

TRIBUNALS (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 Tribunals (Scotland) Bill. It describes the purpose 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 the 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.

3. In this memorandum, unless the context otherwise requires—

“the First-tier Tribunal” means the First-tier Tribunal for Scotland to be established by section 1(1)(a) of the Bill;

“listed tribunal” means a tribunal listed in schedule 1 to the Bill;

“the Parliament” means the Scottish Parliament;

“the Scottish Tribunals” means the First-tier Tribunal and the Upper Tribunal;

“Tribunal Rules” means the Scottish Tribunal Rules made in accordance with section 62 of the Bill regulating the practice and procedure of the Scottish Tribunals; and

“the Upper Tribunal” means the Upper Tribunal for Scotland to be established by section 1(1)(b) of the Bill.

Outline of Bill provisions

4. The Bill creates a new structure for tribunals dealing with devolved matters.

5. Part 1 makes provision for the establishment of the First-tier Tribunal and the Upper Tribunal (collectively known as the Scottish Tribunals). Part 1 also designates the Lord President of the Court of Session as Head of the Scottish Tribunals and creates a new office, the President of the Scottish Tribunals.

6. Part 2 makes provision for the composition of the Scottish Tribunals and their internal structure. The First-tier Tribunal is to be organised into chambers and the Upper Tribunal is to be organised into divisions.

7. Part 3 makes provision so that the functions and members of a tribunal listed in schedule 1 can be transferred-in to the Scottish Tribunals. The Bill allows for the functions of the listed tribunals to be transferred-in to either or both of the Scottish Tribunals. It is anticipated that the First-tier Tribunal will deal with cases in the first instance to which a general right of appeal will lie to the Upper Tribunal. The Bill does, however, allow for first instance functions to be transferred-in to the Upper Tribunal.

8. Part 4 contains more detail in relation to membership of the Scottish Tribunals. Schedules 3 to 6 deal with the appointment and assignment of members. Schedule 7 sets out the terms and conditions of membership including period in office, re-appointment, termination of appointment, disqualification from office, pensions and remuneration. Schedule 8 makes provision as to the training and fitness of members including the process for removing a member from office.

9. Part 5 makes provision as to the composition of the Scottish Tribunals when exercising their decision-making functions.

10. Part 6 enables both the First-tier Tribunal and the Upper Tribunal to review their own decisions and to correct or set-aside those decisions. It also provides for a general right to appeal against a decision of the First-tier Tribunal to the Upper Tribunal and against a decision of the Upper Tribunal to the Court of Session. Chapter 2 of Part 6 also enables the Court of Session to remit an application for judicial review to the Upper Tribunal for determination.

11. Chapters 1 and 2 of Part 7 make provision in respect of the practice and procedure to be followed in proceedings before the Scottish Tribunals. Chapter 3 of Part 7 makes provision for the charging of fees by the Scottish Tribunals as well as the duty of the Scottish Minister to ensure that the Scottish Tribunals are provided with the necessary property, services and personnel which are required for their proper operation, and reporting.

12. Part 8 contains general and ancillary provisions.

Rationale for subordinate legislation

13. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against—

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the need to allow detailed administrative and procedural arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

Delegated powers

14. The delegated powers provisions in the Bill are listed 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 has been considered appropriate.

Section 19(2) – Chambers in the First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

15. Section 19(2) confers a power on the Scottish Ministers, by regulations, to make provision for and in connection with the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal's functions between those chambers.

Reason for taking power

16. The First-tier Tribunal will acquire functions from the listed tribunals through regulations made under section 27(2). Future enactments may also confer further functions on the First-tier Tribunal. The facility to organise the First-tier Tribunal into chambers will enable members with specialist expertise to be allocated to particular chambers and to sit on cases for which they are most qualified.

17. It is considered that the organisation of the First-tier Tribunal into chambers and the allocation of its functions among those chambers is best addressed through subordinate legislation for a number of reasons. Firstly, the functions which may be exercised by the First-tier Tribunal may vary over time and it is important not to set out a rigid chamber structure prior to it acquiring any of those functions. Secondly, it is not yet clear how the functions of the listed tribunals which are to be transferred-in to the First-tier Tribunal will fit together – there may be some overlapping functions which can be grouped together but there may be some functions for which it is important that they are dealt with in separate chambers. The Scottish Government, for example, intends to exercise the regulation-making power so that the functions of the Mental Health Tribunal for Scotland are initially allocated to a separate and individual chamber. Thirdly, it will also be important to retain the facility to alter the chamber structure to meet the varying demands that the Tribunal faces over time.

18. It is considered that the Scottish Ministers are the most appropriate persons to make provision regarding the chamber structure of the First-tier Tribunal and the allocation of its functions among those chambers but the Bill also recognises that it may be more appropriate for the Lord President or Tribunal Rules (which are formulated through a process which is independent of the Scottish Ministers) to determine these matters. Section 10(1), therefore, enables the regulations to make provision authorising the Lord President, or relying on Tribunal Rules, to determine certain of these matters.

19. There are a number of limitations and controls on the regulation-making power. Section 19(1) requires the chambers to be organised having regard to the different subject-matters falling within the jurisdiction of the First-tier Tribunal as well as any other factors which are relevant to the exercise of the Tribunal's functions. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 19(2).

20. Paragraph 7(1) of schedule 9 makes transitional provision so that the First-tier Tribunal need not be organised into chambers or may have only one chamber for such period until it has acquired sufficient functions so as to merit this.

Choice of procedure

21. This power has a potentially significant impact on the way in which the First-tier Tribunal will operate and how its functions will be exercised. It is an area which is likely to be of concern to the members and users of the listed tribunals. This is reflected in the requirement for consultation in section 11(1). It is also considered appropriate that any regulations made using this power be subject to the affirmative procedure in order to ensure a proper level of parliamentary scrutiny.

Section 22(2) – Divisions of the Upper Tribunal

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	affirmative procedure

Provision

22. Section 22(1) provides for the Upper Tribunal to be organised into a number of divisions. Section 22(2) confers a power on the Scottish Ministers, by regulations, to make provision for and in connection with the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal's functions between those divisions.

Reason for taking power

23. The Upper Tribunal will have the functions of disposing of appeals from decisions of the First-tier Tribunal under section 41. Functions of the listed tribunals may also be transferred-in to the Upper Tribunal through regulations made under section 27(2). Future enactments may also confer further functions on the Upper Tribunal. The facility to organise the Upper Tribunal into divisions will enable members with specialist expertise to be allocated to particular divisions and to sit on cases for which they are most qualified.

24. It is considered that the organisation of the Upper Tribunal into divisions and the allocation of its functions among those divisions is best addressed through subordinate legislation for a number of reasons. Firstly, the functions which may be exercised by the Upper Tribunal may vary over time and it is important not to set out a rigid chamber structure prior to it acquiring any of those functions. Secondly, it is not yet clear how the functions of the listed tribunals which will be transferred-in to the Upper Tribunal will fit together – there may be some overlapping functions which can be grouped together but there may be some functions for which it is important that they are dealt with in separate divisions. Thirdly, it will also be important to retain the facility to alter the structure to meet the varying demands that the Tribunal faces over time.

25. It is considered that the Scottish Ministers are the most appropriate persons to make provision regarding the internal structure of the Upper Tribunal and the allocation of its functions among its divisions but the Bill also recognises that it may be more appropriate for the Lord President or Tribunal Rules (which are formulated through a process which is independent of the Scottish Ministers) to determine these matters. Section 10(1), therefore, enables the regulations to make provision authorising the Lord President, or relying on Tribunal Rules, to determine certain of these matters.

26. There are a number of limitations and controls on the regulation-making power. Section 22(1) requires the divisions to be organised having regard to the different subject-matters falling within the jurisdiction of the Upper Tribunal as well as any other factors which are relevant to the exercise of the Tribunal's functions. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 22(2).

27. Paragraph 7(2) of schedule 9 makes transitional provision so that the Upper Tribunal need not be organised into divisions or may have only one division for such period until it has acquired sufficient functions so as to merit this.

Choice of procedure

28. This power has a potentially significant impact on the way in which the Upper Tribunal will operate and how its functions will be exercised. It is an area which is likely to be of concern to the members and users of the listed tribunals. This is reflected in the requirement for consultation in section 11(1). It is also considered appropriate that any regulations made using this power be subject to the affirmative procedure in order to ensure a proper level of parliamentary scrutiny.

Section 26(2) – Modification of listed tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

29. Section 26(2) confers the power on the Scottish Ministers, by regulations, to modify the list of tribunals set out in Part 1 of schedule 1 and the further specification set out in Part 2 of that schedule. Part 1 of schedule 1 sets out a list of tribunals from which the functions and members can be transferred-in to the Scottish Tribunals by virtue of regulations made under section 27(2) and paragraph 1 of schedule 2. Part 2 of schedule 1 makes further specification to assist with the identification of the tribunal and the functions that may be transferred.

Reason for taking power

30. This power has been taken as it may be necessary or desirable to add a tribunal to, or remove one from, the list, or adjust a specification, in view of the manner in which the Scottish Tribunals grow and evolve over time.

31. Subsections (3) and (4) of section 26 restrict the regulation-making power so that a body, office-holder or individual may only be added to the list if it, he or she is established by or under an enactment and is exercising decision-making functions in the manner of a tribunal. Subsection (5) prevents the transfer of any functions from a court or tribunals assessing the fitness or conduct of members of the courts judiciary or members of the Scottish Tribunals.

Choice of procedure

32. The power involves the amendment of primary legislation in a way which will allow for the narrowing and extension of the scope of the Scottish Tribunals. It is, therefore, considered appropriate that the regulation-making power be subject to the affirmative procedure.

Section 27(2) – Transfer-in of functions of the listed tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

33. Section 27(2) confers the power on the Scottish Ministers, by regulations, to provide for the transfer of some or all of the functions from a listed tribunal to the Scottish Tribunals. The regulations may provide for the functions of the listed tribunal to be transferred to the First-tier Tribunal, the Upper Tribunal or both Tribunals.

34. Where regulations made under section 27(2) provide for the functions of a listed tribunal to be transferred to both of the Scottish Tribunals, the regulations may make provision transferring certain functions to one tribunal and certain functions to the other. They can also

provide for a particular function to be transferred to both Tribunals but, where they do so, subsections (3) and (5) requires the regulations to make provision so that it can be ascertained when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules or by the President of Tribunals.

Reason for taking power

35. This power has been taken as it is not considered necessary or appropriate for the Bill to make provision effecting the transfer of functions from the listed tribunals to the Scottish Tribunals. Legislative provision effecting the transfer of functions will be of a detailed and technical nature and will involve the modification of enactments conferring functions on the listed tribunal from which the functions are being transferred-in. It is considered that this is best effected by subordinate legislation.

Choice of procedure

36. The exercise of this regulation-making power will involve selecting which of the Scottish Tribunals is to exercise the functions of a listed tribunal which are being transferred-in and will likely require the modification of the primary legislation establishing and conferring functions on the listed tribunal. It is, therefore, considered appropriate that the regulation-making power be subject to the affirmative procedure.

Section 27(4) – Transfer of functions between the Scottish Tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

37. Section 27(4) confers the power on the Scottish Ministers, by regulations, to provide for a redistribution of those functions which have been transferred-in from the listed tribunals between the Scottish Tribunals.

38. They can also provide for a particular function to be exercisable by both Tribunals but, where they do so, the regulations must make provision so that it can be ascertained when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules or by the President of Tribunals.

Reason for taking power

39. Following the transfer of functions from a listed tribunal to the Scottish Tribunals, it may become apparent that a function which was transferred to the First-tier Tribunal could be more effectively and efficiently dealt with by the Upper Tribunal or, conversely, a function which was transferred to the Upper Tribunal could be more effectively and efficiently dealt with by the First-tier Tribunal. Section 27(4) would enable this further transfer of functions to be effected by regulations without recourse to primary legislation.

Choice of procedure

40. Although this power may involve the amendment of primary legislation, it would only do so consequentially in connection with the transfer of functions between the Scottish Tribunals or to give full effect to the transfer of functions. It is, therefore, considered appropriate that the regulation-making power be subject to the negative procedure.

Section 35(1) – Composition of First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

41. Section 35(1) confers the power on the Scottish Ministers, by regulations, to make provision for determining the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. The regulations may make provision for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (4)).

42. The regulations will only set out the requirements for the composition of the First-tier Tribunal and it will be for the Chamber President of the chamber to which a case is allocated to choose the actual members – although the Chamber President must choose the members in accordance with the regulations (section 34).

Reason for taking power

43. At present, the various listed tribunals sit in accordance with the legislation governing their constitution and procedure in a wide range of formats with a varying number and composition of members. It is likely that the First-tier Tribunal will come to exercise a large number of those functions and provision will have to be made as to the composition of the First-tier Tribunal when convened to exercise these functions. Different compositions will be appropriate in respect of different functions and it is, therefore, considered appropriate for provision to be made in this respect by subordinate legislation.

44. A key part of the regulation-making power is also to ensure that ordinary members with the appropriate qualifications, experience and training are able and required to sit on the cases where those qualifications, experience and training are necessary or helpful.

45. The aim of the policy is to ensure that when convened to hear a case, the First-tier Tribunal will be composed of an appropriate number of members with the appropriate level of experience and expertise. This will facilitate an effective and efficient use of the members of the First-tier Tribunal. It will also allow flexibility so as to ensure that the composition of the First-tier Tribunal can vary in accordance with the wide range of functions that it is expected to be exercising.

46. In order to ensure flexibility, section 10(2) enables regulations made under section 35(1) to delegate authority to the President of Tribunals to determine the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction or to include provision relying on the effect of Tribunal Rules. This will enable the Scottish Ministers to assess whether it is more appropriate for certain matters to be determined by the President of Tribunals or in Tribunal Rules.

47. By virtue of section 11(2), the Scottish Ministers must also consult the President of Tribunals before making regulations under section 35(1).

Choice of procedure

48. The determination of the composition of the First-tier Tribunal when convened to exercise its functions is a power which is key to ensuring that the functions transferred-in from the various listed tribunals are exercised by the First-tier Tribunal in an appropriate manner. For that reason, it is, therefore, considered that the regulation-making power should be subject to the affirmative procedure.

Section 37(1) – Composition of the Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

49. Section 37(1) confers the power on the Scottish Ministers, by regulations, to make provision for determining the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction. The regulations may make provision for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (6)).

50. The regulations will only set out the requirements for the composition of the Upper Tribunal and it will be for the Vice-President of the division to which a case is allocated to choose the actual members – although the Vice-President must choose the members in accordance with the regulations (section 36).

Reason for taking power

51. It is likely that the Upper Tribunal will come to exercise a number of functions of the listed tribunals as well as the function of hearing appeals from decisions of the First-tier Tribunal under section 41. Provision must, therefore, be made as to the composition of the Upper Tribunal when convened to exercise these functions. Different compositions will be appropriate in respect of different functions and it is, therefore, considered appropriate for provision to be made in this respect by subordinate legislation.

52. A key part of the regulation-making power is also to ensure that ordinary members with the appropriate qualifications, experience and training are able and required to sit on the cases where those qualifications, experience and training are necessary or helpful.

53. The aim of the policy will be to ensure that when convened to hear a case, the Upper Tribunal will be composed of an appropriate number of members with the appropriate level of experience and expertise. This will facilitate an effective and efficient use of the members of the Upper Tribunal. It will also allow flexibility so as to ensure that the composition of the Upper Tribunal can vary in accordance with the wide range of functions that it is expected to be exercising.

54. In order to ensure flexibility, section 10(2) enables regulations made under section 37(1) to delegate authority to the President of Tribunals to determine the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction or to include provision relying on the effect of Tribunal Rules. This will enable the Scottish Ministers to assess whether it is more appropriate for certain matters to be determined by the President of Tribunals or in Tribunal Rules.

55. By virtue of section 11(2), the Scottish Ministers must also consult the President of Tribunals before making regulations under section 37(1).

Choice of procedure

56. The determination of the composition of the Upper Tribunal when convened to exercise its functions is a power which is key to ensuring that the Tribunals functions are exercised by the Upper Tribunal in an appropriate manner. For that reason, it is, therefore, considered that the regulation-making power should be subject to the affirmative procedure.

Section 38(3)(b) – Review of decisions

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

57. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 48(2) – Other appeal rights

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

58. Section 48(1) provides that a decision of the Scottish Tribunals against which there is a right of appeal under another enactment is an excluded decision to which the provisions for review and appeal set out in Chapter 1 of Part 6 do not apply.

59. Section 48(2) confers a power on the Scottish Ministers, by regulations, to make exceptions to this general rule.

Reason for taking power

60. While section 41 creates a general right of appeal from a decision of the First-tier Tribunal to the Upper Tribunal and section 43 creates a general right of appeal from a decision of the Upper Tribunal to the Court of Session, it is considered that it will not always be appropriate for these general rights of appeal to apply. The legislation establishing and regulating the procedure of a listed tribunal may, for example, provide for a right to appeal the decision of that tribunal to a sheriff or the Court of Session. When the functions of the listed tribunal are transferred-in to the Scottish Tribunals, it will be open to the Scottish Ministers to leave the previous rights of appeal in place or to remove these and allow the general rights of appeal set out in the Bill to apply. Where the Scottish Ministers consider it appropriate to leave existing rights of appeal in place, section 48(2) will allow the Scottish Ministers, by regulations, to make exceptions so that the general rights of review and appeal set out in the Bill will still be able to apply to certain matters.

61. It is not possible to make provision about these matters until such time as the relevant functions of the listed tribunals are transferred-in to the Scottish Tribunals which makes the use of subordinate legislation appropriate.

Choice of procedure

62. Since any regulations made under section 48(2) will simply be enabling the application of the general rights of review and appeal set out in the Bill, it is considered that the regulation-making power should be subject to the negative procedure.

Section 49(1) – Position on transfer-in

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	negative procedure

Provision

63. Section 49(1) confers a power on the Scottish Ministers, by regulations, to specify certain decision-making functions of the Scottish Tribunals in respect of which any decision made by the Tribunals will be regarded as an excluded decision and will not, therefore, be subject to the general rights of review and appeal set out in Chapter 1 of Part 6.

64. The decision-making functions of the Scottish Tribunals which may be specified in regulations are limited to those which are transferred-in from a listed tribunal and in respect of which, immediately before the transfer of the functions, there was no right of appeal from the decision of the listed tribunal.

Reason for taking power

65. Certain decisions of the listed tribunals are not currently subject to any right of appeal. Where these decision-making functions are transferred to the Scottish Tribunals, it is considered that it may be appropriate to exclude the general rights of review and appeal set out in the Bill. These functions would require to be specified in regulations made under section 49(1) in order that the general rights of review and appeal set out in the Bill are excluded.

66. It is not possible to make provision about these matters until such time as the relevant functions of the listed tribunals are transferred-in to the Scottish Tribunals which makes the use of subordinate legislation appropriate.

Choice of procedure

67. Since regulations made under section 49(1) may only preserve the position which existed prior to the transfer-in of functions, it is considered that the regulation-making power should be subject to the negative procedure.

Section 50(1) – Time limits for applying for permission to appeal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

68. In order to appeal a decision of the First-tier Tribunal to the Upper Tribunal or a decision of the Upper Tribunal to the Court of Session, permission is required under section 41(3) or 43(3) respectively. Section 50(1) confers a power on the Scottish Ministers, by regulations, to specify time limits within which permission to appeal a decision of the Scottish Tribunals must be sought.

Reason for taking power

69. The time limit for applying for permission to appeal is a procedural matter and it is, therefore, considered, to be more appropriate to set out the requirements in subordinate legislation rather than on the face of the Bill. It is, however, considered to be of such importance that it should be set out in regulations made by the Scottish Ministers rather than left to Tribunal Rules.

Choice of procedure

70. Given that the regulation-making power is dealing with procedural matters, it is considered that the regulation-making power should be subject to the negative procedure.

Section 51(2) – Specifying persons who are to be regarded as a party to a case

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

71. Section 51(2) confers a power on the Scottish Ministers, by regulations, to make provision so that persons falling within a specified description can be regarded as a party to a case for the purposes of sections 38, 41 and 43. Under those provisions it is only a party to a case who can apply for a review of a decision of the Scottish Tribunals or appeal a decision of a Tribunal.

Reason for taking power

72. Certain persons or bodies may have an interest in a decision of the Scottish Tribunals but be unable to seek a review or appeal the decision if they were not actually a party to a case. It is, therefore, considered to be prudent to allow subordinate legislation to extend the reference to a party to a case to include persons falling within a specified description. This, for example, may allow certain interest groups to seek the review of, or appeal, a Tribunal decision. Until the full extent of the functions of the Scottish Tribunals are known, it is considered to be appropriate for these matters to be set out in subordinate legislation rather than on the face of the Bill.

Choice of procedure

73. Given that the regulation-making power is dealing with procedural matters, it is considered that the regulation-making power should be subject to the negative procedure.

Section 52(4) – Specification of categories of petition for judicial review which may be remitted to the Upper Tribunal

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

74. Section 52 makes provision so that the Court of Session may, by order of the Court, remit a petition for judicial review to the Upper Tribunal for determination. Under subsection (4) a petition may only be remitted if it falls within a category specified by an act of sederunt made by the Court of Session. Section 52(4), therefore, confers a power on the Court of Session, by act of sederunt, to specify the categories of petitions for judicial review which are appropriate to be remitted to the Upper Tribunal for determination.

Reason for taking power

75. The membership of the Upper Tribunal and the expertise which it is expected to acquire in relation to the matters which fall within its jurisdiction may make it an appropriate body to determine petitions for judicial review which relate to a subject-matter within the Tribunal's expertise. Since the Upper Tribunal will be a new body established by the Bill and will only acquire functions, members and expertise over time it is not considered appropriate to set out the categories of petition which should be capable of being remitted to it from the Court of Session on the face of the Bill.

76. It is considered that the Court of Session will be in the best position to assess which categories of petition will be suitable to be remitted to the Upper Tribunal and which categories of petition the Upper Tribunal will have the expertise to determine.

77. Even if a petition falls within a category specified in an act of sederunt made under section 52(4), the Court may only remit the petition to the Upper Tribunal if, in accordance with section 52(2), it considers that it is appropriate to do so having regard to the functions and expertise of the Upper Tribunal in relation to the subject-matter of the petition.

Choice of procedure

78. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 54(2) – Additional matters in relation to judicial review

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

79. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 56(2) – Venue for hearings

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

80. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 57(1) – Conduct of cases

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

81. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 58(1) – Enforcement of decisions

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

82. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 59 – Award of expenses

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

83. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 60(1) – Conferral of additional powers

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

84. Section 60(1) confers a power on the Scottish Ministers, by regulations, to confer such additional powers on the Scottish Tribunals as are necessary or expedient for the proper exercise of their functions.

Reason for taking power

85. The purpose behind this regulation-making power is to ensure that the Scottish Tribunals will have all the powers and functions which are necessary or expedient in order to properly

exercise the functions transferred-in from the listed tribunals or conferred on them by or under the Bill.

86. Since the Scottish Tribunals will be acquiring functions that are not set out in the Bill, it is appreciated that the Bill may not have conferred all the necessary powers on the Scottish Tribunals to exercise all the functions that will be transferred. It is, therefore, considered to be expedient to include a regulation-making power which will enable additional powers to be conferred on the Scottish Tribunals to ensure the proper exercise of their functions.

87. The regulation-making power may only be exercised so as to confer those additional powers on the Scottish Tribunals which are necessary or expedient for the proper exercise of their functions. The Scottish Ministers must obtain the approval of the Lord President before exercising the regulation-making power.

88. The regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules.

Choice of procedure

89. Given that the regulation-making power will be able to confer additional powers on the Scottish Tribunals to those that are set out in the Bill, it is considered appropriate that they are subject to the affirmative procedure.

Section 61(1) – Application of enactments

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	affirmative procedure

Provision

90. Section 61(1) confers a power on the Scottish Ministers, by regulations, to modify the application of any enactment so far as they consider is necessary or expedient for the purposes of making or giving effect to Tribunal Rules, or giving effect to Part 7 of the Bill.

Reason for taking power

91. The functions of the listed tribunals are set out in a wide array of enactments and once these are transferred-in to the Scottish Tribunals, it may be necessary to modify these functions in order that consistent rules of procedure and practice can be made for the Scottish Tribunals.

92. The regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules.

Choice of procedure

93. Given that the regulation-making power will be able to modify the functions of the Scottish Tribunals, it is considered appropriate that they are subject to the affirmative procedure.

Section 62(1) – Scottish Tribunal Rules

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

94. Section 62 confers a power on the Court of Session, by act of sederunt, to make rules (to be known as Scottish Tribunal Rules) regulating the practice and procedure to be followed in proceedings in the Scottish Tribunals.

95. Sections 63 and 64 make further provision about the extent to which Tribunal Rules may make provision regulating the practice and procedure to be followed in proceedings in the Scottish Tribunals. Section 63 provides that Tribunal Rules may make provision as to the exercise of functions by the members of the Scottish Tribunals as well relying on the effect of practice directions issued under section 68. Section 64 provides that Tribunal Rules may make different provision for different purposes including different provision for different Tribunals, different chambers or divisions or different types of proceedings. It also provides that the generality of section 62(1) is not limited by the specific provisions in the Bill which set out the matters for which Tribunal Rules may make provision.

96. The following provisions make specific provision as to the matters for which Tribunal Rules may make provision:

- section 10(1)(b) enables regulations made under sections 19(2) (regarding the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal's functions among those chambers) and 22(2) (regarding the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal's functions among those divisions) to include provision relying on the effect of Tribunal Rules;
- section 10(2)(b) enables regulations made under sections 35(1) (regarding the composition of the First-tier Tribunal when convened to decide a matter falling within its jurisdiction) and 37(1) (regarding the composition of the Upper Tribunal when convened to decide a matter falling within its jurisdiction) to include provision relying on the effect of Tribunal Rules;
- section 27(4) and (5)(a) enables regulations made under section 27(2) or (4) which provide for a transfer of the functions of a listed tribunal to both the First-tier Tribunal and the Upper Tribunal to provide for the question as to which of the Tribunals is to exercise a particular function to be determined in accordance with Tribunal Rules;

- section 38(3) enables Tribunal Rules to make provision excluding other decisions of the Scottish Tribunals from being reviewed under section 38 or otherwise restricting the availability of a review under that section;
- section 54(2) enables Tribunal Rules to make further provision about the exercise by the Upper Tribunal of any functions it has in relation to a petition for judicial review remitted to it under section 52(2);
- section 56(2) enables Tribunal Rules to make provision regarding the venue for hearings;
- section 57(1) enables Tribunal Rules to make further provision in respect of the conduct of cases before the Scottish Tribunals so as to ensure that the Scottish Tribunals have the necessary powers, rights, privileges and authority regarding such things as the attendance or examination of witnesses, the production of evidence and the preparation of reports;
- section 58(1) enables Tribunal Rules to provide for the means by which an order of the Scottish Tribunals giving effect to a decision is to be enforced;
- section 59(1) provides that the Scottish Tribunals may only award expenses in a case where this is provided for in Tribunal Rules;
- section 65(1) enables Tribunal Rules to make provision for the purpose of proceedings in a case before the Scottish Tribunals including as to the form and manner in which a case is to be brought, the withdrawal of a case, and time limits for making a referral;
- section 66(1) enables Tribunal Rules to make provision about hearings including as to when matters can be dealt without a hearing, whether a hearing is to be held in private or public, appearance and representation at hearings, notice of hearing, adjournment with a view to resolution and the imposition of reporting restrictions;
- section 67(1) enables Tribunal Rules to make provision about evidence given before the Scottish Tribunals including as to the administering of oaths and presumptions to apply and about their decisions (for example, how they are recorded and published).

Reason for taking power

97. Rules governing the practice and procedure to be followed in proceedings in the Scottish Tribunals relate to technical procedural matters which will be detailed, will vary according to chambers, divisions or subject-matters and will require to be updated regularly as the Scottish Tribunals acquire functions. It is not, therefore, appropriate to set out these matters on the face of the Bill.

98. The aim of the Bill is for the rules governing the practice and procedure to be followed in proceedings in the Scottish Tribunals to be framed independently of the executive. It is, therefore, considered that it is appropriate for the Tribunal Rules to be made by the Court of Session (thereby ensuring independence from the executive) by act of sederunt (thereby ensuring transparency).

99. Paragraphs 2(2) and 4(2) of schedule 9 do, however, enable the Scottish Ministers to make transitional arrangements, by regulations, in relation to Tribunal Rules. See the commentary on those provisions.

Choice of procedure

100. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 65(1) – Proceedings and steps

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

101. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 66(1) – Hearings in cases

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

102. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 67(1) – Evidence and decisions

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

103. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 70(1) – Tribunal fees

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

104. Section 70(1) confers a power on the Scottish Ministers, by regulations, to make provision for the Scottish Tribunals to charge reasonable fees in respect of any matter with which they deal.

Reason for taking power

105. Some of the listed tribunals currently charge fees in respect of the exercise of their decision-making functions while others do not. The general rule will be that the Scottish Tribunals cannot charge fees in respect of any matter unless regulations made under section 70(1) authorise them to do so. This provision is made as it is recognised that it will be appropriate, in relation to certain matters, for the Scottish Tribunals to charge reasonable fees.

106. It is not possible to make provision about these matters until such time as the relevant functions of the listed tribunals are transferred-in to the Scottish Tribunals which makes the use of subordinate legislation appropriate. Any fees charged are likely to vary over time which, again, makes the use of subordinate legislation appropriate so that the fees can be updated without recourse to primary legislation.

107. It is considered that the Scottish Ministers are the appropriate persons to make the provision but they must consult the Lord President before doing so.

Choice of procedure

108. It is considered appropriate that the regulation-making power is subject to the negative procedure.

Section 74(1) – Ancillary regulations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative/negative procedure

Provision

109. Section 74(1) confers a power on the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill.

Reason for taking power

110. As with any new body of law, the Bill may give rise to a need for a range of ancillary regulations.

111. The power to make ancillary regulations is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, with the Bill creating a new tribunal structure to which the functions and members of existing tribunals can be transferred, it is possible that unforeseen issues will arise which require further provision to be made or the further modification of the existing law. This power would allow such provision to be made without the need to make further primary legislation.

112. The Bill already includes a number of consequential modifications to related legislation (see Part 2 of schedule 9) as well as transitional provisions (see Part 1 of schedule 9) but the power would allow the Scottish Ministers to make further changes should there be any

unforeseen issues. It may, however, be that the need for further provision is necessary in order to fully and properly implement the Bill's provisions. The Scottish Government considers that the regulation-making power is necessary to allow for this flexibility, especially in light of previous operational experience. Without this power, it may be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Parliament or the Scottish Government.

113. The power, while potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, or in connection with, the Bill.

Choice of procedure

114. Any regulations made under section 74 which textually amend any Act are subject to the affirmative procedure. Where such regulations do not seek to textually amend any Act, it is considered that negative procedure provides an appropriate degree of scrutiny.

Section 77(2) – Commencement of the Bill

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

115. Section 77(2) confers a power on the Scottish Ministers, by order, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 77(3) provides that such an order may include transitional, transitory or saving provision. It is not unusual to allow for such provision in conjunction with a power to make commence the provisions of a Bill.

Reason for taking power

116. It is considered appropriate for the substance provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

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

Schedule 2, paragraph 1(1) – Transfer-in of members

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

118. Paragraph 1(1) of schedule 2 confers a power on the Scottish Ministers, by regulations to provide for the transfer of the members of the listed tribunals to positions in the Scottish Tribunals.

Reason for taking power

119. Where the functions of a listed tribunal are transferred-in to the Scottish Tribunals it is the intention that all of the members of that tribunal will also transfer-in. There may, however, be instances where the functions of a listed tribunal are transferred-in to the Scottish Tribunals in a piecemeal fashion and consequently, it will also be necessary, to allow for the members to transfer-in in a similar fashion.

120. Since the functions of a listed tribunal are to be transferred-in by subordinate legislation, it is also logical for the transfer-in of members to be effected by subordinate legislation.

Choice of procedure

121. It is considered that the negative procedure gives an appropriate degree of scrutiny in relation to the exercise of the regulation-making power contained in paragraph 1(1) of schedule 2. The transfer-in of members to positions in the Scottish Tribunals does not require the amendment of primary legislation.

Schedule 3, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

122. Paragraph 1(2) of schedule 3 confers a power on the Scottish Ministers, by regulations, to prescribe the criteria by which persons will be eligible to be appointed as ordinary members of the First-tier Tribunal.

Reason for taking power

123. The First-tier Tribunal will require ordinary members with a diverse range of qualifications, experience and training depending on the nature of the functions that it is exercising. It will only become apparent as the functions of the listed tribunals are transferred-in to the First-tier Tribunal what types of ordinary member must be appointed. It is anticipated that the ordinary members will include persons from a number of professions (such as medicine, teaching and surveying) as well as other lay members.

124. It is considered that the detail as to the qualifications, experience and training necessary to be appointed as an ordinary member of the First-tier Tribunal is better set out in regulations than on the face of the Bill for reasons of flexibility.

Choice of procedure

125. It is considered that the negative procedure gives an appropriate degree of scrutiny in relation to the exercise of the regulation-making power contained in paragraph 1(2) of schedule 3.

Schedule 3, paragraphs 5(2) and 7(1) and (2) – Further provision about the eligibility of legal members of the First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

126. Paragraph 5(2) of schedule 3 confers a power on the Scottish Ministers, by regulations to specify further criteria beyond that set out in paragraph 5(1) of that schedule which will enable a person to qualify as a legal member of the First-tier Tribunal.

127. The regulation-making power in paragraph 5(2) of schedule 3 is informed by paragraph 6 of that schedule. Paragraph 6(2) enables those regulations to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have subsequently engaged in another law-related activity that may make them suitable to appointed as a legal member of the First-tier Tribunal. Paragraph 6(3) also enables those regulations to make provision in relation to persons who are not solicitors, advocates or barristers but have engaged in a law-related activity through which they have acquired experience in law which may make them suitable to be appointed as a legal member of the First-tier Tribunal.

128. Paragraph 7(1) of schedule 3 confers a power on the Scottish Ministers, by regulations to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the First-tier Tribunal including the calculation of the 5 year qualification period, the effect of debarment from practice and the criteria and nature of other experiences in law.

129. Paragraph 7(2) of schedule 3 confers a power on the Scottish Ministers, by regulations, to modify the list of activities set out in paragraph 6(4) of that schedule which may be used to assess whether a person has acquired experience in law which would make that person suitable for appointment as a legal member of the First-tier Tribunal.

Reason for taking power

130. The Scottish Government considers that it is appropriate to set out the core eligibility criteria by which a person will qualify to be appointed as a legal member of the First-tier Tribunal on the face of the Bill. That is, through practising as a solicitor or advocate in Scotland or as a solicitor or barrister in England and Wales or Northern Ireland and having practised as such for a period of not less than 5 years.

131. The Scottish Government recognises, however, that it may be, or may become, appropriate for persons who have formerly practised as solicitors, advocates or barristers and

who have subsequently engaged in another legal activity or for persons who are not solicitors, advocates or barristers but have engaged in another legal activity to be eligible for appointment as legal members of the First-tier Tribunal. The regulation-making power in paragraph 5(2) of schedule 3 would enable the Scottish Ministers to make regulations enabling such persons to be eligible for appointment as such. It, therefore, gives a degree of flexibility so that the eligibility criteria can be adjusted to recognise legal qualifications and experience other than that gained by solicitors, advocates and barristers. The power is not, however, unlimited and is informed by paragraphs 6 and 7 of that schedule which set out the various matters on which those regulations may make provision. The regulation-making power in paragraph 5(2) of schedule 3 is, itself, augmented by the regulation-making powers contained in paragraph 7(1) and (2).

Choice of procedure

132. It is considered that the negative procedure gives the appropriate degree of scrutiny. Even though paragraph 7(2) of schedule 3 enables the modification of the list of activities set out in paragraph 6(4) of that schedule, the fact that those activities must amount to a suitably attributable experience in law restricts the extent of the power and it is considered that the negative procedure will, therefore, give the appropriate degree of scrutiny.

Schedule 5, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

133. Paragraph 1(2) of schedule 5 confers a power on the Scottish Ministers, by regulations, to prescribe the criteria by which persons will be eligible to be appointed as ordinary members of the Upper Tribunal.

Reason for taking power

134. The Upper Tribunal may require ordinary members with a diverse range of qualifications, experience and training depending on the nature of the functions that it is exercising. It will only become apparent as the functions of the listed tribunals are transferred-in to the First-tier Tribunal what types of ordinary member must be appointed. It is anticipated that the ordinary members will include persons from a number of professions (such as medicine, teaching and surveying) as well as other lay members.

135. It is considered that it is appropriate to leave the detail as to the qualifications, experience and training necessary to be appointed as an ordinary member of the Upper Tribunal is better set out in regulations than on the face of the Bill for reasons of flexibility.

Choice of procedure

136. It is considered that the negative procedure gives an appropriate degree of scrutiny in relation to the exercise of the regulation-making power contained in paragraph 1(2) of schedule 5.

Schedule 5, paragraphs 5(2) and 7(1) and (2) – Further provision about the eligibility of legal members of the Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

137. Paragraph 5(2) of schedule 5 confers a power on the Scottish Ministers, by regulations to specify further criteria beyond that set out in paragraph 5(1) of that schedule which will enable a person to qualify as a legal member of the Upper Tribunal.

138. The regulation-making power in paragraph 5(2) of schedule 5 is informed by paragraph 6 of that schedule. Paragraph 6(2) enables those regulations to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have subsequently engaged in another law-related activity that may make them suitable to be appointed as a legal member of the Upper Tribunal. Paragraph 6(3) also enables those regulations to make provision in relation to persons who are not solicitors, advocates or barristers but have engaged in a law-related activity through which they have acquired experience in law which may make them suitable to be appointed as a legal member of the Upper Tribunal.

139. Paragraph 7(1) of schedule 5 confers a power on the Scottish Ministers, by regulations to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the Upper Tribunal including the calculation of the 7 year qualification period, the effect of debarment from practice and the criteria and nature of other experiences in law.

140. Paragraph 7(2) of schedule 5 confers a power on the Scottish Ministers, by regulations, to modify the list of activities set out in paragraph 6(4) of that schedule which may be used to assess whether a person has acquired experience in law which would make that person suitable for appointment as a legal member of the Upper Tribunal.

Reason for taking power

141. The Scottish Government consider that it is appropriate to set out the core eligibility criteria by which a person will qualify to be appointed as a legal member of the Upper Tribunal on the face of the Bill. That is, through practising as a solicitor or advocate in Scotland or as a solicitor or barrister in England and Wales or Northern Ireland and having practised as such for a period of not less than 7 years.

142. The Scottish Government recognises, however, that it may be, or may become, appropriate for persons who have formerly practised as solicitors, advocates or barristers and

who have subsequently engaged in another legal activity or for persons who are not solicitors, advocates or barristers but have engaged in another legal activity to be eligible for appointment as legal members of the Upper Tribunal. The regulation-making power in paragraph 5(2) of schedule 5 would enable the Scottish Ministers to make regulations enabling such persons to be eligible for appointment as such. It, therefore, gives a degree of flexibility so that the eligibility criteria can be adjusted to recognise legal qualifications and experience other than that gained by solicitors, advocates and barristers. The power is not, however, unlimited and is informed by paragraphs 6 and 7 of that schedule which set out the various matters on which those regulations may make provision. The regulation-making power in paragraph 5(2) of schedule 5 is, itself, augmented by the regulation-making powers contained in paragraph 7(1) and (2).

Choice of procedure

143. It is considered that the negative procedure gives the appropriate degree of scrutiny. Even though paragraph 7(2) of schedule 5 enables the modification of the list of activities set out in paragraph 6(4) of that schedule, the fact that those activities must amount to a suitably attributable experience in law restricts the extent of the power and it is considered that the negative procedure will, therefore, give the appropriate degree of scrutiny.

Schedule 8, paragraph 3(1) – Rules for the investigation and determination of any matter concerning the conduct of members of the Scottish Tribunals and the review of such a determination

Power conferred on: the Lord President
Power exercisable by: Rules made by the Lord President
Parliamentary procedure: not laid no procedure

Provision

144. Paragraph 3(1) of schedule 8 confers a power on the Lord President, by rules, to make provision for the purposes of, or in connection with, the investigation and determination of any matter concerning the conduct of the members of the Scottish Tribunals and the review of any such determination.

145. Paragraph 3(1) of schedule 8 makes analogous provision in relation to the conduct of the legal and ordinary members of the Scottish Tribunals as section 28 of the Judiciary and Courts (Scotland) Act 2008 makes in relation to the conduct of judicial office holders.

146. Paragraph 3(2) makes provision about what the rules may cover in particular. Paragraph 4(a) provides that the Lord President may make different provision for different purposes while paragraph 4(b) provides that the rules are to be published in such manner as the Lord President may determine.

Reason for taking power

147. The Lord President as Head of the Scottish Tribunals will have responsibility for making and maintaining appropriate arrangements about the conduct of the members of the Scottish Tribunals. How those arrangements will operate will be detailed and procedural and it is not considered appropriate for these matters to be set out on the face of the Bill. The Lord

President's power will enable him or her to set out the arrangements in rules which may be readily modified and updated to reflect best practice and changing circumstances. It means that the conduct of the members of the Scottish Tribunals can be provided for by the Lord President in a similar manner in which he or she makes provision in relation to the conduct of the courts judiciary.

Choice of procedure

148. No parliamentary procedure has been applied. The responsibility for making and maintaining arrangements for the conduct of members of the Scottish Tribunals will rest with the Lord President. These procedures will be subject to scrutiny by the Judicial Complaints Reviewer (see paragraph 9 of schedule 8) who may make written representations to the Lord President. The rules will also be published. These measures are considered to offer the appropriate level of public scrutiny.

Schedule 8, paragraph 14 – Procedure to be followed by a fitness assessment tribunal

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

149. Paragraph 14 of schedule 8 confers a power on the Court of Session, by act of sederunt, to make provision with regard to the procedure to be followed by a fitness assessment tribunal convened under paragraph 13 of that schedule to investigate and report on whether a member of the Scottish Tribunals is unfit to hold that position.

Reason for taking power

150. The procedure adopted in relation to the removal of a member of the Scottish Tribunals from that position must be framed so as to ensure the independence of those members is not compromised. It is considered that it is appropriate for this provision to be made by the Court of Session (thereby ensuring independence from the executive) by act of sederunt (thereby ensuring transparency).

151. The provisions will be setting out the detail on procedural matters and it is not, therefore, considered to be appropriate to do this on the face of the Bill. Similar provision is made in relation to the removal of judges of the Court of Session by section 37(5) of the Judiciary and Courts (Scotland) Act 2008.

Choice of procedure

152. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Schedule 9, paragraph 2(2) – Continued application of procedural rules of listed tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

153. Paragraph 2(2) of schedule 9 confers a power on the Scottish Ministers, by regulations, to provide for the procedural rules of a listed tribunal that are in force immediately before the functions are transferred-in to the Scottish Tribunals to continue to have effect (with such modifications as the Scottish Ministers consider to be necessary or expedient) following a transfer of those functions to the Scottish Tribunals.

Reason for taking power

154. The purpose of this regulation-making power is to enable the smooth transfer of functions from a listed tribunal to the Scottish Tribunals with the procedural rules of the listed tribunal continuing to apply (subject to appropriate modification) until such time as they require to be amended or new procedural rules are introduced.

155. Since the functions of the listed tribunals are being transferred by regulations, it is consistent to allow provision to be made in regulations for the continued application of their procedural rules.

156. The existing rules can only be modified so far as the Scottish Ministers consider to be necessary or expedient with respect to the exercise of the same functions by the Scottish Tribunals.

157. Paragraph 3 allows the regulations to make different provision for different purposes and include supplemental, incidental, consequential, transitional, transitory or saving provision and provides for the regulations to be subject to negative procedure since section 73 does not apply.

Choice of procedure

158. It is considered that the negative procedure gives the appropriate level of scrutiny to the exercise of this regulation-making power. The regulations will simply be enabling the existing procedures which govern the exercise of functions by a listed tribunal to continue to apply to those functions when exercised by the Scottish Tribunals following a transfer of functions.

Schedule 9, paragraph 4(2) – Procedural rules prior to the involvement of the Scottish Civil Justice Council

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

159. Paragraph 4(2) of schedule 9 confers a power on the Scottish Ministers, until such time as the Scottish Civil Justice Council is involved in the making of Tribunal Rules to make such rules by setting them out in regulations.

Reason for taking power

160. It is likely that the Scottish Civil Justice Council will only be very recently established by the time that the Scottish Tribunals begin to acquire their functions from the listed tribunals. In the event that the Scottish Civil Justice Council is not yet in a position operationally to assume its role in the formulation of Tribunal Rules, it is considered appropriate to confer a power on the Scottish Ministers to make those rules by setting them out in regulations.

161. Before making any such regulations, the Scottish Ministers are required to consult the President of Tribunals and such other persons as they consider appropriate.

Choice of procedure

162. It is considered that the negative procedure gives the appropriate level of scrutiny to the exercise of this regulation-making power.

This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

TRIBUNALS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM