

SCOTTISH REGISTER OF TARTANS ACT 2008

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government on behalf of Jamie McGrigor MSP, the member in charge of the Bill for the Act. They have been prepared in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE ACT

3. The Act establishes a Scottish Register of Tartans, and requires a Keeper of the Register of Tartans to maintain and oversee the Register and new registrations, and sets down the process for registering new tartan designs in the Register.

4. The Act does this by:

- creating a publicly held and maintained register of tartans;
- setting up a system for registering new tartan designs;
- providing a statutory definition of tartan for the purposes of the operation of the Register;
- conferring on the Keeper of the Records of Scotland the functions of keeping and maintaining the Register and overseeing the registration of new tartan designs; and
- providing the Keeper with a power to charge for services provided in relation to the Register, such as registration of new tartans and provision of copy material from the Register.

5. Registration of a new tartan design will not confer any intellectual property rights such as copyright or design rights upon the person registering the tartan design. Nor will registration affect any existing intellectual property rights in such a tartan design. Intellectual property is a reserved matter under section C4 of Part II of Schedule 5 to the Scotland Act 1998.

SECTION 1: THE REGISTER

6. This section provides for there to be a Scottish Register of Tartans. Subsection (2) defines the purposes of the Register as a repository for tartans and a source of information on tartans.

SECTION 2: MEANING OF “TARTAN”

7. This section provides a definition of tartan for the purposes of the Act.

SECTION 3: KEEPER OF THE SCOTTISH REGISTER OF TARTANS

8. This section concerns the Keeper of the Records of Scotland on whom functions in the Act relating to the Register are conferred. Subsection (1) provides that in carrying out such functions, the Keeper takes the title “Keeper of the Scottish Register of Tartans”. Subsections (2) and (3) make provision regarding certain of the Keeper’s functions under existing legislation and how they relate to the Register and items associated with it. For example, the power of the Keeper under section 8 of the Public Records (Scotland) Act 1937 to preserve records transmitted to him would not apply to any document sent to the Keeper in connection with an application. A duty to preserve such documents is provided in section 4(2)(b).

SECTION 4: FUNCTIONS OF THE KEEPER

9. This section sets out the functions of the Keeper. Subsection (1) confers the functions of setting up, keeping and maintaining the Register. Subsection (2)(a) and (b) require the Keeper to make the Register publicly available, in electronic form, and to care for any documents, woven tartan samples or records supporting an application for registration in the Register or sent to the Keeper in connection with the exercise of his duties. The Keeper has control of the Register and responsibility for it and its contents. Subsection (2)(c) places a requirement on the Keeper to ensure the Register can be used effectively and efficiently. This means, for example, the Register must be organised in such a way as to be searchable.

10. Subsection (3) gives the Keeper a variety of powers in relation to the Register, its contents and physical things underpinning it. Paragraph (a) enables the Keeper to permit the public to inspect physical items associated with the Register (such as documents) held by him and to make copies of such documents. The Keeper can charge a fee for such services. Paragraph (c) enables the Keeper to answer enquiries or provide information on the Register, or undertake research in relation to the Register and its contents and to charge a fee for doing so. Paragraph (d) gives the Keeper a discretion to provide other services relating to the Register and paragraph (e) enables the Keeper to publicise the Register and promote its use. Paragraph (f) means the Keeper may issue guidance on the Register as respects matters the Keeper has power to specify, such as the form of the application for registration. Paragraph (g) allows the Keeper to consult anyone he considers appropriate before issuing guidance, for example tartan industry and other relevant experts.

11. Subsection (4) gives the Keeper a general power to take any steps he considers necessary to enable him to carry out properly and effectively his functions under the Act. This provides him, for example, with flexibility to refine the operation of the Register.

12. Subsection (5) makes provision in relation to the Keeper's duty to afford facilities for the inspection and copying of certain records under section 12A of the Public Records (Scotland) Act 1937. These are records which either fall to be disclosed in accordance with the Freedom of Information (Scotland) Act 2002 or comprise information which is exempt information within the meaning of that Act by virtue of section 25(2)(b)(ii) of that Act. Although the Keeper has a discretion to permit access to physical things and copying of documents under subsection (3), where such physical things fall within the meaning of "record" in section 12A of the Public Records Act 1937, the Keeper must make them available in terms of that section.

SECTION 5: EXISTING COLLECTIONS OF TARTANS

13. This section enables the Keeper to make entries on the Register derived from existing collections of tartan with the consent of the owner of those collections. Subsection (2) gives the Keeper discretion to determine what particulars or details from existing collections will be entered into the Register. Subsection (3) defines existing collections as those held in a register, in electronic or other form, that existed before the coming into force of the Scottish Register of Tartans Act.

SECTION 6: THE APPLICATION

14. This section sets out the process for applying for registration of a tartan in the Register. Subsection (1) clarifies that anyone can apply to register a tartan. Subsection (3) applies only where a person can authorise the Keeper to register a tartan. This would be the case if he had intellectual property rights in the tartan or any material accompanying the application. The subsection requires the applicant to authorise registration and to certify that he has the right to provide such an authorisation. In the event that there is any other person who could also authorise the Keeper to register the tartan (for example someone who shares property rights in the tartan with the applicant), where such a person consents to their name and address appearing on the Register, the applicant must certify to the Keeper that the other person has consented.

15. Subsection (4) sets out what an applicant must do if he does not have a right to authorise the Keeper to register the tartan. This would be the case if he had no intellectual property rights in the tartan or any material accompanying the application. In such a case, an applicant has to be able to certify that there is no other person with the right to authorise registration. To avoid falsely certifying this, the applicant must take reasonable steps to establish whether a person with such a right exists.

16. Subsection (5) requires all applicants (regardless of whether they can authorise the Keeper to register the tartan or not) to provide an indemnity in the event of the Keeper having to pay damages or expenses in consequence of having registered a tartan. This might be the case where registration breached intellectual property rights in the tartan or material accompanying the application held by a third party.

17. Subsection (6) allows the Keeper to specify and amend the form of application.

18. Subsection (7) prescribes the information to be provided in support of an application for registration. This includes a requirement at paragraph (c) for a description of the tartan, including information on colour and on threadcount of the tartan, which is the main component and identifier of a tartan design. Paragraph (d) seeks detail on the applicant's connection or relationship with the name that the design is intended to be registered under. The nature of the association with the name is explained further at subsection (12)(b). This requirement will clarify whether the applicant can establish a proper connection with the name of the tartan, or with any event or organisation with which the name suggests an association. There is also a general provision at paragraph (f) to require from the applicant any other information that the Keeper may specify.

19. Subsection (11) enables an applicant acting on behalf of a group to specify the capacity in which he or she is acting and who the group is, and to authorise the Keeper to record the detail of the group in the Register. This is to help clarify and establish that an application is linked to a particular group, body or organisation which lacks a separate legal personality and thus cannot register under its own name.

20. An application must be accompanied by a photograph or picture of the tartan and a woven sample of the tartan may be included if desired. Subsection (12)(a) allows for the photograph or pictorial representation to be in electronic form but, however provided, the image has to meet any requirements the Keeper sets out.

SECTION 7: DETERMINATION OF APPLICATION

21. This section sets out the process by which the Keeper will consider applications to register a tartan and gives the criteria against which an application is to be considered by the Keeper. It also allows the Keeper to seek additional information which he deems necessary to enable him to consider the application. Subsection (2) sets out the criteria the Keeper will apply when considering applications for registration. An application cannot be accepted in the following situations: where a requirement of the application process set out in section 6 is not met; when the design does not meet the definition of tartan in the Act; where the tartan is not unique or is similar enough to be mistaken for a tartan already registered; when the applicant cannot show sufficient connection/interest/relationship with the name of the tartan in the application (for example the applicant has no connection with an organisation or body whose name is part of, or associated with, the name of the tartan); where the application gives rise to a question more appropriately resolved elsewhere such as a court – such a question might be who is the owner of a tartan. Provided the Keeper is satisfied none of these grounds for refusal has been met, subsection (3) requires the Keeper to accept the application. The Keeper is not required to check the veracity of the certification given under section 6. So long as the certificate is provided (and all the other criteria are met) the Keeper cannot refuse to register.

22. Subsection (4) requires the Keeper to notify the applicant of the outcome of the consideration of the application and to do so in writing. Subsection (5) requires the Keeper to provide an unsuccessful applicant with reasons for rejection and permits him to give advice on how to meet the criteria against which the Keeper considers applications for registration in relation to any subsequent application. This will enable the Keeper to give a view on any steps an applicant could take to satisfy the criteria.

23. Subsection (6) allows the Keeper, in reaching a view on an application for registration, to consult sources of expertise as necessary. This allows the Keeper in coming to a decision on an application to consult and engage with, for example, the tartan industry, the Lord Lyon and other sources of tartan and genealogical expertise as necessary.

SECTION 8: REFUSED APPLICATIONS: RECONSIDERATION

24. The Keeper will decide whether to accept or reject an application. This section provides that where an application for registration is not accepted on certain grounds, the applicant can, within 2 months of being notified of a refusal, and having paid the requisite fee, ask for the application to be reconsidered. Subsection (3) requires the Keeper to reconsider such an application and subsection (4) requires the Keeper, where an application is accepted upon reconsideration, to reimburse the fee for that reconsideration.

SECTION 9: REGISTRATION AND REQUEST FOR WOVEN SAMPLE

25. This section requires the Keeper to make an entry in the Register in relation to a successful application. Under subsection (3), the applicant will be provided with a unique certificate of registration. This will show that the tartan is entered in the Register. Subsection (4) allows the Keeper to specify the form and information on the certificate and subsection (5) allows the Keeper to issue a copy certificate, upon payment of the requisite fee. Subsection (6) gives the Keeper discretion to request a woven sample of tartan where one has not already been provided.

SECTION 10: AMENDMENT OF REGISTER BY REQUEST

26. This section allows any person to seek amendment of the Register and sets out the process for doing so, including, at subsection (2), a requirement to provide a reason for amendment, and any other information that the Keeper may need. A fee is chargeable for requesting amendment of an entry in the Register. Subsections (3) to (5) make provision in respect of requests to amend that mirrors subsections (3) to (5) of section 6 in relation to applications. As with an application to register a tartan, a request to amend an entry may have implications for existing intellectual property rights. So similar authorisations and certifications are required, as is the indemnity of anyone asking for an amendment.

27. Subsection (10) allows the Keeper to determine how the Register should be amended and subsection (11) requires the Keeper to notify the requester of the outcome of the decision on the request to amend. Subsection (12) requires the Keeper to provide an unsuccessful requester for amendment with reasons for the rejection, or, where the request is successful, either provide a copy of the amended entry or some other form of

notification that the amendment has been made. Subsection (13) enables the Keeper to consult sources of expertise as necessary in reaching a view on a request to amend an entry in the Register. Subsection (14) means that where the request is to correct a typographical, clerical or other administrative error, subsections (2) to (13) do not apply. Such requests may be dealt with by the Keeper under section 12.

SECTION 11: AMENDMENT OF REGISTER: REQUEST OTHER THAN BY APPLICANT

28. This section provides additional procedure to that set out in section 10 where a person (called in subsection (1) a “third party”) seeks an amendment of an entry in relation to which that person did not make an application for registration. Where a third party seeks the amendment, the Keeper will contact the original applicant to send them a copy of the third party request to amend their registration and invite written comments within 28 days. Where the original applicant does comment, the Keeper will send those comments to the third party applicant and invite their comment. Again, the procedures set out in this section do not apply if the request is for correction of the sort of errors the Keeper can put right under section 12. The procedure in section 11 does not apply to the amendment of an entry made from an existing collection as in such a case there is no original applicant.

SECTION 12: AMENDMENT OF THE REGISTER: CORRECTIONS

29. This section enables the Keeper to amend the Register at any time to correct errors, such as clerical or typographical errors. Such an amendment may be made in response to a request under section 10(1) or simply by the Keeper himself identifying an error which should be corrected.

SECTION 13: CERTIFICATES OF REGISTRATION FOLLOWING AMENDMENT

30. This section allows the Keeper to send an amended certificate of registration to a person who has submitted a successful application under section 6. The certificate may be issued following a request (whether by the applicant or any other person) to amend the relevant entry under section 10(1).

SECTION 14: FEES

31. This section contains provision for Scottish Ministers to set the fees payable for matters relating to the Register. These are matters specified in the Act as ones in respect of which a fee is payable. Under subsection (1), Scottish Ministers can also specify other matters for which a fee is chargeable and set the level of fee. The section specifies that those fees will be made by order made by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament, and after consultation with the Keeper. Section (5) gives the Keeper a discretion to waive fees in certain circumstances, where Ministers have agreed.

SECTION 15: SCOTTISH RECORDS ADVISORY COUNCIL

32. This section means the Scottish Records Advisory Council's functions will not extend to the Register or material kept by the Keeper in connection with the Register. The Council is a statutory body established under the Public Records (Scotland) Act 1937 and which offers advice to Ministers on matters relating to the keeping of public records in Scotland and on issues of importance to the archive community.

SECTION 16: ANCILLARY PROVISION

33. Under subsection (1) of this section, the Scottish Ministers have power to make, by order, any incidental or consequential provision they consider necessary or expedient for the purpose of or in connection with any provision of the Act or to give full effect to it, or any provision of it. An order under subsection (1) is subject to the negative resolution procedure in the Scottish Parliament, except in cases where it textually amends an Act, when the affirmative procedure is applicable.

PARLIAMENTARY HISTORY

34. The following table sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place and the references to the official report of those proceedings. It also shows Committee reports and other papers and provides references to those reports and other papers.

PROCEEDINGS AND REPORTS	REFERENCE
Introduction	
26 th March 2008	Bill as introduced
Stage 1	
(a) Economy, Energy and Tourism Committee	
10 th Meeting 2008, 14 th May 2008	EET Committee Official Report Cols 755-793
12 th Meeting 2008, 28 th May 2008	EET Committee Official Report cols 892-908
Stage 1 Report	
(b) Finance Committee	
9 th Meeting 2008, 15 th April 2008	Finance Committee Official Report Col 363
(c) Sub Committee on Legislation	
14 th Meeting 2008, 29 th April 2008	Subordinate Legislation Committee, Official Report, cols 269-271
16 th Meeting 2008, 13 th May 2008	Subordinate Legislation Committee, Official Report, col 288
(d) Consideration by the Parliament	
Stage 1 Debate, 19 th June 2008	Official Report, cols 10034-10063

*These Notes relate to the Scottish Register of Tartans Act 2008 (asp 7)
which received Royal Assent on 13 November 2008*

Stage 2	
Economy, Energy and Tourism Committee	
16 th Meeting 2008, 10 th September 2008	EET Committee Official Report Cols 930-942
Bill as amended at Stage 2, 10 th September 2008	Bill as amended at Stage 2
Stage 3	
(a) Consideration by the Parliament	
Stage 3 Debate, 9 th October 2008	Official Report cols 11732-11758
Bill as passed	Bill as passed
Royal Assent, 13 th November 2008	

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