



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 21 November 2024  
SP Paper 691  
69th Report, 2024 (Session 6)

## Delegated Powers and Law Reform Committee

# Legislative Consent Memorandum: delegated powers relevant to Scotland in the Renters' Rights Bill



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

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# Delegated Powers and Law Reform Committee

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;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

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



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# Committee Membership



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**Jeremy Balfour**  
Scottish Conservative  
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**Roz McCall**  
Scottish Conservative  
and Unionist Party



**Daniel Johnson**  
Scottish Labour

# Introduction

1. At its meetings on 29 October<sup>i</sup> and 19 November<sup>ii</sup> 2024, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers that are exercisable within devolved competence in the [Renters' Rights Bill](#) ("the Bill").
2. The Committee considered the Legislative Consent Memorandum ("LCM") for the Bill by virtue of Rule 9B.3.6 of the Scottish Parliament's Standing Orders. Paragraph 6 of Rule 9B.3 provides that where the Bill that is subject to an LCM contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Committee shall consider and may report to the lead committee on those provisions.
3. The Committee also considered the LCM in terms of the Committee's wider remit contained in Rule 6.11.1(b) of the Standing Orders which provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various bills over the course of sessions 5 and 6.

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<sup>i</sup> Rona MacKay MSP substituted for Bill Kidd MSP at this meeting.

<sup>ii</sup> Roz McCall MSP submitted apologies for this meeting.

# Overview of the Bill

4. The Bill makes provision about the private rented sector and tenancies.
5. It was introduced in the House of Commons on 11 September 2024. It is currently at Committee stage, which began on 22 October 2024. As the Bill is still progressing through the UK Parliament, it is subject to amendment. The Committee may therefore need to consider a supplementary LCM in due course.
6. The Bill contains some of the same provisions as a previous bill, the Renters (Reform) Bill, which was introduced by the previous UK administration but which fell at the end of the UK parliamentary session in May 2024.<sup>iii</sup> The Committee had begun its consideration of the relevant powers in that bill before it fell: the Committee had considered its approach on 14 May 2024, had been content with the majority of the powers, and had asked for more information from the Scottish Government in relation to two of the powers (see the [questions](#) to the Scottish Government of 15 May 2024 and the [response](#) of 22 May 2024).
7. Like the previous bill, most of the current Bill applies only to England, but some of it applies to Scotland and/or Wales. The following provisions apply to Scotland:
  - prohibiting discrimination against tenants who receive benefits or are with children in letting private sector properties (Part 1, Chapter 5); and
  - some of the general provisions in Part 5 (being consequential, transitional and commencement powers).
8. These provisions relate to housing, which is within the legislative competence of the Scottish Parliament.
9. The Scottish Government supports the Bill and recommends consent to the relevant provisions.<sup>iv</sup> The LCM states that the policy intention for the rental discrimination provisions (in Chapter 5 of Part 1 of the Bill) is to prohibit discrimination and restrictions against people with children, or people in receipt of benefits, in the letting of private rented sector properties. It states that this policy intent aligns with the Scottish Government's work on rented sector reform and will provide an important element of protection to these vulnerable groups in the private rented sector.
10. The lead committee for the LCM is the Local Government, Housing and Planning Committee.

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iii The previous Bill is available here: [Renters \(Reform\) Bill](#). It was initially introduced on 17 May 2023 and then carried over into the 2023/2024 session on 8 November 2023, but fell in May 2024 having not completed its passage before the UK Parliament was dissolved ahead of the General Election. The previous Bill did not extend to Scotland originally, but was amended at Committee stage in December 2023 to include provisions extending to Scotland.

iv being clauses 49, 52, 54, 137, 139, 142 and 145.

# Delegated Powers

11. The powers in the Bill which are relevant to this Committee's remit are contained in Part 1, Chapter 5 (rental discrimination, Scotland) and Part 5 (General).
12. The Bill confers six powers on the Scottish Ministers. It also confers one power on the Secretary of State which may be exercised within the Scottish Parliament's legislative competence. The relevant powers are as follows, and each is considered in the next section of the report:
  - Clause 49(2) inserting section 6A(3)(b) (Offence of discriminating in relation to **children**) into the Private Housing (Tenancies) (Scotland) Act 2016 - power for Scottish Ministers to extend the exemptions;
  - Clause 49(2) inserting section 6B(3)(b) (Offence of discriminating in relation to **benefits status**) into the Private Housing (Tenancies) (Scotland) Act 2016 - power for Scottish Ministers to extend the exemptions;
  - Clause 52 - power of the Scottish Ministers to protect others;
  - Clause 139 – power of Scottish Ministers to make provision consequential on Chapter 5 of Part 1 (Discrimination relating to children or benefits status: Scotland);
  - Clause 140 - power of the Secretary of State to make consequential provision;
  - Clause 142(4) – power of Scottish Ministers to commence Chapter 5 of Part 1; and
  - Clause 145(2) – power of Scottish Ministers to make transitional provision in connection with the commencement of Chapter 5 of Part 1.
13. The UK Government has published a [Delegated Powers Memorandum](#) (“DPM”) to accompany the Bill. The DPM explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected.
14. As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government's view on the relevant clauses is set out in the LCM.



# Review of relevant powers

## Part 1: Tenancy reform

### Chapter 5: Discrimination relating to children or benefits status: Scotland

#### Clause 49(2): Inserts section 6A (Offence of discriminating in relation to children) into the Private Housing (Tenancies) (Scotland) Act 2016

#### Section 6A(3)(b): power to extend the exemptions

#### Power conferred on: Scottish Ministers

#### Power exercisable by: Regulations

#### Parliamentary procedure: Negative

#### Provision

15. Clause 49(2) creates a criminal offence of discriminating against prospective tenants with children who would live with or visit them, for which landlords and anyone acting directly or indirectly on their behalf may be fined, on summary conviction. The provision is inserted as new section 6A of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”).
16. New section 6A(2) of the 2016 Act provides that it is a defence for a prospective landlord or party acting on their behalf to show that the conduct is a proportionate means of achieving a legitimate aim, or that the property is insured under a contract of insurance granted before the new rules come into force, and which prohibits the use of the property by that category of person.
17. There is an exemption under section 6A(3)(a) for any person who only engages in one or more of the activities explicitly listed in subsection (3)(a), such as publishing adverts in newspapers or on online platforms. The effect of the exemption is that such conduct is not an offence. Section 6A(3)(b) confers power on the Scottish Ministers to extend that list of exemptions by regulations.
18. This power is augmented by a general “add-on” power in clause 137 which provides that all the powers in the Bill (except for those in the General part) include power to make consequential, supplementary, incidental, transitional or saving provision; and that the power to make transitional provision includes power to make retrospective provision so that the regulations apply (with or without modifications) to tenancies that were entered into, or advertising that was begun, before the regulations come into force.

#### Committee consideration

19. The DPM explains that the policy intention in exempting the activities listed in subsection (3)(a) is to ensure that third parties who provide intermediary services, such as online platforms that disseminate advertisements, but are not otherwise involved in the letting of a property can continue to operate without fear of prosecution. The power under subsection (3)(b) to exempt additional conduct from the ‘no children’ rental discrimination prohibitions is being conferred to enable these

provisions to adapt to changing market practices, to avoid inadvertently making third party platforms liable for rental discrimination breaches.

20. According to the DPM and the LCM, the negative procedure is considered to be appropriate because the power can only be used to exclude further categories of persons from the criminal offence. It cannot be used to extend liability for the offence.
21. Given that the power is limited to exempting additional types of activity from the criminal offence, and that details of the policy intention have been provided, the Committee considers this power and the choice of parliamentary procedure to be acceptable.

**22. The Committee is content with the power conferred on the Scottish Ministers in principle and that it is subject to the negative procedure.**

**Clause 49(2): Inserts section 6B (Offence of discriminating in relation to benefits status) into the Private Housing (Tenancies) (Scotland) Act 2016**

**Section 6B(3)(b): power to extend the exemptions**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations**

**Parliamentary procedure: Negative**

**Provision**

23. This power is the counterpart of the power immediately above. The power immediately above created an offence of discriminating against people with children, and the present power creates an offence of discriminating against those in receipt of benefits.
24. Accordingly, clause 49(2) creates a criminal offence relating to discrimination against prospective tenants who receive social security benefits, for which landlords and anyone acting directly or indirectly on their behalf may be fined, on summary conviction. The provision is inserted as new section 6B of the 2016 Act.
25. Under new section 6B(2), it is a defence for a prospective landlord or party acting on their behalf to show that the property is insured under a contract of insurance granted before the new rules come into force, and which prohibits the use of the property by that category of person.
26. Once again, there is an exemption under section 6B(3)(a) for any person who only engages in one or more of the activities explicitly listed in subsection (3)(a), such as publishing adverts in newspapers or on online platforms. Section 6B(3)(b) confers power on the Scottish Ministers to extend that list of exemptions, by regulations.
27. This power is augmented by a general “add-on” power in clause 137, as above.

**Committee consideration**

28. The justification given in the DPM and LCM for taking the power in section 6B(3)(b), and for the choice of procedure, are identical for those given in relation to section 6A(3)(b), discussed above. Accordingly, the Committee considers the power to be acceptable in principle and to be content with the choice of procedure.

- 29. The Committee is content with the power conferred on the Scottish Ministers in principle and that it is subject to the negative procedure.**

## **Clause 52: Power of the Scottish Ministers to protect others**

### **Power conferred on: Scottish Ministers**

### **Power exercisable by: Regulations**

### **Parliamentary procedure: Affirmative**

### **Provision**

30. Clause 52 confers power on the Scottish Ministers to make provision to extend the protections for prospective tenants with children or in receipt of benefits to persons of another description. The power is exercisable by regulations subject to the affirmative procedure,
31. The power is limited to making provision which it would be within the legislative competence of the Scottish Parliament to make. Accordingly the power may be used to extend the provisions in Chapter 5 of Part 1 relating directly to tenancies and tenancy agreements, as these relate to the matter of housing. However it could not be used to extend the provisions relating to insurance contracts and standard securities, as these are reserved matters. Power to extend the protections which relate to reserved matters in Scotland is instead conferred on the Secretary of State, by clause 53.
32. The new power includes a consultation requirement, under which the Scottish Ministers must consult such persons as they consider appropriate before making regulations (see 'Committee consideration' below).
33. The power is a Henry VIII power, in that it can be used to amend existing legislation, including the Bill itself (once enacted) and other primary legislation.
34. The "add on" in clause 137 applies also here, with the result that this power also includes power to make consequential, supplementary, incidental, transitional or saving provision, and the power to make transitional provision includes power to make retrospective provision (by providing for regulations to apply in relation to tenancies entered into before the regulations come into force).

### **Committee consideration**

35. The DPM explains the UK Government's justification for taking the power: to allow flexibility of the rental discrimination provisions in response to future developments and changing market practices within the private rented sector. The UK Government considers that it may become necessary to protect other cohorts (descriptions of persons) under the provisions of the Bill, if the Scottish Ministers

find that landlords or agents are engaging in discriminatory conduct against cohorts of people other than those with children or in receipt of benefits.

36. The equivalent power in the previous bill was clause 50. The new clause differs from clause 50 in two respects, as follows (*consultation* and *removal of the power to modify*).

#### *Consultation*

37. The previous clause did not contain any consultation requirement. In its letter of 15 May 2024, the Committee asked the Scottish Government about its plans for consultation on any exercise of this power given that it enables (among other things) the extension of criminal offences, and what consideration had been given to asking the UK Government to add such a requirement on to the face of the Bill. In its response of 22 May 2024 the Scottish Government did not commit to seeking the addition of a consultation requirement into the previous clause. However, one has been included in the new clause.
38. The new consultation requirement is standard (to consult such persons as the Scottish Ministers consider appropriate) and the Committee is content with it, particularly given that the power is now significantly narrower than before (for the reasons set out next). The Committee welcome that a consultation requirement has now been included.

#### *Removal of the power to modify*

39. Under the power in the previous bill, the protections provided by the bill could be modified, with the result that the protections and any new offences provided in regulations need not have been in the same terms as those in the bill. This ability to modify has not been included in the new clause, with the result (as the DPM says) that the type of discriminatory behaviours which are provided for in regulations in relation to new groups of people must mirror the behaviours that are already prescribed in the Bill in relation to the existing groups (renters with children and/or who are in receipt of benefits). In other words, the power is now limited to including new groups of people in the existing protections contained in the Bill, and the power cannot be used to modify those protections as they apply to new groups (at least not beyond what is possible under the add-on power in section 137).
40. Considering the new power as a whole, the Committee considers that while this remains a relatively wide power to extend the protection afforded against rental discrimination by private landlords or letting agents to any description of persons, and to create corresponding criminal offences, there is a reasonable justification that it is necessary to avoid new primary legislation being required in order to adapt to the legislation to changes in discriminatory practices which may emerge in the future. Further, the power has been significantly narrowed since the previous version by the removal of the power to modify. The ability to amend primary legislation, including the Act itself, is necessary here so that the objective of the clause can be achieved: to add new offences in to the Act.
41. On the choice of procedure, the UK Government's position is that the affirmative procedure is needed to ensure adequate scrutiny and consensus in relation to this power to widen the purview of rental discrimination, particularly given that it will be used to amend primary legislation. The DPM notes that the question for debate is

limited solely to whether the additional cohort of renters should be given the same protections as those with children or on benefits (this is now the case following the removal of the power to modify). The affirmative procedure provides the opportunity for debate before subjecting landlords and letting agents to expanded regulation and the risk of committing an offence. The Committee agrees that the affirmative procedure is appropriate.

**42. The Committee is content with the power conferred on the Scottish Ministers in principle and that it is subject to the affirmative procedure.**

**43. The Committee welcomes that the power is subject to a consultation requirement.**

## **Part 5: General**

### **Clause 139: Power of Scottish Ministers to make consequential provision**

#### **Power conferred on: Scottish Ministers**

#### **Power exercisable by: Regulations**

#### **Parliamentary procedure: Negative procedure unless the power is exercised to modify primary legislation, in which case affirmative procedure**

#### **Provision**

44. This clause confers a power on the Scottish Ministers to make further consequential amendments which arise from Chapter 5 of Part 1 of the Bill (the rental discrimination provisions), within the legislative competence of the Scottish Parliament. Regulations that make consequential provision may amend, repeal or revoke any legislation passed before this Bill or later in the same Parliamentary session. They may also make supplementary, incidental, transitional or saving provision, and any transitional provision may provide for the regulations to apply in relation to tenancies entered into before the regulations come into force.
45. Any regulations that amend or repeal primary legislation are subject to the affirmative procedure. Other regulations under this clause are subject to the negative procedure.

#### **Committee consideration**

46. The DPM states that the power is limited to making provision which is consequential on Chapter 5 of Part 1. It explains the UK Government's view that it is not possible to establish in advance all consequential provision that may be required. A power is needed to avoid any legal uncertainty or legal gaps after the Act comes into force, and it is normal practice to include such a power in these terms.
47. The DPM also notes that the parliamentary procedure for a Henry VIII consequential power such as this is in line with usual practice, with any amendments to primary legislation being subject to the affirmative procedure, and the negative procedure applying otherwise.

48. The Committee is content that it is normal practice to include a consequential power of this nature in Bills, and that there appears to be adequate justification for it. The Committee is also content that the power is conferred on the Scottish Ministers.

**49. The Committee is content with the power conferred on the Scottish Ministers in principle, and that it is subject to the affirmative procedure where amending primary legislation, and otherwise to the negative procedure.**

## **Clause 140: Power of the Secretary of State to make consequential provision**

### **Power conferred on: the Secretary of State**

### **Power exercisable by: Regulations**

### **Parliamentary procedure: Negative procedure unless the power is exercised to modify primary legislation, in which case affirmative procedure**

### **Provision**

50. Clause 140 confers on the Secretary of State a regulation-making power to make further consequential amendments which arise from any provision of the Bill, including provision within the legislative competence of the Scottish Parliament. Regulations that make consequential provision may amend, repeal or revoke an enactment passed before this Bill or later in the same Parliamentary session. They may also make supplementary, incidental, transitional or saving provision, and any transitional provision may provide for the regulations to apply in relation to tenancies entered into before the regulations come into force.

51. Any regulations that amend or repeal primary legislation are subject to the affirmative procedure. Other regulations under this clause are subject to the negative procedure.

### **Committee consideration**

52. When considering the same proposed power in the previous bill (clause 135), the Committee noted that it appears to overlap with the equivalent power for Scottish Ministers to make consequential provision<sup>v</sup>. Specifically, it appears to confer a concurrent power on the Secretary of State to make provision which could also be made by the Scottish Ministers under that power, consequential on provision in Chapter 5 of Part 1 of the Bill. However, neither the DPM nor the LCM mention the concurrent nature of the power. The Committee therefore **asked** the Scottish Government about the policy intention and about the appropriateness of having a concurrent consequential power and to help understand why a different approach has been adopted for this ancillary power.

53. The Committee considered the Scottish Government's **response** at its meeting of 29 October 2024. It accepted the Scottish Government's explanation for the appropriateness of taking the concurrent power in the previous bill. However, given that that bill fell at dissolution, the Committee agreed to seek confirmation that the

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<sup>v</sup> That power was in clause 134 of the previous bill, and is in clause 139 of the current Bill.

Scottish Government's position remains the same in respect of the power in the new Bill.

54. Accordingly the Committee **asked** the Scottish Government:

” Given that this is a new bill, introduced following a change in UK Government, the Committee asks:

- whether the Scottish Government's position in respect of the appropriateness of the power as conferred on the Secretary of State is the same as in relation to the previous bill;
- whether it remains the Scottish Government's understanding that consequential provision will not be made by the Secretary of State except at the express request of the Scottish Government; and
- whether the Scottish Government will agree to notify the Parliament of any request to the UK Government to exercise the power to make provision within the Scottish Parliament's legislative competence.

55. The Scottish Government **responded**:

” Whilst there have been some small adjustments to the relevant provisions between the previous Bill and the Renters' Rights Bill, the provision relating to Scotland (including the extension of clause 140 to Scotland) has been included at the Scottish Government's request.

[...]

Therefore, the Scottish Government's position remains the same as in relation to the previous Bill: namely, that it is appropriate to confer such power on the Secretary of State.

As this provision has been extended to Scotland at the Scottish Government's request, it remains our understanding that any consequential provision which extended to Scotland would not be made other than at the Scottish Government's express request.

The Scottish Government will, of course, as a matter of standard practice, notify Parliament in the event of any request being made to exercise this power to make provision within the Scottish Parliament's legislative competence.

56. The Scottish Government's previous response emphasised the limited, consequential nature of the power, noting that it does not enable the Secretary of State to make wide-ranging, substantive changes to the law in Scotland, or textual modifications of Acts of the Scottish Parliament. For these reasons, the Committee may consider it appropriate that this ancillary power to make consequential provision within the Parliament's legislative competence is conferred concurrently on the Secretary of State.

57. The Committee notes the Scottish Government's continued understanding that any consequential provision which extended to Scotland would not be made by the Secretary of State other than at the Scottish Government's express request.



58. Finally, the Committee welcomes the Scottish Government's commitment to, as a matter of standard practice, notify Parliament in the event of any request being made to exercise this power to make provision within the Scottish Parliament's legislative competence.

59. **The Committee is content with the power conferred on the Secretary of State in principle, and that it is subject to the affirmative procedure where amending primary legislation, and otherwise to the negative procedure.**

60. **The Committee notes the Scottish Government's understanding that any consequential provision which extended to Scotland would not be made by the Secretary of State other than at the Scottish Government's express request.**

61. **The Committee welcomes the Scottish Government's commitment to notify Parliament in the event of any request being made to exercise this power to make provision within the Scottish Parliament's legislative competence.**

#### **Clause 142(4): Commencement**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations**

**Parliamentary procedure: Laid only**

#### **Provision**

62. The Act comes into force for the purposes of making regulations on the day it is passed. For all remaining purposes, the Act comes into force on such a day as the Secretary of State, the Welsh Ministers or the Scottish Ministers appoint in regulations to be made under section 142. The power to appoint a day to bring Chapter 5 of Part 1 (regarding discrimination against renters with children or in receipt of benefits in Scotland) into force is conferred on the Scottish Ministers alone, by clause 142(4).

#### **Committee consideration**

63. It is standard practice to provide for some provisions of a Bill to be commenced by regulations, enabling provisions to be brought into force by the government at an appropriate time. It is also standard practice for such regulations to be laid in the Scottish Parliament, but not subject to further parliamentary procedure.

64. **The Committee is content with the power conferred on the Scottish Ministers in principle, and that it is not subject to procedure in the Scottish Parliament.**

#### **Clause 145(2): Transitional provision**

**Power conferred on: Scottish Ministers**



**Power exercisable by: Regulations****Parliamentary procedure: Laid only****Provision**

65. Clause 145(2) confers power on the Scottish Ministers to make transitional or saving provision in connection with the commencement of Chapter 5 of Part 1, regarding discrimination against renters with children or in receipt of benefits in Scotland. This includes power to provide for a provision of that Chapter to apply (with or without modifications) in relation to tenancies entered into before the coming into force date. Only the Scottish Ministers may make transitional or saving provision in connection with the coming into force of Chapter 5.

**Committee consideration**

66. It is usual to confer a power to make saving and transitional provisions in connection with the coming into force of an Act, in order to enable provision to be implemented in an orderly and appropriate manner. It is also standard practice for such regulations to be laid in the Scottish Parliament, but not subject to further parliamentary procedure.

67. **The Committee is content with the power conferred on the Scottish Ministers in principle, and that it is not subject to procedure in the Scottish Parliament.**

