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

### **Non-Domestic Rates (Scotland) Bill: Stage 1**



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# Contents

<b>Introduction</b>	<hr/> 1
<b>Brief overview of the Bill</b>	<hr/> 2
<b>Delegated Powers</b>	<hr/> 3
Ancillary powers provisions in sections 3, 6, 7, 18, 19 and 20	<hr/> 3
Section 9 – Power to grant relief for new or improved properties	<hr/> 5
Section 11 – Guidance on reduction or remission of rates for certain organisations	<hr/> 5
Section 23 – Power to make provision to prevent or minimise non-domestic rates avoidance	<hr/> 6
<b>Annex A</b>	<hr/> 8
<b>Annex B</b>	<hr/> 19

# **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.



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# Introduction

1. At its meetings on 14 May and 18 and 25 June 2019, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Non-Domestic Rates (Scotland) Bill (“the Bill”).<sup>i</sup>
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
3. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.<sup>ii</sup>
4. In this Report, the Scottish Ministers are referred to as “Ministers”.

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

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

# Brief overview of the Bill

5. 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.
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. Some of the review’s recommendations require primary legislation.
7. The remit of the review team, appointed by Ministers, was:
  - ” To make recommendations that seek to enhance and reform the non-domestic rates (also sometimes referred to as business rates) system in Scotland to better support business growth and long term investment and reflect changing market places, whilst still retaining the same level of income to deliver local services upon which businesses rely.
8. 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

9. The Committee reports as follows on the delegated powers in the Bill.
10. The Committee first considered the Bill at its meeting on 14 May 2019. At that meeting, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:
  - Section 5 – Discretion of local authority to determine whether lands and heritages are dwellings
  - Sections 18(7) and 20(5) – Powers to increase or decrease civil penalty sums
  - Section 30 – Commencement.
11. The Committee also agreed to write to the Scottish Government to raise questions on a number of the delegated powers in the Bill. This correspondence is reproduced in **Annex A**.

## Ancillary powers provisions in sections 3, 6, 7, 18, 19 and 20

### *Committee consideration*

12. It is common for a Bill to contain a power to make ancillary provisions by regulations, for the purposes of or to give effect to the Bill as enacted. This is often achieved in a general provision towards the end of the Act. Often, but not in all cases, the ancillary powers are powers to make incidental, supplementary, consequential, transitional, transitory or saving provisions.
13. Supplementary provision, as a type of ancillary provision, may add to the provisions in the Act, to fill in details that the terms of the Act do not provide, to implement the Act and make it work. Where the powers allow it, ancillary provisions may permit the modification of primary legislation, including the Act itself.
14. The consideration here relates to the various ancillary powers provisions in the Bill, collectively. The several provisions that contain ancillary powers are outlined in **Annex B**.
15. The Committee asked several questions in relation to the justification for the various ancillary powers provisions, and in connection with how the scope of these powers has been expanded, in certain ways, beyond what is usual in a Bill.
16. The Committee accepts, initially, that several of the ancillary powers provisions in the Bill appear to be either necessary or appropriate. The Scottish Government's response repeats a "general point", that as the Bill proposes amendments to a complex rating system and rating reliefs, it is prudent to have some flexibility through the use of ancillary powers provisions in regulations, to deal with unforeseen matters, without the necessity of returning to the Parliament with proposals for primary legislation.

17. Accordingly, the Committee accepts that the Bill in some places adds powers to make ancillary provisions to some powers to make regulations which are inserted into the 1975 Act. It appears that, so far as these ancillary powers are in a normal form (including powers to make supplemental provision), they need to be added because the ancillary powers which are enabled currently in the 1975 Act are limited to where an order is made, rather than regulations.
18. The Committee also accepts the wording of the general ancillary powers contained in section 29(1), alone. Section 29(1) enables “stand alone” regulations that make incidental, supplementary, consequential, transitional, transitory or saving provision, as Ministers consider appropriate, for the purposes of, in connection with or for giving full effect to this Act, or any provision made under it.
19. However, apart from the consideration of section 9 of the Bill, the ancillary powers in the Bill are expanded in a couple of ways which are very unusual:
20. Firstly, powers to make supplementary provision are proposed, which are additional to powers to make further provision (or other provision as considered appropriate). Such powers appear in section 7(4), so far as inserting new section 3ZA((6)(e) and (7)(b), and section 3ZB(6)(g) and 3ZB(7)(b) of the 1975 Act. They also appear in section 18(10) and (11)(b), section 19(7)(d) and (8)(b), section 20(8) and (9)(b), and section 21(6)(d) and (7)(b).
21. The Committee accepts that it may be appropriate that Ministers should be conferred with the powers to make further provision (or other provision as considered appropriate), to the main subject matter of each power. Alternatively, it may be appropriate to confer powers to make provision which is supplementary to the main subject matter of each power. This may be suitable, having regard to the subject matter of the powers, which generally relate to valuation notice procedures, proposals to alter an entry on the valuation roll, appeals to a valuation committee, and certain civil penalty notices.
22. However the Committee is concerned that the provisions mentioned in paragraph 20 combine those two alternatives, into extended powers. It would enable provisions to be made which are supplementary to any such further or other provisions. This is very unusual, and it makes those particular ancillary powers have an uncertain scope.
23. Secondly, the proposed section 29(2)(a) is also very unusual. This provision allows “stand alone” regulations, which make ancillary provision under subsection (1) of the section, to also make further provision ancillary to that provision- including supplementary provision.
24. The Committee is concerned by this proposed “ancillary to ancillary” provision, which extends the power and makes it of uncertain scope.

## **Recommendation**

25. **The Committee recommends that the Scottish Government should give further consideration to the ancillary powers provisions in the Bill in advance of Stage 2, in view of the Committee’s concerns about the specific features of the powers, as set out in paragraphs 19 to 24 above.**

## **Section 9 – Power to grant relief for new or improved properties**

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

### *Committee consideration*

26. Section 9 expands upon the rates relief for new or improved properties which is currently available in the Non-Domestic Rates (New and Improved Properties) (Scotland) Regulations 2019. Those Regulations allow relief for newly built properties to continue for 12 months after the property is first occupied. Section 9 enables the Ministers to make regulations providing for rates relief in relation to newly built or improved properties. Section 3 of the Bill requires entries for such properties to be marked on the valuation roll. In the Barclay Review, this relief is known as the “business growth accelerator.”
27. Section 29(1) enables provision that is ancillary to any provision made under the Bill. The effect is to enable provisions that are ancillary to the ancillary provisions which are enabled by section 9(3)- including supplementary provisions. Again the Committee is concerned by this proposed “ancillary to ancillary” power provision, which extends the power and makes it of uncertain scope.

### **Recommendation**

28. **The Committee considers that the power to make provisions which are ancillary to other ancillary provisions, which results from the combination of sections 9(3)(b) and 29, is not acceptable in this Bill.**

## **Section 11 – Guidance on reduction or remission of rates for certain organisations**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** Guidance
- **Parliamentary procedure:** None, but published

### *Provisions*

29. Section 4 of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 (“the 1962 Act”) enables rating authorities to grant rate relief for properties occupied for the purposes of a club, society or other organisation not established or conducted for profit, and used wholly or mainly for recreation.

30. Section 11 of the Bill adds a power to issue guidance to rating authorities about the use of their discretion to grant that relief. The authorities must have regard to the guidance, and it may be general or for particular purposes. Ministers must publish it, in such manner as they consider appropriate. Before issue, Ministers must consult persons representing the interests of local authorities, and other persons as considered appropriate.
31. This aims to give effect to a recommendation of the Barclay review that the present grant of discretionary relief to sports clubs (up to 100%) may not give due consideration to, for example, the size of a club or the openness of membership.

#### *Committee consideration*

32. It appears to the Committee that the guidance which may be issued under section 11 could, in some circumstances and depending upon its terms, have effects upon the amount of discretionary rate relief which may be granted by a rating authority in respect of properties occupied for recreational purposes, in accordance with section 4 of the 1962 Act.
33. The Committee does not agree with the Scottish Government's view that the Parliament should not have the right to annul this guidance. There is an argument that scrutiny of the guidance by the negative procedure should be applied. The guidance may have effects on rate relief in certain circumstances, and it could have effects on local authority discretion to grant the relief, which has been conferred by section 4 of the 1962 Act.
34. However, the Committee considers that the potential effects and importance of this proposed guidance are informed by policy considerations.

#### **Recommendations**

35. **The Committee therefore recommends that the lead Committee could consider whether the Parliament should have the right to annul this guidance, or revised guidance, by means of the negative procedure.**
36. **If the lead Committee concludes that the publication of the guidance is sufficient (as section 11 provides), the Committee considers that a copy of the guidance should be laid before the Parliament.**

## **Section 23— Power to make provision to prevent or minimise non-domestic rates avoidance**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Enhanced form of affirmative**

#### *Provisions*

37. Part 4 of the Bill confers powers to make provision regarding “anti-avoidance”. Such provision as 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.
38. Section 23(3) enables regulations to modify enactments (except for Part 4 itself), to make different provision for different purposes, and ancillary provisions.
39. Section 27 sets out the procedure where draft Regulations are proposed. Ministers must consult 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)).
40. 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.

#### *Committee consideration*

41. The Committee draws to the attention of the lead Committee the general nature of the power in section 23(1), and the lack of specification of the types of provision that may be included within the regulations.
42. The Scottish Government has indicated 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, provision about when a relief should be made available or withdrawn, provision for resetting periods for reliefs, and provision for how local authorities could treat arrangements that involve unreasonable business conduct.

#### **Recommendations**

43. **The Committee recommends that the Scottish Government considers, in advance of Stage 2, how further specification could be provided in section 23 of the types of provision that may be included, as part of the provision that could be made under subsection (1) of the section. This would further specify how the power can be used.**
44. **Section 27(4) provides that the Scottish Ministers must notify the Parliament about the consultation on the draft anti-avoidance regulations. The Committee considers that this subsection could be made clearer, by providing that the Parliament must be notified when the Scottish Ministers begin the consultation. The Committee notes that the Government will reflect on this in advance of Stage 2.**

# Annex A

## CORRESPONDENCE FROM THE SCOTTISH GOVERNMENT OF 28 MAY 2019

### **Non-Domestic Rates (Scotland) Bill – Stage 1 Consideration**

I note that the Delegated Powers and Law Reform Committee considered the Non-Domestic Rates (Scotland) Bill at its meeting on 15 May 2019. I have provided below an explanation of the Scottish Government's position on the matters raised in your letter of 15 May 2019.

#### **1. Section 3 (inserting section 2A(6) to (8) of the Local Government (Scotland) Act 1975) – New or improved properties: mark in valuation roll**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** Regulations
- **Parliamentary procedure:** (1) negative, (2) affirmative:

(1) power to make provision about things to be treated as “buildings” for the purposes of provision being added to the Local Government (Scotland) Act 1975, and

(2) power to modify the definition of “relevant increase” in that provision Proposed new section 2A(7)(b) would permit ancillary provisions in the regulations (incidental, supplementary, consequential, transitional, transitory or saving). The DPM does not explain why such provisions could be either necessary or appropriate.

#### **DPLR Committee question**

Please explain why the ancillary powers in the proposed new section 2A(7)(b) of the Local Government (Scotland) Act 1975, inserted by section 3, are necessary or appropriate and how these powers could be used - in particular the power to make supplementary provision?

#### **SG response**

As a general point that informs this answer and several others below, the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. It is prudent to have some flexibility in how powers may be used, albeit within the narrow context that powers must operate within, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation because a power is found overly rigid. All uses of powers in the Bill are subject to Parliamentary oversight, which allows the Parliament to stop any use it considers inappropriate.

Specifically in relation to the power in section 3, the 1975 Act does not contain any ancillary powers in relation to the making of regulations (its section 35 only provides ancillary powers in relation to Orders). Proposed new section 2A(7)(b) is provision that would be relatively standard in a modern Bill, to avoid the necessity to return to the Parliament with further primary legislation to deal with technical, operational or

implementation matters that are within the policy intention, but require something beyond the powers as provided for by proposed new section 2A(6).

Although, as mentioned above, the power is seen mainly as a protection against unforeseen circumstances, an example of supplementary provision in relation to things that are, or are not, to be treated as a “building” for the purposes of new section 2A could be related to persons to whom something is to be intimated, or explanations to be provided in relation to it. Also, if a change is made to the definition of a “building” there might be a wish (or need) to make supplementary provision about the impact of the change on buildings that had been receiving relief under section 9 of the Bill, but were no longer going to be within the definition of “building” on which relief is based. Such provision might be transitional or saving provision, but something supplementary might also, or alternatively, be appropriate. Since there may be situations where ancillary provision could usefully be made, the power is considered prudent future-proofing in case such situations arise.

Although the power is giving Ministers the ability to make ancillary provision, any uses of the power would remain subject to Parliamentary scrutiny, which in the case of the amendment of the definition of “relevant increase” would be scrutiny under the affirmative procedure. That gives protection against inappropriate use and the Scottish Government expects that the Committee would examine closely its justification for any use of the ancillary power.

## **2. Section 6 – Valuation notices**

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

Similarly to the explanation sought above, the proposed new section 3(6) would permit ancillary provisions in the regulations (incidental, supplementary, consequential, transitional, transitory or saving). Again, the DPM does not explain why such provisions could be either necessary or appropriate.

### **DPLR Committee question**

Please explain why the ancillary powers in the proposed new section 3(6) of the Local Government (Scotland) Act 1975, as inserted by section 6(b), are necessary or appropriate and how these powers could be used - in particular the power to make supplementary provision?

### **SG response**

As a general point the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. It is prudent to have some flexibility in how this power may be used, albeit within the narrow context that it must operate within, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation because the power is found overly rigid. All uses of the power are subject to Parliamentary oversight, which allows the Parliament to stop any use it considers inappropriate.

Specifically, section 6 of the Bill creates a new power to prescribe information to be included in valuation notices, which is in addition to the current power to prescribe the form of valuation notices. No specific use is envisaged for the supplementary power, or any other ancillary power in this section. They are intended as a futureproofing, particularly given the absence of powers to make ancillary provision within the 1975 Act.

However, an example might be if there were a need to prescribe something beyond information in relation to the rateable value, for example about what the recipient could do with the information or as a result of receiving it. Such provision might also be about how information provided was to be used in the new process relating to appeals, and the proposals that are to proceed them.

### **3. Section 7 – Proposals to alter valuation roll: procedures**

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

Again, the Committee considered that more explanation in relation to the ancillary powers was required.

#### **DPLR Committee question**

Please explain why the ancillary powers in the proposed new section 3ZA(7) of the Local Government (Scotland) Act 1975, inserted by section 7(4), are necessary or appropriate and how these powers could be used?

In particular, why the power to make supplementary provision is required, given that section 3ZA(6)(e) would enable Ministers to specify in regulations such other matters in connection with the making of a proposal as they consider appropriate?

#### **SG response**

As a general point the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. It is prudent to have some flexibility in how this power may be used, albeit within the narrow context that it must operate within, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation because the power is found overly rigid. All uses of the power are subject to Parliamentary oversight, which allows the Parliament to stop any use it considers inappropriate.

Specifically, section 7 of the Bill creates a new framework for making proposals to alter the valuation roll. This is a substantial change, which is likely to have significant consequences for how the system operates and as the Delegated Powers Memorandum says it is likely that the detail of this system will need to be specified further, and probably refined over time in the light of experience, feedback and assessment of how it is operating. It is prudent, given the absence of ancillary powers in relation to the making of regulations under the 1975 Act, to have the flexibility that new section 3ZA(7) seeks to provide.

However, as the Delegated Powers Memorandum explains, the power at proposed section 3ZA(6) is essentially about administrative detail, and therefore the ancillary power in the following subsection is in context relatively limited.

The supplementary power might have uses in relation to the power to make provision about notices to be sent by an assessor to a person who has made a proposal. The section 3ZA(6)(e) power would not cover such provision, as it is not “in connection with the making of a proposal”. It might also be useful should Ministers wish to use the power at section 3ZB(6)(e) to make provision about “other matters in connection with the making of a proposal”, as that could create a reason to make supplementary provision of some kind.

No specific use has been anticipated in drafting the Bill; the addition of what is relatively standard ancillary provision in modern Bills is seen as future-proofing to allow efficient use of Parliamentary time should the principal power appear to fall slightly short of giving the ability to do something that the Parliament finds unobjectionable in regulations.

#### **4. Section 7 – Appeals against entries in the valuation roll: procedure**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative for provision regarding fees, otherwise negative**

As noted above, the Committee considered that more explanation in relation to the ancillary powers was required.

#### **DPLR Committee question**

Please explain why the ancillary powers in the proposed new section 3ZB(7)(b) of the Local Government (Scotland) Act 1975, inserted by section 7(4), are necessary or appropriate, and how these powers could be used?

In particular why the power to make supplementary provision is required, given that section 3ZB(6)(g) would enable Ministers to specify in regulations such other matters in connection with appeals as they consider appropriate?

#### **SG response**

As a general point the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. It is prudent to have some flexibility in how this power may be used, albeit within the narrow context that it must operate within, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation because the power is found overly rigid. All uses of the power are subject to Parliamentary oversight, which allows the Parliament to stop any use it considers inappropriate.

Specifically, section 7 of the Bill creates a new framework for making proposals to alter the valuation roll. This is a substantial change, which is likely to have significant consequences for how the system operates and will probably be refined over time in the light of experience, feedback and assessment.

No specific use of the supplementary provision is anticipated; its use in this context would only arise if there was a need to make some provision that was unrelated to the appeal, but related to some provision in regulations about the appeal. The Scottish Government cannot say what that might be, but an example could relate to proposed new section 3ZB(6)(b), the information to be included in, and documents to be submitted with, an appeal. It might be that there was a wish to make provision about the information or documents that was not directly connected to the appeal itself. If so, the supplementary power would allow regulations containing such provision to be laid before the Parliament for its consideration. In the absence of the power, further primary legislation would be required.

The 1975 Act does not contain a suitable power to make ancillary provision in relation to regulations, therefore it is prudent to have the flexibility that section 3ZB(7)(b) provides, within the limits that arise from it being tied to the power to make regulations under its subsection (6).

## **5. Section 9 – Power to grant relief for new or improved properties**

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

Section 9 enables the Scottish Ministers to make regulations providing for rates relief in relation to newly built or improved properties. The Committee asks the Scottish Government to explain:

### **DPLR Committee question**

- (a) What may be done within regulations under section 9 of the Bill which could not be done presently within regulations under section 153 of the Local Government etc. (Scotland) Act 1994 and an order which may make ancillary provisions under section 181 of the 1994 Act?
- (b) Why are the ancillary powers (including supplementary provision) in section 9(3)(b) considered to be appropriate, and how might they be used?

### **SG response**

Section 9 does not amend existing powers, rather it creates a free-standing power within the proposed Act. As a result regulations under it could actually as the Bill currently stands be supplemented by regulations under the ancillary provision contained at proposed section 29, which follows a relatively standard form in modern Bills. However, it was thought easier for the reader, and for use of the powers, to include the similar provision at section 9(3).

The Scottish Government does not, against this background, see the direct relevance of comparison with the powers in the 1994 Act. Whilst it is true that there is a substantial overlap between the powers, section 153 is expressed in broader terms and, together with proposed section 2A of the 1975 Act (which would be inserted by section 3 of the Bill), section 9 of the Bill sets out in detail how a system of relief for new and improved properties would be provided for. Since section 3 of the Bill would create a requirement for the valuation to be marked in relation to new properties and improved properties, it seems

appropriate to have a specific accompanying power that can be used to clarify what purpose the existence of the mark is to serve.

To the extent the powers overlap, Ministers would simply have two means to deliver proposals. In practice they would be likely to choose use the more specific one for new and improved properties. In terms of the ancillary powers section 9 would give the advantage of allowing ancillary provision to be made by regulations, in accordance with modern practice, rather than requiring a separate Order to be made.

The ancillary powers might have uses in various situations that can be anticipated. For example, improvements to a building could produce an increase in the rateable value. However, separately there could be external factors that affect the rateable value of all properties in an area, or all properties of a type in an area or more generally. Regulations might have to deal with such interactions, but it would not appear to be within the main power to do so with certainty. The ancillary provision could cover such scenarios, possibly as different provision for different purposes, but more probably as incidental, supplementary or consequential provision.

The situations when transitional or transitory provision might be appropriate would include provision around treatment of reliefs for new and improved property in, and around, years of revaluation. That might be a time at which saving provision would be appropriate, though such provision might also be appropriate in the scenario described in the previous paragraph (for example, to provide that relief was to continue at a level produced by improvements, despite a fall in rateable value produced by adverse external factors that might otherwise produce, again for example, a proportionate reduction in the relief).

## **6. Section 11 – Guidance on reduction or remission of rates for certain organisations**

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Guidance**
- **Parliamentary procedure: None, but published**

Section 11 adds a power to issue guidance to rating authorities about the use of their discretion to grant rate relief for certain properties. The Committee asks for explanation of the following matters, in relation to the power to issue guidance to rating authorities in section 11:

(a) It appears that, depending on the content of the guidance, it could affect the amount of discretionary rate relief which could be granted by a rating authority in respect of properties, or certain properties, occupied for recreational purposes in accordance with section 4(5)(c) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962.

### **DPLR Committee question**

Why is it considered appropriate that the Parliament should not have the right to annul the guidance (by means of the negative procedure), if it does not agree with its effects in relation to rating relief?

### **SG response**

The intention of section 11 of the Bill is as described. The duty on local authorities is to have regard to the guidance. There is no requirement that local authorities follow it, though as the guidance will be produced in consultation with persons representing the interests of local authorities the Scottish Ministers would hope that the guidance would carry weight with local authorities as to what it was appropriate for them to do.

There is a statutory duty to consult, and in addition to the required consultation with persons representing the interests of local authorities, Ministers would intend, with the duty to consult such other persons as they consider appropriate, to consult with persons in the sports sector and the Office of the Scottish Charity Regulator. It is unlikely that Ministers would issue guidance that was not well-supported by local authorities in the consultation, since the likelihood would be that such guidance would be had regard to, but then not followed, for whatever reasons led local authorities not to support it.

There seems no need, in the Scottish Government's opinion, for Parliament to be given a power to annul the guidance. If the Lead Committee did not agree with elements of the guidance, it would no doubt make that known. Neither the Scottish Government nor local authorities are likely simply to ignore the Committee's disquiet. It would create pressure to revise the guidance, and although there would be no formal requirement that the Committee be consulted in preparation of revised guidance, the Committee would be able to decide to take a proactive role, in the unlikely event that it was not consulted.

### **DPLR Committee question**

(b) The DPM explains that the Parliament could choose to debate a particular instance of this guidance if it wishes. Why is it considered unsuitable for a copy of the guidance to be laid before Parliament, as publication in a manner considered appropriate by the Scottish Government might not ensure that it is drawn to the Parliament's attention?

### **SG response**

The Scottish Government considers that publication of the guidance is sufficient, in what is a relatively technical area of rating practice. However, the Scottish Government will reflect carefully on any further comments the Committee wishes to make on this point in its Report.

## **7. Sections 18(10) and 20(8) – Power to make further provision about civil penalty notices**

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

Part 3 of the Bill creates obligations on a ratepayer to notify an assessor or the local authority (as the case may be) of information required by a notice, or of a relevant change of circumstances. Sections 18 and 20 specify penalty amounts for failing to comply with such notices or failing to notify a change in circumstances. Regulations made under sections 18(10) and 20(8) enable further provision about the civil penalty notices. In each case they may make ancillary provisions, including supplementary provision.

### **DPLR Committee question**

Please explain, in relation to sections 18(11)(b) and 20(9)(b), why it is considered necessary or appropriate that the regulations may make provision which is supplementary to the further provision about penalty notices that is enabled by those sections?

### **SG response**

As a general point the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. The civil penalty provisions are a new feature of the non-domestic rating landscape and ancillary provision may be needed as part of their creation or, as experience is gained, in their development.

The basic elements of a notice are included in the Bill, at sections 18(2) and 20(2) and (3). It is prudent to have some flexibility in how the powers in section 18(10) and 20(8) may be used, albeit within the narrow context that they must operate within, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation because the power is found overly rigid. All uses of the power are subject to Parliamentary oversight, which allows the Parliament to stop any use it considers inappropriate.

The powers in sections 18(10) and 20(8) are quite narrow in terms of how they can be used, as they relate to the notices and in particular their form and how they may be given. That narrowness has led the Scottish Government to include ancillary powers in the Bill, so that if there is the ability to make provision which arguably is not directly about the penalty notice. That will reduce the risk of challenge, though the ancillary powers are implicitly limited by the main purpose.

An example of supplementary provision might be if it is desired to make provision about how a recipient may, or may not, respond to a penalty notice if the person wishes to seek remission of the penalty. Provision about response would not be provision about the giving of a notice, and it could not override the express provision setting timescales for compliance.

The Scottish Government would stress that it has no current plans to make the provision in this example and the supplementary power is intended as future-proofing, to give the ability to respond if a need is identified.

### **8. Sections 19(7) and 21(6) – Power to make further provision relating to appeals against the imposition of a civil penalty**

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

A person given a civil penalty notice under section 18 or section 20 may appeal to a valuation appeal committee. Sections 19(7) and 21(6) enable further provision about such appeals. The Regulations may make ancillary provisions, including supplementary provision.

### **DPLR Committee question**

Please explain why the ancillary powers in sections 19(8)(b) and 21(7)(b) are necessary or appropriate, and how these powers could be used?

In particular why the power to make supplementary provision is required, given that sections 19(7)(d) and 21(6)(d) would enable Ministers to specify in regulations such other matters in connection with appeals as they consider appropriate?

### **SG response**

As a general point the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. It is prudent to have some flexibility in how the ancillary powers at sections 19(7) and 21(6) may be used, albeit within the narrow context that they must operate within, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation because either or both powers are found overly rigid. All uses of the powers are subject to Parliamentary oversight, which allows the Parliament to stop any use it considers inappropriate.

In relation to the specific ancillary powers in sections 19(8)(b) and 21(7)(b), the innovative nature of the civil penalty system makes it impossible to anticipate what type of provision might desirably be made, as the system develops, but arguably not be within the power to make further provision about appeals.

It might be that there was a wish to make provision about the information to be included in, or documents to be submitted with, an appeal. If that provision related to the information or documents themselves, separate from the appeal, then it would not be directly connected to the appeal itself. The powers might also be useful should Ministers wish to use the power at sections 19(7)(d) or 21(6)(d) to make provision about “other matters in connection with such appeals”, as any such provision could create a reason to make supplementary provision of some kind. In that situation, the supplementary power would allow regulations containing such provision to be laid before the Parliament for its consideration. In the absence of the power, further primary legislation would be required.

### **9. Section 23— Power to make provision to prevent or minimise non-domestic rates avoidance**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Enhanced form of affirmative**

The Committee asks the Scottish Government to explain the following matters in relation to the powers in section 23:

(a) In relation to the devolved taxes which are the subject of the Revenue Scotland and Tax Powers Act 2014, Part 5 of that Act contains provisions in connection with counteracting tax advantages arising from tax avoidance arrangements that are artificial. Sections 66 to 71 specify powers of Revenue Scotland to counter tax advantages, and other provisions for how court or tribunal proceedings in relation to tax avoidance arrangements are to be conducted.

### **DPLR Committee question**

Why is it considered necessary or appropriate that section 23 of the Bill contains general powers to make provisions with a view to preventing or minimising advantages arising from non-domestic rates avoidance arrangements that are artificial, whereas those enforcement powers of Revenue Scotland and further provisions could be specified on the face of the 2014 Act?

### **SG response**

Revenue Scotland is a non-Ministerial department of the Scottish Government. As such, it 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.

Specifically, section 27 proposes that before laying draft regulations the Scottish Ministers must consult representative of local authorities or assessors (or both), and may consult ratepayers. That reflects that non-domestic rates are collected by local authorities and the system is operated by 14 assessors and 32 local authorities, not a central institution. The way in which anti-avoidance is to be tackled will not necessarily involve provision about calculation of a single assessment of the taxpayer's liability, but may, for example, involve provision about 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.

As a result, the Scottish Government does not consider it appropriate, or possible, to set out provision in the manner employed in the Revenue Scotland and Tax Powers Act 2014. It considers that the power needed must be broader, to give flexibility to tackle avoidance wherever it is identified. In recognition of that breadth, the Scottish Government has proposed as a safeguard that the power should be subject to a superaffirmative form of Parliamentary procedure, as well as subject to consultation requirements with local authorities or assessors, whose experience and views will be of considerable significance in developing effective proposals for regulations.

(b) Section 27(5) provides that the Scottish Ministers must have regard to any representations about the proposed draft anti-avoidance regulations received as a result of consultation. Section 27(4) states that Ministers must notify the Parliament about the consultation, without specifying the timing of this.

### **DPLR Committee question**

As representations could be received from the Parliament as a result of the consultation, could the provision be made clearer if the timing for the notification was also specified?

### **SG response**

The Scottish Government would intend to notify the Parliament when the Scottish Government initiates consultation on proposed anti-avoidance regulations, so that the Parliament is immediately aware of the consultation and has the opportunity to participate at that stage, should it wish to do so. Notification at a later time would not serve any useful purpose.

If the Committee's concern is that the drafting of section 27(4) does not expressly state that the notification it requires is to be given at that particular time, then the Scottish Government would carefully reflect on any comments the Committee makes on this point in its Report.

## **10. Section 29 – Ancillary provision**

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative if regulations amend primary legislation, otherwise negative**

The Committee noted that section 29 contains the powers to make ancillary provisions by means of “stand alone” regulations.

### **DPLR Committee question**

The Committee considered that section 29(2)(a) appears to be unusual, as providing that the regulations making ancillary provision under subsection (1) may make incidental, supplementary, consequential, transitional, transitory or saving provision. Therefore, please explain why this duplication is considered appropriate, or whether it is an error?

### **SG response**

As a general point the Bill proposes amendments to a complex rating system. That creates a risk, that a change to one part of its landscape has unexpected impacts on another part. Rating reliefs change from year to year, not just from development of existing reliefs, but also by the introduction of new reliefs. It is prudent therefore to have some flexibility to make ancillary provision, for the purposes of, in connection with, or to give full effect to the Act, so that unforeseen matters may be dealt with without the necessity of returning to the Parliament with primary legislation. All uses of the ancillary power are subject to Parliamentary oversight, which allows the Parliament to stop any use that it considers inappropriate.

The apparently repeated provision in section 29 is not a drafting error. It is not unusual for Bills to include provision with exactly the same effect as section 29(1) as read with section 29(2)(a). What is unusual here is the proximity of the two provisions – it would be more common for the section 29(2)(a) provision to be in a separate section (dealing with regulation-making powers generally) from the section 29(1) provision. A recent example of such provision would be sections 42(1)(a) and 43(1) of the Scottish Crown Estate Act 2019.

Whether there would be a need to make provision of this type is uncertain and it is not possible to give a specific example of how the power to make ancillary provision might be used. As indicated in the general point above, the power is there to deal with anything unexpected that results from the significant and far-reaching changes that the Bill proposes. Provision in or under the Bill may require refinement to ensure it works smoothly, having regard to the varying interests of such stakeholders as ratepayers, assessors, local authorities and valuation appeal committees. The power is being proposed so that there is flexibility, within the express limit that ties any use of the power to the purposes or in connection with the Act and provision made under it, or to give full effect to the Act and provision made under it.

# Annex B

## OUTLINE OF PROVISIONS CONTAINING ANCILLARY POWERS

### **Section 3 (inserting section 2A(6) to (8) of the Local Government (Scotland) Act 1975) – New or improved properties: mark in valuation roll**

1. Section 3 of the Bill inserts new section 2A into the 1975 Act, to provide for information (a “mark”) to be included in the valuation roll to highlight entries for new and improved properties. This will support provision of the relief for new and improved properties provided for in section 9.
2. A mark is required where new buildings are entered on the valuation roll, or where existing buildings are refurbished or extended. Section 9 enables regulations to be made providing for rates relief for properties which are marked on the roll under new section 2A.
3. A “relevant increase” is one resulting from additional buildings being erected or constructed on a property which already has one or more buildings on it, or the refurbishment or extension of an existing building (new section 2A(5)).
4. Ministers may make provision about things that are, or are not, to be treated as a “building” for the purposes of new section 2A. Regulations may also modify the definition of “relevant increase”.
5. An ancillary power is contained in new section 2A(7)(b). The regulations can make incidental, supplementary, consequential, transitional, transitory or saving provision.

### **Section 6 – Valuation notices**

6. This section amends section 3 of the 1975 Act (supplementary provision relating to the valuation roll and alteration of entries in it) to insert a power to prescribe information that a valuation notice must include. Such a notice tells a person the details of an entry in the roll for which they are the proprietor, tenant or occupier of a property.
7. The power will allow Ministers to prescribe that the notice must give specific information relating to the rateable value (RV) of the property. . The power will be used to provide recipients of valuation notices with information, to assist them to decide whether to make a proposal that the RV should be altered, and if so, to frame their proposal relevantly.
8. The proposed new section 3(6) of the 1975 Act contains an ancillary power. It enables the regulations to make incidental, supplementary, consequential, transitional, transitory or saving provision.

### **Section 7 – Proposals to alter valuation roll: procedures**

9. Section 7(4) contains a procedure for proprietors, tenants and occupiers to make proposals to assessors to alter the valuation roll (including the rateable value).
10. A power in the proposed section 3ZA(6) of the 1975 Act would allow Ministers to make provision by regulations 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.

11. Proposed section 3ZA(7) contains ancillary powers, allowing the regulations to make incidental, supplementary, consequential, transitional, transitory or saving provision.

### **Section 7 – Appeals against entries in the valuation roll: procedure**

12. Proposed section 3ZB(6) of the 1975 Act provides that Ministers may by regulations make provision for or about the following matters: the period within which an appeal to a valuation appeal committee is to be made; information to be contained in such an appeal and documents to be submitted; circumstances in which such an appeal may be made only with the permission of the valuation appeal committee; fees payable in connection with such an appeal; the procedure to be followed in an appeal; and the period within which an appeal is to be disposed of, as well as such other matters in connection with appeals, as Ministers consider appropriate.

13. The proposed section 3ZB(7) contains an ancillary power, that the regulations under section 3ZB(6) may make incidental, supplementary, consequential, transitional, transitory or saving provision.

### **Sections 18(10) and 20(8) – Power to make further provision about civil penalty notices**

14. Part 3 of the Bill includes provision for assessors and for local authorities to issue notices seeking information from proprietors, occupiers and tenants. It also creates an obligation on ratepayers to notify a local authority if there is a relevant change in their circumstances. Sections 18 and 20 specify penalty amounts for failures to comply with such notices, and increased penalties where there is continued failure to comply. Section 20 also provides a penalty for failing to notify a change in circumstances.

15. Sections 18(10) and 20(8) enable further provision about the civil penalty notices issued under these sections. This includes the form of notice and how they may be given (such as enabling a notice to be given to a person by name or by a description). In addition to that further provision, the regulations may make ancillary provisions, including supplementary provision (sections 18(11) and 20(9)).

### **Sections 19(7) and 21(6) – Power to make further provision relating to appeals against the imposition of a civil penalty**

16. A person given a civil penalty notice under sections 18 or section 20 may appeal to a valuation appeal committee. Sections 19(7) and 21(6) enable further provision about such appeals, in regulations. That includes in particular provision about information to be included in, and documents to be submitted with, appeals, the procedure to be followed, the period within which an appeal is to be disposed of, and other matters in connection with such appeals as considered appropriate.

17. The regulations may make ancillary provisions, including supplementary provision (sections 19(8) and 21(7)).

### **Section 29 – Ancillary provision**

18. This section near the end of the Bill enables ancillary provisions in Regulations, separately from any ancillary provisions that may be included within other Regulations under the Bill.

19. Ministers may make such incidental, supplementary, consequential, transitional, transitory or saving provisions as they consider appropriate for the purposes of, in connection with or for giving full effect to, any provision made by or under the Bill. Subsection (2) allows regulations to make different provision for different purposes, and to modify any enactment, including the Bill as enacted.

20. The terms of section 29(2)(a) are discussed earlier in this Report.

