



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

25th Report, 2014 (Session 4)

Revenue Scotland and Tax Powers Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
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Delegated Powers and Law Reform Committee

25th Report, 2014 (Session 4)

Revenue Scotland and Tax Powers Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 4 February and 11 and 18 March, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Revenue Scotland and Tax Powers Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 23 May 2013. The Finance Committee is the lead Committee.
4. In broadest outline, the Bill makes provisions for a Scottish tax system to enable the collection and management of Land and Buildings Transaction Tax and Scottish Landfill Tax - “the devolved taxes”. It establishes Revenue Scotland as a new authority which will be the tax authority responsible for collecting Scotland’s devolved taxes from 1 April 2015.
5. The Bill puts in place a statutory framework which will apply to the devolved taxes, and sets out the relationship between the tax authority and taxpayers in Scotland, including the relevant powers, rights and duties.
6. Revenue Scotland is referred to in this report as “RS”.

¹ Revenue Scotland and Tax Powers Bill [as introduced] available here:
http://www.scottish.parliament.uk/S4_Bills/Revenue%20Scotland%20and%20Tax%20Powers%20Bill/b43s4-introd.pdf

² Revenue Scotland and Tax Powers Bill Delegated Powers Memorandum available here:
http://www.scottish.parliament.uk/S4_Bills/RSTPB_DPM.pdf

DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 4 – Delegation of functions by Revenue Scotland

Section 11(8) - Power to allow Scottish Ministers to vary the period which Revenue Scotland's Corporate Plans cover

Section 30 - Power for Scottish Ministers to make regulations for determining the composition of the First-tier Tribunal and the Upper Tribunal

Section 36(1) - Power for Scottish Ministers to set a time limit for appellants to seek permission for an onward appeal

Section 37(4) - Power to specify categories of petition for judicial review that the Court of Session can remit to the Upper Tax Tribunal by an Act of Sederunt

Sections 39(2), 42 to 44, 46 to 51, 83(2)(b), 85(3)(b), 214(b), and paragraph 11(2) of schedule 3 - Tribunal rules

Section 52 – Practice directions

Section 62- Guidance in connection with the general anti-avoidance rule

Section 69(6) – Duty to keep and preserve records

Section 72(2) – Further provision: land and buildings transaction tax

Section 73(1) - Dates by which tax returns must be made

Section 74(4)(b) – Amendment of return by taxpayer

Section 83(2)(c) - Power to refer questions to any other court or tribunal

Section 86(6)(b) – Determination of tax chargeable if no return made

Section 113(2) – Meaning of “carrying on a business”

Section 125(1) – Producing copies of documents

Section 126 – Further provision about powers relating to information notices

Section 130(3) – Power to provide for resolution by the tribunal of disputes as to whether any information or a document is privileged

Section 134(3) – Power to specify certain matters in relation to inspection of business premises

Sections 170(1) and 177(6) – Powers to change the amount of penalties under sections 167, 168 and 169

Section 182(2) – Power to specify the date from which interest is payable

Section 185(1) – Power to specify rates of interest

Section 187(1) – Fees for payment

Section 190(5) – Form of summary warrant

Section 196(1) – Power to change amount of penalty under section 195

Section 198(6) - Power to amend the list of appealable and non-appealable decisions

Section 210(2) - Power to allow the postponement of payment of tax, penalties and interest while a review or appeal is pending

Section 219 - Power to make ancillary provision

Section 224(2) – Commencement

Schedule 1 paragraph 1(3) - Power to vary the minimum and maximum number of members of Revenue Scotland

Schedule 2 paragraph 2(2) - Criteria for eligibility to serve as an ordinary member of the First-tier Tribunal

Schedule 2 paragraph 4(2) - Criteria for eligibility to serve as a legal member of the First-tier Tribunal

Schedule 2 paragraph 6(2) - Power to set criteria for eligibility to serve as a legal member of the Upper Tribunal

Schedule 2, paragraph 9(1) - Power to make provision relating to the 5 and 10 year qualifying periods which apply to legal members of the First-tier and Upper Tribunal

Schedule 2 paragraph 9(2) - Power to modify the list of activities in paragraph 8(5) of the schedule

Schedule 3 paragraph 3(3) – Duty to keep and preserve records

8. At its meeting of 4 February, the Committee agreed to write to Scottish Government officials to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

9. In light of the written responses received, the Committee agreed that it was content with the following delegated powers and did not need to comment on them further:

Section 45(1) – Additional powers - the Tax Tribunals

Section 69(3)(b)- Duty to keep and preserve records

Paragraph 21(1) of schedule 2- Rules for the procedures at a fitness assessment tribunal.

10. The Committee's comments, and where appropriate, recommendations on the remaining delegated powers in the Bill are detailed below.

Section 8 – Ministerial guidance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None (but guidance published)

11. This section sets out that the Ministers may give guidance to RS about the exercise of its functions, and the body must have regard to it. The guidance provided must be published as considered appropriate by Ministers, unless they consider that to do so would impact on the ability to carry out the functions effectively (section 8(4)).

12. The power should be read with section 7, which provides for the independence of RS from the direction or other control by the Scottish Ministers of the exercise of the functions of the proposed new authority.

13. In its written response to the Committee, the Scottish Government accepted that a copy of the guidance should be laid before the Parliament as a matter of course, subject to the terms of the proviso in section 8(4).

14. The Committee notes therefore that the Scottish Government will bring forward an amendment at Stage 2 to provide that a copy of the guidance issued in terms of section 8(1) shall be laid before the Parliament. The Committee is otherwise content with the power to issue guidance in section 8.

Section 11(7)(a) - Power to set the period of Revenue Scotland's first Corporate Plan

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Negative procedure

15. This power allows the Scottish Ministers to set the period that RS's first corporate plan will cover. The corporate plan will set out RS's main objectives, the outcomes that would demonstrate achievement of these objectives, and the activities that RS expects to undertake.

16. The Delegated Powers Memorandum states that the Scottish Government requires the power to specify a first planning period for the corporate plan, and that it is intended that the planning period of the second plan would start from 1 April 2018. However the scope of the power allows any first planning period to be specified by order, whether less or more than 3 years.

17. The Scottish Government in its written response to the Committee explains that a 3 year planning period is standard practice for public body corporate plans. However it has not been explained to the Committee why the power requires to be drawn to allow any first planning period of more than 3 years.

18. **In relation to the power in section 11(7)(a) which permits any period to be specified in an order as the first planning period of Revenue Scotland's corporate plan, the Committee accepts that a first planning period of 3 years is intended and that that period might need to be less. However it considers that the Scottish Government should provide a good reason why the power requires to be drawn to allow any period of more than 3 years to be specified, or otherwise the power should be limited to an appropriate maximum period.**

Section 41 – Venue for hearings of the Tax Tribunals

Power conferred on:	The President of the Tax Tribunals
Power exercisable by:	Determination
Parliamentary procedure:	None

19. Section 41 provides that the Tax Tribunals are to sit at such times and in such places as the President of the Tax Tribunals may determine. (The President is appointed by the Scottish Ministers after consultation with the Lord President of the Court of Session. He or she must be eligible for appointment as set out in Schedule 2 of the Bill.) The Committee queried whether there was consistency between this provision and the provision for other tribunals made in the Tribunals (Scotland) Bill (now the Tribunals (Scotland) Act).

20. **The Committee notes that the Scottish Government will bring forward an amendment of section 41 at Stage 2, to bring it in line with the corresponding provision in section 56 of the Tribunals (Scotland) Act. That section provides that each of the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear or decide a case, or for any other purpose relating to its functions. That is subject to any provision made by tribunal rules, as to the question where in Scotland the Scottish Tribunals are to be convened.**

21. **The Committee will consider the section as amended after Stage 2.**

Section 54 – Guidance

Power conferred on:	The President of the Tax Tribunals
Power exercisable by:	Guidance
Parliamentary procedure:	None (no provision to publish)

22. Section 54 provides that the President of the Tax Tribunals may issue guidance about the administration of the Tax Tribunals as appears necessary or expedient to secure that the functions of the tribunals are exercised efficiently and effectively.

23. The Committee asked why there is no provision to publish the guidance (unlike for instance, section 52(4) on the publication of practice directions), nor for laying a copy before Parliament upon issue. It also asked why though it is specified in the section that the guidance has the purpose of securing that the functions of the Tax Tribunals are exercised efficiently and effectively, there is no provision that any specified persons have a requirement to have regard to it.

24. The Committee accepts, as far as a requirement to lay a copy of this guidance in the Parliament is concerned, that a distinction might be made between this guidance on administrative matters, and directions as to the practice and procedures of the proposed new Tax Tribunals. Administrative guidance on the functioning of the Tax Tribunals might be less likely to have effects on persons' rights and obligations in particular cases coming before the Tax Tribunals.

25. However the Committee considers that the Scottish Government's written response to it has not satisfactorily explained why there should not be a requirement to publish this guidance, even if the requirement was to be subject to exceptions. It is clear from section 54 that the guidance must be considered necessary or expedient to secure that the Tax Tribunals' functions are exercised efficiently and effectively.

26. The guidance could be expected, therefore, to have significance for the effective functioning of the Tax Tribunals system even though it will deal with administrative matters. The provision can be contrasted with the Ministerial guidance proposed to be issued to RS under section 8, where there is a requirement to publish, but not where Ministers consider that publication would prejudice the effective exercise by RS of its functions.

27. The Committee considers that there should be provision that the guidance under section 54 should be published on issue. The section provides that the guidance must be considered by the President of the Tax Tribunals to be necessary or expedient to secure that the Tax Tribunals' functions are exercised efficiently and effectively. The guidance could be expected therefore to have significance for the effective functioning of the Tax Tribunals system, even though it will deal with administrative matters.

28. It would presumably be possible to provide for an exception to publication where this is appropriate. For instance, in circumstances where this would prejudice the effective functioning of the Scottish Tax Tribunals (cf. section 8(4) of the Bill).

29. The Committee also notes the Scottish Government will bring forward an amendment at Stage 2. This would amend section 54 to provide that the members and the administrative staff of the Scottish Tax Tribunals will be required to have regard to the guidance.

Section 70(b) – Preservation of information, etc.

Power conferred on:	Revenue Scotland
Power exercisable by:	Specification in writing
Parliamentary procedure:	None (no provision for publication)

30. Section 69 provides for the duty of a person who is required to make a tax return for a devolved tax, to keep any records needed to enable the person to make a correct and complete return, and to preserve those records.

31. The duty under section 69 to preserve records may be satisfied by preserving them in any form and by any means. Section 70(b) provides that the duty may also be satisfied by preserving the information contained in the records in any form, and by any means. Section 70(b) states that this is subject to any conditions or exceptions that may be specified in writing by RS. This enables RS to specify the form or means by which information contained in tax records may require to be kept.

32. The Committee queried that it may be more appropriate for the power in section 70(b) to be exercisable by a form of subordinate legislation which would be subject to scrutiny by Parliamentary procedure, rather than by an informal written specification which is not subject to procedure. The Scottish Government has acknowledged in response that as this power amounts to enabling RS to put a general gloss on a statutory duty which would be imposed by the Parliament, the power should be exercisable by regulations made by the Scottish Ministers which could be subject to the negative procedure.

33. The Committee notes the Scottish Government will bring forward an amendment at Stage 2. This would amend the power in section 70(b) so that it would be exercisable by the Scottish Ministers by regulations rather than by Revenue Scotland by written specification. The regulations would be subject to the negative procedure.

34. **The Committee will consider the section as amended after Stage 2.**

Section 102 - Power to make regulations preventing reimbursement where this would unjustly enrich the claimant

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Affirmative procedure if textually amending primary legislation, otherwise negative procedure

35. Section 100 provides for the circumstances in which unjust enrichment may be a defence against a claim for repayment of tax. Section 102 enables regulations to be made under which certain reimbursement arrangements may count for the purposes of section 100 - so do not allow Revenue Scotland to defend a repayment claim on the ground of unjust enrichment.

36. These regulations may provide for the conditions the reimbursement arrangements must comply with, and for other arrangements to be disregarded for the purposes of section 100. Section 103 provides that the regulations may make provision for penalties for breach of regulations under section 102.

37. The Committee queried, given the proposed significance or width of this power (in particular to make further provision for penalties) whether the affirmative procedure could be a more suitable level of scrutiny of the regulations, than the negative procedure. The Scottish Government has acknowledged in response that scrutiny by the affirmative procedure would be more appropriate.

38. The Committee notes that the Scottish Government has undertaken to bring forward an amendment at Stage 2, so that the power in section 102 would be subject to the affirmative procedure. The Committee will consider the section as amended after Stage 2.

Powers to make provision about penalties

39. The following powers are drawn together, as the Committee raised the same issue in respect of each with the Scottish Government in the written correspondence. In general terms, the Committee asked whether these powers to make further provision for penalties to enforce requirements specified in the Bill could be drawn more narrowly, to provide initially for suitable maximum penalty amounts.

40. For some powers, it was asked whether in specifying a suitable initial maximum amount, the Bill could specify the circumstances in which a penalty is payable (such as where a person fails to make a tax return by the filing date, in respect of the 2 separate devolved taxes).

41. The Committee takes the view that the appropriate maximum amounts of penalty should initially be set by the Parliament, and that any subsequent changes to those amounts should be subject to the higher level of scrutiny which the affirmative procedure affords.

Section 103(2) - Power to make regulations preventing reimbursement where this would unjustly enrich the claimant- power to provide for penalties

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Affirmative procedure if textually amending primary legislation, otherwise negative procedure

Section (2) – Power to make further provision about penalties for failure to make a tax return

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Affirmative procedure

Section 151(2) – Power to make further provision about penalties for failure to pay tax on or before the due date

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Section 160(7) – Power to make further provision about penalties for errors in taxpayer documents

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Section 162(4) – Power to make further provision about penalties for errors in taxpayer documents attributable to another person

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Section 163(3) – Power to make further provision about penalties for failure to notify Revenue Scotland about an assessment which understates the tax liability

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Section 181(2) - Power to make further provision about penalties for failure to register for tax

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

42. The Scottish Government has confirmed that, having consulted further with stakeholders, it will bring forward amendments at Stage 2 specifying all initial penalty amounts on the face of the Bill. Following Royal Assent and commencement, any subsequent changes to penalty amounts will be set out in secondary legislation, subject to the affirmative procedure.

43. The Committee notes therefore that the Scottish Government has undertaken to bring forward various amendments at Stage 2 in relation to the following provisions, so that all initial penalty amounts would be specified on the face of the Bill. This relates to the powers in sections 103(2), 150(2), 151(2), 160(7), 162(4), 163(3), and 181(2).

44. The Committee asks the Scottish Government, when it responds to this report, to provide further information as to the initial penalty amounts which are proposed, if it is in a position to do so at this stage.

45. **The Committee will also consider the various amendments after Stage 2.**

Schedule 2 paragraph 31- Rules for the procedures at a fitness assessment tribunal

Power conferred on:	The Scottish Ministers
Power exercisable by:	Rules
Parliamentary procedure:	Laid, no further procedure

46. The power at Schedule 2 paragraph 21(1) will enable provisions in connection with the investigation and determination of any matter concerning the conduct of the members of the Tax Tribunals, and the review of any such determination.

47. A similar power at Schedule 2 paragraph 31 enables the procedures to be followed at a fitness assessment tribunal to be set out in rules. The Scottish Ministers will have responsibility for constituting a fitness assessment tribunal, when requested to do so by the President of the Tax Tribunals.

48. The Committee sought clarification as to the intended procedure for scrutiny of the exercise of these powers. The Delegated Powers Memorandum states that the intended procedure applying to these rules is “not laid, no procedure”. However, the default position provided for by section 27 and 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 is that rules made by the Scottish Ministers under an enactment are made as a Scottish statutory instrument, which is laid before the Parliament.

49. The Scottish Government’s written response to the Committee has clarified that the rules will be laid in the Parliament and published, but not subject to further Parliamentary procedure. In respect of the Scottish Tax Tribunals this rule-making power is proposed to be conferred on the Scottish Ministers for an interim period, until the jurisdiction for devolved tax appeals is intended to be transferred to the proposed new Tribunals for Scotland.

50. **The Committee notes that the Scottish Government will bring forward an amendment to paragraph 31 of schedule 2, so that there is provision for the publication of the rules made under that paragraph. This would be consistent with the provision for the rules under paragraph 21 of that schedule. The Committee will consider the provision as amended after Stage 2.**

ANNEX

Correspondence with the Scottish Government

On 4 February, the Committee wrote to the Scottish Government as follows:

Section 8 – Ministerial guidance

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None (but guidance published)

1. Section 8 of the Bill sets out that Ministers may give guidance to Revenue Scotland about the exercise of its functions, and the body must have regard to it. The guidance provided must be published as considered appropriate by Ministers, unless they consider that to do so would impact on the ability to carry out the functions effectively.

2. **The Committee asks the Scottish Government:**

- **What the purposes of this power are and how the power could be exercised?**
- **Why the section provides for the publication of the guidance, but does not provide for a copy of it to be laid before the Parliament?**

Section 11(7)(a) - Power to set the period of Revenue Scotland's first Corporate Plan

Power conferred on:	the Scottish Ministers
Power exercisable by:	order
Parliamentary procedure:	negative procedure

3. Section 11(7)(a) allows Scottish Ministers to set the period that Revenue Scotland's first corporate plan will cover.

4. The Delegated Powers Memorandum states that the power is required to specify a planning period to which the corporate plan of Revenue Scotland will relate, of less than 3 years, and that it is intended the planning period of the second plan would start from 1 April 2018. However the scope of the power allows any first planning period to be specified by order, whether less or more than 3 years.

5. **The Committee therefore asks the Scottish Government why this power should not be drawn more narrowly, to permit a first planning period of 3 years or less to be specified?**

Section 41 – Venue for hearings of the Tax Tribunals

Power conferred on:	The President of the Tax Tribunals
Power exercisable by:	Determination
Parliamentary procedure:	None

6. Section 41 provides that the Tax Tribunals are to sit at such times and in such places as the President of the Tax Tribunals may determine.

7. The Committee notes that a different approach is taken in the Tribunals (Scotland) Bill. Section 56 of that Bill provides that each of the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear or decide a case or for any other purpose relating to its functions. That is also subject to any provision made by tribunal rules, as to the question of where in Scotland the Scottish Tribunals are to be convened.

8. The Committee asks the Scottish Government:

- **Why the power in section 41 is proposed?**
- **Why the power is formulated differently, as compared to the power in section 56 of the Tribunals (Scotland) Bill to determine the venue and timing of hearings of the First-tier Tribunal and the Upper Tribunal for Scotland?**

Section 45(1) – Additional powers- the Tax Tribunals

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

9. Section 45(1) confers a power on the Scottish Ministers to confer such additional powers on the Tax Tribunals as are necessary or expedient for the proper exercise of their functions.

10. Subparagraph 2(b) provides that the regulations can include provision causing Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to apply to the making of a relevant Act of Sederunt, as it does to the making of tribunal rules under the Bill. Part 1 established the Scottish Civil Justice Council. The Court of Session must consider any draft civil procedure rules submitted to it by the Council.

11. The Committee asks the Scottish Government:

- **What the purpose of the provision is?**
- **Why it is appropriate to be included in regulations under subsection (1), rather than conferring a power to make an Act of Sederunt in relation to the Tax Tribunals to which that Part 1 could be applied, and**
- **What “a relevant Act of Sederunt” refers to, as the section does not define this term?**

Section 54 – Guidance

Power conferred on:	the President of the Tax Tribunals
Power exercisable by:	Guidance
Parliamentary procedure:	None (no provision to publish)

12. Section 54 provides that the President of the Tax Tribunals may issue guidance about the administration of the Tax Tribunals as appears necessary or expedient to secure that the functions of the tribunals are exercised efficiently and effectively.

13. The Committee asks the Scottish Government:

- **Why there is no provision for the publication of the guidance (unlike for instance, section 52(4) on the publication of practice directions) nor for laying a copy before Parliament upon issue, and**
- **Why, though it is specified in the section that the guidance has the purpose of securing that the functions of the Tax Tribunals are exercised efficiently and effectively, there is no provision that any specified persons have a requirement to have regard to it?**

Section 69(3) – Duty to keep and preserve records

Section 70(b) – Preservation of information, etc.

Power conferred on:	Revenue Scotland
Power exercisable by:	Specification in writing
Parliamentary procedure:	None (no provision for publication)

14. Section 69 provides for the duty of a person who is required to make a tax return for a devolved tax, to keep any records needed to enable the person to make a correct and complete return, and to preserve those records. Section 69(2) provides the records must be preserved until the end of the later of the “relevant day” and the date on which an enquiry into the return is completed, or a designated officer no longer has power to enquire into the return.

15. Section 69(3) states that the “relevant day” is the 5th anniversary of the day the return is made or a notice of amendment of the return is given; or any earlier day that may be specified in writing by Revenue Scotland.

16. The duty under section 69 to preserve records may be satisfied by preserving them in any form and by any means. Section 70(b) provides that the duty may also be satisfied by preserving the information contained in the records in any form and by any means. Section 70(b) states that that is subject to any conditions or exceptions that may be specified in writing by Revenue Scotland. This enables Revenue Scotland to specify the form or means by which information contained in tax records may require to be kept.

17. In relation to both sections 69(3) and 70(b) therefore, the Committee asks the Scottish Government:

- Why these powers are appropriate in principle and why they should be exercisable by Revenue Scotland (rather than the Scottish Ministers),
- Why the powers should be exercisable by informal written specification which is not subject to Parliamentary procedure, rather than a form of subordinate legislation, and
- Why there is no provision for appropriate publication of the written specifications?

Section 102 - Power to make regulations preventing reimbursement where this would unjustly enrich the claimant

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure if textually amending primary legislation, otherwise negative procedure

18. Section 100 provides that unjust enrichment would be a defence against a claim for repayment of tax. Section 102 enables regulations to be made under which certain reimbursement arrangements may count for the purposes of section 100 - so do not allow Revenue Scotland to defend a repayment claim on the ground of unjust enrichment.

19. These regulations may provide for the conditions the reimbursement arrangements must comply with, and for other arrangements to be disregarded for the purposes of section 100.

20. Section 103 provides that the regulations may make provision for penalties for breach of regulations under section 102.

21. **The Committee asks the Scottish Government :**

- **Why the power in section 103(2) enables any amount of penalty (including daily penalties) to be imposed by regulation; and so why the power could not be drawn more narrowly, to provide for suitable maximum penalties;**
- **Given the width of the power in that respect, whether the affirmative procedure could be a more suitable level of scrutiny of the regulations than the negative procedure? (It is noted in comparison that, for example, the powers to change fixed amounts of penalty in section 170(1) are subject to the affirmative procedure).**

Section 150(2) – Power to make further provision about penalties for failure to make a tax return

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

22. The power at Section 150(2) allows the Ministers to make further provision about penalties for a failure to make a tax return on or before the filing date (as defined in section 73(3) of the Bill).

23. The Committee asks the Scottish Government:

- **Why the provision enables any amount of penalty (including fixed or daily penalties) to be imposed by regulation; and so why the power could not be drawn more narrowly to provide initially for suitable maximum penalty amounts, in relation to the 2 taxes which are currently devolved;**
- **Why, similarly, the Bill could not specify initially the circumstances in which a penalty is payable, where a person fails to make a tax return by the filing date, in respect of the 2 devolved taxes.**

Section 151(2) – Power to make further provision about penalties for failure to pay tax on or before the due date

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

24. The power at Section 151(2) enables the Ministers to make further provision about penalties for a failure to pay tax on or before the due date, including the circumstances in which such a penalty is payable, penalty amounts and types and also arrangements for issuing, appealing and enforcing such a penalty.

25. The Committee asks the Scottish Government:

- **Why, as with the previously discussed power at Section 150(2), the provision enables any amount of penalty (including fixed or daily penalties) to be imposed by regulation; and so why the power could not be drawn more narrowly to provide initially for suitable maximum penalty amounts, in relation to the 2 taxes which are currently devolved;**
- **Why, again, the Bill could not specify initially the circumstances in which a penalty is payable, where a person fails to pay tax by the due date, in respect of the 2 devolved taxes?**

Section 160(7) – Power to make further provision about penalties for errors in taxpayer documents

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

Section 162(4) – Power to make further provision about penalties for errors in taxpayer documents attributable to another person

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

26. Section 160(7) allows the Ministers to make further provision about penalties applicable when a person submits a “relevant document” containing one or more errors, which amounts to, or leads to, an understated tax liability, or a false or inflated claim for relief. The error must be careless or deliberate.

27. Scottish Ministers have power to make further provision, specifying what “relevant documents” are, the penalty amounts and also arrangements for issuing, appealing and enforcing such a penalty. Similarly, Section 162(4) allows the Ministers to make further provision about penalties applicable when a person submits a “relevant document” containing one or more errors which understate the tax liability, or provide a false or inflated claim for relief- but where the error is attributable to another person. A penalty is payable by that other person, where they have deliberately supplied false information or withheld information from the person who submitted the document.

28. **With regard to both sections 160(7) and 162(4) the Committee asks the Scottish Government:**

- **Why the provisions enable any amount of penalty to be imposed by regulation; and so why the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts;**
- **Why the power is appropriate to specify “relevant documents” which amount or lead to the circumstances set out in sections 160(2) or 162(1) arising, and how this power could be exercised?**

Section 163(3) – Power to make further provision about penalties for failure to notify Revenue Scotland about an assessment which understates the tax liability

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

29. Section 163(3) allows the Ministers to make further provision about penalties applicable when a person fails to take reasonable steps to notify Revenue

Scotland about a Revenue Scotland assessment which understates the tax liability.

30. The Committee asks the Scottish Government why the power enables any amount of penalty to be imposed by regulation; and so why the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?

Section 181(2) - Power to make further provision about penalties for failure to register for tax

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

31. Section 181(2) allows the Ministers to make further provision about penalties for a failure to register for the Scottish landfill tax. The Ministers can make further provision specifying the penalty amounts, and the arrangements for issuing, appealing and enforcing such a penalty.

32. The Committee asks the Scottish Government why this power enables any amount of penalty to be imposed by regulation; and so why the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?

Schedule 2 paragraph 21(1)- Conduct rules for the members of the Tax Tribunals

Power conferred on:	the Scottish Ministers
Power exercisable by:	rules
Parliamentary procedure:	Laid- no procedure (suggested for clarification)

Schedule 2 paragraph 31- Rules for the procedures at a fitness assessment tribunal

Power conferred on:	the Scottish Ministers
Power exercisable by:	rules
Parliamentary procedure:	Laid, no procedure (suggested for clarification)

33. The power at Schedule 2 paragraph 21(1) will enable provisions in connection with the investigation and determination of any matter concerning the conduct of the members of the Tax Tribunals, and the review of any such determination.

34. A similar power at Schedule 2 paragraph 31 enables the procedures to be followed at a fitness assessment tribunal to be set out in rules. The Ministers will have responsibility for constituting a fitness assessment tribunal, when requested to do so by the President of the Tax Tribunals.

35. The Delegated Powers Memorandum states that the intended procedure applying to these rules is “not laid, no procedure”. However, the default position provided for by section 27 and 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 is that rules made by the Scottish Ministers under an enactment are made as a Scottish statutory instrument, which is laid before the Parliament.

36. With regard to both Schedule 2 paragraph 21(1) and Schedule 2 paragraph 31 the Committee asks the Scottish Government:

- **For clarification of the Parliamentary procedure intended to apply to these rules, and whether the provisions achieve that procedure.**
- **If it is proposed that the rules are not to be laid, why is that more appropriate than the rules being laid (and made by Scottish statutory instrument)?**
- **Why is there provision for publication of the rules under paragraph 21, but not it appears under paragraph 31?**

On 14 February, the Scottish Government responded as follows:

Section 8 – Ministerial guidance

The Committee asked the Scottish Government:

- **What the purposes of this power are and how the power could be exercised?**
- **Why the section provides for the publication of the guidance, but does not provide for a copy of it to be laid before the Parliament?**

Scottish Government response: The arrangements set out in Part 2 of the Bill are designed to provide appropriate checks and balances as between Revenue Scotland, the Scottish Parliament and Scottish Ministers. These include providing for the independence of Revenue Scotland (section 7) and establishing it as an office-holder in the Scottish Administration which is accountable to Parliament rather than Ministers (which will be achieved by means of a section 104 order under the Scotland Act 1998). The power for Scottish Ministers to issue guidance to Revenue Scotland reflects the critical relationship between Revenue Scotland’s functions in respect of the collection and management of devolved taxes and the Scottish Government’s responsibility for public finances. The power to issue guidance could be exercised in respect of either Revenue Scotland’s general or particular functions as set out in sections 3(1) and 3(2), which include for example protecting the revenue against tax fraud and tax avoidance in respect of which Scottish Ministers have an obvious interest. Guidance under section 8 is not binding on Revenue Scotland.

Given the importance of Revenue Scotland’s role in relation to the collection and management of the devolved taxes, the Government accepts that a copy of any guidance issued by Scottish Ministers to Revenue Scotland should be laid before Parliament as a matter of course, subject to the proviso set out in section 8(4).

The Government will therefore bring forward an amendment to that effect at Stage 2.

Section 11(7)(a) – Power to set the period of Revenue Scotland’s first Corporate Plan

The Committee asked the Scottish Government why this power should not be drawn more narrowly, to permit a first planning period of 3 years or less to be specified?

Scottish Government response: A 3 year planning period is standard practice for public body corporate plans, and the Government considers that that is therefore appropriate for Revenue Scotland’s first corporate plan. As set out in section 11(5), that does not of course preclude Revenue Scotland from revising the corporate plan during the period to which the plan relates if it so wishes.

Section 41 – Venue for hearings of the Tax Tribunals

The Committee asked the Scottish Government:

- **Why the power in section 41 is proposed?**
- **Why the power is formulated differently, as compared to the power in section 56 of the Tribunals (Scotland) Bill to determine the venue and timing of hearings of the First-tier Tribunal and the Upper Tribunal for Scotland?**

Scottish Government response: The Government’s intention is to align the relevant provisions of the Revenue Scotland and Tax Powers Bill (“the Bill”) which establish the Scottish Tax Tribunals as closely as possible to the **corresponding** provisions of the Tribunals (Scotland) Bill. The Government therefore proposes to amend section 41 of the Bill to bring it into line with the corresponding provision to which the Committee has drawn attention in section 56 of the Tribunals (Scotland) Bill.

Section 45(1) – Additional powers- the Tax Tribunals

The Committee asked the Scottish Government:

- **What the purpose of the provision is?**
- **Why it is appropriate to be included in regulations under subsection (1), rather than conferring a power to make an Act of Sederunt in relation to the Tax Tribunals to which that Part 1 could be applied, and**
- **What “a relevant Act of Sederunt” refers to, as the section does not define this term?**

Scottish Government response: The purpose of section 45 is to ensure that the Scottish Tax Tribunals have all the necessary powers and functions for the proper exercise of their functions, and consequently to provide the flexibility to confer additional powers on the Tribunals by regulations should that prove to be necessary. The provisions in section 45(2) of the Bill are identical to the corresponding provisions in section 60(2) of the Tribunals (Scotland) Bill which has now completed Stage 2 scrutiny by the Parliament.

Section 54 – Guidance

The Committee asked the Scottish Government:

- **Why there is no provision for the publication of the guidance (unlike for instance, section 52(4) on the publication of practice directions) nor for laying a copy before Parliament upon issue, and**
- **Why, though it is specified in the section that the guidance has the purpose of securing that the functions of the Tax Tribunals are exercised efficiently and effectively, there is no provision that any specified persons have a requirement to have regard to it?**

Scottish Government response: The guidance provided for by section 54 relates to the administration of the Tax Tribunals rather than the practice and procedures of the Tax Tribunals, which are provided for in section 52. While it is appropriate that directions relating to practice and procedures should be published, the Government does not consider it necessary that guidance issued by the President of the Tax Tribunals relating to purely administrative matters should be published and laid before Parliament. However the Government accepts the Committee's suggestion that section 54 of the Bill should be amended to make it clear that members and administrative staff of the Scottish Tax Tribunals should have to have regard to any such guidance.

Section 69(3) – Duty to keep and preserve records

Section 70(b) – Preservation of information, etc.

The Committee asked the Scottish Government:

- **Why these powers are appropriate in principle and why they should be exercisable by Revenue Scotland (rather than the Scottish Ministers),**
- **Why the powers should be exercisable by informal written specification which is not subject to Parliamentary procedure, rather than a form of subordinate legislation, and**
- **Why there is no provision for appropriate publication of the written specifications?**

Scottish Government response: The power in section 69(3) is designed to allow Revenue Scotland, in particular cases, to accede to requests from the taxpayer that it is not necessary to keep records for the full period of 5 years specified in section 69(2)(a), for example if the records are voluminous and the case has been satisfactorily resolved. Since this power is in the nature of a discretion for Revenue Scotland to exercise flexibility in the taxpayer's favour in particular cases, or categories of cases, the Government does not consider it to be necessary or appropriate for the power either to be exercisable by Ministers or subject to Parliamentary procedure.

As the power in section 70(b) amounts to enabling Revenue Scotland to put a general gloss on a statutory duty imposed by Parliament, the Government agrees that this power, which is designed to provide flexibility in the light of experience, should be exercisable by regulations made by Scottish Ministers subject to negative procedure. An amendment to that effect will therefore be brought forward at Stage 2.

Section 102 - Power to make regulations preventing reimbursement where this would unjustly enrich the claimant

The Committee asked the Scottish Government:

- **Given the width of the power in that respect, whether the affirmative procedure could be a more suitable level of scrutiny of the regulations than the negative procedure? (It is noted in comparison that, for example, the powers to change fixed amounts of penalty in section 170(1) are subject to the affirmative procedure).**

Scottish Government response: The Government accepts the Committee's suggestion that the power in section 102 should be subject to affirmative procedure and intends to propose this as an amendment at Stage 2.

The Committee also asked the following related questions:

Section 150(2) – Power to make further provision about penalties for failure to make a tax return;

- **Why, similarly, the Bill could not specify initially the circumstances in which a penalty is payable, where a person fails to make a tax return by the filing date, in respect of the 2 devolved taxes?**

Section 151(2) – Power to make further provision about penalties for failure to pay tax on or before the due date

- **Why, again, the Bill could not specify initially the circumstances in which a penalty is payable, where a person fails to pay tax by the due date, in respect of the 2 devolved taxes?**

Sections 160(7) and 162(4) – Power to make further provision about penalties for errors in taxpayer documents, and power to make further provision about penalties for errors in taxpayer documents attributable to another person

Why the power is appropriate to specify “relevant documents” which amount or lead to the circumstances set out in sections 160(2) or 162(1) arising, and how this power could be exercised?

Scottish Government response: In the light of the Committee’s comments, the Government will consider further and consult stakeholders on the scope for including more detail in the Bill regarding the circumstances in which the penalties to which reference is made in sections 150(2) and 151(2) should be payable, and also in respect of the “relevant documents” referred to in sections 160(7)(a) and 162(4)(a).

The Committee also asked the Scottish Government the following questions all of which relate specifically to the amount of penalties and are therefore dealt with together:

Section 102 - Power to make regulations preventing reimbursement where this would unjustly enrich the claimant

- **Why the power in section 103(2) enables any amount of penalty (including daily penalties) to be imposed by regulation; and so why the power could not be drawn more narrowly, to provide for suitable maximum penalties?**

Section 150(2) – Power to make further provision about penalties for failure to make a tax return

- **Why the provision enables any amount of penalty (including fixed or daily penalties) to be imposed by regulation; and so why the power could not be drawn more narrowly to provide initially for suitable maximum penalty amounts, in relation to the 2 taxes which are currently devolved?**

Section 151(2) – Power to make further provision about penalties for failure to pay tax on or before the due date

- **Why, as with the previously discussed power at Section 150(2), the provision enables any amount of penalty (including fixed or daily penalties) to be imposed by regulation; and so why the power could not be drawn more narrowly to provide initially for suitable maximum penalty amounts, in relation to the 2 taxes which are currently devolved?**

Section 160(7) – Power to make further provision about penalties for errors in taxpayer documents; and

Section 162(4) – Power to make further provision about penalties for errors in taxpayer documents attributable to another person

- **Why the provisions enable any amount of penalty to be imposed by regulation; and so why the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?**

Section 163(3) – Power to make further provision about penalties for failure to notify Revenue Scotland about an assessment which understates the tax liability

- **The Committee asks the Scottish Government why the power enables any amount of penalty to be imposed by regulation; and so why the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?**

Section 181(2) - Power to make further provision about penalties for failure to register for tax

- **The Committee asks the Scottish Government why this power enables any amount of penalty to be imposed by regulation; and so why the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?**

Scottish Government Response: Having considered the views of the Committee and consulted further with stakeholders, the Government is minded to bring forward amendments at Stage 2 specifying all initial penalty amounts on the face of the Bill. Following Royal Assent and commencement, any subsequent changes to penalty amounts will be set out in secondary legislation subject to affirmative procedure.

Schedule 2 paragraph 21(1) - Conduct rules for the members of the Tax Tribunals

Schedule 2 paragraph 31- Rules for the procedures at a fitness assessment tribunal

The Committee asked the Scottish Government:

- **For clarification of the Parliamentary procedure intended to apply to these rules, and whether the provisions achieve that procedure.**
- **If it is proposed that the rules are not to be laid, why is that more appropriate than the rules being laid (and made by Scottish statutory instrument)?**

- **Why is there provision for publication of the rules under paragraph 21, but not it appears under paragraph 31?**

Scottish Government response: The corresponding rules relating to conduct and fitness assessment in the Tribunals (Scotland) Bill are made by Act of Sederunt and are therefore published but not subject to Parliamentary procedure. In respect of the Scottish Tax Tribunals which will be established by Part 4 of the Bill, the rule-making power is vested in Scottish Ministers for the interim period until jurisdiction for devolved tax appeals is transferred to the new Tribunals for Scotland. However the Government accepts that in both cases the rules should be published and will accordingly bring forward an amendment to Schedule 2, paragraph 31 to that effect.

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