

Leases (Automatic Continuation etc.) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament’s Standing Orders in relation to the Leases (Automatic Continuation etc.) (Scotland) Bill (“the Bill”). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 54–EN);
- a Financial Memorandum (SP Bill 54–FM);
- a Policy Memorandum (SP Bill 54–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 54–LC).

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill implements recommendations of the Scottish Law Commission (“the SLC”) published in its Report on Aspects of Leases: Termination (“the Report”).¹ The overall policy aim is to improve, simplify and update aspects of the Scots law of commercial leases, particularly in relation to the circumstances in which leases continue after their termination dates, so that it meets the needs of a modern Scottish economy.

5. The Bill makes a number of changes to aspects of the Scots law of leases. Part 1 of the Bill makes provision for the leases to which the Act applies. In essence, the Bill applies to commercial leases which are defined for the purposes of the Bill as being leases which are not residential or agricultural leases.

¹ [Report on Aspects of Leases: Termination \(Report No. 260\) \(Scottish Law Commission\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk)

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6. Part 2 of the Bill replaces the common law rules of tacit relocation and the difficulties they cause with a new statutory code. It also modifies the form and content of notices to quit and notices of intention to quit, laying out the manner in which they may be communicated and the persons to whom they must be given.

7. Part 3 of the Bill sets out miscellaneous rules relating to the termination of leases generally, intended to clarify the law and make it more straightforward to apply; making pre-irritancy warning notices capable of delivery by sheriff officer; and reforms the law on apportionment of rent paid in advance, introducing an implied term obliging a landlord to repay overpaid rent covering periods after the ending of a lease.

8. Part 4 contains final general provisions.

Rationale for subordinate legislation

9. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

10. The two delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

Delegated powers

Section 33 – ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

11. Section 33 enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill or any provision made under it. Regulations made under this section may modify any enactment (including the Act resulting from the Bill).

Reason for taking power

12. This power is to allow flexibility when implementing the Bill or otherwise to address any unforeseen circumstances which may arise. While the SLC and the Scottish Government have given careful consideration to the provisions of the Bill, this power is considered appropriate by the Government to ensure that any unexpected issues which require further changes are able to be dealt with effectively so the purpose of the Bill is not inadvertently obstructed following Royal Assent. The power is restricted as it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Bill or provision made under it.

Choice of procedure

13. Regulations made under this section which contain provision which adds to, replaces or omits any part of primary legislation are subject to the affirmative procedure. Otherwise, they are subject to the negative procedure. This approach is typical for ancillary powers of this type and provides safeguards considered appropriate to the significance of the type of legislation which can be made.

Section 35(2) to (4) – commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no further procedure

Provision

14. Section 35(2) to (4) enables the Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Bill (other than sections 32, 33, 35 and 36)

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come into force. Regulations made under this section may make different provision for different purposes and may include transitional, transitory or saving provision.

Reason for taking power

15. The Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such a date as Ministers appoint to be suitable. It is common for commencement provisions to be dealt with by subordinate legislation.

16. The coming into force of the Bill's substantive provisions will have implications for parties involved in leases. Transitional and saving provision is made in Part 2 of schedule 2 of the Bill, but subject to that provision the Bill will apply to existing leases. In order to allow parties to manage their affairs, it is important for the Scottish Ministers to have power to allow for the planning of orderly implementation and to commence the substantive changes when appropriate, or to take account of any other matters that may arise which require commencement at a particular future date. The Scottish Government's intention as noted in the Policy Memorandum for the Bill is to allow for due notice by commencing the Bill not before 6 months beginning with the day of Royal Assent (as recommended by the Scottish Law Commission).

17. It is preferable to ensure there is flexibility in the commencement power in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice for government bills, the commencement regulations should be capable of making transitional, transitory or saving provision or to make different provision for different purposes.

18. Section 35(3) also provides that the commencement regulations can amend the legislation so the actual date of coming into force is substituted for references to the day of coming into force of provisions in the Bill. This has become common for government bills, and is considered useful and appropriate to improve the accessibility of the provisions for the reader, in particular the lay reader, following commencement.

Choice of procedure

19. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill, and accordingly this procedure is considered to be appropriate. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

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