

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT - BACKGROUND

Part 1: Interpretation

Overview

6. [Part 1](#) of the Act contains the provisions which are to apply in relation to the interpretation and operation of future Acts of the Scottish Parliament (“ASPs”) and instruments made under them.
7. The provisions in Part 1 of the Act govern the interpretation and operation of ASPs which receive Royal Assent on or after 4 June 2010 (the day on which Part 1 came into force) and instruments made on or after that date.
8. 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 or made before 4 June 2010.
9. Acts of Parliament and instruments made under them are subject to the interpretation provisions set out in the Interpretation Act 1978 (“the 1978 Act”). The only change that the Act makes in that respect is that instruments of the types listed in section 1(5) which are made jointly under an Act of Parliament and an ASP will be subject to the Act. Again, this applies only in relation to instruments made on or after 4 June 2010.
10. 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 – and not the legislation making the amendments. For instance, if an ASP is enacted on or after 4 June 2010 then its interpretation will be governed by the Act. But if that ASP inserts a new section into an Act of Parliament, then the interpretation of that new section will be governed by the 1978 Act.

Section 1 - Application of Part 1

11. Subsection (1) provides that Part 1 applies to ASPs which receive Royal Assent on or after 4 June 2010 (the day on which Part 1 came into force); to “Scottish instruments” which are made on or after that day (regardless of when the ASP was passed); and to the Act itself. The Part is therefore forward-looking.
12. A “Scottish instrument” is defined in subsection (4) as being an instrument of a type listed in subsection (5) which is made under an ASP (whenever passed) or under both an ASP and an Act of Parliament (again, whenever passed). The instruments listed in subsection (5) are: Orders in Council; orders; regulations; rules (including acts of sederunt and acts of adjournal and other rules of court); schemes; warrants; and byelaws.

13. Subsection (8) provides the Scottish Ministers with a power to modify (which includes amend or repeal – definition in schedule 1) by order the definition of “Scottish instrument” in subsection (5). Any such order is subject to the affirmative procedure.

Existing ASPs and instruments

14. [Part 1](#) does not apply to existing ASPs and instruments made under them in the period since devolution and up to 4 June 2010. The Interpretation Order continues 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 55(2).

Acts of Parliament and instruments made under them and hybrid instruments

15. [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 Acts of Parliament 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 (a “hybrid” instrument). This ensures that the same interpretative provisions apply to the whole of that hybrid instrument.

Disapplication

16. 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 provisions of [Part 1](#) cannot have been intended to apply.
17. 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

18. Subsections (6) and (7) make the [Part](#) applicable to a provision of an ASP or instrument in the same way as the [Part](#) applies to the whole ASP or instrument.

[Section 2 - Commencement of Acts of the Scottish Parliament](#)

19. This section contains the default rule that applies where an ASP (or, by virtue of section 1(6), a provision of an ASP) is silent as to commencement.
20. 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 of the Scottish Parliament and Scottish instruments: time](#)

21. This section applies where an ASP or Scottish instrument (or, by virtue of section 1(6) and (7), a provision of an ASP or instrument) specifies the day on which it is to come into force. The Act, instrument or provision comes into force at the beginning of the day.

Section 4 - Exercise of powers before commencement of Act of the Scottish Parliament

22. This section enables certain powers conferred by a provision of an ASP to be exercised during the “pre-commencement period” if it is necessary or expedient to do so. Subsection (3) defines the “pre-commencement period” as 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. 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.
23. 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.

Section 5 - Power to appoint to an office

24. 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 makes it unnecessary for ASPs to deal with these matters (except in cases where some other provision is wanted from a policy viewpoint). Second, it will promote consistency of approach as between ASPs where there is 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

25. This section provides 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 applies where an ASP confers power to make any instrument, not just some instruments.

Section 7 - Carrying out of powers and duties more than once

26. This provision replicates the effect of the existing provision in paragraph 9 of Schedule 1 to the Interpretation Order by 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

27. **Section 8** is a new section in the sense that it does not have an equivalent in either the Interpretation Order or the 1978 Act. It applies where an ASP confers power on the Scottish Ministers to bring the ASP into force on a day appointed by them by Order.

Subsection (2) provides that the power may be exercised so as to appoint different days for different purposes.

Sections 9 to 11 - References to Acts of the Scottish Parliament, Acts of Parliament and Acts of the Parliaments of Scotland

28. 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 how ASPs are to cite an Act of Parliament, or an Act of the Parliaments of Scotland up to and including 1707.
29. 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

30. This section deals with references in ASPs and Scottish instruments to “EU instruments” (which is an expression listed in schedule 1). 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” up to the day on which the ASP containing the reference receives Royal Assent or the Scottish instrument containing the reference is made. So the section supplies a clear cut-off point for ascertaining the version of the EU instrument to which the ASP or Scottish instrument refers.
31. The approach in this section is different from that 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 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

32. 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” 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.
33. The expression “enactment” is defined in schedule 1 to mean an Act of Parliament, 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

34. This section is based on paragraph 15(2) of Schedule 1 to the Interpretation Order. 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.
35. 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

36. 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.
37. 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

38. 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

39. 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 - Temporary Acts of the Scottish Parliament and Scottish instruments

40. This section provides that sections 15 to 17 apply 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 of paragraph 13(2) of Schedule 1 to the Interpretation Order.
41. A temporary ASP or instrument is one which ceases to have effect at a particular time. For example, an ASP might contain a provision saying that it ceases to have effect 5 years after it comes into force. It is because its life is ended by expiry rather than repeal that this section is necessary.

Section 19 - Effect of repeal and re-enactment

42. 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

43. 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 under which the Crown is bound by an ASP or Scottish instrument by necessary implication. The position as to which Acts of Parliament and instruments made under them bind the Crown remains unaffected by this provision.

44. In view of this provision, section 1(2)(b) is disapplied in relation to section 20 by section 1(3). This is necessary because if section 1(2)(b) did apply it would undermine the effect of section 20(2) (the effect of which is to abolish the common law rule under which the Crown is bound by legislation by necessary implication).

Section 21 - Forms

45. [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, the form is not invalid. This will avoid situations arising where a form may be considered invalid because of a minor defect in it.

Section 22 - Number

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

Section 23 - References to time of day

47. This section replicates paragraph 6 of Schedule 1 to the Interpretation Order by providing that references to the time of day in an ASP or Scottish instrument 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

48. 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 of Schedule 1 to the Interpretation Order.

Section 25 - Definitions

49. Subsection (1) provides that if a word or expression that appears in schedule 1 is used in an ASP or Scottish instrument it has the meaning given in that schedule. The schedule contains words and expressions that occur reasonably frequently in ASPs and Scottish instruments. It avoids the necessity of having to define in a particular ASP or instrument any word or expression that is listed in the schedule. The section largely replicates the effect of Article 6(2) of the Interpretation Order.
50. 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 subsection (2) confers power on the Scottish Ministers to modify the schedule by order. The power is subject to the affirmative procedure.

Section 26 - Service of documents

51. This section makes provision about 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 applies whenever an ASP or Scottish instrument authorises or requires a document to be served on a person. As the words in brackets in subsection (1) indicate, nothing turns on the verb used.
52. Subsection (2) sets out 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).
53. Subsection (5) provides that where a document is served by post, on an address within the United Kingdom, it is taken to have been received 48 hours after it is sent. Similarly when a document is served using electronic communications, it is also taken to have been received 48 hours after it is sent. These are rebuttable presumptions given the

potential difficulties with postal service and problems which may arise with delivery by service providers/internet for email.

Tables

54. The first table below provides a list of corresponding and omitted provision of the Interpretation Order as compared with the provisions in the Act.
55. The second table lists the provisions in Parts 1 and 2 of the Act 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 Act or (where a provision of the Order is not reproduced) states the reason for its omission.

<i>Provision of Interpretation Order</i>	<i>Corresponding provision of Act or reason why omitted</i>
Article 1	omitted - unnecessary
Article 2(1)	schedule 1 (definition of “enactment” and section 1(b) 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
Article 7(1)	omitted – different drafting approach (specific provision made in Act)
Article 7(2)	omitted – Act does not apply to deeds, documents or other instruments
Article 8	omitted - unnecessary
Schedule 1 paragraph 1	omitted - unnecessary

*These notes relate to the Interpretation and Legislative Reform (Scotland)
Act 2010 (asp 10) which received Royal Assent on 3 June 2010*

<i>Provision of Interpretation Order</i>	<i>Corresponding provision of Act or reason why omitted</i>
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
“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

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<i>Provision of Interpretation Order</i>	<i>Corresponding provision of Act or reason why omitted</i>
“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 3 OF
ACT AND THEIR CORRESPONDING PROVISIONS IN
THE INTERPRETATION ORDER AND THE 1978 ACT

<i>Provision of Act</i>	<i>Corresponding provision of Interpretation Order</i>	<i>Corresponding provision of 1978 Act</i>
1	Articles 6(1) and 7(1)	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

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<i>Provision of Act</i>	<i>Corresponding provision of Interpretation Order</i>	<i>Corresponding provision of 1978 Act</i>
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
21	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	Schedule 1
“Act of Parliament”	Schedule 2	Schedule 1
“Act of the Scottish Parliament”	Schedule 2	n/a
“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

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<i>Provision of Act</i>	<i>Corresponding provision of Interpretation Order</i>	<i>Corresponding provision of 1978 Act</i>
“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
“the Privy Council”	Schedule 2	Schedule 1
“registered”	Schedule 2	Schedule 1
“registered medical practitioner”	Schedule 2	Schedule 1
“rules of court”	Schedule 2	Schedule 1
“Scotland”	Article 6(3)	n/a
“the Scottish Administration”	Article 6(3)	n/a
“Scottish instrument”	n/a	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

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<i>Provision of Act</i>	<i>Corresponding provision of Interpretation Order</i>	<i>Corresponding provision of 1978 Act</i>
“subordinate legislation”	Article 6(3)	section 21
“United Kingdom”	Schedule 2	Schedule 1
“writing”	Schedule 2	Schedule 1