Thank you for inviting me to submit comments upon the above Bill.

I think that this Bill should be welcomed. It will provide an essential part of the legal architecture in Scotland which has been missing since devolution. It is surprising that for the past 10 years questions as to how ASPs are to be interpreted, and how SSIs made by Scottish Ministers are to be scrutinized by the Scottish Parliament, have been determined by transitional orders made under the Scotland Act by the UK Government\(^\text{1}\). It is long overdue that the Scottish Parliament and Government should make their own provision about such matters.

However, I have some comments upon Parts 1, 2, 4 and 7 of the Bill. These are contained in the attached Annexes 1-4. These comments reflect some of the comments which I made to the Scottish Government in April 2009 when they consulted upon their proposed Bill (“the consultation comments”)\(^\text{2}\). I have also written an article upon the Bill which is due to be published in the September issue of the Edinburgh Law Review.\(^\text{3}\)

I should declare an interest in the matters included in the Bill. I was the former Government lawyer in charge of the drafting of the various transitional orders which are to be superseded by the Bill. I was also a former advisor to the Consolidation Committee on the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill\(^\text{4}\) and to the Subordinate Legislation Committee upon their Inquiry into Regulatory Framework in Scotland from 2004 and until their 2007 Report\(^\text{5}\).

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\(^{2}\) These are available at http://www.scotland.gov.uk/Publications/2009/04/23115703/0

\(^{3}\) EdinLR Vol13 pp 487-493. The article is entitled “An opportunity missed. Some comments upon the Interpretation and Legislative Reform (Scotland) Bill”.

\(^{4}\) 1st Report 2003 of the Salmon and Freshwater Fisheries(Consolidation) (Scotland) Bill Committee

Comments upon Part 1 of the Bill: Interpretation

General
Part 1 of the Bill is based upon, and largely replicates the effect of the Interpretation Order\(^6\), with one or two exceptions. This Order was in turn based upon the Interpretation Act 1978 ("the 1978 Act") which deals with how Westminster Acts and instruments made under them are to be interpreted. This means that, by and large, ASPs are interpreted in a similar way to Westminster Acts.

In a few places, the provisions of the Interpretation Order have not been followed. This has mainly been because of the need to modernise and clarify their wording. Where this has occurred, the revised provisions in Part 1 are a considerable improvement upon what is in that Order and in the 1978 Act. I refer in particular to sections 4 (exercise of powers before commencement), 7 (carrying out of powers and duties more than once) and 14-19 (effect of repeals).

I also welcome the entirely new provisions, namely section 5 (which spells out what is implied when there is a power to appoint to an office), 8 (which spells out what is implied when there is a power to make a commencement order), 21 (which permits non-material deviations from a prescribed form) and 26 (which extends the existing provision as to how documents are to be served). All of these are useful provisions which will help to simplify ASPs.

I particularly welcome the main new substantive provision in section 20 which changes the law as to when the Crown is bound by an ASP or instrument. This will mean that the Crown will be bound by a future ASP or Scottish instrument unless it is expressly stated otherwise. This will not only introduce clarity and certainty into the law but it will put the Crown in the same position as any subject and thereby restore the position to what it was before 1707.

My other comments are criticisms of what is, and what is not, in Part 1 but they should be read against the background of my general welcome of what is in Part 1.

Principles of interpretation
As I point out more fully in my article, although Part 1 of the Bill purports to make provision about the interpretation of ASPs and Scottish instruments, it does not in fact do so, at least in any substantial way. As mentioned above, the Bill follows the Westminster model. The main purpose of that model is simply to shorten Acts and instruments by providing a dictionary which expresses what is implied by certain provisions or which defines certain terms which are commonly found in them\(^7\). It does not lay down any substantive principles or rules by reference to which the courts are to interpret such Acts.

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\(^7\) It also makes provision as to when Acts commence and the effect of repeals.
or instruments or which may assist them in doing so. Instead this is left entirely to the judges at common law.

I think that this is the wrong approach in principle. It is ultimately for the Parliament, and not the courts, to determine how its Acts or instruments are to be interpreted. The Parliament should therefore be prepared, where necessary, to lay down principles and rules which the courts should be required to take into account when interpreting its Acts and instruments. However, I do not think that it would be desirable, or even possible, to lay down a definitive code of interpretation, although others, such as Francis Bennion, may take a different view. Nevertheless, I share the view of the Law Commissions in their joint Report on the Interpretation of Statutes in 1969 that it would be useful to have some statutory provisions laying down substantive principles for certain purposes. As I said in my article,

“...It is, for example, still unsatisfactory not to know, without extensive and expensive litigation:

- how the courts will interpret a statutory provision and, in particular, whether and in what circumstances, and to what extent, they will adopt a literal or a purposive approach;

- whether breach of a statutory duty or provision will enable someone who suffers loss as a result of that breach to recover damages; and

- what materials the courts may take into account in interpreting a statutory provision and in what circumstances. This is particularly important now that the courts are also required, when interpreting a provision and in order to assess its compatibility with Convention rights, to examine what Parliament took into account in order to justify it."

There may well be other matters which require clarification by statutory provision. I appreciate that it may not be possible to frame suitable amendments to achieve those purposes in the context of this Bill in view of the extensive consultation which would be required upon them. However, I hope that the Committee might be persuaded to encourage Scottish Ministers to have the matter of the statutory interpretation of ASPs and Scottish instruments referred to the Scottish Law Commission for further consideration.

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8 It is only in certain exceptional cases that Parliament has given the courts a direction as to how to approach the interpretation of Acts or ASPs, such as in s 3 of the Human Rights Act 1998 and s 101 of the Scotland Act 1998.
9 Francis Bennion is the author of the standard work on Statutory Interpretation.
11 See e.g. Adams v Scottish Ministers 2004 SC 665.
Westminster legislation
The provisions of Part 1 apply for the interpretation of future ASPs and Scottish instruments. It does not apply to interpret Westminster legislation. This means, in particular, that it does not apply to interpret -

- Westminster legislation even in so far as they relate to devolved matters – with the exception of section 55 (meaning of enactment in Westminster legislation);

- the provisions of an ASP when it makes a textual amendment to Westminster legislation. There is no express provision to this effect but it seems to be regarded that such textual amendments do not form part of the ASP but the Westminster legislation. However, it is suggested that some clarification such as an express provision would be preferable in order to avoid questions being raised– see also the comments upon section 20 below relating to Crown application;

- the effect of the repeal of Westminster legislation by an ASP or a Scottish instrument; or

- the effect of the repeal of an ASP or Scottish instrument by Westminster legislation.

The main reason which is usually given for this is that questions regarding the interpretation and effect of Westminster legislation should be interpreted in accordance with the 1978 Act and not by any devolved legislation. Otherwise, it would be confusing, and perhaps even create uncertainty, if certain provisions in Westminster legislation fall to be interpreted in a different way from other provisions. Section 55 is the first and significant departure from this approach and will be commented upon in relation to Part 7.

However, this approach means

- that the provisions of an ASP or Scottish instrument will be subject to being interpreted by the provisions in this Bill except in so far as they textually amend or repeal a Westminster Act or instrument, when they will be interpreted in accordance with the 1978 Act;

- that the effect of the repeal of an ASP or Scottish instrument will depend upon whether it is repealed by Westminster legislation or by an ASP or Scottish instrument. If it is the former, its effect will be determined by the provisions of the 1978 Act.

This may cause some confusion. However, it does reflect the existing position. The reason why it does not seem to cause confusion to any great extent is that the existing provisions of the 1978 Act and the Interpretation Order are not substantially different from each other. Any difficulties may also be avoided by having express provisions. For example, what is frequently done when an ASP repeals a Westminster provision is to include express saving, transitional or transitory provisions in relation to such repeals which
would apply instead of or in addition to the provisions of sections 15-17 of the

I suggest that the Committee should consider whether this approach should
be continued in this Bill or whether the approach taken in section 55 should be
generalized so that Part 1 will apply to Westminster legislation which relates
to devolved matters. However, if the existing approach is followed, this may
constrain the extent to which the provisions of Part 1 can differ from those in
the 1978 Act without causing confusion in the interpretation of Westminster
legislation. Section 55 may in fact do that.

**Disapplication of provisions in Part 1: Section 1(2)(b)**

Section 1(2)(b) provides that the provisions of Part 1 do not apply in so far as
the context of the ASP or instrument “otherwise requires”, that is in so far as it
is implied from the context that it was not intended that they should apply. I
suggest that section 1(2)(b) should be omitted for two reasons.

Firstly, it creates uncertainty because it is frequently difficult to ascertain
whether the context of the Act or instrument impliedly “otherwise requires”.
This is precisely the same reason which is given in the Policy Memorandum
for abolishing the common law rule that the Crown is bound by an Act by
“necessary implication”\(^\text{12}\). These concepts merely create uncertainty.

Secondly, it is unnecessary. The provision only applies to future ASPs and
instruments. Accordingly, when drafting a provision in the future, if it is not
intended that some expression or other should not attract the meaning in Part
1, it should not be difficult for the drafter to say so expressly. Otherwise, the
only purpose of section 1(2)(b) is to protect the drafter from the
consequences of having omitted to do so. This is not a proper purpose for a
legislative provision.

**Definition of Scottish instrument: Section 1(4)**

I suggest that Scottish instrument should be defined as meaning any
instrument made by virtue of an ASP and not just, as section 1(4) is currently
drafted, only a selection of them. Why, for example, should the provisions of
Part 1 not apply to directions made by Scottish Ministers under an ASP?
Otherwise questions will arise, as they have in the past, as to whether a
power to make directions includes, without express mention, the power to
vary or revoke them. Such a power would be implied by section 6. If it was
thought that something made under an ASP might be regarded as an
instrument and it was not desired that Part 1 should apply to any particular
instrument, it would be easy enough to say so expressly.

**References to enactment: Section 14**

This section has the effect of providing that, when an ASP or instrument refers
to an enactment, the reference is ambulatory, that is it refers to the enactment
not only as it has been amended or extended or applied in the past but as it
will be amended or extended or applied in the future.

\(^{12}\) Section 20(2) and paragraph 23 of the Policy Memorandum.
It certainly should be clear whether such a reference to an enactment should be construed as being ambulatory or not. There are advantages in making such a reference ambulatory because, if it is not, there could be uncertainty and difficulties if the enactment is subsequently amended and there is no amendment to ensure that the reference to that enactment refers to the enactment as amended. I suspect that this may be reason why references to an enactment have usually been interpreted as ambulatory in practice because it is very rare to have an express provision updating those references.

However, making such references automatically ambulatory means that when the Parliament is passing a section which refers to an enactment, it does not know how that reference may be amended, extended or applied in the future which may alter the meaning and effect of that section from what was intended at the time it was first enacted. However, this may not be considered to matter because the amendment will in practice tend to be done by the same Parliament which should, at least in theory, consider the consequences of what that amendment will mean where there are past references to that enactment. Nevertheless, it is something for the Parliament to consider and decide where the balance of advantage lies.

Section 20: Application of Acts and instruments to the Crown

As mentioned above, I welcome this section. However, there may be some uncertainty as to whether it applies to an ASP or Scottish instrument, even when it contains provisions which make textual amendments to a Westminster Act. In other words, does it mean that the Crown will be bound by that textual amendment unless otherwise expressly provided or that the Crown will only be bound if it says so expressly or by necessary implication? It may be useful to have some clarification because at present it reads as if section 20 applies to the whole of the ASP so that, for example, the common law rule that the Crown is bound by necessary implication by an ASP is abolished in relation to all the ASP.

Schedule 1: References to expressions defined in the Scotland Act

Article 6(3) of the Interpretation Order provides that any expression which is listed in section 127(1) of the Scotland Act should have the same meaning as in that Act. This ensures that there is a consistency in the definition of expressions which are defined in the Scotland Act when those expressions are used in ASPs and Scottish instruments.

This provision is not reproduced in Schedule 1 to this Bill. Instead, Schedule 1 refers only to 4 expressions which are defined by reference to their definition in the Scotland Act – Scotland, the Scottish Administration, the Scottish Ministers and Scottish public authority.

The Policy Memorandum does not explain why Schedule 1 does not reproduce article 6(3) of the Interpretation Order or why it omits the definitions of other expressions which are defined in the Scotland Act, such as “the Scottish Executive”, “Scottish Parliament”, “legislative competence”, “devolved
competence”, “reserved matter”, “Convention rights” “First Minister”, “Lord Advocate”, “international obligations” “Scots criminal law” and “Scots private law”.

All that paragraph 25 of the Policy Memorandum states is that Schedule 1 “provides a list of words and expressions commonly used in legislation” and it may be implied from this that it is considered that those other expressions are not commonly used and therefore do not satisfy the “frequent use” test.

However, it is difficult to believe that this is the case. There is hardly an ASP which does not mention the Scottish Parliament and, in Part 2 of this Bill, there are also references to “devolved competence”, “the First Minister” and “the Lord Advocate” – see section 27(4) and Schedule 2, paragraphs 1(1) and 2(1).

In any event, the so called “frequent use” test may not be an appropriate one when deciding whether expressions used in the Scotland Act should be included in Schedule 1. It is much better to be certain that, when an ASP uses expressions used in the Scotland Act, such as “the Scottish Parliament”, “reserved matters” or “legislative competence of the Parliament”, it has the same meaning as in that Act. Otherwise at best ASPs will have to contain express definitions or at worst (and this will tend to happen in practice) there will be no definition and it will require to be argued that it is implied that it should have the same meaning as in the Scotland Act – but that argument will be difficult to mount if there is a deliberate decision not to reproduce article 6(3). The Bill illustrates this point precisely - section 25(4) and paragraph 1(1) of Schedule 2 defines what is meant by a function being exercised within devolved competence but references to the Scottish Parliament, the Parliament, the First Minister and the Lord Advocate are not defined.

Any such reason for not reproducing article 6(3) is all the more extraordinary when it is observed that Schedule 1 contains the following definition-

“The EU”, “the Treaties”, “the EU Treaties”, “EU instrument” and other expressions defined by section 1 of and Schedule 1 to the European Communities Act 1972 (c. 68) have the meanings given by that Act

The expressions defined in the 1972 Act, and particularly those not specified above, are even less used that those defined in the Scotland Act.
Comments upon Part 2 of the Bill: Scottish Statutory Instruments

General
Part 2 makes provision as to the procedures for the scrutiny of SSIs by the Scottish Parliament and in particular the negative and affirmative procedure. However, most of its provisions are based upon, and largely replicate, the effect of the SI Order, with certain simplifications. That Order was in turn based upon the Statutory Instruments Act 1946 which makes provision as to what parliamentary procedures SIs are subject to in the Westminster Parliament. This means that, by and large, SSIs are subject to similar parliamentary scrutiny as are SIs in the Westminster Parliament.

I am very content with all the provisions in Part 2 with the exception of one. They are expressed in a much clearer and simpler way than the existing provisions in the SI Order. The one exception relates to the negative procedure in section 28.

The Bill gives effect to the main recommendation of the 2008 Report of the Subordinate Legislation Committee that, subject to some improvements, the current arrangements and procedures for scrutinising SSIs should be retained. That recommendation reversed the main recommendation of the 2007 Report of the previous Committee, that most SSIs should be scrutinised in draft by the Parliament before they were made. The idea behind the 2007 Report was to streamline existing procedures, simplify the process, and to have better, more targeted and effective scrutiny by the Parliament. In particular, the Committee considered that the procedure most commonly used, the negative procedure, was ineffective because the SSIs were already made and were likely to have been brought into force by the time the subject Committee and the Parliament had an opportunity of considering them. The Parliament would then be reluctant to annul them even if it had serious concerns and, in any event, it might then be too late to reverse their effect.

While the benefits of this proposed procedure were acknowledged in the 2008 report, the Subordinate Legislation Committee suggested that there were a number of positive aspects to the present system, such as its flexibility, which favoured its retention. The Committee considered that many of the defects in that system could be remedied by making improvements to it. However, the
only improvement it recommended which has a bearing upon the effectiveness of the negative procedure was to extend from 21 to 28 days the minimum period within which instruments subject to that procedure should be laid before Parliament before they can come into force. This is given effect by section 28(2) of the Bill. Although this may help the subject Committee, it still will not give time for the whole Parliament to consider whether to annul an instrument before it has come into force. Accordingly, the doubts about the effectiveness of the negative procedure identified in the 2007 report will remain.

It is suggested that the Committee should consider increasing the effectiveness of the negative procedure by, for example:

- increasing the minimum period of 28 days before an instrument can come into force to something approaching the 40 days within which the instrument may be annulled. This might make it more likely that the Parliament would be prepared to use its powers to annul the SSI;

- having a procedure which would allow the Government to remake a SSI to take account of points raised by the Subordinate Legislation Committee without having to re-start the clock on either the 40 or the 28 periods. This would allow the Government to make amendments to the SSI which have been suggested by the SLC or the subject Committee without delaying the time when the SSI is to come into force; and

- providing that, if the Parliament annuls an instrument after it has come into force, Scottish Ministers should be required to make an order restoring the position to what it was or else explain to the Parliament why. This would go further than section 28(4) which does not deal with the situation where the SSI which is annulled has already come into force and taken effect by the time it is annulled.
Comments upon Part 4 of the Bill: Pre-consolidation modification of enactments

General
I suggest (a) that there may be problems about the width of the power conferred by section 47(1) and (b) that consideration should be given as to how to increase the number of Consolidation Bills.

Section 47(1)
Section 47(1) gives the Scottish Ministers the power, by order, to “make such modifications of enactments relating to a particular subject as in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the law on the subject”.

At present, the Parliament's Standing Orders provide for an expedited Bill procedure to be available for Consolidation Bills. A Consolidation Bill for this purpose is defined as a Bill which consolidates certain enactments and the only changes which are allowed are those necessary to give effect to recommendations from the Scottish Law Commission, the Law Commission or both Commissions. The Law Commissions can only recommend amendments which are necessary for the purpose of producing a satisfactory consolidation.

The Policy Memorandum explains that the power proposed in section 47(1) will enable amendments to be made to the legislation to be consolidated which are more extensive than those which the Scottish Law Commission can recommend. The Consultation Paper argued that the recommendations which the Commission can make is too limited because the Commission “may be reluctant to make recommendations in relation to matters which involve significant policy changes or which are likely to provoke political controversy”. The Policy Memorandum is more circumspect in its justification for this power and simply argues “that it can be useful to make somewhat wider changes to bring about a cleaner and more satisfactory consolidation of the legislation concerned. It is intended that the Scottish Ministers will be able to assist consolidation by using an order making power, subject to the affirmative procedure, to make changes which facilitate, or are otherwise desirable in connection with, a Consolidation …Bill”

17 Standing Orders Rule 9.18. There is a similar provision in relation to Codification Bills in Rule 9.18A.
18 See paragraphs 17-23 of the 1st Report 2003 of the Salmon and Freshwater Fisheries(Consolidation) (Scotland) Bill Committee.
19 Policy Memorandum paragraph 48.
21 Policy Memorandum paragraph 48.
However, it is open to question whether these are the kind of amendments which Scottish Ministers should be able to make simply by order. Section 47(1) would enable Scottish Ministers to make amendments which they consider not only to be necessary or desirable to facilitate the consolidation but which are considered to be “desirable in connection with” the consolidation. This is an extremely wide power because it is not limited to amendments which are desirable to facilitate the consolidation. It would enable not only minor policy changes to be made, such as the example given in the Policy Memorandum but significant policy changes to be made as long as they can be dressed up as being somehow “connected with” the consolidation. This is a very wide Henry VIII power for the Parliament to give to the Government. The fact that the order requires an affirmative resolution is not really a very effective parliamentary control because Parliament is being denied the opportunity to scrutinise each amendment on its merits which it would have if they were made by an Executive Bill.

It is suggested that the Parliament should consider carefully whether this is the kind of power which should be given to Scottish Ministers, particularly if the Bill is to continue to be regarded as a Consolidation Bill and attract the expedited procedure in the Standing Orders. It is suggested that, even if the Committee is persuaded that the Government should be given this power, it would be desirable if it was at least subject to a super-affirmative procedure which would enable the Parliament to consider, take evidence upon, and comment upon each proposed amendment. Otherwise, it would seem that the expedited procedure for consolidation Bills might be open to abuse.

Consolidation Bills generally
It appears to be implied that this new power is needed in order to enable consolidations to proceed and that its absence explains why there have been so few consolidations. However, this is far from being the case. It is not the absence of this power which has delayed consolidations but the fact that, since devolution, successive Scottish Governments have not appreciated the need for consolidation and have not been prepared to devote the necessary resources to enable them to be carried out.

Although the Scottish Law Commission has a statutory duty to prepare comprehensive programmes of consolidation and to draft Bills pursuant to such a programme, this can only be done at the request, and with the approval, of Scottish Ministers.22 Every annual report of the Commission since devolution has expressed regret that successive Scottish Governments have not been able to commit the resources necessary to support such a programme. There has only been one consolidation since devolution and most of the work for that was done beforehand.23 It is only at the end of last year that the Commission has begun work on consolidating the legislation relating to bankruptcy in Scotland, resources for which are being supplied by the Accountant in Bankruptcy.24 In these circumstances, there is absolutely

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22 Law Commissions Act 1965 s 3(1)(d).
23 The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.
24 See Scottish Law Commission, Annual Report 2008 (Scot Law Com No 214) 8, 22.
no evidence that consolidations have been inhibited because of the limited scope of the amendments which the Commission can recommend.

Failure to have regular consolidations has meant that it is almost impossible to find the up-to-date state of Scots law in virtually all legislative areas. This was not meant to happen. One of the arguments for devolution was to provide a greater legislative opportunity to bring our statute law up-to-date. This has simply not happened. The position is now worse than before devolution.

In these circumstances, it is suggested that the Committee may wish to consider what steps may be taken to increase the number of Consolidation Bills. A possible way of achieving this, although there are doubtless many other ways, is

- to impose a statutory obligation upon the Scottish Law Commission to consolidate the main areas, if not all, devolved legislation every 10/15 years and to keep that legislation up to date either by having a running consolidation online or to have further regular consolidations within each successive 10 year period;

- to require Scottish Ministers to provide the Commission with adequate resources to carry out this duty so that it does not interfere with the other work of the Commission. In other words, it should not be possible for Scottish Ministers, as they can at present, to prevent the Commission from being able to prepare consolidations by withholding approval or resources;

- to require the Commission, after consultation with the Scottish Parliament and Scottish Ministers and other relevant interests, to draw up a programme of consolidations every 3 years or so and to prepare draft consolidation Bills to implement that programme. The Government should be required to assist the Commission in the preparation of those Bills. It may be necessary for Scottish Ministers to set up some kind of a specialist unit within the Government which is responsible for dealing with consolidation Bills rather than having the task spread amongst different departments which may not know what to do but this is a matter for them; and

- to require Scottish Ministers, within two months of the submission of the Commission report containing a draft Consolidation Bill, to introduce the Bill or, if not, to give reasons why not. If the Government does not introduce the Bill, the Standing Orders should permit the subject Committee or any MSP to do so without any further procedure,

25 The Statute Law Database (http://www.statutelaw.gov.uk/), which provides an online database of statute law in the UK, is of considerable assistance, but it is incomplete and not completely up-to-date. In any event, it is no substitute for a proper consolidation.
such as further consultation\textsuperscript{26}. The Parliament may also wish to consider having a standing committee to deal with such Bills.

\textsuperscript{26} Such as the consultation required for Members’ Bills by rule 9.14.3 of the Parliament’s Standing Orders.
Comments upon Part 7 of the Bill: Miscellaneous and General

I have two comments upon Part 7 – one in relation to section 55 and the other to suggest that something should be included in the Bill to facilitate the implementation of Scottish Law Commission reports.

Section 55
Section 55 is a surprising provision in the Bill. It was not included in the consultative draft and no explanation or justification for it is given in the Policy Memorandum.

At present, the 1978 Act, as amended by the Scotland Act\textsuperscript{27}, provides that references to “enactment” in Westminster legislation do not include “an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.” Section 55 would modify this provision by providing that references to “enactment” in Westminster Acts and instruments passed or made before 1 July 1999, and in the future, will include ASPs and instruments made under them unless a contrary intention appears.

At the time of the Scotland Act, it was decided that, if it was desired that references to enactment in Westminster legislation passed or made after 1 July 1999 should include a reference to an ASP or a Scottish instrument, it should say so expressly.

Section 55 would, however, reverse this by providing that references to enactment in Westminster legislation passed or made on or after the coming into force of section 55 would automatically include a reference to an ASP or a Scottish instrument, unless a contrary intention appears.

Section 55 is contrary to the approach adopted in Part 1. The approach taken in Part 1 is that the Bill should only make provision for the interpretation of ASPs and that Westminster legislation should be left to be interpreted by the 1978 Act. It is thought that this is because it would otherwise cause confusion and uncertainty because

\begin{itemize}
  \item it would only be within the legislative competence of the Scottish Parliament to make provision for the interpretation of Westminster legislation in so far as it relates to matters which are not reserved; and
  \item in many cases, it may be difficult to identify what provisions in Westminster legislation only relate to devolved matters. It could also result in different parts of a Westminster Act being interpreted by the 1978 Act and this Bill.
\end{itemize}

\textsuperscript{27} 1978 Act, schedule 1 as amended by paragraph 16(3) of Schedule 8 to the Scotland Act
Section 55 does not expressly apply only to Westminster legislation which does not relate to reserved matters. Nevertheless, this has to be its effect because otherwise it would be outwith the legislative competence of the Parliament. This is an example of a case where the drafter may have taken the view that it is too difficult, or too complicated, to draft the provision so as to be within legislative competence and so has to rely upon section 101 of the Scotland Act to ensure that the provision is “read down” to achieve that effect. However, if it is so difficult to draft such a provision, this merely indicates how difficult it will be to ascertain what are the provisions of Westminster legislation to which will section 55 will apply.

The position is made even more uncertain by the fact that section 55 is made retrospective so that it applies to any Westminster legislation passed or made before 1 July 1999 which does not relate to reserved matters. At the time of the Scotland Act, this was clearly thought to be undesirable (no doubt because of the above reasons ) because no consequential amendment was made to achieve this effect.

There is also no explanation given as to why the Scottish Government considers it necessary for section 55 to be made retrospective or what effect this might have on past cases. The only purpose and effect of making it retrospective would appear to be to validate any action taken, or cases decided in the past, upon the erroneous assumption that such references already included ASPs but why this should be needed is not clear. In particular,

- do the Scottish Government have any examples where the fact that a reference to an enactment in such Westminster legislation does not include an ASP or Scottish instrument has caused any difficulties in the past? Have they conducted a trawl to ascertain this?;
- why do the Scottish Government consider it be necessary to validate such action taken or cases decided in the past?;
- might this not retrospectively affect any right or liability created by the Westminster legislation or even validate any criminal conviction or penalty which would have ECHR implications;
- what trawls have been done in order to ensure that the retrospective provision would not have any untoward effects?

In these circumstances, I suggest that the Committee may wish to ask the Scottish Government to explain what is the intended purpose and effect of section 55 and to seek answers to the above questions.

28 For example, s 293(1) of the Criminal Procedure (Scotland) Act 1995 provides that a person may be convicted of, and punished for, a contravention of any enactment, notwithstanding that he was guilty of such contravention as art and part only
29 For example, section 226 of the 1995 Act enables Scottish Ministers to amend any enactment specifying an exceptionally high maximum fines
Implementation of Scottish Law Commission Reports

The number of Commission reports which have not been implemented has risen significantly since devolution. The Chairman of the Commission has recently pointed to “[t]he danger ... that Scots law will fall behind the rest of the world's legal systems in responding to the challenges of an era marked by rapid technological and economic change”.\(^\text{30}\)

In these circumstances, it is suggested that the Committee may wish to consider whether there could and should be included in the Bill provisions intended to facilitate the implementation of the reports of the Scottish Law Commission.

A possible way of achieving this, although there are doubtless many other ways, is to have something similar to what was suggested in Annex 3 above in relation to Consolidation Bills, namely to require Scottish Ministers, within two months of the submission of the Commission report containing a draft Bill, to introduce the Bill or, if not, to give reasons why not. If the Government does not introduce the Bill, the Standing Orders should permit the subject Committee or any MSP to do so without any further procedure, such as further consultation\(^\text{31}\). The Parliament may also wish to consider having a standing committee to deal with such Bills.


\(^{31}\) Such as the consultation required for Members’ Bills by rule 9.14.3 of the Parliament’s Standing Orders. Bill Butler MSP is currently consulting on the Damages (Scotland) Bill which would implement the Scottish Law Commissions Report on Damages for Wrongful Death.
Addendum – correction

Introduction

I refer to the comments upon the above Bill which I submitted on 7 August 2009 (“my previous comments”). I would be grateful if the Committees would allow me to correct an error which I have discovered in some of the comments which I made. I apologise for that error and for any inconvenience which it may have caused.

Error

In Annex 4 of my previous comments, I commented upon section 55 of the Bill. In particular, some of the comments which I made were based upon the assumption that the effect of section 55 was retrospective because it applied to any Westminster legislation passed or made before 1 July 1999 which does not relate to reserved matters.

While it is the case that section 55 does apply to such pre 1 July 1999 legislation, the elementary error which I made was in assuming that this made the effect of section 55 retrospective. I should have realised that section 55 only has effect for the future from the date when it comes into force. The fact that it applies in the future to pre 1 July legislation does not make section 55 retrospective. There is nothing in that section which indicates that it was intended to have effect before the date when it comes into effect.

Accordingly, it is only on and after the date when section 55 comes into force that references to enactment in any such Westminster legislation will include references to ASPs and instruments made under them unless the contrary intention appears. It will therefore have no bearing upon how such references may have been interpreted before that date and, by itself, it will not have the effect of re-opening past cases. Accordingly, the queries which I raised and the further explanations which I suggested might be sought from the Scottish Government based upon the assumption that section 55 had retrospective effect should be deleted.

Iain Jamieson