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28 May 2019

Dear Andrew,

## **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 future-proofing, 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 of 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 super-affirmative 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,

