but for a broad power the opposite must be the effect. Here, the design of the provisions is based on the criteria in sections 24 (that there be an “advantage”), 25 (that obtaining an advantage is the main purpose of the “arrangement”) and 26 (that the avoidance arrangement be “artificial”).

In addition, the Scottish Ministers must consider it appropriate to make the regulations, and the Scottish Government would expect that the Parliament would take a close interest in its reasons for reaching that view.

