

# **JUDICIARY AND COURTS (SCOTLAND) BILL**

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## **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. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions in the Judiciary and Courts (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each such provision and explains why the matter is to be left to subordinate legislation. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. This memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

### **INTERPRETATION**

3. In this Memorandum:

- 'the Parliament' means the Scottish Parliament;
- "JAB" means the Judicial Appointments Board for Scotland;
- 'JP court' means Justice of the Peace court;
- 'the SCS' means the Scottish Court Service;
- 'the Bill' means the Judiciary and Courts (Scotland) Bill;
- 'the 1971 Act' means the Sheriff Courts (Scotland) Act 1971(c.58);
- 'the 1988 Act' means the Court of Session Act 1988 (c.36); and
- 'the 2007 Act' means the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6).

## **OUTLINE OF BILL PROVISIONS**

4. The overall aim of the Bill is to strengthen the independence of the judiciary. The Bill makes substantive provision in relation to 4 main policy areas (judicial independence, the judiciary including the provision of a statutory basis for JAB, the courts and new arrangements for the governance of the SCS). The Bill is in 5 parts.
5. **Part 1** provides a statutory guarantee of continued judicial independence in Scotland.
6. **Part 2** provides for the Lord President to be the head of the Scottish judiciary; sets out procedures in relation to the vacancy, incapacity and suspension of the senior judiciary; places JAB on a statutory footing; sets out the criteria for appointment of the Lord President and the Lord Justice Clerk; sets out the eligibility criteria for appointment as a judge of the Court of Session and arrangements for engaging retired and temporary judicial office holders; and makes provision for a scheme for judicial conduct and for the removal of judges and sheriffs.
7. **Part 3** provides for matters relating to judiciary of the Court of Session, sheriff courts and JP courts. It also makes arrangements for quorums of a Division of the Inner House and the Lands Valuation Appeal Court as well as provision for the Lord President to be consulted on the maximum number of judges in the Court of Session.
8. **Part 4** sets out the new governance arrangements for the SCS establishing it as a body corporate and detailing its functions, membership, powers and responsibilities.
9. **Part 5** makes general provision in respect of orders and regulations.
10. Further information about the Bill's provisions are contained in the Explanatory Notes and Financial Memorandum published separately as [SP Bill 6 – EN] and in the Policy Memorandum published separately as [SP Bill 6 – PM].

## **APPROACH TO USE OF DELEGATED POWERS - OUTLINE**

11. The Bill confers powers on the Scottish Ministers, the Lord President and the Court of Session to make orders, regulations and acts of sederunt. All of these powers are new with the exception of those in sections 38 (inserted section 12E), 40, 47, 48 and 54 of the Bill which modify existing delegated powers.
12. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against the need to:
  - strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances quickly;
  - make proper use of valuable Parliamentary time; and
  - allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation.

13. A balance must be struck between the different levels of scrutiny involved in the negative and affirmative resolution procedures. In the Bill the balance reflects the view of the Scottish Government on the importance of the matter delegated by Parliament.

### **GENERAL SUBORDINATE LEGISLATION PROVISION**

14. Section 67 contains the general subordinate legislation provisions. These apply only to the powers conferred directly by the Bill on the Scottish Ministers and the Lord President. Subsection (3) provides that all of these powers are subject to negative resolution procedure with the exception of the following:-

- orders made under section 66(2) (the Scottish Ministers' default power in relation to the SCS) attract the special procedure in subsection (5);
- commencement orders made under section 72(1) are not subject to Parliamentary procedure;
- orders modifying the membership of the SCS under paragraph 2(4) of schedule 3 are subject to affirmative procedure; and
- orders making ancillary provision under section 70 which amend primary legislation are subject to affirmative procedure.

15. The provisions containing delegated powers 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.

### **SUBORDINATE LEGISLATIVE POWERS - DETAIL**

#### **Section 2(5)(h) - Power to prescribe additional courts which may be designated as Scottish courts for the purpose of the functions of the Lord President as head of the Scottish judiciary**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Negative resolution

#### *Provision*

16. Section 2 establishes the Lord President as the head of the Scottish judiciary and in that capacity places a number of responsibilities on that office. These include: making arrangements to secure the efficient disposal of business in the courts; representing the view of the judiciary of any court established under the law of Scotland to the Scottish Parliament and to the Scottish Ministers; for laying before Parliament written representations on matters of importance to the Scottish judiciary or the administration of justice in Scotland; for making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders and to make and maintain arrangements so that the conduct of judicial office holders may be investigated and determined and those determinations reviewed.

17. Subsection (5) sets out the courts in Scotland for which the Lord President has responsibility. Subsection (5)(h) provides the Scottish Ministers with a power to add other courts to the Lord President's remit. Any court added to the Lord President's remit would also be added to the remit of the SCS by virtue of subsection 56(3) which defines the Scottish courts for which the SCS must make provision for as those courts listed in this subsection.

*Reason for taking this power*

18. Over time it may be appropriate for existing courts such as the Scottish Land Court or the Court of the Lord Lyon to come within the Lord President's remit as head of the Scottish judiciary. This power enables such courts to be added.

*Choice of procedure*

19. The negative resolution procedure is considered appropriate to add to the remit of the Lord President as head of the Scottish judiciary and the SCS as these are operational and administrative matters respectively.

**Section 10(1)(g) – power to add judicial offices to remit of the Judicial Appointments Board**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

*Provision*

20. Section 9 establishes the JAB on a statutory basis and provides it with the functions of recommending to the First Minister or the Scottish Ministers as appropriate, individuals for appointment to judicial offices within the remit of JAB and to provide advice in connection with such recommendations. The judicial offices within JAB's remit are listed at section 10. JAB's remit does not extend to the offices of Lord President and the Lord Justice Clerk for which separate provision is made at sections 18 and 19.

21. At section 10(1)(g) the Scottish Ministers are provided with a power to add, by order, other judicial offices to JAB's remit. This power is limited to the extent the only judicial offices to which either the First Minister or the Scottish Ministers are able to make appointments to or nominate or recommend individuals for appointments to, may be added. Whilst judicial offices may be added, none of those listed in section 10(1)(a) to (f) may be taken away. Section 10(3) clarifies that for the purposes of this power "judicial office" means a judge of any court, a tribunal or any other appointment of a judicial nature.

*Reason for taking this power*

22. The JAB has operated effectively since 2002 and is now to be placed on a statutory footing. As JAB continues to establish itself and develop, over time it may be appropriate to add other judicial offices to its remit. It is envisaged that the power may be used to extend JAB's functions to include judicial offices not currently within its remit, or to include new judicial offices that may be created in the future. A power for the Scottish Ministers to do this by order

would enable judicial offices to be added to JAB's remit without the delay and expense of bringing forward primary legislation to amend section 10.

*Choice of procedure*

23. The order making power has limited scope. Judicial offices may be added to JAB's remit, but none of those currently in the Bill may be taken away, and the power applies only to those offices to which either the First Minister or the Scottish Ministers is or are the appointing authority. Orders would be subject to annulment in pursuance of a resolution of the Scottish Parliament. Negative resolution procedure is considered to offer an appropriate balance between, on the one hand, the necessary flexibility to enable the Board to develop and change over time, and, on the other hand, the need for parliamentary scrutiny of a provision of this nature.

**Section 26(1) – power to make rules about the investigation, determination and review of matters concerning judicial conduct**

**Power conferred on:           The Lord President**  
**Power exercisable by:       Rules made by the Lord President**  
**Parliamentary procedure: None**

*Provision*

24. Section 2 gives the Lord President, in his capacity as head of the Scottish judiciary, the function of making and maintaining arrangements for the investigation and determination of any matter concerning the conduct of judicial office holders.

25. Section 26 sets out a framework of powers for a judicial conduct scheme giving the Lord President powers to make rules to determine the detail about how matters of conduct will be investigated and determined.

26. Subsection (2) makes provision about what the rules may cover in particular. For example under subsection (2)(a) they might make provision that where the complaint refers to a judicial decision, or where there is no supporting evidence or where the complaint is vexatious or trivial that no investigation need take place. Under subsection (2)(f) they might provide that a sheriff principal is to investigate a complaint against a sheriff and that a judge of the Court of Session is to investigate a complaint against a sheriff principal. Subsection (3) provides that the Lord President may make different provision about different classes of judicial office holder which would cover the latter example. This subsection also provides that the rules are to be published in such manner as the Lord President may determine.

*Reason for taking this power*

27. The Lord President as head of the Scottish judiciary will have the function of making and maintaining a scheme of conduct for judicial office holders. How that scheme will operate by its nature will be detailed and procedural. These would not be matters for inclusion in primary statute. The Lord President's power will enable him or her to set out the process of the scheme in rules which may be readily modified and updated to reflect best practice and changing circumstances.

*Choice of procedure*

28. No parliamentary procedure has been applied. The responsibility for making and maintaining a scheme of conduct for judicial office holders will rest with the Lord President. These procedures will be subject to scrutiny by a Judicial Complaints Reviewer who will make written representation to the Lord President. The rules will also be published. These measures are considered to offer the appropriate level of public scrutiny.

**Section 35(3) – power to make provision about the procedures relating to tribunals constituted under section 33 to consider fitness of judges; and section 38 – inserting section 12C in the 1971 act giving power to make provision relating to tribunals constituted under the new section 12A of the 1971 act to consider fitness of sheriffs principal, sheriffs and part-time sheriffs**

**Powers conferred on:           The Court of Session**

**Powers exercisable by:       Act of sederunt**

**Parliamentary procedure: None**

*Provision*

29. These provisions are considered together as they both introduce a power for the Court of Session to make provision by Act of Sederunt as to the procedure to be followed by and before tribunals constituted to consider the fitness for office of judges and sheriffs. At present the Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999 (S.I. 1999/1017) makes provision for tribunals to be convened to consider the fitness for office of judges and sections 11C and 12 of the 1971 Act make provision for the removal of sheriffs. The former was made at the time of devolution as a transitional measure and is being replaced by the provisions in the Bill. The latter are being replaced by section 38 which inserts new sections 12A to 12F in the 1971 Act and brings the arrangements for sheriffs into line with those for judges.

*Reason for taking these powers*

30. Any procedures relating to the removal of a judicial office holder must be framed in such a way as to ensure the independence of the judiciary is not compromised. On that basis there may have been an advantage in conferring on the tribunal a discretion to determine the appropriate procedure to follow in the particular circumstances of each case. On the other hand, on a matter of such importance as the removal of a judicial office holder, it is considered appropriate for the rules to be determined by the Court of Session, thus ensuring independence, and set out in an act of sederunt, thus ensuring transparency. Additionally, providing the tribunal with statutory authority to invoke certain procedural mechanisms may assist with the efficient and effective conduct of its inquiry.

*Choice of procedure*

31. Rules made under this power are procedural and administrative. Such detailed matters relating to court procedure are generally not considered appropriate to be included in primary legislation. An act of sederunt made by the judges of the Court of Session is considered to offer sufficient safeguards. Similar provision is made in section 5 of the 1988 Act for the Court of

Session to regulate its procedure by acts of sederunt and such acts do not attract Parliamentary procedure.

**Section 38 - inserting section 12E in the 1971 Act giving power to remove a person from the office of sheriff principal, sheriff or part-time sheriff**

**Power conferred on:           The First Minister**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure:  Negative resolution**

*Provision*

32. Section 38 of the Bill inserts a new section 12E into the 1971 Act. New section 12E provides that a sheriff principal, sheriff or part-time sheriff may be removed from office by the First Minister and that they may only be removed following an order made by statutory instrument in the Scottish Parliament.

*Reason for taking this power*

33. This is not a new power. The existing section 12 of the 1971 Act already provides a power for the Scottish Ministers to remove sheriffs principal and sheriffs by virtue of an order made by statutory instrument subject to negative resolution procedure. Section 11C of the 1971 Act provides that part-time sheriffs may only be removed from office by order of the tribunal (constituted to consider fitness for office). It is considered appropriate for the First Minister, rather than the Scottish Ministers, to exercise this power as sheriffs and sheriffs principal are appointed following a recommendation by him and to have the same arrangements for the removal of part-time sheriffs.

*Choice of procedure*

34. An order made under this section will be subject to negative resolution procedure. As mentioned above this is the same as the existing power to remove sheriffs and sheriffs principal. The action to remove a person from shrieval office would only be taken at the end of a thorough process, namely the tribunal procedure in new sections 12A to 12D of the 1971 Act, and therefore the negative resolution procedure continues to be appropriate. Section 12E(3)(b) reflects section 12(3) of the 1971 Act which provides that the order should not come into effect until 40 days after it is laid in the Parliament.

**Section 40 – Maximum number of judges of the Court of Session**

35. This is not a new power but amends section 1 of the 1988 Act to provide for the Lord President to be consulted before a draft Order is laid before Parliament increasing the number of persons who may be appointed as judges of the Court. The Order is ultimately made by Her Majesty in Council. This new consultation requirement reflects the new functions and responsibilities placed on the Lord President by the Bill, in his capacity as head of the Scottish judiciary.

**Section 42 – power to regulate procedure etc, in the Court of Session by act of sederunt (new section 5(ba) of the Court of Session Act 1988)**

**Power conferred on:**            **The Court of Session**  
**Power exercisable by:**       **Act of sederunt**  
**Parliamentary procedure:** **None**

*Provision*

36. Section 42 provides for certain procedural matters regarding Divisions of the Inner House to be provided by act of sederunt. The matters to be dealt with in this way include the setting of a quorum, and in the case of extra Divisions, providing for which judge shall preside over the Division and sign its interlocutors. It does so by repealing section 2(4) of the Court of Session Act 1988 (“the 1988 Act”) (which provides for the quorum to be three judges) and inserting a new act of sederunt making power regarding quorum in section 5(ba) of the 1988 Act.

*Reason for taking this power*

37. This is intended to provide the Court of Session with a flexible power to adjust the quorum of judges to fit the demands of courts business. For example the quorum may be reduced to 1 judge to deal with procedural matters whilst the substance of a competent appeal may be dealt with by 3 or more judges.

*Choice of procedure*

38. The Court of Session has various powers to regulate its own procedure by act of sederunt under section 5. Since the setting of a quorum and the naming of a presiding judge are clearly procedural matters, it is appropriate that they be determined by the court by act of sederunt. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not subject to parliamentary scrutiny.

**Section 43 – power to set the quorum for the Lands Valuation Appeal Court by act of sederunt (new section 7A of the Valuation of Lands (Scotland) Amendment Act 1879)**

**Power conferred on:**            **The Court of Session**  
**Power exercisable by:**       **Act of sederunt**  
**Parliamentary procedure:** **None**

*Provision*

39. Section 43 is a similar power to set the quorum of the Lands Valuation Appeal Court for by act of sederunt, inserted at section 7A of the Valuation of Lands (Scotland) Amendment Act 1879.

*Reason for taking this power*

40. This is intended to operate in the same way and provide the same flexibility as section 42 will in relation to the quorum of a Division of the Inner House of the Court of Session.

*Choice of procedure*

41. As with section 42, the setting of a court's quorum is clearly a procedural matter, and it is appropriate that the Court of Session makes provision for this independently of the Parliament and the Government.

**Sections 47 and 48 –power to alter the boundaries of sheriffdoms and sheriff court districts and places where sheriff courts are to be held**

**Power conferred on:           The Lord President**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure:   Negative resolution**

*Provisions*

42. These provisions are considered together as they both transfer order making powers from the Scottish Ministers to the Lord President and the powers themselves are interlinked.

43. The Scottish Ministers have power by order under section 2 of the 1971 Act to alter the boundaries of sheriffdoms, form new sheriffdoms and provide for the abolition of sheriffdoms. They also have power by order under section 3 of that Act to decide the arrangement of sheriff court districts and where sheriff courts are to be held.

44. These sections transfer those powers to the Lord President and provide for a role for the SCS in that process. Section 47 amends section 2 to transfer this order making power to the Lord President and subsection (4) in particular inserts: a new subsection (2A) which makes the exercise of the power subject to the consent of the SCS if as a consequence, any office requires to be abolished and a new subsection (2B) which provides that orders which involve consequential alterations to the sheriff court districts boundaries, a requirement to open new sheriff court or the closure of an existing sheriff court may only be made on the recommendation of the SCS. Section 48 also amends section 3 to transfer this order making power to the Lord President and subsection (3) in particular inserts a new subsection (2A) in requiring any order altering the arrangement of sheriff court districts and where sheriff courts are to be held to be initiated by the SCS.

*Reason for taking this power*

45. The role of the Lord President as head of the Scottish judiciary means that it is no longer appropriate for the Scottish Ministers to continue to have a role in the formation and structure of sheriffdoms in terms of section 2 of the 1971 Act. These decisions relate to how sheriffs principal and sheriffs are deployed across Scotland and are a matter for the Lord President. The new governance arrangements mean that the SCS will be responsible for the provision and resourcing of courts in Scotland and therefore it is appropriate for orders under section 2 which would involve provision of the kind that may be made under section 3(2) (i.e. the opening or closing of sheriff courts) only to be initiated on the recommendation of the SCS given the impact on its resources from any such change. Where an order under section 2 is made which involves the abolition of an office subsection 47(4) (which inserts the new subsection (2A) in section 2) the consent of the SCS is required to the making of such an order. This is because it will be for the SCS to pay compensation to any such person under section 2(3)(b) of the 1971 Act.

46. Orders under section 3 again require to be initiated by recommendation of the SCS. This is because any such orders will impact on their resources and the new governance arrangements mean that the SCS will be in charge of the estate and of the running of the courts in Scotland.

*Choice of procedure*

47. These sections do not confer new powers. Previously orders under section 2 of the 1971 Act were subject to negative resolution procedure and orders under section 3 were subject to no procedure. It is considered appropriate to transfer these powers to the Lord President as head of the Scottish judiciary with the appropriate checks and balances described above and to make them both subject to negative resolution procedure. The SCS itself could not make such orders. The Lord President as a relevant Scottish public authority for the purposes of article 4(1)(b) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096) can make such orders. The difference in relation to instruments made by this public authority is that they are not to be subject to the approval of the Scottish Ministers. It is considered inappropriate to require the approval of the Scottish Ministers to such orders as the control of the business is an essential part of the Lord President's function of ensuring the efficient disposal of business in the courts. The Lord President is being put in a constitutionally unique position as head of the Scottish judiciary by the measures in this Bill. There are precedents for this type of instrument, namely orders made by the Court of Session under section 40 of the Sheriff Courts (Scotland) Act 1907 and by the Lord President under section 12 of the Public Records (Scotland) Act 1937. The disadvantage is that there would be no-one to speak to such an order in Parliament. In addition the Lord President cannot be required to give evidence to Parliament in terms of section 23(7) of the Scotland Act. However, it is anticipated that the Lord President may decide to attend in person or would send one of his officials if requested. Ultimately appropriate Parliamentary control remains as Parliament could pray against an order under sections 2 or 3 of the 1971 Act if they were not satisfied.

**Section 54 – amending sections 59, 63 and 81 of the 2007 Act in relation to JP courts**

**Power conferred on:           The Lord President**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

48. This section amends the 2007 Act and transfers the following powers from the Scottish Ministers to the Lord President: the power to establish JP courts (section 59(2)) and the power to amend section 6 (2) of the Criminal Procedure (Scotland) Act 1995 so that it can provide that a JP court (where not constituted by a stipendiary magistrate) is to be constituted by one JP only (section 63(2)). It also changes the procedure for the latter from affirmative to negative resolution.

*Reason for taking power*

49. The reasoning is the same as that for the changes to arrangements for sheriff courts in sections 47 and 48 of the Bill as described above. Namely these changes reflect the new governance arrangements for the SCS and the fact that the Scottish Ministers will no longer have any role in the provision of courts.

*Choice of procedure*

50. Reference is made to the explanation for the choice of procedure under section 47 and 48 described above. The same considerations as to instruments made by the Lord President being not subject to approval of the Scottish Ministers apply. Both orders will be subject to negative resolution procedure. The procedure for orders under section 59(2) of the 2007 Act remains the same and the procedure for orders made under section 63(2) is changed from affirmative to negative. This brings it into line with the procedure for changes to sheriff courts described above. It is not considered appropriate to have a higher level of scrutiny for lower courts. In addition it would not be possible for the Lord President to make an order subject to affirmative procedure as he would be unable to speak to it in Parliament.

**Section 58(1)(h) – power to require administrative support for other persons**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure:   Negative resolution**

*Provision*

51. Section 58 gives the SCS the responsibility for providing property, services and staff required by the Lord President in respect of his duties as head of the Scottish judiciary; sheriffs principal in the carrying out of their administrative functions; the Public Guardian; and the Court of Session, Criminal Courts and the Sheriff Courts Rules Councils. The section also provides that the Scottish Ministers may, following consultation with the Lord President, specify by order additional persons in respect of whom the SCS would have this responsibility.

*Reason for taking this power*

52. An order made under this section would give Ministers flexibility to ensure that the SCS could respond to future changes in relation to the court system and provide property, services and staff to other persons which may be necessary, for example, following a review of existing court structures.

*Choice of procedure*

53. Such an order will be subject to negative procedure. This is considered appropriate as it is about an administrative matter. It would be subject to consultation with the Lord President, since as head of the Scottish judiciary and chair of the SCS, the Lord President has a key interest in decisions about what courts or other entities should be within the remit of the SCS.

**Section 62(8)(a) and (9)– power to specify the end date for the first planning period and power to specify subsequent periods**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

54. Section 62(8)(a) provides that the first planning period ends on a date to be specified by the Scottish Ministers. Subsection (8)(b) provides that each subsequent planning period shall be 3 years. Subsection (9) gives a power to the Scottish Ministers to alter that period.

*Reason for taking this power*

55. The power to specify the end date for the first plan will allow flexibility in respect of the period to be covered by the first plan to be produced by the SCS. This would be useful, for example, to give the SCS the flexibility to adopt in substance the corporate plan which is already under development for the Scottish Court Service Executive Agency for 2008/09 to 2010/11 should they so choose. The power in subsection (9) to specify a different planning period than 3 years will provide flexibility to enable changes to be made should it be necessary to ensure that the SCS planning framework is compatible with that operating within the Scottish Administration as a whole, for example, if best governance practice changes and a planning period different from 3 years becomes normal for public bodies.

*Choice of Procedure*

56. Negative resolution procedure is considered appropriate as it these matters are administrative in nature.

**Section 66(2) – power to carry out the functions of the SCS**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Affirmative procedure – order laid after being made

*Provision*

57. Section 66 provides that in the event of a serious failure by the SCS to carry out its functions, such that there is a significant risk to the efficient and effective functioning of the Scottish courts, the Scottish Ministers may take over those functions.

*Reason for taking this power*

58. It is considered important that the Scottish Ministers have some type of emergency power to deal with a situation where for some reason the SCS is not performing its functions to such an extent as to pose a significant risk to the Scottish courts.

*Choice of procedure*

59. As this order would only be necessary in the most serious of situations where it could be anticipated that timing would be an important element of a suitable response to a perceived problem it is considered appropriate that it should be contained in a statutory instrument which would be laid in the Scottish Parliament after being made. This would enable action to be taken immediately to address the problem. The action which the Scottish Ministers could take under this section, however, is a fundamental variation to Parliament's intention that the administration of the courts should be done by the SCS and a procedure which requires an affirmative resolution by the Parliament if the Scottish Minister's actions is to be allowed to stand is appropriate. Unless earlier revoked, the order would cease to have effect at the end of the period of 40 days if it is not by then approved by resolution of the Parliament. Subsection (6) provides that the period of 40 days should not include any time during which the Parliament is dissolved or is in recess for more than 4 days.

60. This would provide an appropriate and timely opportunity for Parliamentary decision while enabling Ministers to respond speedily to a significant problem with serious implications for the running of the Scottish courts.

**Section 70 – Ancillary provision**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure: Negative resolution or affirmative resolution if textually amending an Act**

*Provision*

61. This section provides that the Scottish Ministers may by order make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, or in connection with, the Bill. Subsection (2) provides that such an order make modify any enactment.

*Reason for taking power*

62. This provision is considered to be necessary to allow flexibility if further changes were found to be necessary as a result of the provisions in the Bill, some of which may not become apparent until after Bill is commenced. The power whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in consequence of, or giving full effect to, the provisions of the Bill.

*Choice of procedure*

63. Subsection (2) provides that any order made under this section will be subject to affirmative resolution procedure if it textually amends primary legislation. Otherwise, it will be subject to negative resolution procedure. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

## **Section 71 – Transitional provision**

**Power conferred on:**           **The Scottish Ministers**  
**Power exercisable by:**       **Orders made by statutory instrument**  
**Parliamentary procedure:** **Negative resolution**

### *Provision*

64. This section provides that the Scottish Ministers may make such transitional provisions as are necessary or expedient in connection with the coming into force of any provision of this Act. Subsection (2) provides that such an order may modify any enactment.

### *Reason for taking power*

65. This provision is considered to be necessary to allow flexibility for the coming into force of the provisions of the Bill. For example transitional arrangements may be needed in relation to the members of JAB and the Chief Executive of the SCS.

### *Choice of procedure*

66. Although subsection (2) allows such an order to modify an enactment it is still considered appropriate for this to be subject to negative resolution procedure as these measures are only transitional in nature. It would not be appropriate to textually amend legislation for temporary purposes.

## **Section 72 – Commencement**

**Power conferred on:**           **The Scottish Ministers**  
**Power exercisable by:**       **Orders made by statutory instrument**  
**Parliamentary procedure:** **None**

### *Provision*

67. This section provides that the provisions of the Bill will come into force by order made by the Scottish Ministers.

### *Reason for taking this power*

68. It is considered appropriate for the Bill to be commenced at such times as the Scottish Ministers think appropriate or expedient. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation.

### *Choice of procedure*

69. As is usual for commencement orders no provision is made for parliamentary scrutiny.

## **Schedule 1 – paragraph 3(4) – Judicial Appointments Board - membership**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Negative resolution

### *Provision*

70. Schedule 1 makes various provisions in relation to the JAB. JAB will have twelve members, comprising 3 different categories of membership: judicial, legal and lay. Whilst the Scottish Ministers are to appoint the legal and lay members it is for the Lord President to appoint the judicial members.

71. Paragraph 3(4) provides the Scottish Ministers with an order-making power to modify either the judicial or legal membership categories. This power could be used to alter the membership of the Board on a permanent or temporary basis.

72. A power to alter the lay membership category is not necessary because paragraph 4(1) provides that the number of lay members must be the equivalent of the total number of judicial and legal members. Therefore if an order under sub-paragraph 3(4) increased the judicial and legal membership categories by 1 each, lay membership would increase by 2 as a consequence of the provisions at sub-paragraph 4(1).

73. The provision at sub-paragraph 3(4) limits the extent of the power as it prevents the Scottish Ministers from removing any of the judicial or legal membership categories listed at sub-paragraphs 3(1) and (2) unless they have been added by order.

### *Reason for taking this power*

74. The Scottish Ministers want to build in flexibility to alter the statutory number of members should the workload of the Board warrant this. Situations may arise, for example, when the Board is asked to deal with a large number of appointments and the Scottish Ministers would not want the process to be hampered as a result of a limitation on membership. The power would enable JAB to expand efficiently and effectively in response to changing circumstances.

### *Choice of procedure*

75. This order-making power has very limited scope, in that judicial and legal members may be added to JAB, but the only members who may be taken away are those that have been added by order; the basic cadre of judicial and legal members set out in paragraph 3(1) and (2) cannot be disturbed. An order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility in responding to peaks of activity at JAB and, on the other hand, the need for parliamentary scrutiny of a provision of this nature.

**Schedule 3 – paragraph 2(5) – power to alter the membership of the SCS**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution

*Provision*

76. Paragraphs 2(2) and (3) of Schedule 3 list the judicial and non-judicial members of the SCS. Paragraph 2(5) enables the Scottish Ministers to modify either or both the judicial and non-judicial membership by order with the consent of the Lord President. Paragraph 1(5) restricts the effect of such an order to ensure that the total number of judicial members should always exceed the total number of non-judicial members which is a key principle in judicially-led governance of the SCS.

*Reason for taking this power*

77. This power will allow for flexibility in the future to ensure that the membership of the SCS has the appropriate experience, knowledge and skills to manage the functions required of it. These functions may develop over time, for example to reflect changes within the wider justice system. It will also ensure that the any changes to the structure of the judiciary can be adequately reflected in the definition of the professional groups from which members are drawn.

*Choice of procedure*

78. The membership of the SCS is of fundamental importance to the effective management of the Scottish courts which is reflected in the fact that it is detailed within Schedule 3 of the Bill. It is considered that any amendment to the membership is a potentially significant change to the nature of the SCS and should receive the level of Parliamentary scrutiny associated with the affirmative resolution procedure.

**Schedule 3 – paragraph 3(2) – power to regulate the procedures for appointment of members of the SCS**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

79. Paragraph 2 provides for the Lord President to appoint members of the SCS other than the Chief Executive and the Lord Justice Clerk.

80. Paragraph 2 also provides that appointments can only be made if the person has been nominated, or otherwise selected for appointment, in accordance with such procedure as the Scottish Ministers may prescribe by regulation. Paragraph 2(3) provides that such regulations may prescribe different procedures for different categories of membership and enable persons to nominate or select persons suitable for appointment.

81. Paragraph 2(4) requires the Scottish Ministers to consult the Lord President before making such regulations.

*Reason for taking this power*

82. Arrangements for the nomination of members will be provided for in regulations to give a degree of flexibility as to the actual process involved. For example, the appointment of judicial and other professional members of the Republic of Ireland's court service is done by election from the professionals concerned, and the Scottish Ministers might want to experiment with this procedure in Scotland. Alternatively, the Scottish Ministers and the Lord President may prefer to proceed with appointment on the basis of open advertisement and competition. There may be different means of selection for different categories of members. The order making power provides flexibility to enable account to be taken of experience of the effectiveness of procedures over time and of any changes which take place in the structure of the judiciary etc.

*Choice of procedure*

83. Regulations made under this section will be subject to negative resolution procedure. As this will be predominantly a technical and administrative matter within the framework established by the Bill it is considered that this is appropriate. It is appropriate for the Lord President to be consulted before regulations are made since it will be for the Lord President to make appointments to the SCS.

**Schedule 3 – paragraph 19(1) – power to transfer property and liabilities to the SCS**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Orders made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

*Provision*

84. Paragraph 19 of Schedule 3 provides that property of the Scottish Ministers held or used by them in connection with the purposes of the Scottish courts or the judiciary of those courts may be transferred by order to the SCS. The corresponding liabilities may also be transferred.

*Reason for taking this power*

85. This order will be necessary to give the new SCS full control over and responsibility for property and liabilities which are currently held by the Executive Agency in the name of the Scottish Ministers. Once the SCS becomes a separate entity within the Scottish Administration it would be inappropriate for the Scottish Ministers to retain control over its assets or retain responsibility for its liabilities. The detailed, technical work to identify all the relevant property and liabilities will be ongoing with a view to an order being laid as soon as possible after the Bill receives Royal Assent.

*Choice of procedure*

86. An order made under this section will be subject to negative resolution procedure. This is considered appropriate for such an administrative matter within the framework established by the Bill.

*This document relates to the Judiciary and Courts (Scotland) Bill (SP Bill 6) as introduced in the Scottish Parliament on 30 January 2008*

# **JUDICIARY AND COURTS (SCOTLAND) BILL**

## **DELEGATED POWERS MEMORANDUM**