

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT - BACKGROUND

3. The provisions of the Act are of a highly technical nature. The Act broadly restates the existing law contained in the three statutory instruments listed in paragraph 4 below. Any departures from the existing position are highlighted where appropriate. Specifically the Act 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.
4. Up until now 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”).
5. Before introducing the Bill, the Scottish Government carried out an extensive consultation exercise which included the publication on 12 January 2009 of a consultation paper and draft Bill - <http://www.scotland.gov.uk/256959>. The Act substantially implements the proposals contained in that consultation paper but is not identical to the draft Bill as it includes changes made before introduction as well as amendments made during its parliamentary passage.

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.

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

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

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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>
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
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)

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

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

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<i>Provision of Act</i>	<i>Corresponding provision of Interpretation Order</i>	<i>Corresponding provision of 1978 Act</i>
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
“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

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

Part 2: Scottish Statutory Instruments

Overview

56. The main purpose of Part 2 of the Act is to make provision regarding the parliamentary scrutiny of “devolved subordinate legislation”. That expression is defined in section 37 of the Act to mean subordinate legislation contained in a Scottish statutory instrument (“SSI”), excluding special procedure orders (which are dealt with in Part 4 of the Act). 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”).

Section 27 - Definition of “Scottish statutory instrument”

57. 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 of making, confirming or approving orders, regulations and rules;
 - any function of Her Majesty of making an Order in Council which is conferred by an ASP, a Scottish instrument (as defined by section 1(4)) or any other enactment provided the function is exercised within devolved competence (as defined by section 54 of the Scotland Act 1998);
 - any function of the High Court of Justiciary of making an act of adjournal; and
 - any function of the Court of Session of making an act of sederunt.
58. 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 Act 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.
59. Subsection (5) repeals section 10 of the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1966 \(c.19\)](#). That section provided for the functions of making acts of adjournal and acts of sederunt, absent any provision to the contrary, to be exercisable by SI. That section is no longer required as section 27(2)(d) and (e) of the Act provide for the functions of making acts of adjournal and acts of sederunt to be exercisable by SSI.
60. Subsection (6) introduces schedule 2. Schedule 2 (discussed in more detail below) modifies enactments that predate the Act to reflect the provision made in section 27 for classifying documents as SSIs.

Section 28 - Instruments subject to the negative procedure

61. [Section 28](#) defines what is meant when an enactment provides that devolved subordinate legislation is subject to the negative procedure.
62. Under the negative procedure the legislation is made (i.e. signed) 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 period of 21 days specified in the Order is 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;

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- 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.
63. Subsections (4) to (7) explain the effect of the Parliament making an annulment resolution.
 64. 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.
 65. 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.
 66. 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

67. **Section 29** defines what is meant when an enactment provides that devolved subordinate legislation is subject to the affirmative procedure.
68. **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.
69. **Section 29(3)** provides that an SSI is not properly made and has no effect if the statutory pre-condition 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.
70. **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

71. **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.
72. 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.
73. 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).
74. 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)

75. **Section 31** makes provision about the consequences of failure to lay an 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).
76. 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 (as defined by subsection (6)) 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 of Article 10(3) of the SI Order.

Section 32 - Laying of Scottish statutory instruments before the Scottish Parliament

77. **Section 32** defines what laying an SSI or draft SSI before the Parliament entails where an enactment authorises or requires laying. It provides that, unless a contrary intention appears, laying an SSI or draft SSI means taking such steps as the Parliament's standing orders specify.
78. Subsection (3) provides that failure to lay an 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 certain powers

79. **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.
80. Subsection (6) 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.
81. Subsection (7) makes clear that a power subject to the procedure commonly known as the emergency procedure cannot be combined with a power subject to any other procedure. Under the emergency procedure, an instrument can come into force immediately upon being made but can remain in force for a specified period only unless approved by parliamentary resolution.

Section 34 - Power to change procedure to which subordinate legislation is subject

82. **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.
83. 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 made subject to either the negative or affirmative procedure.

Section 35 - Procedures prescribed in pre-commencement enactments

84. 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

85. 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.

Section 37 - Interpretation of Part 2

86. This section provides for the interpretation of the expressions used in Part 2.

Part 3: Publication of Acts and Instruments

Overview

87. [Part 3](#) of the Act makes provision about the numbering, printing, publication and preservation of ASPs and SSIs.

Section 38 - Official prints of Acts of the Scottish Parliament

88. This section restates and replaces articles 3(1) and (2) and 4 of the Interpretation Order.
89. [Section 38](#) 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 2010 asp 10. Subsections (6) and (8) make 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”.

Section 39 - Publication of official prints of Acts of the Scottish Parliament

90. This section restates and replaces article 3(3) and (4) of the Interpretation Order.
91. It makes provision for the printing and publication of the certified copy of every 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. The QPS is also empowered to make other arrangements for the publication of ASPs, for example on a website.

Section 40 - Preservation of official prints of Acts of the Scottish Parliament

92. 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.
93. 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

94. [Section 41\(1\)](#) requires the responsible authority, as soon as possible after an 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](#).
95. [Section 41\(3\)](#) provides that, in criminal proceedings for an offence consisting of a contravention of an 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, or on behalf of, the responsible authority to bring the SSI to the notice of

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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

96. 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. The regulations made must make provision for the publication of all instruments on a website or by other electronic means.
97. 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 43 - Preservation of Scottish statutory instruments

98. 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 43(2) obliges the Keeper to preserve every SSI received.

Section 44 - Publication in the Gazettes

99. This section makes provision as to what is meant when any enactment requires an 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 45 - No duty to print Scottish statutory instruments

100. This section amends section 92(1)(a) of the Scotland Act 1998 to remove the duty on the QPS to print copies of SSIs. The duty to print imposed by the Scotland Act is being removed to reflect the greater emphasis being placed by sections 41 and 42 on publication (particularly online publication).

Section 46 - Queen’s Printer: delegation of functions

101. [Section 46](#) provides for the delegation of any of the functions conferred on the QPS by Part 3 of the Act or by regulations made 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 47: Interpretation of Part 3

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

Part 4: Orders Subject to Special Parliamentary Procedure

Overview

103. The main purpose of Part 4 of the Act 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 \(S.I. 1999/1593\)](#) (“the SPP Order”).

Sections 48 to 53

104. This Part replicates the effect of the SPP Order. It provides that the following procedure is to apply to an order subject to SPP:—
- the order is to be advertised in the Edinburgh Gazette (and a local newspaper if the order relates to a particular area);
 - if the order is objected to (and the objection is not frivolous or concerned with a question of compensation which can be referred to an arbiter) the order must be confirmed by an ASP. The Bill for that ASP is to be treated as a Private Bill unless the Parliament provides for a special procedure in its standing orders;
 - if the order is not objected to it must be laid before the Parliament. The order may come into force 40 days after being so laid, unless the Parliament resolves that it be annulled.

Part 5: Laying of Documents Other Than Scottish Statutory Instruments

105. **Section 54** makes provision as to what is meant when an enactment requires or authorises a document other than an SSI, or a draft SSI, to be laid before the Parliament (for instance the annual report of a Government agency). Like section 32 (which explains what laying an SSI or draft SSI before the Parliament means) laying other documents before the Parliament is defined to mean taking such action as the Parliament's standing orders require.

Part 6: Miscellaneous and General

Section 55 - Consequential revocation of transitional orders

106. **Section 55** makes provision for the revocation of the transitional orders.

Section 56 - Orders

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

Section 57 - Ancillary provision

108. **Section 57(1)** confers on the 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 Act. 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.
109. **Section 57(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 Act'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.

Section 58 - Short title and Commencement

110. **Section 58** makes provision for the short title of the Act. It provides that the Act comes into force on the day after the date on which it receives Royal Assent except for Parts 2 (Scottish Statutory Instruments), Part 4 (Special Parliamentary Procedure), Part 5 (Laying of Documents other than SSIs) and section 55(3) (revocation of the SI Order). These provisions are to be brought into force on a day or days appointed by Scottish Ministers.

Schedule 1: Definition of Words and Expressions

111. The schedule supplies definitions of commonly-used words and expressions. Words and expressions have been included 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

112. **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 55 of the Act will revoke the SI 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 Act. This schedule achieves that.
113. 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 that such ASPs need to be caught 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.
114. **Paragraph 2** applies to the Scottish Ministers’, the First Minister’s and the Lord Advocate’s functions under pre-commencement enactments of making, confirming and approving orders, regulations and rules. It provides that any enactment which provides for the function to be exercisable by SI ceases to have effect. By virtue of section 27(2)(a) such functions are, by default, exercisable by SSI. If, however, the pre-commencement enactment does not provide for the function to be exercisable by SI it would not have been exercisable by SSI in terms of the SI Order. Accordingly paragraph 2(3) provides that if no provision has been made for the function to be exercisable by SI, it is not to be exercisable by SSI. Any orders, regulations or rules made in exercise of the function will therefore not be caught by the definition of SSI due to the exception to the default rule in section 27(3)(a).
115. **Paragraph 3** applies to functions of Her Majesty, which are exercisable within devolved competence, of making Orders in Council under pre-commencement enactments. It provides that section 1 of the 1946 Act ceases to apply to such functions. That section provides that, by default, every Order in Council is to be an SI. By virtue of section 27(2)(c) Orders in Council within devolved competence will, by default, be SSIs instead. Paragraph 3(3) provides that if any enactment disapplies section 1 of the 1946 Act (that is, provides for a particular function of making an Order in Council not to be exercisable by SI), the function is not to be exercisable by SSI. Any Order in Council made in exercise of such a function will therefore not be caught by the definition of SSI in the Act due to the exception to the default rule in section 27(3)(a).
116. **Paragraph 4** applies to the High Court of Justiciary’s functions of making acts of adjournal and to the Court of Session’s functions of making acts of sederunt under pre-commencement enactments. If the pre-commencement enactment conferring the function provides that it is not to be exercisable by SI, paragraph 4(2) provides for it not to be exercisable by SSI.
117. **Paragraph 5** applies to other subordinate legislation making functions under pre-commencement enactments. Specifically, it applies to the Scottish Ministers’, the First Minister’s and the Lord Advocate’s functions of making, confirming and approving subordinate legislation other than orders, rules and regulations. It also applies to the subordinate legislation making functions of devolved Scottish public authorities (as defined by paragraph 1(1)) and to functions of making, confirming or approving

devolved subordinate legislation conferred on anyone other than a Minister of the Crown. Section 27 provides for such functions to be exercisable by SSI only if an enactment provides for them to be exercisable by SSI. Paragraph 5(2) makes provision to that effect in relation to any function which a pre-commencement enactment states is exercisable by SI.

Schedule 3: Scottish Statutory Instruments: Procedures Prescribed in Pre-Commencement Enactments

118. 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.
119. It provides that the negative procedure (defined by section 28) applies 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).
120. It provides that the affirmative procedure (defined by section 29) applies 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).
121. It provides that section 30, which requires the instrument simply to be laid before the Parliament, applies 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).
122. To the extent that pre-commencement 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

123. 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 to that Act.
124. 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.
125. [Schedule 4](#) accordingly provides that, where any pre-commencement enactment provides for:

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- an SI to be subject to annulment in pursuance of a resolution of the Parliament, sections 28 and 31 apply to it as they apply in relation to an 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 applies to it as it applies in relation to an SSI which is subject to the affirmative procedure; and
 - an SI to be laid before the Parliament (but it is to be subject to neither the negative nor the affirmative procedure), sections 30 and 31 apply to it as they apply in relation to an SSI.
126. [Schedule 4](#) also applies the provisions of section 32 (which defines what it means for an instrument to be laid before the Parliament) to SIs and draft SIs laid before the Parliament.