

SCOTLAND ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS (AND SCHEDULES)

Part 4: Miscellaneous

Section 34: Convention rights and EU law: role of the Advocate General in relation to criminal proceedings

192. This section amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). *Subsection (3)* inserts a new section 288ZA into the 1995 Act, subsections (2) and (3) of which contain a definition of a “compatibility issue” as a question raised in criminal proceedings as to:
- (a) whether a public authority has acted in way that is unlawful under section 6(1) of the Human Rights Act 1998 or incompatible with European Union law;
 - (b) whether an Act of the Scottish Parliament, or a provision of such an Act, is incompatible with the European Convention on Human Rights or with EU law.
193. The new section inserted by *subsection (3)* also gives the Advocate General for Scotland a right to take part in criminal proceedings so far as they relate to a compatibility issue. *Subsection (7)* amends section 288A of the 1995 Act to allow the Advocate General for Scotland, in certain circumstances, to refer a compatibility issue to the High Court for their opinion following the conclusion of trial proceedings.

Section 35: References of compatibility issues to the High Court or Supreme Court

194. *Section 35* inserts a new section 288ZB into the 1995 Act providing powers for compatibility issues to be referred to the High Court and to the Supreme Court in certain circumstances. A lower court may refer a compatibility issue to the High Court, constituted as an appeal court. The Lord Advocate and the Advocate General for Scotland may require a lower court to refer a compatibility issue to the High Court, constituted as an appeal court. Where the Lord Advocate or Advocate General for Scotland make such a referral, the High Court may determine the issue itself or refer the issue to the Supreme Court.
195. If the High Court, acting as an appeal court, is considering a compatibility issue, other than on a reference, then the High Court could refer the compatibility issue to the Supreme Court. In these circumstances the Lord Advocate or Advocate General for Scotland could require the High Court to refer the compatibility issue to the Supreme Court.

Section 36: Convention rights and EU law: criminal appeals to the Supreme Court

196. *Subsection (2)* amends section 57(3) of the 1998 Act so that acts or failures to act by the Lord Advocate in prosecuting any offence, or as head of the system of criminal prosecutions in Scotland, are not rendered *ultra vires* by virtue of section 57(2) of the 1998 Act.

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197. *Subsection (3)* amends section 102 of the 1998 Act so that the Supreme Court may only determine the compatibility issue. The power to remove or limit any retrospective effect of that decision, or to suspend its effect, is to be exercised by the High Court.
198. *Subsection (4)* amends the definition of a “devolution issue” in paragraph 1 of Schedule 6 to the 1998 Act so that a matter which is a compatibility issue cannot also be a devolution issue.
199. *Subsections (5) and (6)* amend the 1995 Act to provide a right to appeal a compatibility issue from the High Court, constituted as an appeal court, to the Supreme Court. Such an appeal can only be made with the permission of the High Court or the Supreme Court (although such permission is not needed if the compatibility issue was referred to the High Court by the lower court at the request of the Lord Advocate or Advocate General for Scotland). An application for permission to appeal has to be made to the High Court within 28 days of the determination of the appeal or such longer period as the Court considers equitable. If the High Court refuses permission, an application to the Supreme Court has to be made within 28 days of the date of the High Court’s refusal of permission. Again the time limit can be extended if the Court considers this equitable.
200. *Subsections (5) and (6)* also provide that the new appeal right to the Supreme Court can only apply to the determination of a compatibility issue. The Supreme Court may reformulate the compatibility issue but it can only do this for the purpose of determining the compatibility issue. The powers of the Supreme Court can only be exercised to determine the compatibility issue and once the Court has done this it must remit the proceedings to the High Court.

Section 37: Time limits for appeals on devolution issues in criminal proceedings

201. This section amends Schedule 6 to the 1998 Act to provide time limits for appeals to the Supreme Court in relation to devolution issues arising in criminal proceedings. An application has to be made to the High Court for permission to appeal within 28 days of determination of the appeal or such longer period as the Court considers equitable. If the High Court refuses permission, an application to the Supreme Court has to be made within 28 days of the date on the High Court’s refusal of permission. Again the time limit can be extended if the Court considers this equitable. The time limits are the same as those that apply in relation to compatibility issue appeals to the Supreme Court in criminal proceedings by virtue of section 36.

Section 38: Review and power to amend sections 34 to 37

202. This section requires the Secretary of State to arrange a review of the provision made by sections 34 to 37. The review has to take place within 3 years of the new appeal right for compatibility issues coming into force, but could take place earlier if the Secretary of State considers this to be appropriate.
203. *Subsection (4)* gives the Secretary of State power to make an order amending the provision made by sections 34 to 37 and to make further provision about these matters. The first order made after the conclusion of the review will have to take account of the review. An order made by the Secretary of State would be subject to the affirmative resolution procedure.

Section 39: Maximum penalties which may be specified in subordinate legislation

204. Section 113(10) of the 1998 Act specifies the maximum penalties that may be applied to criminal offences created in subordinate legislation made under powers conferred by the 1998 Act (for example, orders made under section 104 of the 1998 Act, which may make provision in consequence of any provision made by or under an Act of the Scottish Parliament).

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205. Currently section 113(10) restricts the penalties which can be imposed for new criminal offences created in subordinate legislation under the 1998 Act to a maximum of three months imprisonment or a fine not exceeding level 5 on the standard scale on summary conviction and a maximum of two years imprisonment on conviction on indictment.
206. *Subsection (2)* substitutes section 113(10) with new subsections (9A), (9B) and (10).
207. New subsection (9B) changes the maximum penalties which may be applied to offences created in relation to Scotland to reflect summary justice reforms made by the Scottish Parliament in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. New subsection (10) provides that the maximum penalties which may be applied to offences created in relation to England and Wales and Northern Ireland remain the same as currently provided for by the 1998 Act, other than a change to the maximum fine which may be applied to offences which are triable either way (where correct terminology of the “statutory maximum” now applies – subsection (9B) makes a similar change in relation to Scotland for either way offences).
208. *Subsection (3)* provides a power for Her Majesty, by Order in Council, to amend subsection (9B) or (10) so as to change any period of imprisonment or amount of fine specified there. *Subsection (4)* amends Schedule 7 to the 1998 Act to provide that Type A procedure is applied to such Orders. Paragraph 2 of Schedule 7 defines Type A procedure as meaning that no recommendation to make the legislation is to be made to Her Majesty in Council unless a draft of the Order has been subject to the affirmative procedure in both Houses of Parliament and also the Scottish Parliament.

Section 42: Power to make consequential, transitional and saving provision

209. This section confers powers on the Secretary of State or the Treasury to make consequential or transitional provision by order.
210. *Subsection (1)* of this section gives the Secretary of State the power, by order, to make provision consequential on Parts 1 and 2 and the other provisions in Part 4 of the Act.
211. *Subsection (2)* gives the Secretary of State the power, by order, to make transitional or saving provision in connection with the coming into force of those provisions of the Act.
212. *Subsection (3)* gives the Treasury the power, by order, to make provision consequential on section 29 or 31 and transitional or saving provision in connection with the coming into force of any provision of Part 3.
213. *Subsection (4)* provides that provision under the section may amend, repeal or revoke an enactment passed or made before the Act was passed.
214. *Subsection (5)* defines ‘enactment’ for the purposes of this section.
215. *Subsection (6)* provides that where a statutory instrument made under this section containing an order under subsection (1) or (2) amends or repeals primary legislation then it is subject to draft affirmative procedure in both Houses (otherwise *subsection (7)* provides for negative procedure to apply).
216. *Subsection (8)* provides that any instrument made by the Treasury under subsection (3) which amends or repeals any provision of an Act is subject to draft affirmative procedure in the House of Commons (otherwise *subsection (9)* provides for negative procedure in the Commons to apply).

Section 44: Commencement

217. *Subsection (1)* of this section provides for certain provisions to come into force on the day the Act is passed.
218. *Subsection (2)* provides for certain other provisions to come into force 2 months after the Act is passed, including most of the provisions of Part 3 (finance). But this is subject

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to *subsection (3)*, which provides for certain sections dealing with finance to have effect according to their own provisions. In relation to the provisions for income tax, this is because they need to take effect *in relation to a particular tax year*, rather than from a particular date. The provisions in sections 25(1) to (6) and section 26(8) enable the Treasury to specify the relevant tax year in each case. In relation to SDLT and landfill tax, the Treasury needs to have discretion to disapply those taxes, so as to synchronise with the coming into force of the two devolved taxes in Scotland. The provisions in sections 29(4) (SDLT) and 31(4) (landfill tax) give the Treasury this discretion.

219. *Subsection (4)* provides that section 25(7) and Schedule 2 and section 32 of the Act come into force on such day as the Treasury may, by order made by statutory instrument, appoint.
220. *Subsection (5)* provides that the other provisions of the Act not dealt with in subsections (1) to (4) of the section come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint.
221. *Subsection (6)* provides that the Secretary of State or the Treasury may appoint different days for different purposes.