This document relates to the Scottish Fiscal Commission Bill (SP Bill 78) as introduced in the
Scottish Parliament on 28 September 2015

SCOTTISH FISCAL COMMISSION BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

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 Scottish Fiscal Commission 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.

BACKGROUND

3. The Scottish Fiscal Commission was originally set up by the Scottish Government to independently scrutinise Government forecasts of receipts from the taxes created by the Scottish Parliament under powers devolved by the Scotland Act 2012 (Land and Buildings Transaction Tax and Scottish Landfill Tax) and the economic determinants underpinning forecasts of receipts from non-domestic rate income. The Bill is intended to place the Scottish Fiscal Commission on a statutory footing in line with best international best practice and the OECD’s recommended principles for Independent Fiscal Institutions.

4. The Bill makes provision for a robust and fully independent Scottish Fiscal Commission which is directly accountable to Parliament. The Commission will continue to play a key role in scrutinising and reporting on tax forecasts and other fiscal projections that are prepared by the Scottish Government, in order to maximise the openness and transparency of the forecasting process. The Bill will also provide a platform to expand the Commission’s remit to reflect any future expansion in the Parliament’s fiscal powers, including the implementation of the additional fiscal powers recommended for devolution by the Smith Commission and the subject of the Scotland Bill currently proceeding through the Westminster Parliament.

OUTLINE OF BILL PROVISIONS

5. The Bill comprises of 28 sections and is divided into the following sub headings:
   - Scottish Fiscal Commission – sets up the Commission.
   - Functions - details the Commission’s functions.

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1 http://www.oecd.org/gov/budgeting/recommendation-on-principles-for-independent-fiscal-institutions.htm
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- Corporate Status – sets the Commission up as a body corporate.
- Membership – makes provision and sets criteria for appointments.
- Remuneration and Expenses – allows the Commission to pay its members.
- Staff – provides for staffing arrangements.
- General – provides for the Commission to regulate its own procedure and for it to delegate functions.
- Transitional and Consequential – amends public bodies legislation and allows for current Commission members to continue in role.

RATIONALE FOR SUBORDINATE LEGISLATION

6. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:
   - the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example greater devolved fiscal powers);
   - the need to make proper use of valuable Parliamentary time; and
   - the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

DELEGATED POWERS

Section 5 – Power to modify the Commission’s functions

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative

Provision

7. This provision will allow the Scottish Ministers to confer functions on the Commission, and to modify or remove the Commission’s functions, following consultation with the Commission. Ministers may not remove the Commission’s functions under sections 2(1) or (3) using this regulation-making power, but may remove or modify any paragraph in subsection (1). This means that Ministers cannot by regulations remove the two core functions of the Commission – namely to prepare reports setting out its independent assessments of the reasonableness of fiscal estimates prepared by the Scottish Ministers and to prepare such other reports assessing the reasonableness of fiscal factors as it considers appropriate. However, Ministers may by regulation remove the requirement to prepare reports setting out the reasonableness of any of the individual forecasts or projections specified at paragraphs (a) to (d).
Reason for taking power

8. Where possible, we have sought to “future proof” the remit of the Commission in the drafting of the legislation. For example, the requirement to assess the reasonableness of “forecasts of receipts from the devolved taxes” will automatically encompass Scottish air passenger duty and aggregates levy once these are devolved to the Scottish Parliament.

9. This power will build flexibility into the remit of the Commission to enable the functions to expand to reflect the devolution of further fiscal powers to the Scottish Parliament. This will enable the Commission’s remit to be extended in future without the need for further primary legislation, but subject to proper Parliamentary oversight and agreement.

10. For example, once the Scottish Parliament has the additional legislative competence set out in the Scotland Bill introduced to the Westminster Parliament in May 2015, the Scottish Ministers will be able to add to the functions of the Commission using this regulation-making power.

11. The nature of further fiscal devolution may necessitate changes to the Commission’s existing statutory functions and so the Scottish Ministers will also have the power to modify or remove functions. For example, it will be necessary to modify the requirement on the Commission to assess the reasonableness of “the Scottish Ministers’ forecasts of receipts from income tax attributable to a Scottish rate resolution” when the power to set the Scottish rate of income tax, as provided for by the Scotland Act 2012, is replaced by the power for the Scottish Parliament to set all income tax rates and thresholds for non-savings, non-dividend income as proposed in the current Scotland Bill.

12. The Scottish Ministers shall not be able to remove the Commission’s function under section 2(3) which empowers the Commission to prepare reports on such fiscal factors as it considers appropriate. As this general function gives the Commission full flexibility to report on the reasonableness of such other devolved fiscal factors as the Commission may determine and thus is critical to its structural and operational independence, it is appropriate that the removal of this function should require primary legislation.

Choice of procedure

13. Affirmative procedure is considered to be appropriate because the provision allows for the amendment of primary legislation. Any change to the Commission’s functions will have a direct impact on the expert independent scrutiny of fiscal forecasts and projections prepared by the Scottish Ministers.

Section 7 - Access to information

<table>
<thead>
<tr>
<th>Power conferred on:</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations made by Scottish Statutory instrument</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative</td>
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Provision

14. Section 7 provides for the Commission to have a right of access to relevant information held by specified public bodies that may be required by the Commission in order for it to perform its functions. This power allows the Scottish Ministers to add to the list of specified bodies by regulations.

Reason for taking power

15. The Bill as introduced requires the Scottish Government, Revenue Scotland, the Keeper of the Registers of Scotland and the Scottish Environmental Protection Agency to provide relevant information to the Commission. These are the bodies directly involved in the collection and management of the two currently devolved taxes (Land and Buildings Transaction Tax and Scottish Landfill Tax).

16. This power will allow Ministers to give the Commission access to information held by other bodies or officeholders that may be relevant to the preparation or scrutiny of forecasts of future devolved taxes. This provision is subject to other legislation that prohibits, restrict access or relates to the disclosure of the information required by the Commission, for example the Data Protection Act 1998 or the Revenue Scotland and Tax Powers Act 2014.

Choice of procedure

17. Affirmative procedure is considered to be appropriate because the regulations would impose new specific duties on public bodies or officeholders in the Scottish Administration.

Section 11 – Members of the Commission

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: negative

Provision

18. This provision allows Scottish Ministers the power to alter the number of Commission members.

Reason for taking power

19. The Bill provides that the Commission should consist of a member to chair the Commission and between two and four other members. We consider that this number of members will provide the Commission with the necessary capacity and expertise to carry out present and future statutory functions. However, it is prudent to allow for some flexibility to increase the size of the Commission in future, should there be a significant expansion in the fiscal powers of the Scottish Parliament beyond those currently legislated for and provided for in the Scotland Bill introduced to the Westminster Parliament in May 2015.
Choice of procedure

20. Negative procedure is considered appropriate for what is essentially a limited power to make very specific amendments. It is also notable that there are similar powers in the Crofting Reform (Scotland) Act 2010, Police and Fire Reform (Scotland) Act 2012 and Historic Environment Scotland Act 2014, and that they are all subject to negative procedure. The appointment of individual members being subject to Parliamentary approval (section 11(3)) was also taken into consideration when determining the procedure.

Section 26 – Ancillary Powers

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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>affirmative if changing an Act, otherwise negative.</td>
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</tbody>
</table>

Provision

21. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitory, transitional or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill.

Reason for taking power

22. The reason for taking the power is to enable the Scottish Ministers to institute the Commission and address any unforeseen situations as soon as it is practical for them to bring forward regulations. Whilst the power is wide-ranging it is vital that the Scottish Fiscal Commission interacts well with Scots law and the changing fiscal landscape in Scotland.

Choice of procedure

23. Regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act is subject to the affirmative procedure. Any other regulations made under this section are subject to the negative procedure. These procedures are typical for ancillary powers.

Section 27 – Commencement

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</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>laid, no procedure</td>
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</table>

Provision

24. This provision allows the Scottish Ministers to commence provisions in this Bill (other than sections 26, 27 and 28, which come into force on the day after Royal Assent) on such day as the Scottish Ministers may by regulations appoint. Such regulations can include transitional, transitory or saving provision and appoint different dates for different purposes.
Reason for taking power

25. It is standard for the Scottish Ministers to have control over the commencement of a Bill and for the substantive provisions to be commenced at such a time as they appoint to be suitable. This is to provide flexibility to enable the provisions of the Bill to be brought into force in a coordinated and managed way, so as to give proper effect to the Bill without having to resort to primary legislation.

Choice of procedure

26. It is normal practice for commencement regulations to be laid before Parliament but not subject to additional procedure. Commencement regulations bring into force provisions whose policy have already been considered by the Parliament during the passage of the Bill. It is thought to be sufficient that any regulations under this section are laid before Parliament as soon as practicable after they are made (and before they come into force). This is provided for by virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

27. When commencing a provision it is common to have to make provision which deals with the transition to the new regime (or save aspects of the old regime for a period) and it is generally considered appropriate and most accessible for the users of legislation for this to be done as part of the commencement regulations. If substantial or complex transitional, transitory or saving provision were required before commencement could occur, consideration may be given to using the powers under section 26 (ancillary provision).
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