

# **INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) BILL**

[AS AMENDED AT STAGE 2]

---

## **REVISED EXPLANATORY NOTES**

### **CONTENTS**

1. As required under Rule 9.7.3A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Interpretation and Legislative Reform (Scotland) Bill (introduced in the Scottish Parliament on 15 June 2009) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these are indicated by sidelining in the right margin

### **INTRODUCTION**

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

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

4. The provisions in the Interpretation and Legislative Reform (Scotland) Bill are of a highly technical nature. The Bill broadly restates the existing law contained in the three statutory instruments listed in paragraph 5 below. Any departures from the existing position are highlighted where appropriate. Specifically the Bill deals with:

- the publication, interpretation and operation of Acts of the Scottish Parliament (“ASPs”) and instruments made under them;
- the making of subordinate legislation in the form of a Scottish statutory instrument (“SSI”), the procedures which apply to it in the Scottish Parliament and its publication; and
- the special procedure which applies to orders that are subject to special parliamentary procedure.

5. Up until now, the first three of these matters have been regulated by three transitional orders made by the UK Government under the Scotland Act 1998, namely:

- the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/1379) (“the Interpretation Order”);

- the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (S.I. 1999/1096) (“the SI Order”); and
- the Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999 (S.I. 1999/1593) (“the SPP Order”).

## **PART 1: INTERPRETATION**

### **INTRODUCTORY**

#### **Purpose of Part 1**

6. Part 1 of the Bill contains the provisions which are to apply in relation to the interpretation and operation of future Acts of the Scottish Parliament (“ASP”) and instruments made under them.

#### **General approach**

7. The provisions in Part 1 of the Bill will govern the interpretation and operation of ASPs and instruments made under them which are enacted on or after the day Part 1 of the Bill is brought into force.

8. Westminster Acts and instruments made under them are, and will continue to be, subject to the interpretation provisions in the Interpretation Act 1978 (“the 1978 Act”). Since power was devolved to the Scottish Parliament in 1999, ASPs and instruments made under them have been subject to the interpretation provisions in the Interpretation Order and that will remain the case for all such legislation enacted before Part 1 of the Bill comes into force.

9. For the avoidance of doubt, where legislation is amended the amendments are interpreted in accordance with the interpretation provisions applicable to the legislation being amended not the legislation making the amendments. For instance, if an ASP is enacted after Part 1 of the Bill comes into force its interpretation will be governed by the Bill. But if that ASP inserts a new section into a Westminster Act, the interpretation of that new section will be governed by the 1978 Act.

## **PART 1**

### **Section 1: Application of Part 1**

10. Subsection (1) provides that Part 1 will apply to ASPs which receive Royal Assent on the same day as, or after the coming into force of, Part 1 of the Bill; to “Scottish instruments” which are made on or after that day (regardless of when the ASP received Royal Assent); and this Bill. The Part is therefore forward-looking.

11. A “Scottish instrument” is defined in section 1(4) and (4A) in terms of a fixed list of instruments made under an ASP (whenever passed) or under both an ASP and an Act of Parliament (whenever passed). The list includes: Orders in Council; orders; regulations; rules (including acts of sederunt and acts of adjournal and other rules of court); a scheme; a warrant; and byelaws.

12. Subsection (7) provides the Scottish Ministers with a power to modify (which includes amend or repeal) the definition of “Scottish instrument” in section 1(4A) by order. Any such order will be subject to the affirmative procedure.

*Existing ASPs and instruments*

13. Part 1 does not apply to existing ASPs and instruments made under them in the period since devolution and before the coming into force of the Part. The Interpretation Order would continue to apply in relation to ASPs and instruments made under them before that day. This is given effect to by the making of saving provision in section 56(2).

*Westminster Acts and instruments made under them*

14. Part 1 also does not apply to Acts of Parliament and instruments made under them, even although they may relate to devolved matters. The principal reason for that is that it would create uncertainty and confusion for the reader if some provisions in Westminster Acts fell to be interpreted in accordance with Part 1 while other provisions fell to be interpreted in accordance with the 1978 Act. Part 1 does, however, apply to an instrument which is made under powers contained both in an Act of Parliament and in an ASP. This ensures that the same interpretative provisions apply to the whole of that instrument.

*Disapplication*

15. Subsection (2) contains a general qualification of subsection (1) so that a provision of Part 1 does not apply in two cases. The first (which would be the case in any event) is where there is express provision in an ASP or Scottish instrument that differs from the provision in Part 1. The second is where there is no express provision but the context of the provision being construed means that the provision of Part 1 cannot have been intended to apply.

16. There is one important exception to the second case. It relates to the applicability of the legislation to the Crown in section 20 and is explained in more detail in the commentary on that section.

*Application of Part to provisions of ASPs and instruments*

17. Part 1 has to be read subject to subsections (5) and (6). Those subsections make the Part applicable to a provision of an ASP or instrument in the same way as the Part applies to an ASP or instrument.

**Section 2: Commencement of ASPs**

18. This section contains the proposed default rule that would apply where an ASP (or, by virtue of section 1(5), a provision of an ASP) is silent as to commencement.

19. The rule differs from the previous provision in the Interpretation Order (paragraph 2 of Schedule 1) in that, instead of providing that the ASP comes into force at the beginning of the day on which the Act receives Royal Assent, it provides that the ASP or provision comes into force at the beginning of the day after the day on which the Bill for the ASP receives Royal Assent.

### **Section 3: Commencement of Acts and instruments: time of day**

20. This section would apply where an ASP or Scottish instrument (or, by virtue of section 1(5) and (6), a provision of an ASP or instrument) specifies the day on which it is to come into force. The Act, instrument or provision would come into force at the beginning of the day.

### **Section 4: Exercise of powers before commencement of Act of the Scottish Parliament**

21. This section enables certain powers conferred by a provision in an ASP to be exercised during the “pre-commencement period”, which is the period beginning the day after the day on which the Bill for the ASP receives Royal Assent and ending immediately before the enabling provision comes into force if it is necessary or expedient to do so. Examples of when this power could be exercised include making a Scottish instrument, establishing bodies corporate, making appointments, giving notice or documents or prescribing forms.

22. The new provision is similar to the existing provision in paragraph 10 of Schedule 1 to the Interpretation Order, but the wording in that paragraph is not very clear in terms of when the powers can be exercised and when they can have effect. The new provision makes it clear that the powers can be exercised in the pre-commencement period only but any subordinate legislation or anything else cannot have effect before the provision conferring the power comes into force. The new provision defines what is meant by the “pre-commencement period”.

### **Section 5: Power to appoint to an office**

23. This section sets out the other powers (such as a power to determine the terms and conditions of appointment, or a power to remove or suspend a person from the office or to reappoint or reinstate a person to the office) that are available where an ASP confers power to appoint a person to an office. This is a new section, modelled on section 12 of the New Zealand Interpretation Act 1999. It contains material that would otherwise be likely to be set out in ASPs which contain provision appointing a person to an office. The inclusion of this section has two consequences. First, it will shorten ASPs as it would make it unnecessary for ASPs to deal with these matters (except in cases where some other provision was wanted from a policy viewpoint). Second, it will promote consistency of approach as between ASPs where there was no policy or other justification for taking a different approach in relation to the conferring of these ancillary powers.

### **Section 6: Power to revoke, amend and re-enact**

24. This provision makes it clear that the power to make a Scottish instrument includes the ancillary powers to revoke, amend and re-enact. These additional powers are no longer “implied” powers. Since it provides that these ancillary powers are included in and therefore form part of the principal power, the words in paragraph 11 of Schedule 1 to the Interpretation Order which provide that the powers to revoke, amend and re-enact are “exercisable in the same manner and subject to the same conditions or limitations” can be omitted as unnecessary. This section is similar to but wider than the existing provision in paragraph 11 because it would apply where an ASP confers power to make any instrument and not just some of them.

### **Section 7: Carrying out of powers and duties more than once**

25. This provision replicates the effect of the existing provision in paragraph 9 of Schedule 1 to the Interpretation Order providing that where a power has been conferred or a duty imposed by an ASP or a Scottish statutory instrument then that power or duty may be exercised or performed on more than one occasion, as and when required. It further provides that where a power is conferred or duty imposed by an ASP or a Scottish statutory instrument on an office holder then the office holder may exercise the power or perform the duty.

### **Section 8: Additional powers on commencement by order**

26. Section 8 is a new section. It provides for the exercise of powers in relation to the commencement of an ASP, allowing that such power may provide for different days to be appointed for different purposes.

### **Sections 9 to 11: References to ASPs, Acts of Parliament and Acts of the Parliaments of Scotland**

27. Section 9 makes provision as to how ASPs and Scottish instruments are to refer to ASPs, Acts of Parliament and Acts of the Parliaments of Scotland. ASPs may be cited by reference to their short title or by their year followed by the letters “asp” and number. Sections 10 and 11 make provision as to when ASPs cite an Act of Parliament, or of the Parliaments of Scotland up to and including 1707.

28. The sections essentially replicate the effect of article 5 of the Interpretation Order, though section 9 contains new material (subsection (1)(b)) to reflect the requirements set out in section 38(6) as respects “official prints” of ASPs (i.e. setting out the functions to be undertaken by the Clerk of the Scottish Parliament).

### **Section 12: References to EU instruments**

29. The section provides that a reference to an “EU instrument” is a reference to that instrument as amended, extended or applied by another “EU instrument” the day on which the Act containing the reference receives Royal Assent or the Scottish instrument containing the reference is made. The approach in this section is different from what is proposed in section 14 (references to other legislative provisions). The reason for the difference is that paragraph 1A of Schedule 2 to the European Communities Act 1972, as inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (c.51), confers power to make ambulatory references to “EU instruments”. This allows decisions to be taken on a case by case basis as to whether references to EU instruments should be ambulatory.

### **Section 13: References to portions of legislative provisions**

30. The provision replicates paragraph 15(1) of Schedule 1 to the Interpretation Order and deals with the case where an ASP or instrument refers to a portion of an “enactment” (which is defined as including Acts of Parliament and instruments made under them) by referring to words, sections and so on from or to which the portion extends. This will arise often where textual amendments are being made. For example, where an ASP amends another ASP by substituting

new text for the passage from “word x” to “word y”. In that case, the portion to be substituted would include word x and word y.

31. The expression “enactment” is defined in schedule 1 to mean a Westminster Act, an instrument made under it, an ASP, a Scottish instrument, and a provision of any such Act or instrument.

#### **Section 14: References to other legislative provisions**

32. This section is based on paragraph 15(2) of Schedule 1 to the Interpretation Orders. There is at present some doubt as to whether when an Act refers to an enactment, the reference is to that enactment as amended by subsequent enactments up to the date of the reference in the ASP or instrument or whether it also includes a reference to that enactment as amended by enactments after the date of the reference. This section resolves this issue and states that when an Act refers to an enactment, the reference is ambulatory, i.e. that it includes a reference to that enactment as amended by enactments after the date of the reference.

33. The expression “enactment” is defined in schedule 1 to mean a Westminster Act, an instrument made under it, an ASP, a Scottish instrument, and a provision of any such Act or instrument.

#### **Sections 15 to 17: Effect of repeals**

##### *Section 15*

34. This section makes provision as to some of the consequences where an ASP or Scottish instrument repeals an ASP or revokes a Scottish instrument and reflects in part paragraph 13(1)(e) of Schedule 1 to the Interpretation Order. It provides that any repeal does not affect anything done previously under the repealed legislation, and also that it does not revive any previously repealed or revoked enactments or rule of law.

35. The section does not deal with the case where an Act of Parliament is repealed (or an instrument made under an Act of Parliament is revoked) by an ASP or Scottish instrument because this is dealt with by section 23A of the 1978 Act. As mentioned in relation to section 1, the interpretation of an Act of Parliament and an instrument made under it, including the effect of its repeal, is a matter for the 1978 Act. It is open to the repealing ASP to make further or different provision.

##### *Section 16*

36. This section makes provision as to the effect of repeal on existing rights, including enforcement of an existing right, where an ASP or Scottish instrument repeals another ASP or revokes a Scottish instrument. The section is intended to reflect part of paragraph 13(1)(e) of Schedule 1 to the Interpretation Order.

##### *Section 17*

37. This section makes provision as to the effect on offences already committed and breaches of statutory provisions where an ASP or Scottish instrument repeals another ASP or instrument.

The provision is intended to reflect part of paragraph 13(1)(d) of Schedule 1 to the Interpretation Order.

### **Section 18: Application of sections 15 to 17 to temporary Acts and instruments**

38. This section applies sections 15 to 17 to the expiry of a temporary ASP as if the temporary Act were repealed by an ASP, and to the expiry of a temporary Scottish instrument as if the temporary instrument were revoked by an ASP. This section replicates the effect in paragraph 13(2) of Schedule 1 to the Interpretation Order.

### **Section 19: Effect of repeal and re-enactment**

39. This section replicates the effect of paragraph 14(2) of Schedule 1 to the Interpretation Order. The section deals with the case where an ASP or Scottish instrument repeals an ASP and re-enacts the repealed ASP, with or without modification. This provision could be used, for example, where the law is to be consolidated.

### **Section 20: Application of Acts and instruments to the Crown**

40. This provision introduces a substantive change to the law. At present, the Crown is bound only by a statutory provision which makes express provision or by necessary implication. This section provides for a new default position - the Crown will be bound by an ASP or a Scottish instrument unless the provision expressly exempts it. This section also abolishes the common law rule that the Crown is bound by an ASP or Scottish instrument by necessary implication. The position as to which Westminster Acts and instruments made under them bind the Crown remains unaffected by this provision.

41. In view of this provision, section 1(2)(b) (the disapplication of the context of an Act or instrument requiring) is disapplied in relation to section 20 by virtue of section 1(3). This is because, if section 1(2)(b) were applied, it would undermine the effect of section 20(2), the effect of which is to abolish the common law rule that the Crown is bound by legislation by necessary implication.

### **Section 21: Forms**

42. Section 21 provides that when a form used differs from the form as prescribed in or under an ASP, then unless the difference in the form used materially affects the effect of the form or is misleading, then the form is not invalid. This will avoid situations where a form may be considered invalid because of a minor defect in it.

### **Section 22: Number**

43. This section replicates paragraph 3(c) of Schedule 1 to the Interpretation Order providing that words in the singular include the plural and vice versa.

### **Section 23: References to time of day**

44. This section replicates paragraph 6 of Schedule 1 to the Interpretation Order providing that references to the time of day in an ASP or SSI refer to Greenwich mean time. And that the provision is subject to section 3 of the Summer Time Act 1972 (c.6).

### **Section 24: Meaning of words and expressions used in instruments**

45. The section provides that, where a word or expression is used in a Scottish instrument, it has the same meaning as given in the ASP under which it was made. This replicates the provision in paragraph 8, Schedule 1 to the Interpretation Order.

### **Section 25: Definitions**

46. Subsection (1) introduces a schedule of defined words and expressions and provides that, if a word or expression that appears in the schedule is used in an ASP or Scottish instrument, it will have the meaning given in the schedule. The section replicates the effect of Article 6(2) of the Interpretation Order.

47. It is likely that over time the schedule will need to be updated to remove entries that are no longer frequently used and to add new entries where the frequency with which an expression is used merits it. Therefore, in subsection (2), the Scottish Ministers have been given a power to modify the schedule by order, which will be subject to the affirmative procedure.

### **Scotland Act definitions**

48. Some expressions which are defined for the purposes of the Scotland Act have been included as having the same meaning as in the Scotland Act – “member of the Scottish Executive”, “the Scottish Administration”, “the Scottish Ministers” and “Scottish public authority”.

### **Section 26: Service of documents**

49. This section makes provision for the service of documents. It expands the current service by post provisions (paragraph 4 of Schedule 1 to the Interpretation Order) and sets down a default rule for service of documents. It would apply whenever an ASP or Scottish instrument authorised or required a document to be served on (or given or sent to etc.) a person. As the words in brackets in subsection (1) indicate, nothing turns on the verb used.

50. Subsection (2) proposes three ways in which a document can be served: personal delivery; post (registered or recorded); and, if agreed, in writing, in advance with the recipient, using “electronic communications” (such as email). Whether a document is served by post or electronic communications, it is taken to have been received 48 hours after the day it is sent. These are rebuttable presumptions given the difficulties with postal service and problems which may arise with delivery by service providers/internet for email.

**Tables**

51. The first table below provides a list of corresponding and omitted provision of the Interpretation Order as compared with the provisions in the Bill.

52. The second table lists the provisions in Parts 1 and 2 of the Bill with their corresponding provisions in the Interpretation Order and the 1978 Act.

**TABLE 1**

**TABLE OF CORRESPONDING AND OMITTED PROVISIONS OF THE INTERPRETATION ORDER**

The first column of the Table lists the provisions of the Interpretation Order.

The second column gives the corresponding provision of the Bill or (where a provision of the Order is not reproduced) states the reason for its omission.

<b>Provision of Interpretation Order</b>	<b>Provision of Bill or reason why omitted</b>
Article 1	omitted - unnecessary
Article 2(1)	schedule 1 (definition of “enactment” and sections 1 and 27 (application; and definition of “Scottish Statutory instrument”)  partially omitted (definition of “the Parliament”)
Article 2(2)	omitted - unnecessary
Article 3(1)	section 38(6)
Article 3(2)	section 38(8)
Article 3(3)	section 39(1) & (2)
Article 3(4)	section 40(1)
Article 4(1)	section 38
Article 4(2)	section 38(2)
Article 4(3)	section 38(3), (4) & (5)
Article 5(1)	partially omitted as unnecessary; section 9(3)
Article 5(2)	section 9(1)
Article 5(3)	section 9(2)
Article 5(4)	sections 10 and 11
Article 6(1)	omitted - unnecessary
Article 6(2)	section 25(1)
Article 6(3)	omitted - some definitions included in schedule 1

*This document relates to the Interpretation and Legislative Reform (Scotland) Bill as amended at Stage 2 (SP Bill 27A)*

Article 7(1)	omitted – different drafting approach (specific provision made in Bill)
Article 7(2)	omitted – Bill does not apply to deeds, documents or other instruments
Article 8	omitted - unnecessary
Schedule 1 paragraph 1	omitted - unnecessary
Schedule 1 paragraph 2	sections 2 and 3
Schedule 1 paragraph 3	section 22 reproduces the provisions on number; gender provisions are omitted as unnecessary
Schedule 1 paragraph 4	section 26
Schedule 1 paragraph 5	omitted – infrequent use – specific provision can be made in Act or instrument as required
Schedule 1 paragraph 6	section 23
Schedule 1 paragraph 7	omitted as unnecessary – provision applies without need for specific provision
Schedule 1 paragraph 8	section 24
Schedule 1 paragraph 9(1)	section 7(1) and (2)
Schedule 1 paragraph 9(2)	section 7(3)
Schedule 1 paragraph 10	section 4
Schedule 1, paragraph 11	section 6
Schedule 1, paragraph 12	section 15(1) and (3)
Schedule 1, paragraph 13(1)	sections 15(1) and (2), 16 and 17
Schedule 1, paragraph 13(2)	section 18
Schedule 1, paragraph 14(1)	omitted - unnecessary
Schedule 1, paragraph 14(2)	section 19
Schedule 1, paragraph 15(1)	section 13
Schedule 1, paragraph 15(2)	section 14
Schedule 1, paragraph 16	section 12
Schedule 2 - “Act”	schedule 1
“civil partnership”	schedule 1
“commencement”	schedule 1
“the Communities” etc.	the corresponding expressions (“the EU” etc.) are in schedule 1
“Comptroller and Auditor General”	omitted – infrequent use
“Crown Estates Commissioners”	omitted – infrequent use

*This document relates to the Interpretation and Legislative Reform (Scotland) Bill as amended at Stage 2 (SP Bill 27A)*

“Court of summary jurisdiction”	omitted – infrequent use
“Devolution issue”	omitted – infrequent use
“EEA agreement”	omitted – infrequent use
“EEA state”	omitted – infrequent use
“England”	omitted – infrequent use
“Government department”	omitted – infrequent use
“High Court”	schedule 1
“Land”	schedule 1
“Lands Clauses Acts”	schedule 1
“Minister of the Crown”	omitted – infrequent use
“Month”	schedule 1
“Oath” and “affidavit”	schedule 1
“Ordnance map”	schedule 1
“Person”	schedule 1
“Police area” etc.	schedule 1
“The Privy Council”	schedule 1
“Registered”	schedule 1
“Registered medical practitioner”	schedule 1
“Rules of court”	schedule 1
“Scottish parliamentary election”	omitted – infrequent use
“Secretary of State”	schedule 1
“Sheriff”	schedule 1
“Standard scale”	schedule 1
“Statutory declaration”	schedule 1
“Statutory maximum”	schedule 1
“The Treasury”	omitted – infrequent use
“United Kingdom”	schedule 1
“Wales”	omitted – infrequent use

“Writing”	schedule 1
-----------	------------

**TABLE 2**

**TABLE SHOWING PROVISIONS OF PARTS 1 AND 2 OF BILL AND THEIR CORRESPONDING PROVISIONS IN THE INTERPRETATION ORDER AND THE 1978 ACT**

Section of Bill	Provision of Interpretation Order	Provision of 1978 Act
1	Articles 4 and 5	sections 22 and 23
2	Schedule 1, paragraph 2	section 4
3	Schedule 1, paragraph 2	section 4
4	Schedule 1, paragraph 10	section 13
5	n/a	n/a
6	Schedule 1, paragraph 11	section 14
7	Schedule 1, paragraph 9	section 12
9	Article 5(3)	section 19
10	Article 5(4)	section 19
11	Article 5(4)	section 19
12	Schedule 1, paragraph 16	section 20A
13	Schedule 1, paragraph 15(1)	section 20(1)
14	Schedule 1, paragraph 15(2)	section 20(2)
15	Schedule 1, paragraphs 12, 13(1)	section 16(1)
16	Schedule 1, paragraph 13(1)	section 16(1)
17	Schedule 1, paragraph 13(1)	section 16(1)
18	Schedule 1, paragraph 13(2)	section 16(2)
19	Schedule 1, paragraph 14(2)	section 17
20	n/a	n/a
22	Schedule 1, paragraph 3	section 6(c)
23	Schedule 1, paragraph 6	section 9
24	Schedule 1, paragraph 8	section 11
25	Article 6(2)	section 5
26	Schedule 1, paragraph 4	section 7
38	Articles 3((1) and (2) and 4	n/a
39	Article 3(3)	n/a
40	Article 3(4)	n/a
Schedule 1 “Act”	Schedule 2	section 21, Schedule 1
“civil partnership”	Schedule 2	Schedule 1
“commencement”	Schedule 2	Schedule 1
“Constable”	n/a	n/a
“document”	Article 6(3)	n/a
“enactment”	Article 6(3)	Schedule 1
“The EU” etc.	Schedule 2	Schedule 1
“financial year”	Article 6(3)	Schedule 1
“functions”	Article 6(3)	n/a

“High Court”	Schedule 2	Schedule 1
“land”	Schedule 2	Schedule 1
“Lands Clauses Acts”	Schedule 2	Schedule 1
“local authority”	n/a	n/a
“local authority area”	n/a	n/a
“member of the Scottish Executive”	Article 6(3)	n/a
“modify”	Article 6(3)	n/a
“month”	Schedule 2	Schedule 1
“oath” and “affidavit”	Schedule 2	Schedule 1
“ordnance map”	Schedule 2	Schedule 1
“person”	Schedule 2	Schedule 1
“police area”	Schedule 2	Schedule 1
“police authority”	Schedule 2	Schedule 1
“police force”	n/a	n/a
“registered”	Schedule 2	Schedule 1
“registered medical practitioner”	Schedule 2	Schedule 1
“rules of court”	Schedule 2	Schedule 1
“the Scottish Administration”	Article 6(3)	n/a
“the Scottish Ministers”	Article 6(3)	n/a
“Scottish public authority”	Article 6(3)	n/a
“Secretary of State”	Schedule 2	Schedule 1
“sheriff”	Schedule 2	Schedule 1
“standard scale”	Schedule 2	Schedule 1
“statutory declaration”	Schedule 2	Schedule 1
“statutory maximum”	Schedule 2	Schedule 1
“subordinate legislation”	Article 6(3)	section 21
“United Kingdom”	Schedule 2	Schedule 1
“writing”	Schedule 2	Schedule 1

## **PART 2: SCOTTISH STATUTORY INSTRUMENTS**

### **OVERALL PURPOSE**

53. The main purpose of Part 2 of the Bill is to make provision regarding the parliamentary scrutiny of “devolved subordinate legislation”. That expression is defined in section 37 of the Bill to mean subordinate legislation contained in a Scottish statutory instrument (“SSI”), but excluding special procedure orders (which are dealt with in Part 5) and so-called local

instruments (which are and will continue not to be subject to formal parliamentary scrutiny). Part 2 replaces the provisions of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (S.I. 1999/1096) (“the SI Order”). That Order was largely based on the provisions of the Statutory Instruments Act 1946 (c.36) (“the 1946 Act”) which applies to statutory instruments (“SIs”).

## **PART 2**

### **Section 27: Definition of “Scottish statutory instrument”**

54. This section contains the definition of SSI. It provides that the document by which certain statutory functions are exercised will, by default, be an SSI. Subject to the exceptions in subsection (3), those functions are:

- any function of the Scottish Ministers, the First Minister or the Lord Advocate to make, confirm or approve an order, regulations or rules; and
- any function of Her Majesty to make an Order in Council by virtue of an ASP, an instrument made under an ASP or any other enactment provided the function is exercised within devolved competence (which has the meaning given in section 54 of the Scotland Act).

55. This provision ensures that those functions which are most commonly exercised by SSI will automatically be caught by the definition, without the enabling enactment having to provide that the function is to be exercised by SSI. In other cases it may be less obvious that the function should be exercisable by SSI, particularly where the instrument made in exercise of the function is not of a legislative nature. The Bill allows for this by providing that the document by which certain statutory functions are exercised will only be an SSI if so provided in the enabling (or any other) enactment. Those functions are:

- any function of the Scottish Ministers, the First Minister or the Lord Advocate to make, confirm or approve subordinate legislation other than orders, regulations and rules (such as directions, schemes, bye-laws and warrants); and
- any function of any other person of making, confirming or approving subordinate legislation.

### **Section 28: Instruments subject to the negative procedure**

56. Section 28 defines what is meant when an enactment provides that devolved subordinate legislation is subject to the negative procedure.

57. Under the negative procedure the legislation is made (i.e. signed by or on behalf of the responsible authority) and is then subject to annulment by resolution of the Parliament. The main features of the procedure are that:

- section 28(2) requires the SSI to be laid before the Parliament as soon as practicable after being made and not less than 28 days before the legislation is due to come into force. This replicates article 10(2) of the SI Order except that the existing period of 21 days has been extended to 28 days and there is an express requirement to lay the instrument as soon as possible after it is made;

- section 28(3) provides that the Parliament may, within the period of 40 days beginning with the date on which it is laid, resolve that the instrument be annulled;
- section 31(2) provides that failure to comply with these requirements does not invalidate the instrument;
- section 28(8) provides that, in calculating the period of 28 or 40 days, no account is to be taken of any time during which the Parliament is dissolved or in recess for more than 4 days.

58. Subsections (4) to (6) explain the effect of the Parliament making an annulment resolution.

59. Subsection (4) provides that, in so far as the instrument is not in force on the date of the annulment resolution, the instrument is not to come into force. But, in so far as the instrument is in force on that date, nothing further is to be done under, or in reliance upon, the instrument after that date.

60. Following an annulment resolution, subsection (6) requires the “responsible authority” to revoke the instrument (unless it is an Order in Council). Subsection (9) defines the expression “responsible authority”. If the instrument is an Order in Council, subsection (5) provides that following an annulment resolution Her Majesty may revoke it. Subsection (10) provides that a revocation order made under either subsection (5) or (6) is to be an SSI.

61. Subsection (7) provides that neither the annulment resolution, nor the instrument’s consequent revocation, affects the validity of anything previously done under the instrument or the making of a new SSI

### **Section 29: Instruments subject to the affirmative procedure**

62. Section 29 defines what is meant when an enactment provides that devolved subordinate legislation is subject to the affirmative procedure.

63. Section 29(2) provides that devolved subordinate legislation subject to the affirmative procedure is not to be made unless a draft of the SSI containing it is laid before, and approved by resolution of, the Parliament.

64. Section 29(3) provides that a SSI is not properly made and has no effect if the statutory precondition that a draft of it be laid before and approved by a resolution of the Parliament is not complied with. This provision replicates the position at common law.

65. Section 29(4) ensures that section 32(3) applies to instruments subject to the affirmative procedure. That means, provided a draft of it was approved by a resolution of the Parliament, an instrument will not be invalid only because the draft was not laid properly in accordance with the requirements of the Parliament’s standing orders.

### **Section 30: Other instruments laid before the Parliament**

66. Section 30 makes default provision for what is to happen in relation to all devolved subordinate legislation which is not subject to either the negative or the affirmative procedure.

67. Subsection (2) requires the SSI to be laid before the Parliament. That is to happen as soon as practicable after the SSI is made and before it is due to come into force.

68. Subsections (3) and (4) except certain instruments from the requirement prescribed in subsection (2). The instruments excepted are those made under one or more of the enactments mentioned in subsection (4).

69. Subsection (5) provides Scottish Ministers with a power to modify the list at subsection (4) by order, thereby extending or restricting the applicability of the laying requirement in subsection (2). By virtue of subsection (6), an order under subsection (5) is to be subject to the affirmative procedure.

### **Section 31: Failure to lay instruments in accordance with section 28(2) or 30(2)**

70. Section 31 makes provision about the consequences of failure to lay a SSI in accordance with the laying requirements in section 28(2) (which provides for the negative procedure) or section 30(2) (which provides for simple laying).

71. It makes clear that failure to comply with the laying requirements does not affect the validity of an instrument as a matter of law (subsection (2)). Rather it is a matter for which the responsible authority is answerable to the Parliament. Subsections (3) and (4) provide that, if the instrument is made without complying with the relevant laying requirement, the responsible authority must explain why in writing to the Presiding Officer as soon as practicable. This replicates the terms Article 10(3) of the SI Order.

### **Section 32: Laying of Scottish statutory instruments before the Scottish Parliament**

72. Section 32 defines what laying a SSI or draft SSI before the Parliament entails where an enactment authorises or requires laying. It provides that, unless a contrary intention appears, laying a SSI or draft SSI means taking such steps as the Parliament's standing orders specify.

73. Subsection (3) provides that failure to lay a SSI or draft SSI in accordance with the enactment which authorises or requires it does not affect the instrument's validity.

### **Section 33: Combination of powers**

74. Section 33 makes provision for subordinate legislation making powers subject to different scrutiny procedures to be exercised together in a single instrument. In particular, it provides a foundation in law for making instruments using a combination of powers some of which are subject to the affirmative procedure (in terms of section 29), the negative procedure (in terms of section 28) and others to no procedure aside from laying or no procedure at all (in terms of section 30). It provides that where powers are so combined the highest scrutiny procedure applies to the whole instrument.

75. Subsection (4) also makes clear that where powers are so combined, it has no effect on any additional requirements which may apply to one or more of the powers being exercised. A duty to consult before exercising one of the powers, for instance, will continue still to apply and will do so only in relation to the exercise of that power.

### **Section 34: Power to change procedure to which subordinate legislation is subject**

76. Section 34 allows the procedure for making, confirming or approving devolved subordinate legislation to be changed by order, subject to the affirmative procedure. Such an order may only be made to give effect to a resolution of the Parliament calling for the procedure to be changed.

77. An order under section 34 may, in particular, allow functions subject to the negative procedure to be made subject to the affirmative procedure and vice-versa and for functions subject to no procedure aside from laying to be subject to either the negative or affirmative procedure.

### **Section 35: Procedures prescribed in pre-commencement enactments**

78. This section introduces schedule 3 which modifies procedures prescribed in pre-commencement enactments to bring them into line with sections 28 to 32.

### **Section 36: Statutory instruments subject to procedure in the Scottish Parliament**

79. This section introduces schedule 4 which makes provision in respect of SIs which are subject to procedure before the Parliament. Schedule 4 contains glossing provisions to bring the pre-commencement enactments under which SIs subject to procedure before the Parliament are made into line with sections 28 to 32.

## **PART 3: PUBLICATION OF ACTS AND INSTRUMENTS**

### **OVERALL PURPOSE**

80. Part 3 of the Bill makes provision about the numbering, printing and publication of ASPs and SSIs.

## **PART 3**

### **Section 38: Official prints of ASPs**

81. This section restates and replaces articles 3(1) and (2) and 4 of the Interpretation Order.

82. Section 38(1) makes provision about the numbering of ASPs. They are to be numbered consecutively in each calendar year according to the date on which they received Royal Assent with the prefix “asp” before the number – for example 2008 asp 8. Section 38(6) and (8) makes provision for the Clerk of the Parliament to write this number on a copy of the ASP and for that copy to be known as “the official print” of the Act

### **Section 39: Publication of official prints of Acts of the Scottish Parliament**

83. This section restates and replaces paragraphs (3) and (4) of article 3 of the Interpretation Order.

84. It makes provision for the printing and publication of the certified copy of an ASP. The Clerk of the Parliament is required to certify a copy of the official print of each ASP and send it to the Queen's Printer for Scotland ("QPS") who is required to ensure that it is printed and made available for sale.

#### **Section 40: Preservation of official prints of Acts of the Scottish Parliament**

85. This section requires the Clerk of the Parliament to send the official print of each ASP to the Keeper of the Records of Scotland who is required to preserve it.

86. This section replicates article 3(4). The express duty imposed on the Keeper by subsection (2) to preserve the official print is new; it has hitherto been implied.

#### **Section 41: Queen's Printer for Scotland to publish instruments**

87. Section 41(1) requires the responsible authority, as soon as possible after a SSI is made, to send a certified copy of it to the QPS. Section 41(2) requires the QPS to publish copies of it in accordance with regulations made under section 42.

88. The manner of publication is left for the Scottish Ministers to specify in regulations under section 42(2)(b).

89. Section 41(3) provides that, in criminal proceedings for an offence consisting of a contravention of a SSI, it is a defence to prove that, at the date of the alleged contravention, the SSI had not been published by the QPS. Section 41(4) qualifies this by providing that this defence is not available if it is proved that reasonable steps had been taken by the responsible authority to bring the SSI to the notice of the public, persons likely to be affected by it or the person charged. It is made clear that this does not affect any rule of law relating to the time at which the SSI comes into force.

#### **Section 42: Publication, numbering and citation: regulations**

90. This section requires the Scottish Ministers, by regulations subject to the affirmative procedure, to make provision for, or in connection with, the publication, numbering and citation of SSIs. Any regulations made under these provisions must make provision for the publication of all instruments on a website or by other electronic means.

91. This is intended to enable provision to be made which is similar to the kind of detailed provisions in articles 5 to 9 of the SI Order. It also enables the regulations to make provision for charging for the provision of copies of SSIs or of the lists or annual editions of them.

#### **Section 42A: Preservation of Scottish statutory instruments**

92. This section requires the "responsible authority" to ensure that the Keeper of the Records of Scotland receives the signed copy of each SSI made by the authority. For the purposes of this section "responsible authority" has the meaning given in section 31(6). Section 42A(2) obliges the Keeper to preserve every SSI received.

### **Section 43: Publication in the Gazettes**

93. This section makes provision as to what is meant when any enactment requires any SSI to be published or notified in the London, Edinburgh or Belfast Gazette. It provides that this requirement is complied with if a notice is published in the Gazette stating that the SSI has been made and providing information as to how copies of it may be obtained.

### **Section 44: No duty to print Scottish statutory instruments**

94. This section amends section 92(4) of the Scotland Act 1998 to remove the duty on the QPS to print copies of SSIs.

### **Section 45: Queen's Printer: delegation of functions**

95. Section 45 provides for the delegation of any function of the QPS under section 41 or conferred by regulations under section 42. The QPS will remain responsible for carrying out such functions and anything done by the delegate is to be treated as if done by the QPS. This provision will enable the QPS, for example, to contract out the printing and selling of SSIs as she does at present.

### **Section 46: Interpretation of Part 3**

96. This section provides for the interpretation of expressions used in Part 3.

## **PART 5: ORDERS SUBJECT TO SPECIAL PARLIAMENTARY PROCEDURE**

### **OVERALL PURPOSE**

97. The main purpose of Part 5 of the Bill is to make provision for special parliamentary procedure ("SPP") for the purposes of section 94(2)(b) of the Scotland Act. These provisions replace the provisions of the Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999 (SI 1999/1593) ("the SPP Order").

## **PART 5**

### **Sections 48 to 53**

98. This Part simply replicates the effect of the SPP Order. It provides that where special parliamentary procedure is required then the following procedure is to apply :

- the order is to be advertised in the Edinburgh Gazette;
- the order, if objected to, (other than frivolous objections or objections as to compensation) requires to be confirmed by an ASP. The relevant Bill (in absence of any special provision in the Parliament's Standing Orders concerning the procedures for such a Bill) is to be treated as a Private Bill; and
- the order, if there are no objections to it, (other than detailed above) is to come into force 40 days after being laid, unless the Parliament resolves that the order be annulled.

## **PART 6: LAYING OF DOCUMENTS OTHER THAN SSIS**

99. Section 54 makes provision as to what is meant when an enactment requires or authorises a document other than a SSI, or a draft SSI, to be laid before the Parliament. It makes similar provision to section 32 (which defines what laying a SSI or draft SSI before the Parliament entails).

## **PART 7: MISCELLANEOUS AND GENERAL**

### **Section 56: Consequential revocation of transitional orders**

100. Section 56 makes provision for the revocation of the transitional orders.

#### **Section 56A: Orders**

101. Section 56A provides that a power to make an order under any of the Bill's provisions (other than section 28) includes the power to make such transitional, transitory or savings provisions as the Scottish Ministers may consider necessary or expedient.

#### **Section 56B: Ancillary provision**

102. Section 56B(1) confers on the provide Scottish Ministers power to make, by order, such supplementary, incidental, or consequential provision as they consider appropriate for the purpose of, in consequence of, or for giving full effect to the provisions of the Bill. Subsection (3) provides that such an order may modify any enactment. Subsection (4) provides that any order made under subsection (1) is to be subject to the affirmative procedure.

103. Section 56B(2) confers on the Scottish Ministers power to make, by order, such transitional, transitory, or savings provision as they consider necessary or expedient in connection with the coming into force of the Bill's provisions. Subsection (3) provides that such an order may modify any enactment. Subsection (5) provides that any order made under subsection (2) is to be subject to the negative procedure.

## **SCHEDULE 1: DEFINITION OF WORDS AND EXPRESSIONS**

104. The schedule supplies definitions of commonly-used words and expressions. Additional words and expressions have been added where they are thought to be used sufficiently frequently in ASPs and Scottish instruments – and so pass the “frequent use” test.

## **SCHEDULE 2: SCOTTISH STATUTORY INSTRUMENTS: TRANSITIONAL AND CONSEQUENTIAL PROVISION**

105. Section 27 will create a free-standing definition of “Scottish statutory instrument”. Prior to section 27 coming into force, an instrument would be classified as an SSI (by virtue of article 4 of the SI Order) only if it was also an SI (within the meaning of section 1 of the Statutory Instruments Act 1946 (c.36)). As section 56 of the Bill will revoke the Interpretation Order it is necessary to adapt enactments passed or made before Part 2 comes into force to bring them into line with the new approach taken to the definition of an SSI in the Bill. This schedule achieves that.

106. A pre-commencement enactment is defined as meaning an enactment passed or made before Part 2 comes into force. For this purpose, an ASP is taken to have been passed on the date on which the Bill for it was passed by the Parliament – that is before it is enacted by receiving Royal Assent. The reason for this is because there is a pragmatic need to catch such ASPs at the earliest possible time when they can no longer be amended by the Parliament because they are likely to refer to the old SI procedures and therefore require the modifications made by this schedule.

107. Paragraph 2 applies where there is a function of the Scottish Ministers, the First Minister or the Lord Advocate to make, confirm or approve orders, regulations or rules under a pre-commencement enactment. It provides that any provision which provides for the function to be exercisable by SI to cease to have effect. However, if there is no such provision, then the function is not to be exercisable by SSI. This brings these provisions into line with section 27(2)(a).

108. Paragraph 3 applies where there is a function of Her Majesty to make an Order in Council under a pre-commencement enactment so far as the function is exercisable within devolved competence. It provides that section 1 of the 1946 Act ceases to apply to such a function. That section provides that such an Order in Council is exercisable as a SI. This brings these provisions into line with section 27(2)(c).

109. Paragraph 4 applies in relation to other functions to make subordinate legislation under a pre-commencement enactment which correspond to section 27(2)(b) and (d). It provides that any provision which provides for the function to be exercisable by SI should have effect as if it provided for the function to be exercisable by SSI.

110. Paragraph 5 makes similar exceptions to those made by section 27.

### **SCHEDULE 3: SCOTTISH STATUTORY INSTRUMENTS: PROCEDURES PRESCRIBED IN PRE-COMMENCEMENT ENACTMENTS**

111. This schedule modifies the existing procedures for scrutinising SSIs in pre-commencement enactments in order to bring them into line with the provisions in sections 28 to 32 providing for negative procedure, affirmative procedure and the default procedure of simply laying the SSI before Parliament. It provides that the negative procedure will apply where the pre-commencement enactment provides that:

- the instrument, having been made, is subject to annulment in pursuance of a resolution of the Parliament (paragraph 2);
- a draft of the instrument must be laid before the Parliament and it cannot be made if the Parliament so resolves within 40 days (paragraph 3); or
- the instrument, having been made, cannot come into force until it has been laid before the Parliament for a specified period and the Parliament may, by resolution, annul it (paragraph 4).

112. It provides that the affirmative procedure will apply where the pre-commencement enactment provides that:

- a draft of the instrument must be laid before the Parliament and it cannot be made until the Parliament has resolved that it can (paragraph 5); or
- the instrument, having been made, cannot come into force unless and until is laid before the Parliament and approved by resolution (paragraph 6).

113. It provides that the default procedure, which requires the instrument simply to be laid before the Parliament, will apply where the pre-commencement enactment provides that:

- the instrument, having been made, cannot come into force unless it has been laid before the Parliament for a specified period (paragraph 7); or
- the instrument does not need to be laid before the Parliament at all (paragraph 8).

114. To the extent that pre-commencement enabling enactments provide for any other parliamentary scrutiny procedures they will continue unaltered.

#### **SCHEDULE 4: APPLICATION OF PART 2 TO STATUTORY INSTRUMENTS LAID BEFORE THE PARLIAMENT**

115. Some SIs and draft SIs are subject to scrutiny by the Parliament. For example, the Scotland Act provides for this in the case of Orders in Council subject to the procedures referred to as Types A, F and H in Schedule 7.

116. As a consequence of the new statutory framework for the Parliament's scrutiny procedures provided for in sections 28 to 32, it is necessary to adapt references in pre-commencement enactments to the Parliament's scrutiny of SIs and draft SIs to refer to the new procedural labels. Pre-commencement enactments are defined in paragraph 1 of Schedule 4 to mean enactments passed or made before Part 2 comes into force.

117. Schedule 4 accordingly provides that, where any pre-commencement enactment provides for:

- an SI to be subject to annulment in pursuance of a resolution of the Parliament, section 28 should apply to it as it applies in relation to a SSI which is subject to the negative procedure;
- a draft of an SI to be laid before, and approved by resolution of the Parliament, section 29 should apply to it as it applies in relation to a SSI which is subject to the affirmative procedure;
- an SI to be laid before the Parliament (but it is to be subject to neither the negative nor the affirmative procedure), section 30 should apply to it as it applies in relation to an SSI.

118. Schedule 4 also applies the provisions of section 32 (which defines what it means for an instrument to be laid before the Parliament) to such SIs and draft SIs.



*This document relates to the Interpretation and Legislative Reform (Scotland) Bill as amended at Stage 2 (SP Bill 27A)*

**INTERPRETATION AND LEGISLATIVE REFORM  
(SCOTLAND) BILL  
[AS AMENDED AT STAGE 2]**

**REVISED EXPLANATORY NOTES**

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2010.

Applications for reproduction should be made in writing to: Information Policy, Office of the Queen's Printer for Scotland (OQPS), St Clements House, 2-16 Colegate, Norwich NR3 1BQ, or by e-mail to [licensing@oqps.gov.uk](mailto:licensing@oqps.gov.uk). OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley

