Dear Convener

During the evidence session that I attended in relation to the provisions of the Interpretation and Legislative Reform (Scotland) Bill on 03 November 09, I undertook to write to the Committee to clarify the Scottish Government’s position on two issues. The issues were:

(a) the omission of the word “necessary” from the provisions regarding breaches of the 28 day rule; and

(b) concerns raised by the Faculty of Advocates in relation to preservation of SSIs given that the Bill imposes no express obligation on the Queen’s Printer for Scotland (“QPS”) to print future Scottish statutory instruments (“SSIs”).

I also wish to take this opportunity to provide the Committee with an explanation of the Scottish Government’s reasoning for not providing an Equality Impact Assessment (“EIA”) for the Bill.

Section 31 – 28 Day Rule

Issue (a) was raised by Mr Chisholm (the relevant discussion appears in the Official Report of the evidence session at column 764).

Mr Chisholm noted that article 10(3) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (“the Transitional SI Order”), provides that an instrument subject to the negative procedure can only be brought into force fewer than 21 days after being laid where it is “necessary” to do so. Sections 28 and 31 of the Bill, which will replace articles 10 and 11 of the Transitional SI Order in making provision for the negative procedure, make no reference to a breach of what will become the 28 day rule having to be “necessary”. Mr Chisholm expressed concern that the consequence of that word’s omission might be to lessen the inhibition Governments feel about breaching the rule.

The Government confirms that it is certainly not its intention to usher in a less rigorous approach to breaches of the 28 day rule. Indeed it is precisely because the Government recognises the importance of giving the Parliament an opportunity to consider an instrument before bringing it into force that the provisions of the Bill will extend the period for that scrutiny from 21 to 28 days. If
the authority responsible for an instrument decides not to allow the full 28 days, the Bill will require that authority to explain its reasons in writing to the Presiding Officer. If the Parliament is not satisfied by those reasons then, as would happen at present, the Parliament could resolve to annul the instrument. The Bill does nothing to materially alter the current position and it certainly does nothing to weaken the position of the Parliament and its committees in determining whether a breach of the rule is justified.

In fact the converse is true. The word “necessary” has deliberately not been included in the Bill to ensure that, ultimately, it is for the Parliament, not the courts, to assess the adequacy of the reasons adduced for any breach of the 28 day rule.

As I alluded to during the meeting, I wrote to the Convener on 28 September 2008 to explain the Government’s understanding that article 10(3) of the Transitional SI Order is directory, not mandatory in effect. I wrote in the context of the Plastic Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2008 (SSI 2008/261). During the course of considering that instrument, it emerged that there was a difference in opinion between the Parliament and the Government about the meaning of article 10(3). The Parliament’s view was that a breach of the 21 day rule which is not objectively “necessary” renders the instrument legally invalid. If that view is correct, then ultimately the courts can be asked to decide whether a breach of the 21 day rule is “necessary”. The Government’s view was, and remains, that there is no legal significance to the word “necessary” in article 10(3). On the Government’s view, if the Parliament does not accept a breach of the 21 day rule to be justified it can resolve to annul the instrument. But if the Parliament accepts the reasons given by the responsible authority and decides not to annul the instrument, it should not be possible to reopen the issue in the courts and have the instrument declared invalid on the basis that the court takes a different view from the Parliament.

The Government considers it important, as a matter of constitutional principle, that it should be for the Parliament not the courts to decide whether to tolerate a breach of the 28 day rule. Moreover, allowing the matter to be dealt with in the courts risks prolonged uncertainty about the validity of an instrument. A legal challenge to the necessity of breaching the 28 day rule may not be raised until months, or even years after the instrument came into force. The court’s consideration of the issue, which may go through several appeal stages, could take months or years more. During all of that time citizens would be uncertain about whether they need to conform to the instrument’s provisions. That is not consistent with basic principles of good governance which require laws, as far as possible, to operate reliably and calculably.

To make the position clear going forward, the Bill contains no express stipulation of the circumstances in which a breach of the 28 day rule is permissible. Since there will be no statutory test, there will be no issue for the courts to exercise
jurisdiction over. The Bill thereby ensures that it will be solely for the Parliament to decide whether to accept the reasons given for a breach of the 28 day rule.

Section 42 – Publication and preservation of SSIs

Issue (b) was raised by Dr McKee’s question regarding section 1(6) of the Legal Deposit Libraries Act 2003 (“the 2003 Act”). The relevant discussion appears in the Official Report of the evidence session at column 767.

The 2003 Act is a re-enactment of section 15 of the Copyright Act 1911, which required publishers of print media to deposit a copy of printed publications with the legal deposit libraries (including the National Library for Scotland). The innovation of the 2003 Act is that it also makes provision which will allow the Secretary of State to incrementally extend the duty to deposit to encompass non-print media. However, to date, no Regulations have been made requiring non-print media to be deposited and thus if SSIs were only published electronically they would not, for the time being, be subject to the 2003 Act.

But, as the Scottish Government has consistently made clear, it has always been intended that the Regulations to be made under section 42 of the Bill will require the QPS to make printed copies of SSIs available to the public on request. It is the Scottish Government's view that any SSI so published will be subject to the requirement to be deposited in terms of the 2003 Act. The difficulty Dr McKee alluded to arises in the event that the UK Government makes Regulations under the 2003 Act requiring the deposit of electronic versions of SSIs. As he observed, section 1(6) of the 2003 Act states that a copy of a work is to be deposited “in the medium in which it is published”. That raises the question: if SSIs are published electronically and in print, in which media should they be deposited? Section 2(2) of the 2003 Act provides for that question to be answered by the Secretary of State in Regulations, but again no Regulations have yet been made. Accordingly the Scottish Government cannot, at this stage, deny the suggestion that the transmission of electronic copies of SSIs could, at some stage in the future, satisfy the delivery requirements of the 2003 Act.

However, the QPS does at present print annual editions containing all general and some local SSIs made each year, together with a list of the SSIs and an index. The annual edition does, in our view, fall to be delivered in terms of the Legal Deposit Libraries Act 2003.

The Scottish Government fully recognises the importance of ensuring a proper record is kept of all legislation. In that regard it is important to note that the preservation of SSIs is not solely secured by virtue of their being deposited with the legal deposit libraries. Currently the Keeper of the Records of Scotland (“the Keeper”) is under a general duty, in terms of the Public Records (Scotland) Act 1937, to preserve and make available public records. The preservation of SSIs is currently carried out by the Keeper under that general duty.
Specific provision for the preservation by the Keeper of official prints of ASPs is presently made by the Transitional SI Order. Section 40 of the Bill replicates that provision. In their response to our consultation on the Bill, the Faculty of Advocates were welcoming of the draft provision, which became section 40. They went on to suggest that all parliamentary publications should be dealt with in this manner.

I am at present considering whether or not to include in the Bill a specific duty on the Keeper to preserve SSIs, similar to that imposed on him by section 40 of the Bill in relation to ASPs. I am also considering whether or not to include a duty on the QPS to provide a printed copy of each SSI to the National Library of Scotland.

Equality Impact Assessment

The Scottish Government acknowledges that it has now become common practice for an EIA to accompany every Bill when introduced into the Parliament, and indeed all other session 3 Bills to date have had one. As the Committee will appreciate from both their own deliberations on the Bill and the Accompanying Documents, the provisions of the Interpretation and Legislative Reform (Scotland) Bill deal with matters of a technical, legal nature. The Bill deals principally with the minutiae of the processes for making SSIs and points of detail about the interpretation of ASPs and SSIs. As a consequence the Bill, unusually, has no direct or indirect impact on the general public, business, charities or any other organisation within civic Scotland. Accordingly an EIA was not thought necessary.

I hope that this information will assist the Committee in its deliberations.

Bruce Crawford MSP
Minister for Parliamentary Business
19 November 2009.