Dear Dougie

I refer to your letter of 22 September 2009 regarding the above in which you sought explanations for a number of matters related to the ILRB’s DPM. As requested I provide our explanations below.

Section 1(7) – Application of Part 1 – Definition of “Scottish instrument”

(a) to explain why it has elected to adopt a more restricted and closed definition of Scottish instrument together with a power to amend the definition which is a change in approach to that taken by the Interpretation Order and the draft Bill it consulted upon;

Scottish Government Response

The definition of “Scottish instrument” in section 1(4) of the consultation draft of the Bill departed from the existing approach in the Interpretation Order. In article 2(1) of the Order the expression means “Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made under an Act of the Scottish Parliament”. The section in the consultation draft was framed in very wide terms and would have included the examples of instruments listed in the Interpretation Order as well as all other types of instrument made by virtue of an ASP. It would therefore include directions given by the Scottish Ministers as well as codes of practice and guidance issued under an ASP. The consultation paper invited views on whether the definition of “Scottish Instrument” should be as wide as proposed. It also asked whether or not it was thought preferable to provide an exhaustive list.

Respondents to the consultation generally favoured having a broad definition of “Scottish instrument” because it avoids the perceived difficulties with a “list” approach: the difficulty of compiling an exhaustive list; and the lack of flexibility to adapt to changing circumstances that would stem from having a list. However, some respondents raised concerns that a broad definition could catch documents which have not been made following a legislative process (such as guidance documents intended for the general public) and as such the application of legal principles of interpretation would not be appropriate.

As a result of the representations made in the consultation process, we felt that the overriding principle that the Bill should follow is that the definition should make it absolutely clear which types of instrument are caught. We therefore decided to adopt the more restricted definition used in the Bill as introduced in order to remove any uncertainty on what types of instruments
are, and are not, covered. However in order to address the concerns about lack of flexibility and the prospect of a list becoming out of date over time, we propose the power in section 1(7) to modify the definition in section 1(4).

In summary, sections 1(4) and (7) are intended to balance the need to establish legal certainty as to what is included in the definition of "Scottish instrument" with the desire to retain flexibility to amend the definition so that it is accurate and relevant in the future.

**SLC Question**

(b) to explain why it is considered necessary or appropriate to take a power to remove categories of Scottish instrument, as well as to add further types?;

**Scottish Government Response**

We have carefully considered this point but are of the view that it is both necessary and appropriate to keep the power to modify the definition of “Scottish instrument” in section 1(7) of the Bill. We would want to be able to add categories to the definition, as well as remove or amend as required, and the power to modify would allow us to do these things. This takes into account the ability to adjust terminology of the types of instruments caught if names were to change or to adjust a category which we did not intend to catch in its entirety and to substitute one type for a more restricted type. A power to only add categories would be too restrictive, particularly taking into account that this is a new regime and it is appropriate that there is flexibility in approach. Any modification would be by affirmative procedure and so would have appropriate Parliamentary scrutiny.

**SLC Question**

(c) to explain the effect of the exercise of the power in section 1(7) to remove any of the types of instrument listed in section 1(4) (in relation to the interpretation and construction of such types of instruments made on or after the day when Part 1 of the Bill comes into force but before the change to the list), that would be affected by the change, and to comment on whether any such effects are considered to be desirable?; and

**Scottish Government Response**

The Scottish Government would only propose removing a type of instrument from section 1(4) after careful consideration of all the likely consequences of such a change. We would also consider whether it was necessary to make savings or transitional provision in order to remove any undesirable effects that any change might have on existing Acts or instruments.

**SLC Question**

(d) to explain whether it is intended that Orders of Council, Acts of Sederunt and Acts of Adjournal should be included within the current scope of the list in
section 1(4) of the Bill as “Scottish instruments”, and whether this could be made clearer?

**Scottish Government Response**

It is not intended that section 1(4) includes Orders of Council and the provision as drafted does not include Orders of Council. Acts of Adjournal and Acts of Sederunt are intended to be covered and we will consider whether and, if so, what amendments may be required at Stage 2 to make it clearer.

**Section 25(2) – Definitions in schedule 1**

**SLC Question**

(a) Given it is not explained in the DPM, why is it intended to include words and expressions in Schedule 1 based on a “frequent use” test, rather than other reasons for inclusion that might be used?

**Scottish Government Response**

The purpose of an interpretation act is to shorten Acts and instruments by avoiding the need to repeat the most commonly used provisions or definitions of general application. Consequently, the words and expressions that are included in schedule 1 are those that are considered to appear most commonly in legislation and so pass what is referred to as the “frequent use” test. Those who responded to the consultation exercise did not propose any other selection criteria.

**SLC Question**

(b) Has the Government considered whether any of the definitions as listed in Schedule 1 should be exempt from the power to modify definitions; for example, because they are of fundamental constitutional importance?

**Scottish Government Response**

The Scottish Government did not consider it necessary to exempt any of the definitions provided in schedule 1 from modification. The definitions may only be changed if the Parliament is satisfied that an amendment is required and resolves to approve the change in an order. In any event, an Act of the Scottish Parliament or an instrument made under it can define what an expression means in any particular case.

**SLC Question**

(c) Can the Government explain why a power to modify is considered necessary rather than a power to add new definitions?

**Scottish Government Response**
The power to modify, as opposed to only add new, definitions to schedule 1 provided in section 25(2) provides flexibility for future events. It would, for instance, allow redundant words or expressions to be removed from the list. It may also be necessary to adjust an existing definition, for instance, where a later Act defines an expression.

**SLC Question**

(d) Has it been considered whether the exercise of the proposed general power to modify the definitions in Schedule 1 might alter the effect of existing Acts or instruments if terms are redefined in future?

**Scottish Government Response**

The Scottish Government would only propose the modification of a definition given in schedule 1 after careful consideration of all the likely consequences of such a change. We would also consider whether it was necessary to make savings or transitional provision in order to remove any undesirable effects that any change might have on existing Acts or instruments.

**SLC Question**

(e) Could the Bill make clearer that any future changes to the defined terms in Schedule 1 would only affect Acts or instruments made after the coming into force of the change?

**Scottish Government Response**

In the interests of legal certainty and in order to ensure compliance with ECHR any changes to definitions would be done on a case by case basis but we would ensure that the application of any change would be made clear.

**Section 34(2) – Power to change procedure to which subordinate legislation is subject**

**SLC Question**

Why has the Scottish Government considered that, following a resolution of the Parliament in terms of section 34(1), the Scottish Ministers should have the discretion, rather than the requirement, to make an order making the necessary modification of any enactment to give effect to the resolution?

**Scottish Government Response**

This was a matter covered by the Minister when he gave evidence to the committee on 28 April 2009. As he explained, the decision to give the Scottish Ministers discretion to make an order following upon a resolution of the Parliament reflects the constitutional principle that, with certain significant exceptions, resolutions of the Parliament are not binding on the Government. However, in the event of the Parliament passing such a resolution, the
Scottish Government will carefully consider how to proceed on a case by case basis.

Section 42(1) – Publication, numbering and citation: regulations

SLC Question

(a) how it envisages the power in section 42(2)(a) to prescribe the form of SSIs could be used? Has the Government considered if some ways of prescribing the form (as hypothetical examples, the length of instruments or formal requirements for the title) could affect the actual contents, and whether it is desirable to make clear in the power that the contents cannot be so prescribed?; and

Scottish Government Response

Section 42(2) elaborates upon the general power in terms of section 42(1) to make provision for or in connection with “the publication, numbering and citation of Scottish statutory instruments”. Given that context, the Scottish Government considers the power in section 42(2)(a) to prescribe the “form of instruments” to refer to, for instance, the design of any template to be used by QPS for publishing instruments and not to the content of the instrument. In the Scottish Government’s view any attempt to prescribe the content of instruments in terms of section 42(2)(a) would be ultra vires.

It is presently envisaged that section 42(2)(a) will be used to make ostensibly the same provision as is presently made by article 5(2) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999. A copy of the proposed Regulations will be forwarded to the SLC shortly.

SLC Question

(b) in relation to section 42(2)(g), can the Government clarify the present arrangements by which charges for copy instruments, lists and annual editions are set? Would the Government agree that paragraph (g) could enable charging for access to copy instruments on the OPSI or OQPS websites, and is it intended that any such (hypothetical) proposal could fall within the enabling powers in section 42?

Scottish Government Response

Charges for copy instruments, lists and annual editions are set under the contracts let in the name of The Queen’s Printer for Scotland. These contracts are based on the best possible prices which OQPS can obtain when they tender their service contracts and then by limiting any increases during the life of the contract to any movement in a combination of pricing indices (incl. RPI and Producer Price Indexes). In the case of individual copies of instruments this results in charges for printed copies being related strictly to the page extent of the item of legislation. The pricing of annual editions and
bound volumes is related to enabling the QPS contractor to recover the costs of production.

The Scottish Government agrees that section 42(2)(g) could, in some circumstances, enable charging for access to instruments online. However, no such charge is levied at present and the Government has no present intention to alter that. Should Government policy in this regard subsequently change, any regulation made under section 42(2)(g) would be subject to the affirmative procedure.

Jan Marshall
Deputy Director
Constitution and Parliamentary Secretariat
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