

PUBLIC RECORDS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Public Records (Scotland) Bill. 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.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill is divided into 3 Parts (consisting of 16 sections) and one schedule.
4. Part 1 of the Bill imposes duties on the public authorities listed in the schedule, to produce, implement and review records management plans. The Scottish Ministers may amend the list of authorities by order under section 2. Plans must be approved by the Keeper of the Records of Scotland ("the Keeper") and the Bill also gives the Keeper the power to review whether authorities are complying with their plans and to publicise failures to comply.
5. Part 2 of the Bill makes amendments to provisions about court records under the Public Records (Scotland) Act 1937 ("the 1937 Act").
6. Part 3 contains general provision on commencement.
7. Further information about the Bill's provisions are contained in the Explanatory Notes and Financial Memorandum, published separately as SP Bill 56-EN and the Policy Memorandum, published separately as SP Bill 56-PM.

APPROACH TO USE OF DELEGATED POWERS

8. The Bill contains a number of delegated powers which are explained in more detail below. The Scottish Government has carefully considered whether and in what manner

provisions should be set out in subordinate legislation rather than on the face of the Bill. In considering these issues, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the likely frequency of amendment;
- the need to make proper use of Parliamentary time;
- ensuring sufficient flexibility to respond to changing circumstances; and
- the need to anticipate the unexpected which might otherwise frustrate the purpose of the provision in primary legislation

9. In addition to the powers outlined below, the Bill also contains: a power for the Keeper to set dates for the submission and review of records management plans and requirements as to the form and manner of such submission (sections 4(1) and (2) and 5(1)(b)); a duty on the Keeper to issue guidance on the form and content of records management plans (section 1(3)); a duty on the Keeper to publish a model records management plan (section 8); a power for the Keeper to issue further guidance to authorities about their duties under the Bill (section 9); and a power for Scottish Ministers to issue directions to the Keeper as to the form and content of the Keeper's annual report (section 11). It is considered that these are of an executive and administrative rather than legislative nature, and as such they are not detailed in this memorandum.

DELEGATED POWERS

10. The delegated powers provisions are listed below together with a short explanation of:

- what each power allows;
- who the power is conferred on;
- the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why this procedure (if any) is considered appropriate.

Section 2(2) – Power to amend the list of public authorities to which Part 1 applies

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution

Provision

11. Section 2(2) enables Scottish Ministers to amend the list of public authorities to which Part 1 of the Bill applies. An order may be used to add public authorities to the list, or to modify or remove existing entries on the list. Subsection (3) defines and limits the types of bodies, office-holders and other persons who can be added to the list. Subsection (7) allows orders under subsection (2) to make consequential, supplementary, incidental, transitional, transitory or saving provision, and allows orders to modify enactments.

Reason for taking power

12. This power enables Scottish Ministers to update the list of public authorities where necessary, as bodies or offices are abolished or newly created or their names are changed. The power is required to enable Scottish Ministers to keep the entries in the schedule up-to-date. It is preferable to have the capacity to do this without the need to await a suitable vehicle in primary legislation.

13. The power to make consequential and other amendments is considered necessary to ensure that, where a new public authority is added to the list, changes can be made to any existing records management duties which apply to that authority, so that these do not conflict with or duplicate the records management duties under the Bill. Section 13 of the Bill makes these kinds of amendments to records management duties of certain authorities which are listed in the schedule.

Choice of procedure

14. Section 2(8) provides that an order under section 2(2) is subject to affirmative procedure. This will enable Parliament to consider and decide whether it is appropriate to amend the schedule in order to impose records management obligations on a new body or to remove such obligations from an existing body.

Section 14(2) – Requirement to consult the Keeper before making provision about the transmission of Court of Session and High Court records

Power conferred on:	High Court of Justiciary and Court of Session
Power exercisable by:	Act of Adjournal or Act of Sederunt (according to which court exercises the power) made by statutory instrument
Parliamentary procedure:	No Parliamentary procedure

Provision

15. Section 14(2) amends section 1 of the 1937 Act by inserting a new subsection (3). Section 1 of the 1937 Act allows the Court of Session and High Court to make Acts of Sederunt and Acts of Adjournal which provide for the transmission of their records to the Keeper. These Acts may set times and conditions for the transmission of records to the Keeper. They may also make provision for the Keeper to re-transmit records to the Courts where they are required for court proceedings.

16. Inserted subsection (3) will require the Courts to consult the Keeper before making an Act of Sederunt or an Act of Adjournal under section 1 of the 1937 Act.

Reason for amending the power

17. The addition of a consultation requirement is considered necessary to ensure that the Keeper's views are taken into account by the Courts when deciding when, and how, records should be transmitted and when setting rules about re-transmission.

18. It remains appropriate for transmission and re-transmission to be regulated by Act of Adjournal or Act of Sederunt, rather than by primary legislation or Orders made by Scottish Ministers. The current approach ensures flexibility and recognises that the Courts remain best-placed to make the final decision on these matters.

19. The new consultation requirement will ensure that the Keeper can contribute to decisions about the timing of transfer of records to the Keeper for permanent preservation, which records should be transmitted and how records should be re-transmitted and then returned to the Keeper in accordance with section 1(2) of the 1937 Act.

Choice of procedure

20. The Bill does not alter the current procedures for Acts of Adjournal and Acts of Sederunt made under section 1 of the 1937 Act. Transmission and re-transmission of court records is largely an administrative matter and the addition of a consultation requirement to this power does not necessitate a change in procedure.

Section 15(1) – Power to commence the Bill by order

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: No Parliamentary procedure

Provision

21. This section provides that Parts 1 and 2 of the Bill will come into force on a day set by the Scottish Ministers by order. Part 3 will come into force automatically on the day after Royal Assent.

Reason for taking power

22. This will enable the Scottish Ministers to bring the Bill into force. It is considered appropriate for the Bill to be commenced at such times as the Scottish Ministers consider appropriate or expedient. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

23. Section 15 has the effect that commencement orders will not be subject to Parliamentary procedure (meaning that they will not be laid after being made). This is usual for commencement powers.

*This document relates to the Public Records (Scotland) Bill (SP Bill 56) as introduced in the
Scottish Parliament on 7 October 2010*

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