

TRIBUNALS (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Tribunals (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 28A(2) – Accommodation of functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

2. The two methods by which decision-making functions may be conferred on the Scottish Tribunals are transfer-in under section 27 of this Bill, or by the direct conferral of functions by an Act of the Scottish Parliament or subordinate legislation under an Act.

3. This power allows the Scottish Ministers to amend the Tribunals Bill whenever functions are directly conferred on the Scottish Tribunals. The amendment will specify the new functions on the face of the Tribunals Bill.

Reason for taking power

4. The intention is that the Tribunals Bill should be able to give the user a complete picture of the jurisdictions of the Scottish Tribunals. This power will be used to incorporate in the text of the Act references to decision-making functions directly conferred on the Scottish Tribunals.

Reason for choice of procedure

5. The Scottish Government considers that negative procedure is appropriate as this power can only be used to make descriptive, technical changes to the Tribunals Bill which will, in any

event, only be able to be made following direct conferral of functions on the Scottish Tribunals by another Act (which will have completed its own parliamentary procedure).

Section 28A(3) – Accommodation of functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

6. The two methods by which decision-making functions may be conferred on the Scottish Tribunals are transfer-in under section 27 of this Bill, or by the direct conferral of functions by an Act of the Scottish Parliament or subordinate legislation under an Act.

7. This power allows the Scottish Ministers to amend the Tribunals Bill or the legislation directly conferring new functions on the Scottish Tribunals whenever functions are directly conferred. Amendments can be made in order to make the new functions conferred on the Scottish Tribunals exercisable in accordance with the Tribunals Bill.

Reason for taking power

8. Under section 27(6), regulations which transfer in decision-making functions to the Scottish Tribunals are able to make provision to give full effect to that transfer. The new power in section 28A(3) allows equivalent provision to be made when a function is directly conferred on the Scottish Tribunals.

Reason for choice of procedure

9. Regulations made under section 27(2) and (6) are affirmative because they are principally made under 27(2), which provides for transfer-in. The policy choice whether to transfer in a jurisdiction is considered sufficiently important that it requires to be subject to the affirmative procedure. The regulation-making power in section 27(6) supplements this. The power in section 28A(3) is not equivalent to the regulation-making power in section 27(2) – it involves, in itself, no choice whether to transfer a jurisdiction into the Scottish Tribunals. Therefore, there does not exist the same justification for making it subject to the affirmative procedure. Instead, it more closely replicates only the supplementary ability of 27(6) to give full effect to the transfer of a jurisdiction into the Scottish Tribunals. The Scottish Ministers do not consider that this, independently, is a sufficiently significant power to justify the affirmative procedure.

10. It is worth giving an example for this. If primary legislation were to confer new decision-making functions directly on the Scottish Tribunals, it is not impossible that there might be unanticipated (consequential) adjustments required to legislation required to make the new jurisdiction work neatly with the new Tribunals system. Section 27(6) allows this to occur when the Scottish Tribunals gain a new jurisdiction as a result of regulations made under 27(2). For example, provisions might be adjusted so that other enactments explicitly make reference to relevant provisions in the Tribunals Bill or to remove provision that is no longer necessary as the result of the direct conferral of the new jurisdiction.

Section 28B(1) – Redistribution of functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

11. The two methods by which decision-making functions may be conferred on the Scottish Tribunals are transfer-in under section 27 of this Bill, or by the direct conferral of functions by an Act of the Scottish Parliament or subordinate legislation under an Act.

12. This power allows the Scottish Ministers to redistribute functions directly conferred on the Scottish Tribunals between the Scottish Tribunals.

Reason for taking power

13. Under section 27(4) regulations may be made which redistribute functions between the Scottish Tribunals if those functions were transferred in. This power completes the picture by granting Scottish Ministers the same powers of redistribution in respect of those functions which were directly conferred on the Scottish Tribunals.

Reason for choice of procedure

14. The Scottish Government considers that negative procedure is appropriate as this power complements the power in section 27(4), which is subject to negative procedure. The redistribution of functions is an operational matter and, although both powers can be used to amend primary legislation, this can only be done consequentially in connection with the transfer of functions between the Scottish Tribunals once they have been acquired by the Tribunals by other means.

Section 32(2) – Conditions of membership etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

15. Schedule 7 to the Bill contains detailed provisions concerning the terms of membership on which members of the Scottish Tribunals hold office. Paragraphs 2 to 9 provide that tribunal members hold office for a period of five years, after which they will be automatically re-appointed unless certain conditions are met.

16. This power allows the Scottish Ministers to provide for permanent appointments to the Scottish Tribunals by making regulations to which schedule 7 is subject.

Reason for taking power

17. After considering the recommendation in the Justice Committee's Stage 1 Report, the Scottish Ministers agreed that the Bill should be amended to allow for the possibility of permanent appointments to the Scottish Tribunals if there was a business need for a permanent appointment identified. This power allows the Scottish Ministers to, in consultation with the President of Tribunals, make provision to this effect where necessary.

Reason for choice of procedure

18. The Scottish Government considers that negative procedure is appropriate as this power concerns operational matters and will be exercised only when the President of Tribunals has been consulted.

Section 37A(1) – Voting for decisions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure
Amended or new power: New

Provision

19. Sections 34 and 36 make provision about how decisions in the Scottish Tribunals are to be made.

20. This power allows the Scottish Ministers to provide for how decisions are to be voted for when tribunals are composed of more than one member, for example by giving a chairing member a casting vote in the event of a tie.

Reason for taking power

21. Regulations of this sort will only need to be made for jurisdictions which require it. Different jurisdictions might require different provision, or no provision, to be made in respect of their decision-making functions. For some tribunals the question may never arise as they consist of an individual member. For tribunals which consist of an odd number of members, there may be a need to make regulations (even though a majority is easily accomplished) because it is not impossible that a tie could occur. For some tribunals provision would obviously be required to resolve any questions about how decisions should be voted for. For instance, if the tribunal consists of an even number of members, a tie is naturally possible. Generally, a tie is something that needs to be dealt with. In addition, it may be that it is appropriate to make provision for particularly types of decisions to be taken unanimously. For example, in important or unusual cases. This is all for the sake of ensuring legal certainty and clarity in decision-making.

22. Tribunals Rules made under section 37B(1) can determine who is to be the chairing member. It is considered that this matter is appropriately addressed in Rules as it is largely an operational, rather than substantive question. All members of tribunals will have equal judicial capacity in all their functions, by virtue of section 13. The type and qualification of members who will comprise a tribunal is determined by composition regulations, made under section 37(1), and subject to the affirmative procedure. The substantive question of principle is whether this is a jurisdiction, or particular decision-making function, for which voting regulations should

provide that a chairing member has a casting vote. Regulations which provide for this are also subject to the affirmative procedure. The determination of the identity of the particular member who is to have that casting vote is not a question of principle, and is therefore most appropriately dealt with operationally by Rules made under section 37B(1). Also to be noted is the reference to types of member or particular expertise (and that different provision can be made for different purposes).

Reason for choice of procedure

23. The Scottish Government considers that affirmative procedure is appropriate as this power concerns the question of how decisions are made in the Scottish Tribunals, noting that the connected powers in sections 35(1) and 37(1) are subject to affirmative procedure.

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
Amended or new power: Amended

Provision

24. Section 48 provides for decisions against which there is a right of appeal in another Act to be excluded decisions for the purposes of section 46. Regulations under section 48(2)(a) allow the Scottish Ministers to make exceptions to that provision.

25. The power in section 48(2)(a) makes complementary provision allowing existing appeal rights to cease to be exercisable.

Reason for taking power

26. In its Stage 1 Report, the Delegated Powers and Law Reform Committee questioned whether the existing provision in section 48 allowed for a choice of appeal rights to be created. The new power in section 48(2)(b) is intended to make it clear that when an appeal right is specified using the power in section 48(1)(a), existing rights can be switched off using this power.

Reason for choice of procedure

27. The Scottish Government considers that negative procedure is appropriate as this power will simply be used to determine the application of a right of appeal rather than its existence.

Section 61A(1) – Offences in relation to proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure
Amended or new power: New

Provision

28. This power allows the Scottish Ministers to create offences in connection with proceedings before the Scottish Tribunals. Subsection (1)(a) describes the things which may be made an offence.

29. As well as allowing offences to be created in respect of the failure of refusal to give or produce evidence, this power allows the Scottish Ministers to specify the circumstances in which a person can refuse to give or produce evidence in proceedings before the Scottish Tribunals.

Reason for taking power

30. This power allows offences to be created where jurisdictions within the Scottish Tribunals system require it. For example, see paragraph 12 of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 for provision made in respect of the Mental Health Tribunal for Scotland. In the mental health jurisdiction, it is considered that these matters are sufficiently grave to require to be criminalised. This provision allows Scottish Ministers to make equivalent provision in respect of this and other jurisdictions, where it is considered appropriate.

Reason for choice of procedure

31. The Scottish Government considers that affirmative procedure is appropriate, alongside a requirement for the approval of the Lord President, as this power concerns the creation of criminal offences.

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**
Amended or new power: **Amended**

Provision

32. 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. Various sections in the Bill allow Tribunal Rules to make provision on matters relating to the work of the Scottish Tribunals.

33. Ultimately, Tribunal Rules will be drafted by the Scottish Civil Justice Council, which will be required by an amendment made by this Bill to have a tribunals committee for the exercising of its tribunals-related functions: see schedule 9 at paragraph 12.

34. Until such time as the Scottish Civil Justice Council takes over this role, Scottish Ministers will continue to make the required Tribunal Rules. While Scottish Ministers make these Rules, paragraph 4 of schedule 9 requires these Rules to be set out in regulations, made subject to the negative procedure, with a requirement to consult the President of Tribunals and other persons considered appropriate.

35. Some amendments were made to the following sections at Stage 2, including some rearrangement for clarity and sense.
36. Section 37B(1) supplements section 37A(1), to allow Tribunal Rules to determine who is to be the chairing member of the a tribunal. Sections 37A(1) and 37B(1) are discussed above.
37. The power at section 56(2) has been adjusted to expressly mention the time at which a tribunal could be convened as well as the place. This is for completeness.
38. The power at section 57 has been adjusted to expressly mention for completeness the citation of witnesses as well as the matters already referred to.
39. Section 59 has been restructured but with the same overall effect.
40. Section 63 has been adjusted to provide a more detailed scheme for when and to whom Tribunal Rules may confer functions.
41. Sections 65 and 66 have been adjusted so that Rules may conjoin applications or allow for two or more sets of proceedings to be heard at the same time.
42. Section 67(4) has been broadened to allow Tribunal Rules to make provision about further aspects of decisions of the Scottish Tribunals.
43. Provision is made in new section 28B(2) for Tribunal Rules to determine which tribunal should exercise a particular function when that function has been redistributed under that section.

Reason for taking power

44. Tribunal Rules will relate to technical, operational and procedural matters. These adjustments make appropriate expansions to and clarification of the scope of Tribunal Rules.

Reason for choice of procedure

45. 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 70(1) – Tribunal fees

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative procedure
Amended or new power:	Amended

Provision

46. This power allows the Scottish Ministers to provide for reasonable fees to be paid in respect of matters in proceedings before the Scottish Tribunals. This power has been amended to impose a new consultation requirement, including with the Lord President.

Reason for taking power

47. Certain tribunals which it is intended to transfer in to the Scottish Tribunals already charge fees. It is not possible to make provision of this sort until these Tribunals are transferred in. In its Stage 1 Report on the Bill, the Justice Committee recommended that the Scottish Ministers consider whether there should be a consultation requirement attached to the power to make regulations on fees in the Scottish Tribunals. Having considered this, Scottish Ministers are content that it is appropriate that consultation should be undertaken if there are any proposals to make regulations using this power. In particular, this will give interested parties the chance to make representations about any proposed fees.

Reason for choice of procedure

48. The Scottish Government considers that negative procedure is appropriate. Any fees charged are likely to have to vary over time and the power has been made subject to consultation requirements. This position is unchanged from that at Introduction as mentioned in the original Memorandum.

This document relates to the Tribunals (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

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