

CONSUMER SCOTLAND BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Consumer Scotland 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.

OUTLINE OF BILL PROVISIONS

3. The Bill is comprised of 3 parts and 2 schedules.
 - Part 1 deals with the establishment of the body to be known as Consumer Scotland, which is to have the general function of providing consumer advocacy and advice with a view to achieving specified objectives including a reduction in consumer harm in Scotland and an increase in consumer confidence in dealing with businesses. The body's functions, powers and reporting obligations are set out in this Part, with the detail regarding the body's membership and procedure contained in schedule 1.
 - Part 2 concerns the duty that the Bill imposes on relevant public authorities (to be designated in secondary legislation), when making decisions of a strategic nature, to have regard to the impact of those decisions on consumers in Scotland and the desirability of reducing harm to consumers in Scotland.
 - Part 3 concerns matters of interpretation and other final provisions. Schedule 2 concerns the application of existing public bodies legislation.
4. The Bill confers powers on the Scottish Ministers to make regulations in relation to a range of matters dealt with in the Bill. The powers conferred by the Bill are, for the most part, either of a technical and procedural nature or relate to matters which, because of their character, require a flexible approach and thus are more appropriate to be dealt with by subordinate legislation.

RATIONALE FOR DELEGATED POWERS

5. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:
 - strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;

- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Functions

Section 4(1)(c) – Information that Consumer Scotland may obtain, analyse and review

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

Provision

7. Section 4(1) allows Consumer Scotland to obtain, analyse and review information about consumer matters and about the views of consumers on consumer matters. Subsection (1)(c) allows the Scottish Ministers, by regulations, to prescribe other types of information that Consumer Scotland may obtain, analyse and keep under review.

Reason for taking power

8. This power ensures that, if the Scottish Ministers consider it appropriate, Consumer Scotland will be able to gather and review other categories of information beyond those set out in subsection (1)(a) and (b). Those categories of information cannot be predicted at this time and the provision is intended to allow a degree of flexibility and future-proofing. This flexibility about the body's information-gathering remit is in line with that provided for other consumer advocacy organisations, such as the Consumer Council for Northern Ireland.

Choice of procedure

9. The choice of negative procedure and attendant level of scrutiny reflects the limited impact of the provision, which will neither significantly alter Consumer Scotland's objectives or functions, nor impose obligations on any other organisations. Consumer Scotland's core function (set out in section 2) of providing consumer advocacy and advice cannot be altered under any of the regulation-making powers in the Bill.

Section 5(1)(c) – The information function

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

Provision

10. Section 5 empowers Consumer Scotland to provide or secure the provision of advice and information to consumers. This covers information and advice about the body itself and its functions and about consumer matters (as defined by section 23). Subsection (1)(c) enables the Scottish Ministers to prescribe, by regulations, other matters on which Consumer Scotland may provide advice and information to consumers.

Reason for taking power

11. This power ensures that, if the Scottish Ministers consider it appropriate, Consumer Scotland will have the ability to provide advice or information to consumers on matters other than Consumer Scotland and consumer matters. The reason for taking the power is to allow for changing circumstances or needs that cannot be predicted at this time. Although “consumer matters” is broadly defined in section 23(1) to cover the interests of consumers and any matter connected with those interests, it is possible that in the future currently unforeseen issues falling outwith that definition may arise on which Ministers would like Consumer Scotland to be able to provide consumers with advice and information. The provision also ensures that Consumer Scotland’s powers are in line with those of other consumer advocacy bodies in the United Kingdom.

Choice of procedure

12. The choice of negative procedure and attendant level of scrutiny reflects the limited potential impact of the provision, which will neither significantly alter Consumer Scotland’s objectives or functions, nor impose obligations on any other organisations. Consumer Scotland’s core function (set out in section 2) of providing consumer advocacy and advice cannot be altered under any of the regulation-making powers in the Bill.

Information-gathering

Section 8(2)(d) – Requirement to provide information to Consumer Scotland

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

Provision

13. Section 8 enables Consumer Scotland to serve a notice on a person listed in subsection (2) requiring the person to provide it with certain information. It may only do so in relation to information which it requires for the purpose of exercising its functions. The persons listed in subsection (2) and therefore potentially subject to this requirement are a designated regulator, a

regulated provider, any other person who supplies goods or services in the course of a business, and any other person or description of person specified, through regulations made under subsection (2)(d), by Ministers. Section 8(5) adds that regulations under subsection (2)(d) may provide either that section 9 (failure by a designated regulator) is to apply in relation to a person specified or of a description specified by the regulations as it applies to a designated regulator, or that section 11 (enforcement by the court) is to apply in relation to such a person.

Reason for taking power

14. The power ensures that the Scottish Ministers can extend Consumer Scotland’s ability to require information from certain persons to cover persons or a description of persons not yet known. It is being taken to future-proof the Bill as it is possible that in future groups of persons might be identified who undertake functions similar to persons already subject to the requirement.

Choice of procedure

15. As this information-gathering power is a relatively invasive power with the potential to interfere with Article 8 of the European Convention on Human Rights (the right to respect for private and family life, home and correspondence), it is considered appropriate that any extension of the power to make additional persons subject to it be subject to a high degree of parliamentary scrutiny.

Section 8(6)(a) and (b) – Requirement to provide information to Consumer Scotland

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

Provision

16. As already noted, section 8 enables Consumer Scotland to serve a notice on a person listed in subsection (2), requiring the person to provide it with certain information. The persons listed in subsection (2) and therefore potentially subject to this requirement include a designated regulator and a regulated provider. Section 9 makes provision regarding failure by a designated regulator to comply with a section 8 notice, while section 10 makes provision for Consumer Scotland to refer regulated providers to the relevant designated regulator (being the designated regulator under whose jurisdiction the regulated provider in question falls). Under section 8(6)(a) and (b) the Scottish Ministers can specify, by regulations, which persons are “designated regulators” and “regulated providers” for the purposes of sections 8, 9, 10 and 11, as well as specifying which designated regulator is the relevant designated regulator for each regulated provider.

Reason for taking power

17. The power is required because the Scottish Ministers intend to work with regulators and regulated providers to ascertain those which should be subject to the requirement to provide information to Consumer Scotland.

Choice of procedure

18. As this provision only concerns regulators and regulated providers, the potential Article 8 ECHR issues that arise in relation to section 8(2)(d) do not arise here, as there is no possibility of the information-gathering powers being extended to private individuals. The entities potentially subject to this requirement to provide Consumer Scotland with information already operate in regulated markets and their designation in regulations made under this section will simply subject them to a limited degree of further regulation. Negative parliamentary procedure is accordingly considered appropriate.

Section 12(2) – Exemptions from requirement to provide information

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

Provision

19. Section 12 provides exemptions from the requirement to provide information to Consumer Scotland. No person may be required under section 8(1) or section 11 to provide information which they could not be compelled to provide in legal proceedings before the Court of Session. Subsection (2) gives Scottish Ministers the power to prescribe additional exemptions from the requirements to provide information to Consumer Scotland. The Scottish Ministers would do so by regulations and can provide for an exemption by detailing the persons, type of information or circumstances to which the exemption is to apply.

Reason for taking power

20. The reason for taking this power is to ensure Ministers have the flexibility in future to exempt persons or categories of information from the requirement to provide information to Consumer Scotland, or to specify the circumstances in which a person may refuse to provide such information, should any such exemption be thought desirable. Should Consumer Scotland use its information-seeking powers in such a way as to raise concerns, Ministers could potentially address those concerns by providing for suitable exemptions. The power to provide exemptions in section 12 thus provides a useful safeguard in relation to the information-gathering power in section 8.

Choice of procedure

21. The choice of negative procedure reflects the fact that the power will not impose any additional obligations on any other persons or organisations but is, in fact, a means of potentially mitigating the impact of the power in section 8. On that basis a lesser degree of parliamentary scrutiny is thought suitable and negative procedure appropriate.

Review of performance and modification of functions

Section 19(1) – Power to modify Consumer Scotland’s functions

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

22. Section 19 empowers the Scottish Ministers, by regulations, to confer new functions on Consumer Scotland or to modify or remove existing ones. They can only do so following consultation with Consumer Scotland and, where relevant, others. This power will enable Consumer Scotland’s remit to be adjusted in future without the need for further primary legislation, but subject to parliamentary oversight and agreement. Ministers may not use this regulation-making power to remove Consumer Scotland’s core functions as set out in section 2.

Reason for taking power

23. The power to amend the functions of the new body is taken to ensure that the Scottish Ministers have flexibility to adapt Consumer Scotland in the future should new circumstances or challenges emerge, for example in response to new Government initiatives or changes to devolved regulated markets.

Choice of procedure

24. Given that Consumer Scotland’s core functions under section 2 are protected, negative procedure is considered generally appropriate. Where primary legislation is affected, however, it is considered right that the Parliament should be able to exercise the higher degree of scrutiny that affirmative procedure affords, given that it will have enacted the primary legislation in question (unless the Act being amended was passed prior to devolution) and given that changes to primary legislation are more likely to alter matters of fundamental principle rather than minor or technical detail.

Consumer Interests

Section 20(2) – Duty to have regard to consumer interests

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

Provision

25. Section 20 places a duty on relevant public authorities, when making decisions of a strategic nature, to consider the impact on consumers in Scotland and the desirability of reducing harm to consumers in Scotland. Subsection (2) provides for the Scottish Ministers, through regulations, to set out which persons are “relevant public authorities” and therefore to determine

which persons are subject to the duty. Only persons with functions of a public nature can be designated. Ministers can specify a person in relation to all of their functions or specified functions only. Before making regulations, the Scottish Ministers must consult such persons as they consider appropriate. This consultation must always include any person whom they intend to designate as a relevant public authority who is not currently so designated.

Reason for taking power

26. The overarching duty is potentially wide-ranging in its impact and must strike the balance between having a meaningful impact and not overburdening public authorities. The Scottish Ministers therefore wish to work collaboratively with public authorities in ascertaining to which bodies the duty should apply, so Ministers are unable to specify which bodies are relevant public authorities on the face of the Bill. The power will be an important tool to ensure that the duty applies to those public authorities that have an impact on consumers, including those that may be as yet unknown or unforeseen.

Choice of procedure

27. It is considered appropriate that this power should be subject to affirmative procedure in order to allow the Parliament a high level of scrutiny of the question of which relevant public authorities should be subject to the duty, as the question of whom the duty applies to is central to its operation and effect.

Interpretation and final provisions

Section 25(1) – Ancillary provision

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Parliamentary procedure:	negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

28. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision for the purposes of, in connection with or for giving full effect to the Bill.

Reason for taking power

29. As with any new body of law, the Bill may give rise to a need for a range of ancillary provision. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

30. Regulations made under this section which contain a provision which adds to, replaces or omits any part of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type and reflects the fact that the Parliament should be able to carefully scrutinise any amendments to primary legislation, while ancillary changes to subordinate legislation are likely to be of a more technical nature and so merit a lesser degree of parliamentary scrutiny.

Section 27(2) – Commencement

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

Provision

31. This section enables the Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Act (other than sections 23, 24, 25, 27 and 28) come into force. Such regulations may include transitional, transitory or saving provision.

Reason for taking power

32. The Scottish Ministers consider it appropriate for the substantive provisions of the Bill to be commenced at such a date as they appoint to be suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation. Such provisions may require to make transitional or transitory provision, or the saving of repealed or amended provisions.

Choice of procedure

33. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

Consumer Scotland

Paragraph 2(6) of schedule 1 – Membership

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

Provision

34. Paragraph 2 of schedule 1 makes provision regarding the membership of Consumer Scotland and its appointment. Sub-paragraph (6) provides that the Scottish Ministers may by

regulations amend sub-paragraph (1)(b) to alter the minimum or maximum number of members who are appointed in addition to the chairing member.

Reason for taking power

35. The power sought will ensure that Consumer Scotland's membership can reflect Consumer Scotland's operational requirements, for example to match any expansion or reduction in the body's activity, as well as any changes over time in what is considered to be best practice.

Choice of procedure

36. The choice of negative procedure and attendant level of scrutiny reflects the limited impact of the provision, which will neither significantly alter Consumer Scotland's aims, objectives or functions nor impose obligations on any other organisations. Any change will be fairly technical in nature and, accordingly, negative procedure is considered appropriate.

This document relates to the Consumer Scotland Bill (SP Bill 49) as introduced in the Scottish Parliament on 5 June 2019

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