

# **HIGH HEDGES (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by Mark McDonald MSP with the assistance of the Scottish Government. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament's Standing Orders, of provisions in the High Hedges (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### **Outline of Bill provisions**

2. The Bill aims to provide an effective means of resolving disputes over the effects of a high hedge where the issue has not been able to be resolved amicably between neighbours. It does so by giving home owners and occupiers a right to apply to a local authority where it is considered a high hedge is affecting the enjoyment of their property, and empowers local authorities to make and enforce decisions in relation to high hedges.

3. The Bill gives local authorities new powers to decide whether a high hedge adversely affects the reasonable enjoyment of domestic property. It enables a local authority to reject an application if it concludes the applicant has not taken all reasonable steps to resolve the matter before applying, or where the application is frivolous or vexatious.

4. The Bill enables a local authority to issue a high hedge notice where, having taken all the circumstances into account, it finds that a hedge is having an adverse effect. A high hedge notice may require a hedge owner to take action to remedy the problem and prevent it recurring. Should that action not be taken within the time specified in the high hedge notice, the local authority will be empowered to enter the property, take the specified action, and recover the costs from the owner of the hedge. There is a right of appeal to Scottish Ministers.

### **Rationale for subordinate legislation**

5. In deciding whether the provision should be specified on the face of the Bill or left to subordinate legislation, careful consideration has been given to the importance of each matter against the need to—

- strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation;
- the need to make proper use of parliamentary time; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of any provision in primary legislation approved by the Parliament.

### **Delegated powers**

6. The Bill's delegated powers provisions are set out below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure is considered appropriate.

### **Section 34 – Power to modify meaning of “high hedge”**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure

#### *Provision*

7. Section 1 defines a “high hedge” for the purposes of this Bill. Subsection (1) states that the Act only applies to a hedge which is formed wholly or mainly by a row of 2 or more evergreen or semi-evergreen trees or shrubs, which rises to a height of more than 2 metres above ground level and forms a barrier to light. Subsection (3) states that no account is to be taken of the roots of a high hedge in applying this Act.

8. Section 34 of the Bill confers on Scottish Ministers the power to modify by regulations the definition of a high hedge, as set out in section 1.

9. This power could be used to add deciduous trees or shrubs to the definition of a high hedge, to adjust the height at which a hedge comes within the ambit of the Act or to amend the type of barrier which it forms.

#### *Reason for taking power*

10. When developing the policy that has produced this Bill, special consideration was given to the definition of a high hedge. Currently, section 1 would include deciduous plants and shrubs if they formed part of a mainly evergreen or semi-evergreen hedge, but would exclude hedges that were formed wholly or mainly of deciduous plants. Full details of the considerations underlying the definition are set out in the Policy Memorandum accompanying the Bill.

11. The definition of high hedge in the Bill is similar to that in the legislation in place in England and Wales and Northern Ireland. However, there are differing views on what the

definition should cover. Some stakeholders have been vocal in their support for the inclusion of much more than just a “high hedge” in the Bill.

12. The approach taken in the Bill is to adopt a tightly focused definition which minimises complexity and expense. This seeks to avoid creating unwieldy legislation that would be difficult and expensive to enforce.

13. However, as there are competing arguments, it is thought desirable to have some flexibility and therefore a power to adjust the coverage of the Bill by means of altering the definition of high hedge. While the proposed power would not go so far as to allow unrelated things to be within the mechanism of the Bill, there may, after observing the operation of the Bill, be a desire to revisit the definition of high hedge, either to widen or to narrow it.

14. Giving the Scottish Ministers a power to amend the definition by order is considered to be the best way to build in that flexibility and offer the opportunity for a review of the operation of the Bill.

15. This power would avoid the need for the Parliament to consider entirely new primary legislation, the sole purpose of which would be to amend the definition of a high hedge and make any necessary consequential changes. It is not envisaged that if it was considered appropriate to amend section 1 in such a way it would raise any issues which could not adequately be considered by the Parliament under the affirmative procedure.

16. The power also allows for such supplementary, incidental, consequential, transitory, transitional or saving provisions as the Scottish Ministers consider appropriate as it may be necessary to amend other provisions of the Act – or of other Acts – to take account of any adjustments to the definition in section 1.

#### *Choice of procedure*

17. This power can be used to narrow or widen the definition of a high hedge, which could have a significant impact on the application of the legislation. Affirmative procedure is therefore considered to be the appropriate level of parliamentary scrutiny.

#### **Section 35 – Ancillary provision**

**Power conferred on: the Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Generally negative procedure but affirmative procedure if making textual changes to an Act.**

#### *Provision*

18. Section 35 of the Bill confers on Scottish Ministers a power to make by order such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any

provision of the Bill. Section 35(2) provides that the power extends to the modification of any enactment.

*Reason for taking power*

19. Any body of new law may give rise to the need for a range of ancillary provisions. For example, consequential provision may be required in order to make necessary changes to related legislation. It may be that the consequences have not been identified and as such further changes may be required. The order-making power is considered to be necessary to allow for this flexibility.

20. It is considered that the power to make such provision should extend to the modification of enactments. Without the power to make incidental, supplementary and consequential provision, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament's or the Scottish Government's resources.

21. The power is limited as it can only be used if the Scottish Ministers consider it appropriate to do so for the purposes of, or in consequence of, or for giving full effect to the Bill or any provision of it.

*Choice of procedure*

22. Section 35(3) provides that any order made under this section will be subject to affirmative procedure if it adds to, replaces or omits any part of the text of an Act. Otherwise, it will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny, taking account of the nature of the orders which may be made using this power.

**Section 37 – Commencement**

**Power conferred on: the Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: The Order must be laid before the Parliament (subject to section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).**

*Provision*

23. Section 37 of the Bill provides that, with the exception of that section and sections 33, 35 and 38 which come into force on the day after Royal Assent, the Scottish Ministers may by order appoint the day on which the provisions of the Bill come into force. Section 37(3) provides that such an order may include transitory, transitional or savings provision.

*Reason for taking this power*

24. Section 37 enables Scottish Ministers to bring the Bill's main provisions into effect by means of a commencement order. This is intended to enable the Scottish Government to bring

the Bill's provisions into force once they have ascertained that local authorities have the necessary administrative and other arrangements in place and have published any necessary guidance.

25. It is intended to use the power in subsection (3) to make the necessary transitory provision amending section 12 of the Land Registration (Scotland) Act 1979 to exclude the Keeper of the Registers of Scotland indemnity for losses arising in consequence of an inaccuracy in any information contained in a notice of liability for expenses or a notice of discharge registered under this Bill until such time as the provision of the Land Registration etc. (Scotland) Act 2012 repealing section 12 is in force. There may be unforeseen issues which arise at the time of commencement which require other transitional or transitory provisions. The power in subsection (3) enables such provision to be made.

*Choice of procedure*

26. As is now usual for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

*This document relates to the High Hedges (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 2 October 2012*

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