

REVENUE SCOTLAND AND TAX POWERS 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 Revenue Scotland and Tax Powers 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 Revenue Scotland and Tax Powers Bill is the third of three related Bills being brought forward as a consequence of measures enacted in the Scotland Act 2012 (c.11). It follows two tax-specific Bills, the Land and Buildings Transaction Tax (Scotland) Act 2013 which received Royal Assent on 31 July 2013 and the Landfill Tax (Scotland) Bill which is being considered by the Scottish Parliament in the current session.
4. The Bill makes provisions for a Scottish tax system to enable the collection and management of Land and Buildings Transaction Tax (LBTT) and Scottish Landfill Tax (SLfT) - "the devolved taxes". It establishes Revenue Scotland as a new non-Ministerial Department which will be the tax authority responsible for collecting Scotland's devolved taxes from 1 April 2015. It puts in place a statutory framework which will apply to the devolved taxes and sets out in clear terms the relationship between the tax authority and taxpayers in Scotland, including the relevant powers, rights and duties.

APPROACH TO USE OF DELEGATED POWERS

5. 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 a balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example changing market conditions);
 - 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 (for example tax avoidance).

6. The delegated powers provisions 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.

DELEGATED POWERS

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 made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

7. The provision allows Scottish Ministers to set the period that Revenue Scotland's first corporate plan will cover. The corporate plan will set out Revenue Scotland's main objectives, the outcomes that would demonstrate achievement of these objectives and the activities Revenue Scotland expects to undertake.

Reason for taking power

8. Revenue Scotland will be responsible for the collection and management of devolved taxes from 1 April 2015. The board of Revenue Scotland will need time to consult on the corporate plan so it is unlikely to be in place from 1 April 2015. As such Scottish Ministers may need to specify that the corporate plan will cover less than the three year periods that subsequent plans will cover.

Choice of procedure

9. Negative procedure is considered appropriate for what is essentially an administrative matter. The Bill sets out a planning period of three years. It is intended that plans will run from the first of April of the relevant three year period, however Revenue Scotland's first plan will not be in place by the 1st April 2015. This power will allow Scottish Ministers to specify that the first corporate plan could cover a period less than three years. As such the subsequent plan would start from 1 April 2018.

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

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

Provision

10. The provision allows Scottish Ministers to vary the period that any of Revenue Scotland's corporate plans cover after the first corporate plan from the standard three years set out on the face of the Bill.

Reason for taking power

11. It is anticipated that Revenue Scotland's corporate plans, following the first corporate plan, will cover a three period. Scottish Ministers however recognise that if changes to Revenue Scotland's functions were anticipated three years may be too long a period for the corporate plan to cover and may wish to change the planning period.

Choice of procedure

12. Negative procedure is considered appropriate for what is essentially an administrative matter. The planning period for Revenue Scotland's corporate plans after the first corporate plan is set out on the face of the Bill. The power would allow Scottish Ministers to vary this planning period in the light of current business conditions.

Section 30(1) - Power for Scottish Ministers to make regulations for determining the composition of the First-tier Tribunal and the Upper Tribunal

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

Provision

13. The provision allows Scottish Ministers to determine the composition of a panel convened to hear a case in the Tax Tribunals, both the First-tier and Upper Tribunal when a case falls within the Tax Tribunals jurisdiction. The regulations may provide for the determination of the number of members who are to hear a particular type of case as well as the types of member (whether ordinary or legal). It will be a matter for the President of the Tax Tribunals to choose the actual members, but this choice must be exercised in accordance with these regulations. The regulations may treat separately the Tribunals decision making functions at first instance and on appeal.

Reason for taking power

14. To allow Scottish Ministers to determine the appropriate composition of panels sitting in the First-tier Tribunal or Upper Tribunal to hear specific types of cases. The aim of the policy is to ensure that when convened to hear a case, the First-tier Tribunal and 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 Tax Tribunals

and allow flexibility to ensure that the composition of the Tax Tribunals can vary in relation to the types of case they will hear.

Choice of procedure

15. The determination of the composition of the Tax Tribunals is important in ensuring that when convened to exercise its functions the Tax Tribunal does so in an appropriate manner. Therefore affirmative procedure is considered appropriate. The regulations would also limit the President of the Tax Tribunal's discretion in choosing members to sit on a panel as provided for in sections 27(2) and 27(3). The President of the Tax Tribunals is the senior member of the Tax Tribunals.

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

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

Provision

16. The provision allows Scottish Ministers to set a time limit for an appellant to seek permission for an onward appeal. For a case originally heard in the First-tier Tribunal, permission for an onward appeal has to be sought from the First-tier Tribunal and, if that is not forthcoming, from the Upper Tribunal. For a case heard in the Upper Tribunal, permission for an onward appeal has to be sought from the Upper Tribunal and, if that is not forthcoming, from the Court of Session.

Reason for taking power

17. 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 Tribunals rules.

Choice of procedure

18. Negative procedure is considered appropriate for what is essentially a procedural matter. The provision does not allow for the amendment of the Bill or other primary legislation.

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

Power conferred on: the Court of Session
Power exercisable by: Act of Sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure (Act of Sederunt applies)

Provision

19. Section 37 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 37(4), therefore, confers a power on the Court of Session, by Act of Sederunt, to specify the category of petitions for judicial review which are appropriate to be remitted to the Upper Tribunal for determination.

Reason for taking power

20. 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. 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.

21. Even if a petition falls within a category specified in an Act of Sederunt made under section 37(4), the Court may only remit the petition to the Upper Tribunal if, in accordance with section 37(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

22. 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 39(2) – Additional Matters

Power conferred on: the Court of Session
Power exercisable by: Act of Sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure (Act of Sederunt applies)

23. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 42(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 (Act of Sederunt applies)

24. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 43(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 (Act of Sederunt applies)

25. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 44(1) – 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 (Act of Sederunt applies) laid no procedure

26. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 45(1) - Power for Scottish Ministers to confer additional powers on the First-tier Tribunal and Upper Tribunal as are necessary or expedient for the proper exercise of their functions.

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

Provision

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

Reason for taking power

28. The purpose behind this regulation-making power is to ensure that the Tax Tribunals will have all the powers and functions which are necessary or expedient in order to properly exercise the functions of the Tax Tribunals. The regulation-making power may only be exercised so as to confer those additional powers on the Tax Tribunals which are necessary or expedient for the proper exercise of their functions. 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

29. Affirmative procedure is considered appropriate as the regulations would add to the powers of the Scottish Tax Tribunals as set out in Part 4 of this Bill.

Section 46(3) - Power for 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 (Act of Sederunt applies)

Provision

30. Section 46 confers a power on the Court of Session, by Act of Sederunt, to make rules (to be known as the Scottish Tribunal Rules) regulating the practice and procedure to be followed in proceedings in the Tax Tribunals.

31. Sections 47 and 48 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 Tax Tribunals. Section 47 provides that Tribunal Rules may make provision as to the exercise of functions by the members of the Tax Tribunals as well relying on the effect of practice directions issued under section 52. Section 48 provides that Tribunal Rules may make different provision for different purposes including different provision for the First-tier and the Upper Tribunal. It also provides that the generality of section 62(1) is not limited by sections 49 to 51 or any other provisions in the Bill which set out the matters for which Tribunal Rules may make provision.

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

- section 39(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 37(2);
- section 42(1) enables Tribunal Rules to make further provision in respect of the conduct of cases before the Tax Tribunals so as to ensure that the Tax 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 43(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 44(1) provides that the Scottish Tribunals may only award expenses in a case where this is provided for in Tribunal Rules;
- section 49(1) enables Tribunal Rules to make provision for the purpose of proceedings in a case before the Tax 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 50(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 51(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

33. The aim of the Bill is for the rules governing the practice and procedure to be followed in proceedings in the Tax 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).

Choice of procedure

34. 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 47(1) – Exercise of functions

Power conferred on: the Court of Session
Power exercisable by: Act of Sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure (Act of Sederunt applies)

35. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 48(1) – Extent of rule-making

Power conferred on: the Court of Session
Power exercisable by: Act of Sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure (Act of Sederunt applies)

36. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 49(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 (Act of Sederunt applies)

37. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 50(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 (Act of Sederunt applies)

38. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 51(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 (Act of Sederunt applies)

39. See the commentary on the subordinate legislation-making powers contained in section 46 (3) (Tribunal Rules).

Section 69(6) - Power for Scottish Ministers to specify records that do or do not require to be preserved under this section and to require supporting documents that need to be kept under this section.

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

Provision

40. Section 69 sets out the duty of a person who is required to deliver a return in relation to devolved taxes to keep and preserve records that are needed to complete that return. It lists the types of records and supporting documents that generally need to be kept and sets out the maximum time period for which records need to be kept. Section 69(6) provides for Scottish Ministers to make regulations specifying records that do or do not have to be preserved under section 69. The regulations can also specify supporting documents that are required to be kept under section 69.

Reason for taking power

41. Scottish Ministers recognise that a wide range of records and supporting documents could be used to make a return. Rather than attempt to provide a definitive list in the Bill the power would allow Scottish Ministers to be able to provide greater detail of the types of records or supporting documents that have to be preserved or do not need to be preserved to comply with section 69.

Choice of procedure

42. Negative procedure is considered appropriate for what is essentially an administrative matter relating to the records and supporting documents that may underpin a tax return. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 72(2) - Power for Scottish Ministers to make regulations that make provision for keeping and preserving records that relate to transactions that are not notifiable for LBTT.

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

Provision

43. The provision allows Scottish Ministers to make regulations that provide for the keeping and preservation of records in relation to LBTT land transactions that are not notifiable. The regulations may apply sections 69 to 71 to buyers where the transaction does not need to be notified, with or without modification. Section 69 deals with the duty keep and preserve records, section 70 deals with how information may be preserved and section sets out the penalty that relates to the failure to preserve records.

Reason for taking power

44. This section relates to LBTT and sets out that Scottish Ministers may make regulations to specify records and supporting documents that a buyer must keep and preserve in relation to land transactions that do not have to be notified. A land transaction may not initially be notifiable under the 2013 Act. But it can become notifiable later, for instance where a lease continues after the end of its original term. Regulations under this section may apply the provisions concerning

a taxpayer's duty to keep and preserve records that are set out in the previous sections 69 to 71, to a buyer in a land transaction that is not notifiable. Any expressions used in this section and in the Land and Buildings Transaction Tax (Scotland) Act 2013 have the meaning given in that Act.

45. Schedule 1 of the LBTT Act provides for a power to amend the list of exempt (non – notifiable) transactions. If the list of exempt (non-notifiable) transactions was added to Scottish Ministers may wish to make further provision for the related records or supporting documents to be preserved. To allow this flexibility it is considered appropriate to do this by regulations rather than on the face of the Bill.

Choice of procedure

46. Affirmative procedure is considered appropriate because the regulation could have the effect of applying sections 69 to 71 to LBTT transaction that are not initially notifiable but may become notifiable at a later date. As such the regulations would impose an additional duty to keep records and a penalty if records were not preserved.

Section 73(1) - Power for Scottish Ministers to make regulations about the date by which tax returns must be made to Revenue Scotland.

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

Provision

47. The provision allows Scottish Ministers to make regulations about the date by which tax returns must be made to Revenue Scotland. Regulations may modify this Bill or any other enactment.

Reason for taking power

48. Scottish Ministers recognise that different taxes may require different dates by which returns must be made to Revenue Scotland. As such it is considered appropriate to set out these dates in subordinate legislation rather than provide this level of detail in the Bill.

Choice of procedure

49. Affirmative procedure is considered appropriate because the date by which a tax return has to be made is significant for taxpayers, but is also the “filing date” which is key part of the provisions detailing when tax returns can be amended by both the taxpayer and Revenue Scotland and the time limits for requesting review or making an appeal.

Section 74(4)(b) - Power to prescribe the relevant date by order from which the taxpayer will have one year to amend a tax return.

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

Provision

50. Section 74 provides that a taxpayer may amend a return within 12 months of the filing date, which is defined in section 73(3) as the date by which the return has to be made or such other date as the Scottish Ministers prescribe by order.

Reason for taking power

51. In some circumstances it may be desirable to change the date the 12 month amendment period runs from for all tax returns or a certain class of tax return. The power would, for example, allow Scottish Ministers the flexibility to have the 12 month amendment period run from the actual date a tax return was made rather than the filing date.

Choice of procedure

52. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 83(2)(c) - Power to refer a case to any other court or tribunal.

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

Provision

53. Section 79 provides that at any time during an enquiry any question arising may be referred to the appropriate tribunal. Section 83 details that the appropriate tribunal may be the Lands Tribunal for Scotland, the First-tier Tribunal, the Upper Tribunal or any other court or tribunal specified by the Scottish Ministers by order.

Reason for taking power

54. To provide that Scottish Ministers have the power to ensure that a question raised during an enquiry is heard by the most appropriate court or tribunal.

Choice of procedure

55. Negative procedure is considered appropriate because the provision aims to allow the flexibility to ensure that questions raised during enquiries can be determined as effectively and

efficiently as possible. As such it is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 86(6)(b) - Power to prescribe the “relevant date” referred to in section 86.

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

Provision

56. Section 86 provides for Revenue Scotland to make a determination of tax due where a person has failed to make a tax return by the required filing date. No Revenue Scotland determination can be made five years after the relevant date, which is the filing date or such other date that the Scottish Ministers may by order prescribe.

Reason for taking power

57. In certain circumstances it may be appropriate for the five year period to run from a date other than the filing date. The power would allow Scottish Ministers the flexibility to, for example, set a new relevant date for all taxes or a specific tax.

Choice of procedure

58. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 102(1) - Power to make regulations preventing reimbursement where this would unjustly enrich the claimant.

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

Provision

59. The provision allows Scottish Ministers to make regulations that prevent any reimbursement for the purposes of a defence of unjust enrichment. Unjust enrichment may occur where a repayment of tax is made to a taxpayer, but the taxpayer has not ultimately borne the cost of the tax. For example, if landfill tax is repaid to the landfill site operator who has paid the tax, the operator could be unjustly enriched as it is those paying to deposit waste at the site that will have ultimately borne the cost of the tax. Section 100 provides that unjust enrichment would be a defence against a claim for repayment of tax. Section 103 provides that the regulations may make provision for penalties that breaches regulations under section 102.

60. Section 103 provides that regulations made under section 102 may contain provision for penalties to be applied to a person breaches any obligations imposed in regulations under section 102.

Reason for taking power

61. To ensure that Scottish Ministers have the power to prevent a repayment of tax unjustly enriching a claimant. A repayment of tax could proceed if the arrangements to reimburse the persons who ultimately paid the tax comply with the regulations. These arrangements include setting a period for reimbursement to take place, repayment to Revenue Scotland if reimbursement does not take place and requires interest paid by Revenue Scotland on a repayment to be treated in the same way as the repayment. Records must be kept and made available to Revenue Scotland on request that show how the arrangements for reimbursement were carried out. Given the importance of ensuring that any repayment of tax is reimbursed to the persons who ultimately paid the tax, penalties could also apply for non-compliance with obligations set out in the regulations.

Choice of procedure

62. Negative procedure is considered appropriate for what is essentially an administrative matter. If, however, the reimbursement arrangements laid out in the regulation require the amendment of the Bill or other primary legislation then the procedure is affirmative.

Section 113(2) – Power to specify activities and persons in relation to references to ‘carrying on of a business’ in Part 7 of the Bill.

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

Provision

63. The provision allows Scottish Ministers to set out activities or persons which are (and are not) to be treated for the purposes of Part 7 of the Bill as being involved in the carrying on of a business. Part 7 of the Bill sets out the overall investigatory powers of Revenue Scotland, including powers in relation to information and documents and inspections of premises and other property.

Reason for taking power

64. This power is required to allow Scottish Ministers to set out further activities, other than those specified in the Bill, which are or are not to be treated as the carrying on of a business for the purposes of Part 7 of the Bill. After the Bill gains Royal Assent, Scottish Ministers may wish, for example, to legislate for new activities or practices to be treated for the purposes of Revenue Scotland’s investigatory powers as a business, or to put beyond doubt the applicability of an existing activity or practice in relation to the investigatory powers.

Choice of procedure

65. Negative procedure is considered appropriate for a technical and largely administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 125(1) – Power to set conditions and exceptions about producing copies of documents

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

Provision

66. The provision allows Scottish Ministers to set out conditions or exceptions applying to a situation where a person required by an information notice to produce a document wishes to comply with the notice by producing a copy of the document. An information notice is a notice issued in writing by a designated officer to either a taxpayer or third party requiring information or document(s) to be provided in order to check a person's tax position in relation to the devolved taxes.

Reason for taking power

67. This power is required to ensure that Scottish Ministers can set conditions and where a person who is the subject of an information notice would otherwise be able to comply with the notice by producing a copy of the document rather than the original. There may be situations where it would neither be reasonable nor helpful for the purposes of an investigation for a copy of the document to be provided. The conditions and exceptions may be tax-specific and technical, and may indeed need to be changed over time, therefore it is considered to be more appropriate to set out these conditions and exceptions in subordinate legislation rather than on the face of the Bill.

Choice of procedure

68. Negative procedure is considered appropriate for a technical and largely administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 126 – Power to make further provision about information notices

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

Provision

69. The provision allows Scottish Ministers to make further provision about powers relating to information notices, including their form and content and the time periods and manner of complying with such notices.

Reason for taking power

70. This power is required to enable Scottish Ministers to provide greater detail about information notices other than those already set out in the Bill. As the form and content of information notices are likely to be detailed and tax-specific, and will likely need to be changed over time, it is considered to be more appropriate to set out these conditions and exceptions in subordinate legislation rather than on the face of the Bill.

Choice of procedure

71. Negative procedure is considered appropriate for a technical and largely administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 130(3) – Power to provide for resolution of disputes as to whether information or a document exchanged between legal adviser and clients is privileged

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative procedure

Provision

72. The provision allows Scottish Ministers to make provision in relation to information notices for the resolution by the tribunal of disputes as to whether any information or document is privileged in connection with communications between legal advisers and clients. The regulations are able to make provision as to the custody of a document while its status is being decided.

Reason for taking power

73. It is foreseeable that there will be disputes as to whether a document or part of a document benefits from confidentiality of communications (sometimes known as “legal professional privilege”). Such disputes are likely to end up at the tribunal so this power allows Scottish Ministers to set further provision about the process and criteria or conditions for resolving these disputes at tribunal. Given there is likely to be a need to make changes to such provision over time, it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

74. Negative procedure is considered appropriate for a technical and largely administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Section 134(3) – Power to specify third parties in relation to inspections of business premises

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

Provision

75. The provision allows for Scottish Ministers to specify persons or categories of persons to be treated as third parties where an inspection of their business premises is considered necessary by the tax authority in order to check the tax position of another person. The designated officer will have the power to inspect the overall premises and any business assets or relevant documents on the premises that are relevant to the investigation. The designated officer cannot enter or inspect any part of the business premises that is used solely as a dwelling.

Reason for taking power

76. This power is required to enable Scottish Ministers to provide greater detail about persons or categories of persons that should be treated as a third party where an inspection of their business premises is considered necessary in order to check the tax position of another person. Given the specification of third parties is likely to be different for each devolved tax, and will likely need to be updated over time, it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

77. Negative procedure is considered appropriate for a technical and administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

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 made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

78. The provision allows Scottish 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.

Further provision can include the circumstances in which such a penalty is payable, penalty amounts and types and also arrangements for issuing, appealing and enforcing such a penalty. The regulations under this section cannot create criminal offences but can make changes to primary legislation.

Reason for taking power

79. This power is required to enable Scottish Ministers to provide greater detail about a penalty a person is liable for where they fail to make a tax return on or before the filing date in relation to the devolved taxes. The arrangements for such a penalty may be different for each devolved tax so it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

80. Affirmative procedure is considered to be appropriate because the power allows for the amendment of primary legislation.

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 made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

81. The provision allows Scottish Ministers to make further provision about penalties for a failure to pay tax on or before the date payment was due, 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. The regulations under this section cannot create criminal offences but can make changes to primary legislation.

Reason for taking power

82. This power is required to enable Scottish Ministers to provide greater detail about a penalty a person is liable for where they fail to pay tax on or before the due date in relation to the devolved taxes. The arrangements for such a penalty may be different for each devolved tax so it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

83. Affirmative procedure is considered to be appropriate because the power allows for the amendment of primary legislation.

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 made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

84. The provision allows Scottish Ministers to make further provision about penalties applicable when a person submits a relevant document containing one or more errors which understates the tax liability or provides a false or inflated claim for relief. The penalty can only be applied where the error is due to careless or deliberate behaviour on behalf of the person submitting the document. A penalty is payable for each error or inaccuracy in the document. Scottish Ministers can make further provision specifying what relevant documents are for the purposes of this penalty, the penalty amounts and also arrangements for issuing, appealing and enforcing such a penalty. The regulations under this section cannot create criminal offences but can make changes to primary legislation.

Reason for taking power

85. This power is required to enable Scottish Ministers to provide greater detail about a penalty a person is liable for where they submit a taxpayer document (in relation to the devolved taxes) which contains one or more errors. The arrangements for such a penalty may be different for each devolved tax so it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

86. Affirmative procedure is considered to be appropriate because the power allows for the amendment of primary legislation.

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 made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

87. The provision allows Scottish Ministers to make further provision about penalties applicable when a person submits a relevant document containing one or more errors which understates the tax liability or provides a false or inflated claim for relief and where the error is attributable to another person. In such cases, a penalty is payable by the other person who the error is attributable to, where they have deliberately supplied false information or withheld information from the person who submitted the document.. Scottish Ministers can make further

provision specifying what relevant documents are for the purposes of this penalty, the penalty amounts and also arrangements for issuing, appealing and enforcing such a penalty. The regulations under this section cannot create criminal offences but can make changes to primary legislation.

Reason for taking power

88. This power is required to enable Scottish Ministers to provide greater detail about a penalty a third party is liable for where one or more errors in a taxpayer document submitted by the taxpayer are attributable to them. The arrangements for such a penalty may be different for each devolved tax so it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

89. Affirmative procedure is considered to be appropriate because the power allows for the amendment of primary legislation.

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

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

Provision

90. The provision allows Scottish 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. Scottish Ministers can make further provision specifying what relevant taxes are for the purposes of this penalty, the penalty amounts and also arrangements for issuing, appealing and enforcing such a penalty. The regulations under this section cannot create criminal offences but can make changes to primary legislation.

Reason for taking power

91. This power is required to enable Scottish Ministers to provide greater detail about a penalty a person is liable for where they fail to take reasonable steps to notify Revenue Scotland about a Revenue Scotland assessment which understates the tax liability. The arrangements for such a penalty may be different for each devolved tax so it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

92. Affirmative procedure is considered to be appropriate because the power allows for the amendment of primary legislation.

Section 170(1) – Power to change the amount of penalties relating to failure to comply with an information notice, obstruction of an officer during an inspection or providing inaccurate information or documents as a result of an information notice. Section 177(6) applies this power to the increased daily default penalty amount in 177(4)

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

Provision

93. The provision in section 170(1) allows Scottish Ministers to change the penalty amounts applicable when a person fails to comply with an information notice (£300), provides inaccurate information or documents in complying with an information notice (£3000) or if they obstruct an officer carrying out an inspection (£300). Scottish Ministers can only change the penalty amounts if it appears to them that there has been a change in the value of money since the amount was last set.

94. The provision in section 177(6) applies the order-making power in section 170(1) to the increased daily default penalty in section 177(4) so that the Scottish Ministers can change the penalty amount where it appears to them that the value of money has changed since the penalty amount was last set. Where the lower daily default penalty has been applied for more than 30 days and the person continues to fail to comply with the tax authority the increased daily default penalty can be applied with the approval of the tribunal.

Reason for taking power

95. This power is required to enable Scottish Ministers to change the penalty amount in sections 167, 168, 169 and 177 where it is felt by Ministers that the value of money has changed since the penalty amount was last set. Due to inflation (or deflation where that occurs), it is likely that over time Ministers will wish to change the amounts originally set. It is considered to be more appropriate to set out this provision in subordinate legislation as opposed to amending primary legislation each time Ministers wish to change one of the penalty amounts.

Choice of procedure

96. Affirmative procedure is considered to be appropriate because any power in relation to setting or changing the provision about civil financial penalties would benefit from the additional scrutiny of Parliament.

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 made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

97. The provision allows Scottish Ministers to make further provision about penalties for a failure to register for SLfT imposed by virtue of sections 22 or 23 of the Landfill Tax (Scotland) Bill. It is not expected that such a penalty would apply to LBTT because there is no registration involved with RoS prior to making a tax return in relation to LBTT, whereas a landfill site operator will need to register with SEPA. Scottish Ministers can make further provision specifying the penalty amounts and also arrangements for issuing, appealing and enforcing such a penalty. The regulations under this section cannot create criminal offences but can make changes to primary legislation.

Reason for taking power

98. This power is required to enable Scottish Ministers to provide greater detail about a penalty a person is liable for where they fail to register for tax. The arrangements for such a penalty may be different for each devolved tax so it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

99. Affirmative procedure is considered to be appropriate because the power allows for the amendment of primary legislation.

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

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

Provision

100. The provision allows Scottish Ministers to specify a relevant date, 30 days after which interest begins to be payable on the amount of any unpaid tax. The interest rate charged is set out in regulations made under section 185(1) and interest continues to be charged until such time as the tax is paid.

Reason for taking power

101. This power is required to enable Scottish Ministers to specify a date, 30 days after which interest on unpaid tax is payable. As Scottish Ministers may wish to change the definition of this date at any point, it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

102. Negative procedure is considered appropriate for a technical and largely administrative matter such as defining a date. The provision does not allow for the amendment of the Bill or other primary legislation.

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

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

Provision

103. The provision allows Scottish Ministers to specify the rates of interest applying to unpaid tax (section 182) or penalties (section 183) owed to Revenue Scotland or to any repayment of tax, penalties or interest owed by Revenue Scotland to the taxpayer (section 184). Different interest rates can be set for different devolved taxes and different penalties.

Reason for taking power

104. This power is required to enable Scottish Ministers to set and change the interest rates applying to unpaid tax or penalties owed to Revenue Scotland or to any repayment of tax, penalties or interest owed by Revenue Scotland to the taxpayer. As such interest rates may need to be changed over time to reflect changes, for example in market conditions, it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Choice of procedure

105. Affirmative procedure is considered to be appropriate to allow an appropriately strong level of scrutiny by the Parliament of this power to set interest rates.

Section 187(1) – Power to specify the time and manner of fees for payment

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

Provision

106. The provision allows Scottish Ministers to specify details of a fee that must be paid when a person makes a payment to Revenue Scotland (or a person authorised by Revenue Scotland) using a method of payment set in regulations by Scottish Ministers (e.g. credit card). The details of the fee that can be specified include the time and manner of the fee and whether it applies generally or for specified purposes. The fee that can be charged by Revenue Scotland must be

limited to the cost of recovery regarding the fee it is charged itself for accepting payment by the method in question.

Reason for taking power

107. This power is required to enable Scottish Ministers to set and change the details (amount, time and manner for example) a fee which must be paid when a person makes a payment to Revenue Scotland (or a person authorised by Revenue Scotland) using a particular method of payment (e.g. credit card). The fee that can be charged by Revenue Scotland must be limited to the cost of recovery it is either charged or incurs itself by accepting payment via the method in question i.e. fees cannot be set at a level which generates additional revenue above that of the cost involved.

Choice of procedure

108. Negative procedure is considered appropriate for a technical and administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation. As the fees or time limits that apply may need to be changed over time to reflect changing circumstances, for example market conditions or costs incurred by Revenue Scotland, it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill.

Section 190(5) – Power to prescribe the form of a summary warrant granted by the sheriff court

Power conferred on: the Court of Session
Power exercisable by: Act of Sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure (Act of Sederunt applies)

Provision

109. The provision allows the form of a summary warrant granted by the sheriff court to be set by Act of Sederunt. A summary warrant can only be issued following an application to the sheriff court from a designated officer in relation to a sum of money payable by a person to Revenue Scotland.

Reason for taking power

110. This power is required to allow further detail to be set regarding the form of a summary warrant granted by the sheriff court in relation to the devolved taxes. As the form of the summary warrant may need to be changed over time, it is considered to be more appropriate to set out this provision in subordinate legislation rather than on the face of the Bill. Specifying the form of court and court-related documents is normally done by Act of Sederunt.

Choice of procedure

111. This power is set by Act of Sederunt because it relates to the functioning of civil procedure in the sheriff court.

Section 196(1) – Power to change the amount of a penalty arising from a third party failing to comply with a notice to supply contact details of a debtor

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

Provision

112. The provision allows Scottish Ministers to change the amount of a penalty (as set out in section 195) that a third party is liable to pay following a failure to comply with a Revenue Scotland notice to supply contact details of a debtor. Scottish Ministers can only change the penalty amount where it appears to them that there has been a change in the value of money since either the provision in this enactment came into effect or since this power was last exercised, whichever is later.

Reason for taking power

113. This power is required because due to inflation (or deflation where that occurs), it is likely that over time Ministers will wish to change the amount of the penalty set in section 195 (£300). It is considered to be more appropriate to set out this provision in subordinate legislation as opposed to amending primary legislation each time Ministers wish to change the penalty amount.

Choice of procedure

114. Affirmative procedure is considered to be appropriate because any power in relation to setting or changing the provision about civil financial penalties would benefit from the additional scrutiny of Parliament.

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

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

Provision

115. Section 198 sets out the decisions that are appealable at 198(1). Those decisions that are not appealable are laid out at 198(4). Section 198(6) allows Scottish Ministers to amend the list of appealable and non-appealable decisions by adding a decision, varying the description of a decision to remove a description from either subsection.

Reason for taking power

116. Scottish Ministers consider it important that decisions that are appealable or not appealable are set out on the face of the Bill, but would like to ensure that they have the flexibility to amend either list to reflect future circumstances.

Choice of procedure

117. Affirmative procedure is considered appropriate as the order would amend sections 198(1) and 198(4) of this Bill and as such impact on a taxpayer's ability to appeal to the Scottish Tax Tribunals or seek a review of a decision from Revenue Scotland.

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

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

Provision

118. Section 210 provides that where there is a review or appeal any tax, penalty or interest due will remain payable as if there was no review or appeal. Section 210(2) allows Scottish Ministers to make regulations that may include provision for: applications by appellants to postpone amounts of tax, penalties and interest; and set out the effect of any determination by Revenue Scotland on such applications; agreements between appellants and Revenue Scotland about the postponement of amounts of tax, penalties and interest; applications to the Tax Tribunal for such postponement; and appeals against determinations by Revenue Scotland and decisions by the Tax Tribunal on such applications.

Reason for taking power

119. The payment of tax, penalties and interest prior to an appeal would be appropriate in some cases, for example where the taxpayer has already collected the tax from a third party. For example a landfill site operator who wishes to appeal may have already collected the tax from those depositing waste at the landfill site. On the other hand, where the taxpayer is the person who ultimately pays the tax, having to pay tax, penalties or interest prior to being able to appeal or seek a review is likely to act as a major deterrent to pursuing a dispute with Revenue Scotland. As such Scottish Ministers would have the power to make provision for the postponement of tax, penalties or interest with a review or appeal is on-going.

Choice of procedure

120. Given the regulations would postpone the payment of potentially significant amounts of tax, penalties and interest it is considered that affirmative procedure is appropriate.

Section 218(1) – Powers relating to subordinate legislation

Power conferred on:	N/A
Power exercisable by:	N/A
Parliamentary procedure:	N/A

Provision

121. Although not a free standing power in itself the provision does allow that orders and regulations may make different provision for different purposes including for different devolved taxes. Orders and regulations may contain incidental, supplementary, consequential, transitional, transitory or saving provision, although not in relation the power contained at 219(1).

Reason for taking power

122. To ensure that Scottish Ministers have the power to make provisions that are different for different purposes and contain incidental, supplementary, consequential, transitional, transitory or saving provisions.

Choice of procedure

123. This depends on the procedure associated with the relevant order or regulation making power.

Section 219(1) - Power to make ancillary provision

Power conferred on:	the Scottish Ministers
Power exercisable by:	order made by Scottish statutory instrument
Parliamentary procedure:	affirmative procedure if amending primary legislation, otherwise negative

Provision

124. This provision enables Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, this Bill or any provision made under it.

Reason for taking power

125. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. The ancillary provision is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provision in the Bill. The

ancillary power is wide-ranging because it is vital that collection and management of the devolved taxes is able to be delivered effectively and efficiently.

126. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues. 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.

127. The power, whilst 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, or for giving full effect to any provision of the Bill.

Choice of procedure

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

Section 224(2) – Power to commence Bill

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

Provision

129. This provision allows Scottish Ministers to commence provisions in this Bill (other than sections 218-223 and 225) on such day as they appoint by order. Such an order can include transitional, transitory or saving provision.

Reason for taking power

130. It is standard for Scottish Ministers to have control over the commencement of a Bill.

Choice of procedure

131. No procedure is provided, which is typical for commencement powers.

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

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

Provision

132. The provision allows Scottish Ministers to specify a different minimum and maximum number of members of Revenue Scotland.

Reason for taking power

133. Schedule 1 paragraph 1(1) provides that there will be no fewer than five and no more than nine members of Revenue Scotland. The reason for taking the order making power is to allow Scottish Ministers to alter the minimum and maximum number of members without recourse to primary legislation. This would provide flexibility to ensure that the number of members are sufficient to effectively exercise Revenue Scotland's functions. For example if further taxes are devolved in the future (as is envisaged by the Scotland Act 2012) it may be necessary to increase the number of members of Revenue Scotland.

Choice of procedure

134. Negative procedure is considered appropriate for what is essentially an administrative matter, even though the power allows for the Bill to be amended in a very limited way.

Schedule 2 paragraph 2(2) - Power to set criteria for eligibility to serve as an ordinary member 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

135. The provision allows Scottish Ministers to prescribe the criteria in terms of qualifications, experience and training that a person needs to be eligible for appointment as an ordinary member of the First-tier Tribunal.

Reason for taking power

136. The First-tier Tribunal will require ordinary members with a range of different professional qualifications, experience and training. It is considered preferable to set out the detail of the qualifications, experience and training necessary to be an ordinary member of the First-tier Tribunal in regulations rather than on the face of the Bill for reasons of flexibility.

Choice of procedure

137. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Schedule 2 paragraph 4(2) - Power to set criteria for eligibility to serve as a legal member 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

138. Paragraph 4(2) of schedule 2 confers a power on the Scottish Ministers, by regulations to specify further criteria beyond that set out in paragraph 4(1) of that schedule which will enable a person to qualify as a legal member of the First-tier Tribunal. Further details about eligibility are dealt with at paragraph 8, sub-paragraphs (3) and (5) and (6) (see below).

Reason for taking power

139. 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 five years.

140. 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.

Choice of procedure

141. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

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

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

Provision

142. Paragraph 6(2) of schedule 2 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. Further details about eligibility are dealt with at paragraph 8, sub-paragraphs (4) and (5) and (6) (see below).

Reason for taking power

143. 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 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 10 years.

144. 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.

Choice of procedure

145. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Schedule 2 paragraph 8 – Supplementary criteria applying to regulations made under paragraphs 4(2) and 6(2) of schedule 2

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

Provision

146. This provision sets out supplementary eligibility criteria applying to regulations made under paragraphs 4(2) and 6(2) of schedule 2 which set out criteria for the appointment of legal members to the First-tier Tribunal and Upper Tribunal.

Reason for taking power

147. 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 or 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 five years or 10 years respectively.

148. 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 Tax Tribunals. The regulation-making power in paragraphs 4(2) and 6(2) of schedule 2 would enable the Scottish Ministers to make regulations enabling such persons to be eligible for appointment. 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 8 and 9 of that schedule which set out the various matters on which those regulations may make provision. The regulation-making power in paragraph 4(2) and 6(2) of schedule 2 is, itself, augmented by the regulation-making powers contained in paragraph 9(1) and (2).

Choice of procedure

149. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Schedule 2 paragraph 9(1) - Power to make provisions relating the five and ten year qualifying periods that apply to legal members of both the First-tier and Upper Tribunal

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

Provision

150. The Scottish Ministers may by regulations make provisions relating to the calculation of the five year period mentioned in schedule 2 paragraphs 4(1) and 8(3)(a) or the ten year period mentioned in schedule 2 paragraphs 6(1) and 8(4)(a). The regulations may for, example, make reference to recent or continuous time. The regulations may include provision relating to, for example, debarment from practice during the five or ten year periods mentioned above and make further provision relating to the criteria for suitability and the nature of experience required.

Reason for taking power

151. Paragraph 9(1) of schedule 2 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 Tax Tribunals including the calculation of the five or 10 year qualification period, the effect of debarment from practice and the criteria and nature of other experiences in law.

Choice of procedure

152. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Schedule 2 paragraph 9(2) - Power to vary the list of activities to which regulations relating to eligibility to serve as a legal member of the First-tier or Upper Tribunal may refer

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

Provision

153. The provision allows Scottish Ministers to modify the list of activities that relate to the eligibility of a person to serve as a legal member or either the First-tier or the Upper Tribunal. The list of activities are set out in schedule 2 paragraph 8(5) and apply to the regulation making powers set out paragraphs (4)(2) and (6)(2b).

Reason for taking power

154. The Scottish Ministers 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 Tax Tribunals. Paragraph 8(5) provides details of the activities that may qualify a person to serve as a legal member of the Tax Tribunals. The regulation-making power in paragraph 9(2) allows Scottish Ministers the flexibility in the future to modify the list of activities. If for example further taxes were devolved then other activities currently not listed in paragraph 8(5) may be relevant.

Choice of procedure

155. It is considered that the negative procedure gives the appropriate degree of scrutiny. Even though paragraph 9(2) of schedule 2 enables the modification of the list of activities set out in paragraph 8(5) 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 2 paragraph 21(1) Rules for the investigation and determination of any matter concerning the conduct of members of the Tax Tribunals and the review of such a determination.

Power conferred on: the Scottish Ministers
Power exercisable by: rules made by the Scottish Ministers
Parliamentary procedure: not laid no procedure

Provision

156. Paragraph 21(1) of schedule 2 confers a power on the Scottish Ministers, 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 Tax Tribunals and the review of any such determination.

157. Paragraph 21(2) makes provision about what the rules may cover in particular. Paragraph 22(a) provides that the Scottish Ministers may make different provision for different purposes while paragraph 22(b) provides that the rules are to be published in such manner as the Scottish Ministers may determine.

Reason for taking power

158. Scottish Ministers will have responsibility for making and maintaining appropriate arrangements about the conduct of the members of the Tax 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 Scottish Ministers power will enable them to set out the arrangements in rules which may be readily modified and updated to reflect best practice and changing circumstances.

Choice of procedure

159. 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 Scottish Ministers.

Schedule 2 paragraph 31 Rules for the procedures to be followed at a fitness assessment tribunal.

Power conferred on: the Scottish Ministers
Power exercisable by: rules made by the Scottish Ministers
Parliamentary procedure: not laid no procedure

Provision

160. A power for Scottish Ministers, by rules, to make provision for the purposes of procedures to be followed at a fitness assessment tribunal.

Reason for taking power

161. Scottish Ministers will have responsibility for constituting a fitness assessment tribunal when requested to do so by the President of the Tax Tribunals. The function of a fitness assessment tribunal is to assess whether a member is fit to hold a position of member of the Tax Tribunals.

Choice of procedure

162. 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 Scottish Ministers.

Schedule 3 paragraph 3(3) - Power to define the records and supporting documents that need to be preserved to support a claim for relief from double assessment or overpayment of tax

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

163. Sections 97, 98 and 99 allow taxpayers to make a claim for relief from double assessment or overpayment of tax. Schedule 3 paragraph 3 requires such taxpayers to keep records to enable them to make a correct and complete claim for relief. The provision in schedule 3 paragraph 3(3) allows Scottish Ministers to specify in regulations those records and supporting documents that must be kept.

Reason for taking power

164. Scottish Ministers recognise that a wide range of records and supporting documents could be used to make a claim for relief. Rather than attempt to provide a definitive list in the Bill the power would allow Scottish Ministers to be able to provide greater detail of the types of records or supporting documents that have to be preserved or do not need to be preserved to comply with paragraph 3 of schedule 3.

Choice of procedure

165. Negative procedure is considered appropriate for what is essentially an administrative matter. The provision does not allow for the amendment of the Bill or other primary legislation.

Schedule 4 paragraph 7(8) - Power to amend provisions relating to subordinate legislation in section 68 of the Land and Buildings Transaction Tax (Scotland) Act 2013.

166. The amendments made by this paragraph remove the reference in section 68(2) to section 54(2), since that provision is being repealed by paragraph 7(5) of schedule 4, remove the reference in section 68(3) to section 56(1), since section 56 is being repealed by paragraph 7(7) of schedule 4, and insert a new subsection (6A) into section 68.

167. That new subsection provides that, where an order under section 24(1) or paragraph 3 of schedule 19 (setting rates and bands of tax) is not approved by the parliament within 28 days of it being made and so ceases to have effect, anything previously done under the order is still valid despite the order falling. In addition, the order having fallen does not stop the Scottish Ministers bringing forward new orders under section 24 or paragraph 3.

168. New subsection (6A) brings section 68 into line with section 41(6) of the Landfill Tax (Scotland) Bill. But it does not alter either how the powers in section 24 and paragraph 3 of schedule 19 can be used or the parliamentary procedure applicable to them. It is included in this memorandum, however, for the sake of completeness as it does alter what happens if orders under those two provisions are not approved by the parliament.

This document relates to the Revenue Scotland and Tax Powers Bill (SP Bill 43) as introduced in the Scottish Parliament on 12 December 2013

REVENUE SCOTLAND AND TAX POWERS BILL

DELEGATED POWERS MEMORANDUM