

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

2. The Memorandum describes the purpose of each of the subordinate legislation provisions in the Interpretation and Legislative Reform (Scotland) Bill and outlines the reasons for seeking the proposed powers. It should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF BILL PROVISIONS

3. The provisions in the Interpretation and Legislative Reform (Scotland) Bill are of a highly technical nature. The Bill is split into 7 Parts.

- Part 1 deals with the interpretation and operation of Acts of the Scottish Parliament (ASPs) and instruments made under them;
- Part 2 deals with the making of subordinate legislation in the form of a Scottish statutory instrument (SSI) and the procedures which apply to such an instrument in the Scottish Parliament;
- Part 3 makes provision about the publication of ASPs and SSIs;
- Part 4 provides for the Scottish Ministers, by order, to make amendments to enactments in order to facilitate their consolidation;
- Part 5 provides for the special procedure which applies to orders that are subject to special parliamentary procedure;
- Part 6 defines what it means for documents other than SSIs to be laid before the Scottish Parliament; and
- Part 7 makes miscellaneous and general provision, including provision about the coming into force of the Act.

Rationale for subordinate legislation

4. The Bill contains 6 delegated powers provisions, which are explained in more detail below. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to—

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances, without having to include the necessary provision in primary legislation;
- the need to make proper use of valuable parliamentary time;
- the need to ensure that other areas of regulation can be developed in a coherent and consistent way by other authorities;
- the likely frequency of amendment;
- the possible need to change provisions in a co-ordinated way, for example to react to changes in approach when considering roll-out;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of any provision in primary legislation approved by the Parliament.

DELEGATED POWERS

5. This Memorandum describes the provisions of the Bill which confer power to make subordinate legislation. It 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;
- the purpose of the provision and why it is considered appropriate for the matter to be dealt with in subordinate legislation; and
- the parliamentary procedure, if any, to which the exercise of the power to make subordinate legislation is to be subject.

6. Sections 1(7), 25(2), 34(2), 42(1), 47(1) and 57(3) contain the powers to make subordinate legislation. All the instruments are to be made as orders or regulations. All the instruments are subject to the affirmative procedure with the exception of commencement orders under section 56, which are not subject to any procedure.

DESCRIPTION OF DELEGATED POWERS

Section 1(7) – Application of Part 1 – Definition of “Scottish instrument”

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative

Provision

7. Section 1(7) gives the Scottish Ministers the power, by order, to modify the definition of “Scottish instrument” set out in subsection (4). Subsection (4) provides a fixed list of the types of instruments which are to be, in the meantime, “Scottish instruments”. The provisions of Part 1 of the Bill, which deal with the interpretation and operation of ASPs and Scottish instruments, apply to those instruments which fall within the definition of “Scottish instrument” in section 1(4). Subsection (7) allows the Scottish Ministers to change the list of instruments which fall within that definition and can thereby expand or constrict the types of instrument to which Part 1 of the Bill applies. Subsection (8) states that such an order is subject to the affirmative procedure.

Reason for taking power

8. The documents that are to be considered to be Scottish instruments may change over time. This power gives Scottish Ministers the flexibility to revise the list if it becomes necessary.

Choice of procedure

9. The exercise of this power would involve amendment to primary legislation and would materially affect the operation of the provisions of the Bill to different types of instruments. In the circumstances, it is appropriate that the order is subject to the affirmative procedure.

Section 25(2) – Definitions in schedule 1

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative

Provision

10. Subsection (1) introduces schedule 1, which defines certain words and expressions and provides that, if a word or expression that appears in schedule 1 is used in an ASP or a Scottish instrument, it will have the meaning given in schedule 1. Subsection (2) provides Scottish Ministers with a power by order to modify schedule 1. Subsection (3) states that such an order is subject to the affirmative procedure.

Reason for taking power

11. Over time it is likely that schedule 1 will need to be updated. Inclusion in the schedule is based on a “frequent use” test of expressions and words in ASPs and Scottish instruments. It

may be desirable to remove entries which are no longer frequently used or which cease to be relevant or appropriate. New entries may need to be inserted where the frequency with which a word or expression is used in ASPs and Scottish instruments merits it. As well, entries may need to be amended if they are no longer relevant or it is appropriate to do so. The order making power will provide this flexibility.

Choice of procedure

12. The use of this power would involve amendment to primary legislation and would affect the interpretation of all those ASPs and Scottish instruments to which Part 1 applies. In the circumstances, it is appropriate that the order is subject to the affirmative procedure.

Section 34(2) – Powers to change procedures to which subordinate legislation is subject

Power conferred on: Scottish Ministers

Power exercisable by: Order

Parliamentary procedure: Affirmative

Provision

13. Section 34 makes provision for changes to be made to the procedure to which devolved subordinate legislation is subject. Subsection (2) provides that the Scottish Ministers may, by order, make modification of such enactments as is necessary for the purpose of giving effect to a parliamentary resolution that any function of making, confirming or approving a SSI which is:

- subject to the negative procedure should instead be subject to the affirmative procedure;
- subject to the affirmative procedure should instead be subject to the negative procedure; or
- not subject to the negative or affirmative procedure should instead be subject to one of those procedures.

Reason for taking power

14. The Subordinate Legislation Committee (SLC) in their Report into the Regulatory Framework in Scotland (12th Report, 2008 (Session 3)) considered that there is a need, at times, to alter the scrutiny procedures that instruments are subject to in terms of their parent Act. The SLC considered that the parliamentary scrutiny procedure prescribed in an enabling Act may cease to be appropriate where the significance of the subordinate legislation's subject-matter has changed over time. The reason for taking the power is therefore to provide flexibility to alter scrutiny procedure to reflect any changes in the relevant policy environment, without having to resort to primary legislation.

Choice of procedure

15. The use of this power may involve amendment of primary legislation. It would change the scrutiny procedure which the legislature intended the subordinate legislation be subject to. In the circumstances, it is appropriate that the instrument is subject to the affirmative procedure.

Section 42(1) – Publication, numbering and citation regulations

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative

Provision

16. This section enables 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. It also enables the regulations to make provision for charging for the provision of copies of the SSIs or of the lists or annual editions of them. It is intended that this power will be used to make detailed provision similar to that in articles 5 to 9 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (S.I. 1999/1096).

Reason for taking power

17. It is appropriate that detailed arrangements about publication, numbering and citation of SSIs should be included in subordinate legislation. This allows flexibility, for example to include new methods of publication and for variation of the charges for legislation as appropriate.

Choice of procedure

18. The use of this power could change the manner in which the Queen’s Printer for Scotland carries out her functions. Given the potential consequences in relation to how legislation is made public, it is appropriate that the instrument is subject to the affirmative procedure.

Section 47(1) – Pre-consolidation modifications of enactment

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative

Provision

19. Section 47(1) gives the Scottish Ministers the power, by order subject to the affirmative procedure, to “make such modifications of enactments relating to a particular subject as in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the law on the subject”. The focus of the power is on producing a satisfactory consolidation. It could not be used to make substantive policy changes for their own sake.

20. Subsection (2) provides that no order can be made unless a Bill, or a group of Bills consolidating the law on the subject has either been introduced in the Scottish Parliament or presented to either House of Parliament. This ensures that the subject committee and other committees (e.g. the SLC) scrutinising the order have before them the draft consolidated legislation in order to see the proposed changes in the context of the consolidation that they are intended to facilitate and so can judge better whether the power is being properly used. The provision refers to “a group of Bills” because it is possible that a consolidation may proceed by

way of more than one Bill. Paragraph (b) will enable the power to be used in connection with a consolidation Bill at Westminster. The power can only be used to make modifications which would be within the legislative competence of the Parliament. Section 47(3) provides for the order to take effect immediately before the consolidated Act, or group of Acts, commence. Section 47(5) defines consolidation as including the restatement of the common law; this allows provision to apply to Codification Bills too.

Reason for taking power

21. The power to make pre-consolidation modification of enactments will facilitate the consolidation of legislation.

Choice of procedure

22. The uses to which this power can be put are restricted in that the power can only be used to make modifications which facilitate, or are otherwise desirable in connection with a consolidation or codification. The power therefore cannot be used to make substantive policy changes. Nevertheless, the power can be used to modify primary legislation and for that reason it is appropriate that the instrument is subject to the affirmative procedure.

Section 57(3) – Commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: None

Provision

23. Section 57(2) provides that, with certain exceptions, the Act comes into force at the beginning of the day after the day on which the Bill for the Act receives Royal Assent. This means essentially that Parts 1, 3, 4 and 7 (except 56(3)) come into force on that day. Section 57(3) provides that Parts 2, 5 and, in Part 7, section 56(3) come into force on such day as the Scottish Ministers may by order appoint.

Reason for taking power

24. Exact commencement dates for substantive provisions in the Bill are not yet definitely fixed and accordingly the flexibility provided by the ability to make commencement orders is required.

Choice of procedure

25. The decision on when and to what extent the Bill is commenced is an administrative issue for the Scottish Government. As is usual therefore, the Government considers that the commencement powers should not be subject to any Parliamentary procedures.

*This document relates to the Interpretation and Legislative Reform (Scotland) Bill (SP Bill 27)
as introduced in the Scottish Parliament on 15 June 2009*

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