EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 2012 (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) ORDER 2013

2013 No. 7 (S. 1)

1. 1.1 This explanatory memorandum has been prepared by the Office of the Advocate General and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order makes transitional provision following the commencement of the provisions in the Scotland Act 2012 ("the 2012 Act") regarding compatibility issues and devolution issues. The Order makes transitional provision to deal with devolution issues that have been raised in Scottish criminal proceedings prior to 22nd April 2013. The Order also makes a number of consequential amendments to secondary legislation as a result of the commencement of the provisions in the 2012 Act relating to compatibility issues.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Sections 34 to 36 of the 2012 Act make provision for a new right of appeal in relation to "compatibility issues". These sections will come into force on 22nd April 2013. "Compatibility issues" are questions relating to compatibility with the European Convention on Human Rights ("ECHR") or EU law arising in Scottish criminal proceedings. Issues which are compatibility issues would previously have been "devolution issues". The Order makes transitional provision to set out how devolution issues which arose before the 22nd April 2013 will be treated if they would have been compatibility issues had they arisen on or after 22nd April 2013.

4.2 Section 37 of the 2012 Act imposes time limits for seeking permission to appeal to the Supreme Court against the determination of a devolution issue arising in criminal proceedings. The Order makes provision for the time limits to apply in relation to devolution issues in criminal proceedings determined by the High Court of Justiciary before 22nd April 2013.

4.3 Consequential amendments to the Legal Aid (Scotland) Act 1986 and the Criminal Justice and Licensing (Scotland) Act 2010 are also needed as a result of the commencement of sections 34 to 36 of the 2012 Act. However as these amendments are

to an Act of Parliament and to an Act of the Scottish Parliament they are subject to the affirmative resolution procedure and so are included in a separate instrument.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Following the coming into force of the Scotland Act 1998 ("the 1998 Act"), the UK Supreme Court and its predecessors were given a role in determining "devolution issues" arising in court proceedings. Devolution issues under the 1998 Act include questions of whether an Act of the Scottish Parliament is within its legislative competence, and whether the proposed or purported exercise of a function by the Scottish Ministers would be incompatible with any of the rights under the ECHR or with the law of the European Union.

7.2 The 2012 Act makes substantial amendments to this aspect of the 1998 Act and creates a new scheme of appeals in relation to "compatibility issues". These are questions arising in criminal proceedings in Scotland about compatibility with the ECHR or EU law. These issues would currently be dealt with as devolution issues under the regime created by the 1998 Act. Under the 2012 provisions, the remit of the Supreme Court is to determine the compatibility issue and then remit the case to the High Court for such further action as that court should see fit.

7.3 The policy intention of this instrument is to ensure that sections 34 to 37 of the 2012 Act take effect as quickly as possible to prevent two different criminal appeals systems operating in Scotland for a lengthy period of time and allow the benefits of the new system to take effect. This is achieved by converting certain existing devolution issues to compatibility issues on or shortly after 22nd April 2013. This will only apply to devolution issues that would have been compatibility issues had they arisen on or after 22nd April 2013. It is also achieved by making provision for the time limits for seeking permission to appeal to the Supreme Court against a determination of a devolution issue to apply to such an issue that was determined before 22nd April 2013.

8. Consultation outcome

8.1 An informal, targeted consultation, on this Order was undertaken with key stakeholders. Feedback was received and the Order was adjusted in the light of the responses received.

9. Guidance

9.1 No guidance is being prepared in respect of this instrument. However, steps are being taken to ensure that practitioners are made aware of the transitional arrangements provided for in this Order.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Section 38 of the 2012 Act requires the Secretary of State to review the provision made by sections 34 to 37 of the 2012 Act as soon as practicable after the end of 3 years beginning with the day on which section 36(6) comes into force (or earlier if the Secretary of State considers it appropriate). In other words, a review is required to take place as soon as practicable after the 22nd April 2016. Section 38(3) of the 2012 Act sets out what the review must consider, and this includes whether any changes are required to the provision made by sections 34 to 37.

13. Contact

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can answer any queries regarding the instrument.