

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT - BACKGROUND

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

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- 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;
 - 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

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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.