SUBORDINATE LEGISLATION COMMITTEE

AGENDA

27th Meeting, 2009 (Session 3)

Tuesday 27 October 2009

The Committee will meet at 2.15 pm in Committee Room 4.

1. **Decision on taking business in private**: The Committee will decide whether to take item 8 in private.

2. **Interpretation and Legislative Reform (Scotland) Bill**: The Committee will take evidence on the Bill at Stage 1 from—

   Andrea Longson, Senior Librarian, Advocates Library, Roderick Thomson QC, and Brian Gill, Advocate, Faculty of Advocates;

   and then from—

   Patrick Layden QC TD, Commissioner, and Gregor Clark CB, Parliamentary Counsel, Scottish Law Commission;

   and then from—

   Iain Jamieson, Solicitor, The Law Society of Scotland.

3. **Home Owner and Debtor Protection (Scotland) Bill**: The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill at Stage 1.

4. **Tobacco and Primary Medical Services (Scotland) Bill**: The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill at Stage 1.

5. **Draft instruments subject to approval**: The Committee will consider the following—

   the Water Environment (Groundwater and Priority Substances) (Scotland) Regulations 2009 (SSI 2009/draft).
6. **Instruments subject to annulment:** The Committee will consider the following—

the Rural Development Contracts (Rural Priorities) (Scotland) Amendment (No. 3) Regulations 2009 (SSI 2009/335);
the Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Amendment Order 2009 (SSI 2009/338);
the Pollution Prevention and Control (Scotland) Amendment Regulations 2009 (SSI 2009/336);
the Welfare of Animals (Transport) (Scotland) Amendment Regulations 2009 (SSI 2009/339);

7. **Instruments not laid before the Parliament:** The Committee will consider the following—

the Climate Change (Scotland) Act 2009 (Commencement No.1) Order 2009 (SSI 2009/341).

8. **Interpretation and Legislative Reform (Scotland) Bill:** The Committee will consider the main themes arising from the evidence session.

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The papers for this meeting are as follows—

**Agenda Items 1-7**

Legal Brief  
Summary of Recommendations

**Agenda Item 2**

Paper from the Clerk  
SPICe briefing  
Written evidence

**Agenda Item 3**

Government Response

**Agenda Item 4**

Paper from the Clerk

**Agenda Items 5 & 6**

Government Responses

**Agenda Item 8**

Paper from the Clerk
The Committee will be invited to consider the following recommendations under consideration at the meeting. Decisions are a matter for the Committee.

Agenda Item 3  Home Ownership and Debtor Protection (Scotland) Bill

Section 4 – Pre-action requirements

The Committee may wish to report that—

- it considers that the powers in section 24A(8)(b) and (d) of the 1970 Act and section 5B(8)(b) and (d) of the 1894 Act (inserted by section 4 of the Bill) are too wide given that they can be used to specify without limitation, additional “pre-action requirements” of creditors, and also to modify enactments to change those requirements. The Committee accepts that there may require to be some adjustment to those requirements set out in the Bill, of a more minor nature depending on changes to economic factors and their effect on repossessions over time. However, the sweeping power to provide for any new pre-action requirements goes much further and need not be restricted in its use to modifications of these sections. The Committee considers that it is not a proper use of delegated powers to permit wholesale revision of or replacement of the scheme which Parliament has approved through primary legislation, and recommends that significant restrictions should be placed on the scope of this power to limit it appropriately;

- without such restrictions it has concerns whether affirmative procedure in relation to those powers in section 24A(8)(b) and (d) and section 5B(8)(b) and (d) shall provide sufficient Parliamentary scrutiny of any order including any modifications to the pre-action requirements;

- If such restrictions are not brought forward the Committee recommends that orders exercising those powers should be subject to super-affirmative procedure which requires a proposed draft order to be laid before Parliament together with an explanatory document for a prescribed period, to permit public consultation on the terms of the proposed order prior to laying of an order for approval. Ministers should be required to consider comments received and provide an explanation to
Parliament as to the extent to which comments have been addressed in the final order;

- it recommends there should be a statutory requirement to consult specified bodies or persons representative of the interests of debtors, creditors, the money advice sector and any other interests affected by the proposals, before any order is proposed under section 4;

- it recommends that the guidance which may be issued in terms of sections 24A(7) and 5B(7) inserted by section 4 of the Bill is of sufficient importance that it should be considered by the Parliament before issue. It recommends that a draft of the guidance should be laid in Parliament for a suitable period for consideration before it is issued, and that if during that period the Parliament makes any resolution in relation to it, the Scottish Ministers must have regard to that resolution.

Section 9 – certificate for sequestration

The Committee may wish to recommend that, as the Government has indicated in its response to the Committee that it is intended the scope of the power in section 5B(5)(e) (as inserted by section 9) will only relate to formalities of process and advice and information requirements, and not additional substantive conditions, it considers whether this power could be drawn more narrowly to reflect that limited scope.

Section 15 – ancillary provision

The Committee may wish to recommend that the power in section 15(1)(a) to make supplemental etc. ancillary provisions which modify Acts should be subject to affirmative resolution procedure, whether or not such modifications are in the form of textual amendment of an Act.

Agenda Item 4 Tobacco and Primary Medical Services (Scotland) Bill

The Committee may wish to note the Government’s response to its stage 1 report.
Agenda Item 5  Draft instruments subject to approval

The Water Environment (Groundwater and Priority Substances) (Scotland) Regulations 2009 (SSI 2009/draft)

The Committee may wish to report this instrument to the lead committee and Parliament as follows––

- that the provisions for the identification of hazardous substances provided in new Schedule 2 to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 could be clearer and regulation of activities involving such substances more transparent. It may wish to draw attention to its concern that through delegation of the function of identifying hazardous substances to SEPA there may be changes made to the list of such substances without public notice where previously legislative change would be required. Changes to the list of hazardous substances has implications for the scope of activities covered by the CAR regime and the scope of offences with significant criminal penalties;

- that it is unable to express a view on whether or not there has been the specification of a new GBR and therefore whether the procedural requirements of section 21(2) to (4) of the 2003 Act are engaged given the lack of clarity over the scope of hazardous substances. The Committee invites the lead committee to consider this further; and

- that the instrument contains minor errors in the citation of relevant revocations in Schedule 3 and the procedural powers referred to in the preamble but that these errors are not thought to affect the operation of the instrument.

Agenda Item 6  Instruments subject to annulment

The Rural Development Contracts (Rural Priorities) (Scotland) Amendment (No. 3) Regulations 2009 (SSI 2009/335)

The Committee may wish to report that––

- while the preamble to the instrument indicates an intention that the reference in regulation 7(b) to Council Regulation 834/2007 is a reference to this Community instrument as amended from time to time, no such ambulatory reference is made, in the absence of express provision to that effect; and that the Committee welcomes the Government’s commitment to correct this error; and
• there is a drafting error in the reference to the title of Council Regulation 834/2007, in the preamble to the Regulations, but it is not considered that this error affects the validity or the operation of the instrument.

The Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Amendment Order 2009 (SSI 2009/338)

The Committee may wish to report that it is content with this instrument and that for its interests it is also content with the reasons provided by the Scottish Government for not complying with the 21 day rule.

The Pollution Prevention and Control (Scotland) Amendment Regulations 2009 (SSI 2009/336)

The Welfare of Animals (Transport) (Scotland) Amendment Regulations 2009 (SSI 2009/339)


The Committee may wish to consider if it is content with these instruments.

Agenda Item 7 Instruments not laid before Parliament

The Climate Change (Scotland) Act 2009 (Commencement No.1) Order 2009 (SSI 2009/341)

The Committee may wish to consider if it is content with this instrument.
SUBORDINATE LEGISLATION COMMITTEE

27th Meeting, 2009 (Session 3)

Tuesday 27 October 2009

Interpretation and Legislative Reform (Scotland) Bill

Written Submissions

Chris Himsworth, University of Dundee

1. I would like to confine my comments to Parts 2-7 of the Bill and, within those, to two rather specific aspects which relate to the definition of “Scottish statutory instruments” (s 27) and to the publication of SSIs (ss 41-42). The SSI-related parts of the Bill have a long history in successive debates and reports of the Subordinate Legislation Committee to which I have, in small part, contributed. I do not want to go back over old ground.

2. As to s 27 of the Bill, it seems to me that its coverage should be as inclusive as possible, in order that the attributes attached by the Bill to SSIs can be widely distributed. This is a general concern and I assume that the Committees will be anxious to ensure that, in principle, such coverage is achieved. I do, however, have two specific questions:

   (a) I understand that, taken together, s 27(2)(a) and (b) do achieve considerable breadth so far as Scottish Government functions are concerned. One way or another, most relevant functions will, I imagine, be covered. A concern I have, however, is that, in s27(2)(a) “an order, regulations or rules” is (i) ambiguous and, therefore, capable of creating uncertainty; and (ii) potentially capable of excluding other similar categories which ought to be included.

   (b) I also wonder whether, in s 27(2)(c) “an Order in Council” may be too narrowly expressed? There may be other instances which could be added but I have in mind, in particular, the “proclamations” which can be made under s 1(2) of the Banking and Financial Dealings Act 1971. I have noticed that such a proclamation (of 13 June 2007) was published as a sort of unofficial (unnumbered) appendix to the UK SIs of 2007 which strikes me as unsatisfactory. Perhaps “or proclamation” could be inserted into subs (2)(c)? Or perhaps some broader term?

3. My other point is about publication and the terms of ss 41-42. S 41(2) requires the Queen’s Printer to publish SSIs. But publication is to be “in accordance with regulations under section 42”. Such regulations may provide for the manner of publication; and disapply s 41(2) “in relation to an instrument or class of instrument”.
4. It seems to me that, in respect of instruments required to be published in the 21\textsuperscript{st} century there is a very strong case for saying that (a) the mode of publication should always include publication on the internet (howsoever defined); (b) there should be no exceptions from this rule permitted to be made by means of regulations; and (c) these requirements should be categorically provided for in primary legislation i.e. in this Bill/Act. The sort of exceptions to printed publication devised in the 1940s should not be accepted in respect of electronic publication in the 2000s. The observations about publication and printing in paras 44-45 of the Policy Memorandum seem sensible as far as they go (although the exclusions from printed publication will have to be carefully scrutinised when the regulations are made) but the Bill could be usefully amended to achieve the purposes I have mentioned.
Faculty of Advocates

Introduction
The Faculty of Advocates is grateful for the invitation to submit written views on the general principles of the Interpretation and Legislative Reform (Scotland) Bill. The Faculty responded to the Scottish Government’s consultation paper and draft Bill published earlier this year, and this written evidence is largely informed by that response.

In general, we agree with the broad aims of the Bill, particularly:

- the decision to continue to have general interpretive provisions applying to ASPs and instruments, but not to seek to set out any general principles of interpretation in legislation;
- the streamlined Scottish Parliamentary procedure, implementing the recommendations of the Subordinate Legislation Committee;
- the special Parliamentary procedure;
- the approach to pre-consolidation modification of enactments.

We have some concerns with matters of detail but appreciate that those are not relevant at this stage of the Bill’s Parliamentary progress.

This written evidence therefore concentrates on three particular issues of broader principle: Crown application; the power to amend schedule 1 to the Bill and the duty for the Queen’s Printer to print copies of SSIs.

Crown application
We note from paragraph 70 of the Scottish Government’s Policy Memorandum that the view of many respondents to the consultation paper was that the Crown should be placed in the same position as the general public and should be bound by legislation unless there is an express exception. We do not agree.

On balance we favour preservation of the existing rule that the Crown should only be bound expressly or by necessary implication. Clearly, different views can reasonably be held here. In favour of the present rule, we think that it is useful and works in practice. There does not appear to be a compelling reason for departing from the established principles that pertain to Westminster legislation. The inclusion of “necessary implication” might be fortuitous in its application, in situations where EU law, or the ECHR, requires a construction that might have the effect of binding the Crown even though no express provision has been made. We also note that the Crown is not a subject and in our view there is no compelling argument that it should be treated as one by default.

Amendment of schedule 1
We do not think that the Scottish Ministers should have the power to amend
definitions in schedule 1 by order made by a SSI. Our concern here is not so much the potential addition of definitions to schedule 1, but the potential for altering the definitions for existing terms. This could have wide reaching and unforeseen consequences in particular instances. It therefore seems desirable to restrict the potential for any such adverse effects by requiring primary legislation. If, however, the Scottish Ministers are to have this power, we agree that it should be exercisable by the affirmative procedure.

**Printing of SSIs**
The Advocates Library acts as the national law library for Scotland. The Library has an important national duty, working with the National Library of Scotland, to ensure that the published heritage of Scotland is preserved for the present and future benefit of its citizens and the wider population.

We are concerned that the provisions of the Bill may endanger our ability to carry out that duty. Our principal concern is the provision in sections 41 and 44 of the Bill under which the Queen’s Printer for Scotland has a duty only to publish, and not to print, SSIs.

The question of whether subordinate legislation should be printed is significant both for the ability to access the legislation and to preserve it. In our view, insufficient consideration has been given to the latter. For example, we note the reference in paragraph 75 of the Policy Memorandum to the low average sales of printed copies of SSIs and to the Scottish Government’s intention, in regulations under the Bill, to require the Queen’s Printer for Scotland to furnish individuals with hard copies of SSIs on request. The approach reflected in the Policy Memorandum appears, mistakenly, to assume that this is an issue only of accessibility. It ignores the importance of preservation.

There is as yet no preservation standard accepted, internationally or nationally, by information professionals for non-print media. There have been concerns about the failure of the Scottish Parliament to ensure appropriate archiving of its publications. We do not think that the archiving of websites is adequate. By contrast, there are well established standards for the preservation of print media, which are followed by all the national archive bodies. While there is a movement towards accessing material in electronic format, long-term preservation in that context is still uncertain.

In our view, the only way to ensure the long-term preservation of this important aspect of the published heritage of Scotland is by requiring its continued production in printed paper format, to be held at more than one location. We therefore think that section 41 of the Bill should be expanded to provide a statutory duty for the Queen’s Printer to deposit a printed version of each SSI with both the Advocates Library (through the National Library of Scotland) and one other major library in Scotland.

We are not satisfied that a duty for the Queen’s Printer to provide a hard copy to individuals on request, if created under regulations as intended, would be adequate. Even if institutions such as the Advocates Library were able to
make such a request under the regulations, the requirement to do so would create significant extra work and expense, both in monitoring what SSIs had been made and in making requests.

The Senior Librarian of the Advocates Library has discussed these concerns with the Head of Official Publications of the National Library of Scotland and the Chair of the Scottish Working Group on Official Publications. They are both of a similar view.
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. 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”). I have also written an article upon the Bill which is due to be published in the September issue of the Edinburgh Law Review.

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 and to the Subordinate Legislation Committee upon their Inquiry into Regulatory Framework in Scotland from 2004 and until their 2007 Report.

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2 These are available at http://www.scotland.gov.uk/Publications/2009/04/23115703/0
3 EdinLR Vol 13 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
Comment 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.

\(^7\) 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 1978 Act.

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 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.
Annex 3

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”.

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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. 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. 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. In these circumstances, there is absolutely

22 Law Commissions Act 1965 s 3(1)(d).
23 The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.
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.\(^{25}\) 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\(^{27}\), 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

- 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

- 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.

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\(^{27}\) 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.

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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”.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 consultation31. 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.
The Law Society of Scotland (the Society) welcomes the opportunity to submit written evidence on the above Bill and has the following comments to make.

The Society welcomes this technical but important Bill and, in the interests of accessibility of legislation, supports the replacement of the three transitional orders which form the current regime. As the Bill broadly restates the provisions currently found in the three transitional orders, the Society has only a few comments to make.

Section 1
The Society welcomes the statement in Paras 8 and 9 of the explanatory notes. The Interpretation Bill should not apply to Westminster Acts and instruments which relate to devolved areas of the law nor to an Act of the Scottish Parliament or Scottish Instrument which amends Westminster legislation.

However, the current wording of the Bill does not preclude the latter from being the case as the Bill simply applies to all Acts of the Scottish Parliament or Scottish Instruments which receive royal assent after commencement of the Bill. This matter should not be left to explanatory notes.

Section 26
As electronic communication is so widely used, a provision for serving documents by electronic means is appropriate. This fits into the ejustice agenda of the EU and the ‘Digital Britain’ agenda. However, the Society has some concerns about how fallible such technology may be and whether the provision as it currently stands would create difficulties. For example, there may be questions over how one would prove that the document has been served and what would happen if there is a fault in the recipients email or their service is interrupted.

Adequate safeguards, guidelines and mechanisms to ensure that a document served electronically was actually received would need to be established. It may be worthwhile to establish such a mechanism, but this would require considerable work by technological specialists and the Bill may not the appropriate place for this.

Further, the implication in section 26(6) that a document served electronically is received after 24 hours seems to be too restrictive. The Society would suggest that the implication either be removed, or the time period extended.

Section 30
The Society would question the ‘default’ approach for subordinate legislation which is not subject to the negative or affirmative procedure under section 30. The effect of this section is to enact a presumption that subordinate legislation is subject to a procedure which requires less scrutiny than both the affirmative and negative procedure.
While the Society agrees that a default approach is necessary to deal with the cases where the enabling Act does not provide for the negative or affirmative procedure, the presumption should be that subordinate legislation should be subject to the highest level of scrutiny and therefore the affirmative procedure.
National Trust for Scotland

Introduction
The Trust’s interest in this legislation relates to Part 5 of this Bill which deals with Special Parliamentary Procedure (SPP) and the Trust’s special powers to declare land inalienable as enshrined it is enabling Acts of Parliament. The Trust responded to the Scottish Government consultation in April 2009 in support of the proposal.

Overall View
The Trust is supportive of the policy objective of Part 5 of the Bill, which, as stated in the Policy Memorandum, is to replace the current transitional provisions in the SPP Order and to maintain the status quo.

Background
The Trust’s statutory purposes as set out in 1935 include ‘promoting the permanent preservation for the benefit of the nation of lands and buildings in Scotland of historic or national interest or natural beauty and also of articles and objects of historic or national interest…’

One of the means by which the Trust carries out this statutory purpose is through ownership. Under the Trust’s enabling Acts of Parliament, the Trust’s Council may declare lands or buildings in its care inalienable which gives them protection against creditors and compulsory purchase. Inalienability therefore gives potential donors the strongest assurance which is realistically available that any property given to the Trust will be owned by it in perpetuity.

The Trust cares on behalf of the nation for a great diversity of properties, including mountains, coastlines, islands, woodlands, battlefields and historic sites, gardens, castles, mansions and cottages. Those properties welcome over two million visitors each year. The Trust wishes to ensure that the inalienable lands and buildings held for the benefit of the nation retain the protection afforded by its 1935 and 1947 Acts, against compulsory purchase procedures, as enshrined in section 1(2) and paragraph 9 of Part 3 of the First Schedule of the Acquisition of Land (Authorisation Procedure) Scotland) Act 1947 and reinstated by section 120 (2) of the Local Government, Planning and Land Act 1980.

32 From Section 4 of The National Trust for Scotland Order Confirmation Act 1935.
33 Specifically Section 22(2) of The National Trust for Scotland Order Confirmation Act 1935.
Prof Colin Reid, University of Dundee

The provisions contained in Parts 1, 2, 3 and 7 of this Bill are generally welcome, bringing clarity and simplification to the law.

Part 1

s.1 I welcome the decision to restrict the definition of “Scottish Instrument” to measures that have clear legal effect.

ss.4-5 The advent of these powers should lead to two changes in practice. Firstly, it should avoid the partial bringing into force of particular provisions in an Act for limited purposes such as those set out here. Secondly, there should be express reference to these provisions in the exercise of powers that they have authorised, to avoid any uncertainty arising over the source of the legitimacy of what is being done.

s.20 I particularly welcome the decision that legislation should bind the Crown unless the contrary is expressly provided. Although recognising the potential for confusion arising from a different rule applying to Westminster legislation (as noted by those who opposed this change in their responses to the consultation paper), removing the special position of the Crown is the correct thing to do in a modern democratic society and the possibility of co-ordinating a change on this point seems so small that the only option is to proceed separately in Scotland. If problems do arise that provoke a re-examination of the position at Westminster, that would be no bad thing.

Part 2

The simplification and clarification of the procedures for the making of Scottish Statutory Instruments is welcome, although since the operation of the provisions depends on the interaction of the Act and the Parliament’s own Standing Orders it is difficult to see the whole picture at this stage.

s.34 Where the Parliament has resolved that the procedure should be changed, the Ministers should be required to give effect to the resolution by introducing an order making the necessary changes. If there appear to be good reasons why the change envisaged in the resolution should not be made, these should be explained and the Parliament has the opportunity to reconsider its decision at the stage of approving the amending measure under the affirmative procedure.

Part 3

ss.41-42 Members of the public should have access to the law that governs them. I wholly accept that a statutory duty to have copies of every instrument printed and available for sale is not appropriate, but there should remain a clear duty to ensure that copies are readily available to the public. The present practice of publishing all instruments on the internet is most welcome, including the recent change of practice to include even local instruments in the electronically available materials, and the practice proposed in para.45 of the Policy Memorandum on this Bill is also appropriate. Nevertheless there should remain a clear obligation to make instruments available (by whatever
means). Accordingly, the bare terms of s.45(2)(d) are not appropriate since they would appear to allow instruments to be made without being made available.

If there is a desire to allow exceptions to the specific “duty to publish” (which might become inappropriate as technology, practice and expectations develop), an alternative might be to require that where a regulation under s.45(2)(d) does remove the obligation to publish, then a secondary duty arises on the Queen’s Printer to satisfy him/herself that the instruments in question are available in a suitable form, perhaps with a duty to report to the Parliament in any case where this does not seem to be the case.

**Part 7**
These provisions are welcome.
Scottish Law Commission

1. The Scottish Law Commission welcomes the opportunity to comment on the draft Bill which will be of use not only to lawyers, but also to parliamentarians and professionals in any field of activity which is regulated by, under or by virtue of primary legislation.

2. We also agree that this is an opportune time for the Scottish Parliament to assume control of this important, if technical, area of law.

General

3. We note that the Scottish Parliament's legislation will be part of the broader corpus of legislation applying to Scotland. It will not, because of the provisions of the Devolution settlement, be possible to institute a wholly Scottish statute book. Much of the primary legislation applicable to Scotland will continue to be enacted at Westminster. Further, it remains the case that much of the Westminster legislation enacted prior to devolution continues to apply to Scotland, even in relation to matters which are not reserved.

4. We consider that it would be of more utility to the user of the Statute Book if the rules of interpretation for Acts of the Scottish Parliament were to the same effect as those for Acts of the United Kingdom Parliament. We would be concerned if the result of this exercise were to establish a second set of interpretative rules, inconsistent with, and perhaps even contradictory of, those in the Interpretation Act 1978. If, and there are examples of that in this Bill, a general rule of construction were changed by this Bill, then the reader of Scottish legislation would have to be aware that the rules of interpretation prior to the passing of this Bill were different from those after that date. This would of course be something which professional users would get used to: but it is not clear to us that it is desirable to impose that duty upon them, in the absence of serious policy reasons for a change.

5. Our strong preference would be to ensure that where a rule currently in the 1978 Act is being reproduced, that should so far as possible be done in the same terms as in the 1978 Act. It is trite that where provisions are expressed in different terms, it is because they are intended to have a different meaning. It would be very unfortunate if a statute designed to assist in the interpretation of primary legislation gave rise to questions as to whether propositions expressed in different terms nevertheless meant the same thing.

6. That said, we of course appreciate that this is an opportunity to adjust or correct current rules of interpretation which may have proved not to be useful. (In that connection we note with approval the terms of section 15(2)(d), which makes it clear that where Act A has inserted words into Act B, the repeal of Act A does not have the effect of removing the amending words from Act B.)

Part 1

7. We have some comments about the structure of Part 1. Like the Interpretation Act 1978, and the 1999 Order, Part 1 of this Bill sets out a number of fundamental rules which are to apply to provisions which
commonly or frequently appear in Acts of the Scottish Parliament. But the broad statement of the rule has to be qualified by acknowledging either that a clear provision in an individual Act may be contrary to the general rule, or that the context of a particular Act may require the rule to be modified or adjusted. In the present Bill that provision as to contrary intention or different context is inserted as a general proposition in Section 1.

8. Technically, we are inclined to agree that this approach will work in most cases. But we have two concerns. First, anyone reading the particular rules is not seeing the whole story. He also requires to look back at section 1 to find out that the basic proposition is subject to a qualification. Secondly, it is not clear that the general qualification in section 1 will in all cases provide the degree of sophistication and flexibility which would be given if the individual rules had the qualifications built into them.

9. For example, the relatively bald statements about exercising powers and performing duties set out in section 7(3) of the Bill are subject to the qualifications set out in section 1(2). But there must be some doubt as to whether the combination of those two provisions achieves the same level of flexibility as appears from section 12 of the 1978 Act.

10. We would accordingly suggest that the provisions in Part 1 would be of more use to the reader if the qualifications were attached to the individual rules.

Crown application

11. Section 20 provides a specific example of the point which we made in paragraphs 3 to 5 above. The present position is that the Crown is bound only by a statutory provision which makes express provision to that effect, or by necessary implication. We note that this position has obtained since the decision of the House of Lords in Lord Advocate v Dumbarton District Council34, in which Lord Keith of Kinkel observed –

"---[I]t is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or by necessary implication." (at page 26)

His Lordship went on to say, on the same page, that

"it is most desirable that Acts of Parliament should always state explicitly whether or not the Crown is intended to be bound by any, and if so which, of their provisions."

The practical effect of the judgment, which provided a welcome element of clarity in what had been a contentious area of the law, was to require Parliamentary counsel, in particular, to consider the question of Crown application. No doubt that is now routinely done. The effect of the current

34 1990 SC (HL) 1
provision in the Bill will be to reverse that rule for the purposes of future legislation of the Scottish Parliament. Given that the position is not being changed for Acts of the UK Parliament applicable to Scotland, it is difficult to see what is to be gained by changing the rule for future Scottish Parliament legislation. We are firmly of the view that it would be better to restate the existing position than to change it.

Section 25
12. We agree that it would be appropriate for the Scottish Ministers, by affirmative order, to be able to amend the definitions in Schedule 1.

Part 2
13. Generally we welcome the simplification of the classification of subordinate legislation and the procedures applicable to it.

14. While we appreciate that the current system for subordinate legislation contains orders, regulations, rules and other descriptions of instrument, we are not clear that those different terms have any sensible purpose. As the Donoughmore Committee observed in 1932:

"There is no simple classification of the heterogeneous collection of regulations, rules and orders in force today; nor is it easy to formulate one which is either simple or satisfactory. Indeed, unless classification leads to some useful differentiation of procedure there is not much to be gained by it."

15. Accordingly we welcome the simplification of the various forms of subordinate legislation into the all-embracing "Scottish Statutory Instrument" as set out in section 27. We hope that it presages the end of the use of different terms such as orders, regulations or rules etc.

Conclusion
16. We would of course be happy to give evidence as to any of the general matters set out above in more detail, should that be necessary or desirable.

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35 Committee on Ministers’ Powers Cmnd 4060
36 Pages 28-29.
SEPA

SEPA is pleased to be able to contribute to the Committees’ consideration of this Bill and is grateful to be given the opportunity to make this submission. SEPA is pleased to note that the Bill is based largely on the draft Bill, which contained useful proposals for improvement of statutory interpretation.

SEPA is also pleased to note that the Bill has been drafted to take account of issues raised in its response to the consultation on the draft Bill. For instance, it notes that the definition of “Scottish instrument” (cl 1(4))) has been re-drafted. It also notes that minor differences in statutory forms will not affect their effect (cl.21).

SEPA also notes that the Bill has taken forward some matters, which although not thought to be causing concern presently, nonetheless places the issue beyond doubt. For instance, SEPA notes with approval that there is clarity as to the date of commencement of Acts of the Scottish Parliament (cl. 2).

SEPA would refer that the Bill took greater account of some issues. For instance, although SEPA is in favour of the principle of electronic service of documents, there are some matters that remain outstanding. SEPA refers to its response to the consultation on the draft Bill where it stated:

"Although SEPA acknowledges that service of documents electronically is only one of several methods, SEPA would like to see some issues addressed in further detail before it would be comfortable with using this as a method of service. While a party may have agreed in advance to have issued documents electronically, the electronic address used by a party may have changed but the person may not have intimated this change to other parties. Notices could be sent to an unused address, without generation of a failure receipt, yet the service could still comply with the requirements of section 24. In the alternative, it may be that a person's consent to electronic communications is deemed to terminate at the end of a prescribed period, unless expressly agreed to be continued.

Further provisions on (1) what is required to establish consent to electronic service and (2) what is required to establish proof of delivery of electronic communication would be helpful.

The Companies Act 2006 provides for deemed receipt 48 hours after delivery in the case of electronic documents. This Bill reduces that to 24 hours, and SEPA's view is that it would be desirable to have consistency.

The Bill defines "electronic communication" more narrowly than in the Electronic Communications Act 2000. Again, SEPA's view is that it would be desirable to have consistent definitions."

It may also be, as indicated in SEPA's original response, that the Bill may wish to permit service of documents by means of publication on a website.
SEPA notes that some of the statutorily defined terms, in Schedule 1, may remain open to interpretation. It stated, in its original response that some terms may require to have amended definitions. For instance, it stated:

"Document - as worded this could, at least theoretically, include items probably not intended to be included in the definition, such as a computer hard drive.

Writing - it is not clear if this includes non-permanent forms of writing, such as correspondence issued electronically."

SEPA would be pleased to provide any additional information requested.
Judges of the Court of Session

Introduction

1. We have previously provided the Scottish Government with comments on a draft version of the Bill that was issued as part of a consultation paper in January 2009.

2. The following comments on the general principles of the Bill are primarily based upon the terms of our response to that consultation process. In particular, this response focuses on the principal aspects in respect of which the Bill, as introduced, does not fully reflect the observations which we previously made as part of the earlier consultation process. The matters referred to at paragraphs 12 to 15 are new points which we did not refer to in our response to the consultation process.

General principles

3. First however we would wish to say that we support the general principle of primary legislation containing general interpretative provisions which apply to future Acts of the Scottish Parliament and Scottish instruments. We also agree with the general principle of simplifying the definition of a Scottish statutory instrument and are content with the approach that that definition should apply for the purpose of pre-commencement enactments as well as future enactments. In addition, we support the proposed power of the Scottish Ministers under Part 4 of the Bill to modify enactments prior to consolidation. We consider that that this would be a useful power which would assist in the important task of improving the quality of the statute book by means of consolidation statutes, there being a number of fields in which consolidation is long overdue.

4. That said, there are a number of particular matters upon which we wish to comment. These matters primarily relate to the terms of sections 20 and 31 of the Bill, as introduced. We also wish to comment on sections 1(4), 26(7) and 28(6) and on the effect of Part 1 of the Bill generally.

Part 1 – Interpretation

Section 20: Application of Acts and instruments to the Crown

5. While we see value in having the position set out in the Bill, we do not favour departing from the existing position, whereby the Crown is bound only by express provision or necessary implication. That position currently applies equally to the Westminster legislation and to Acts of the Scottish Parliament.

6. Logically, if it is a necessary implication that the statute is binding on the Crown, that implication should be given effect notwithstanding the absence of express words. We also consider that there may be disadvantages in having one rule for Westminster legislation and another for an Act of the Scottish Parliament. An Act of the Scottish Parliament or indeed a Scottish statutory
instrument may require to be read with, or in the context of, a body of Westminster legislation and Westminster subordinate legislation. In our view, if different principles required to be employed in relation to the application of such statutes to the Crown, this may result in potential confusion.

7. The consultation draft of the Bill on which we previously commented contained a draft provision which sought to provide that an Act of the Scottish Parliament or a Scottish instrument does not bind the Crown unless the legislation expressly provides for this. In the Bill, as introduced, this provision has been reversed so that it now provides that an Act of the Scottish Parliament or a Scottish instrument does bind the Crown except in so far as the Act or instrument provides otherwise.

8. We note from paragraphs 70 and 71 of the Policy Memorandum which accompanies the Bill that this provision was revised because the majority of respondents to the Scottish Government’s consultation process expressed the view that the Crown should be placed in the same position as the general public and therefore should be bound by legislation unless that legislation expressly stated otherwise. However, the Crown is generally not in the same position as a member of the public either de jure or de facto. We are concerned that the revised draft provision in the Bill, as introduced, involves even more of a divergence from the principles which will continue to apply in considering the circumstances in which Westminster legislation binds, or does not bind the Crown, as the case may be.

Section 31: Failure to lay instruments in accordance with section 28(2) or 30(2)

9. As we stated in our response to the consultation paper, we have reservations about the effect of section 31 of the Bill. In effect, subsection (2) of section 31 provides that failure to meet the requirement to lay the Scottish statutory instrument does not affect its validity. Only if the responsible authority subsequently, and belatedly, lays the instrument before the Scottish Parliament does the, perhaps relatively mild, sanction of tendering an explanation to the Presiding Officer come into play. However, if the responsible authority does not belatedly lay the instrument before the Scottish Parliament (i.e. it does not lay the instrument at all), the validity of the instrument would nonetheless continue indefinitely. We take the view that this is unsatisfactory and we suggest that it may be more appropriate that the exemption from invalidity should be dependent on a rectification of the failure to lay the instrument timeously. We also suggest that such a failure should only be capable of being rectified by laying the instrument, immediately the failure is noted.

Other drafting points

10. In relation to the service of documents, section 26(7) of the Bill includes a definition of “electronic communication”. As a minor matter of drafting, we suggest that it might be preferable if the words “...is capable of producing
“text” were used at the end of that provision, rather than “intended to produce writing”.

11. In the case of an instrument subject to the negative procedure, we note that section 28(6) of the Bill makes provision to the effect that if the Scottish Parliament passes a resolution to annul the instrument, the Scottish Ministers must revoke the instrument. However, it is possible that the instrument may have been made by an authority other than the Scottish Ministers. We take the view that the duty to revoke the instrument should be placed on the maker of the instrument, rather than on the Scottish Ministers in every case.

12. We also consider that there may be some doubt as to whether the term “Scottish instrument”, as defined in section 1(4) of the Bill as introduced, now includes Acts of Sederunt and Acts of Adjournal. That matter would seem to be dependent on the question of whether such instruments can be said to be “rules” within the meaning of section 1(4)(d) of the Bill.

13. At present, under the existing Interpretation Order (S.I. 1999/1379), we consider that it is clear that Acts of Sederunt and Acts of Adjournal made under enabling powers which are contained in Acts of the Scottish Parliament fall within the definition of “Scottish subordinate legislation”. The inclusion in that definition of the words “other instruments made under an Act of the Scottish Parliament” appears to put the matter beyond doubt. However, no such catch-all reference is now included in the definition of “Scottish instrument” in the Bill. Acts of Sederunt and Acts of Adjournal are not specifically referred to in the definition and we consider that there may be some doubt as to whether all such instruments can be said to be “rules”. We consider that it might be helpful for the definition of “Scottish instrument” to be altered further to put the matter beyond any doubt.

14. We also consider that practical issues may arise in relation to the treatment of statutory instruments which are stated to be made under a number of different enabling powers, some of which are contained in Westminster legislation and others in Acts of the Scottish Parliament. Two Acts of Sederunt which were recently made in relation to the Adoption and Children (Scotland) Act 2007 (S.S.I. 2009/283 and S.S.I. 2009/284) provide an example of this. As matters stand at present, questions may arise as to whether, in that situation, it is the Interpretation Act 1978 or the Interpretation Order (S.I. 1999/1379) which applies to the instruments.

15. Part 1 of this Bill will add a third set of general interpretation provisions which may be potentially applicable to instruments. We consider that it is in theory possible that a future instrument could therefore be made under (a) an enabling provision in existing Westminster legislation, (b) an enabling provision in an existing Act of the Scottish Parliament and (c) an enabling provision in an Act of the Scottish Parliament which receives Royal Assent after Part 1 of the Bill comes into force. Although this scenario is not likely to arise frequently, we consider that there is scope for potential uncertainty as to which set of interpretation provisions apply in circumstances where mixed
enabling powers are being exercised. It would be desirable to make clear which interpretation provisions apply in the case of hybrid instruments.
Introduction

1.1 We are grateful for the invitation to submit written views on the general principles of the Interpretation and Legislative Reform (Scotland) Bill.

1.2 In general we welcome the broad aims of the Bill which will formalise the arrangements for the future processing and publication of legislation in Scotland. We would nevertheless like to offer comments particularly in respect to the arrangements for publication of Acts and Instruments. Our overriding aim is that the framework put in place for the publication of all Scottish legislation should reflect both current practice and the existing and anticipated demands of users for access to Scottish legislation.

2. Background

2.1 The office of Queen’s Printer for Scotland was established by section 92 of the Scotland Act 1998. The Act sets out the responsibilities as effectively being:

- to exercise the Queen's Printer responsibilities in relation to the printing of Acts of the Scottish Parliament and subordinate legislation;
- to exercise any other functions conferred on her by this Act or any other enactment; and
- on behalf of Her Majesty to exercise Her rights and privileges in connection with:
  - Crown copyright in subordinate legislation
  - Crown copyright in any existing or future works (other than subordinate legislation) made in the exercise of a function which is exercisable by any office-holder in, or member of the staff of, the Scottish Administration (or would be so exercisable if the function had not ceased to exist)
  - other copyright assigned to Her Majesty in works made in connection with the exercise of functions by any such office-holder or member.

Section 92(5) of the Scotland Act specifies that the Queen’s Printer of Acts of Parliament shall hold the office of Queen's Printer for Scotland (QPS).

2.2 The QPS (complementing her responsibilities as the Queen’s Printer of Acts of Parliament) operates a unified and coherent policy for the publication of all Scottish and other UK Legislation. The Bill as introduced could have the impact of creating diverging and separate arrangements for the publication of Acts of the Scottish Parliament.
(ASPs) on the one hand, and Scottish Statutory Instruments (SSIs) on the other. Equally this would mean separate arrangements from other Crown legislative services applying to Scotland.

2.3 Copies of all ASPs and SSIs are printed and made available for sale via the official Contractor (currently The Stationery Office Limited (TSO)). In addition all ASPs and SSIs are published on both the official legislation websites (oqps.gov.uk and opsi.gov.uk), the latter providing the portal for access to all United Kingdom legislation. ASPs are published on the website ahead of the printed copies, as soon as possible after receipt of the approved text following Royal Assent, whilst SSIs are currently published on the websites simultaneously with the printed copies. We are though discussing with the Scottish Government arrangements which would mean that SSIs are also made available on the website in advance of printed copies. All SSIs are now published on the website including those local and other instruments which are currently exempted from printing. This latter arrangement has been welcomed by users of the website and has also been commented upon favourably in other written submissions to the Committee.

2.4 We also publish the Explanatory Notes and Executive Notes alongside the relevant piece of legislation and will launch an application by the end of the year enabling users to view the text of the Explanatory Notes interweaved with the text of the ASP to which they refer.

2.5 The continuing shift to online access results in sale of printed copies of Scottish legislation reducing considerably so that the average number of copies sold per ASP is now only 65 copies whilst the average number of copies sold per SSI (excluding copies taken for internal use by the Scottish Government) is now 29 copies with just six instruments selling in excess of 100 copies in print.

2.6 The following table and charts demonstrate the growing use made of the OQPS website:

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</tbody>
</table>
Figures from WebTrends

In addition access to Scottish legislation via the Official legislation portal (opsi.gov.uk) continues to grow with over 300,000 page views on SSIs and 195,000 page views on ASPs each month.

2.7 Based on the current circumstances it is our assessment that the existing statutory obligation to “print” both ASPs and SSIs should be amended to become a statutory obligation to “publish”. Print copies of Scottish legislation will be made available for sale as they are at present, but given how users now access the material, as highlighted by the above statistics, they should no longer be the primary means for making legislation available. Print copies will continue to be available and users will be able to place standing orders to receive all ASPs and/or SSIs or those relating to particular subjects.

2.8 In terms of provision of archive copies of Scottish legislation, apart from the two official print copies of ASPs one of which is retained by the
Parliament and one by the National Archives of Scotland, copies of each ASP and SSI are also provided to each of the six Legal Deposit Libraries in the UK and Ireland under the provisions of the Legal Deposit Libraries Act 2003. As a result a copy of each piece of Scottish Legislation is deposited with the National Library of Scotland and nothing contained in the present Bill will change this. We therefore believe the concerns expressed by the Faculty of Advocates and others are unfounded.

3. Comments on provisions within the Bill

3.1 Given the background set out above we would offer the following specific comments on the Bill as introduced:

Part 1 – Interpretation

Sections 2 and 3 – There are instances where an instrument does not make specific provision for it to come into force on a particular day. There ought, therefore, to be a provision which specifies that in such circumstances it should come into force on a day relating to the date on which it is made.

Section 3(2) – There are instances where an instrument will come into force at a particular time of day, so perhaps this should be amended to read: “unless a specific provision is made for the coming into force the Act or Instrument comes into force at the beginning of the day”.

Sections 10(2) and 11(2) – References are made to “any revised edition of the statutes printed by authority, to that edition”. As this relates to the former Statutes in Force which ceased publication in 1996, to be replaced by the UK Statute Law Database; in order to cover all circumstances perhaps the reference ought now to be to “any revised edition of the statutes printed or otherwise published by authority, to that edition”.

Part 2 – Scottish Statutory Instruments

Section 27 – The wider definition of an instrument is to be welcomed, but perhaps it could still be drawn more widely. Many citizens do not understand the distinction between various pieces of legislation whether this is an Act, an instrument, a Rule, Order or Regulation. Where there are also Statutory Codes, Codes of Practice or other pieces of subordinate legislation which are not currently SSIs, but which require compliance, then they would see these as legislation and would expect to find them on the OQPS website. Perhaps consideration could therefore be given to an appropriate amendment which would deal with this?

Part 3 – Publication of Acts and Instruments
In practical effect the legislative responsibilities ought to be such so that the QPS can operate a single framework for publication of both Acts and Instruments.

Section 39(2) – Given the background of diminishing sales of printed copies the primary obligation should be to publish an Act on a website (managed by the Queen's Printer for Scotland), though print copies should also be made available for sale.

Section 42(2)(d) – Given that we are now taking steps to publish all SSIs on the website, this provision which potentially disappplies the requirement to publish, would now appear to be overtaken and ought therefore to be deleted.

Section 42(2)(g) – If this provision remains we could be left with differing arrangements for charging for the supply of printed copies of an SSI and charging for the supply of printed copies of an ASP, where one was regulated and the other is not. The current practice to charge for the supply of printed copies, with the same price being charged for a piece of legislation of a similar page content no matter whether the Act or Instrument is produced in London, Edinburgh, Cardiff or Belfast is both effective and efficient and is understood by users. The current policy is also that downloading the text of any ASP or SSI from the official legislation websites is free, providing for open and ready access to legislation for all users. Any change would be detrimental to this policy. It would therefore be anomalous for the arrangements for supply of copies of SSIs either in print or on the website to be regulated whilst the same arrangements in respect of ASPs would not. We therefore recommend that this provision should be removed from the Bill.
Minister for Parliamentary Business

During an informal briefing session with the Subordinate Legislation and the Standards, Procedures and Public Appointments Committees on 8 September 2009, my officials indicated that I would write to both Convenors providing details of possible amendments to the Bill that the Scottish Government may be considering bringing forward at Stage 2. I have decided to provide this information on possible amendments to the Committees in order to allow them to take this into account, as appropriate, during the stage 1 consideration of the Bill.

Proposed stage 2 amendments

At present we are considering making minor amendments to the Bill as follows:-

- section 1 – we are keeping under review the application of Part 1 including the definition of “Scottish instrument” to ensure that it meets the policy intention;
- section 26 – following a meeting with the Law Society of Scotland about their concerns regarding electronic service of documents, we will make minor amendments to the section to clarify that consent to service by electronic means requires to be in writing;
- section 33 – we have made provision to allow the exercise of certain powers subject to different Parliamentary procedures (no procedure and negative) to be combined in the same instrument. We propose to extend this to allow powers that are subject to negative and affirmative procedure to be combined in the same instrument;
- local instruments and orders made under the Transport and Works (Scotland) Act 2007 (TAWS orders) – we are considering whether it is necessary to clarify the position on Parliamentary procedure in relation to local instruments.
- schedule 1 – we are also keeping under review the list of words and expressions defined in the schedule and will amend, as appropriate. We have identified, for instance, that the definition of registered medical practitioner requires to be updated.

The consideration of these amendments mentioned above has arisen for a number of reasons: to ensure the Bill’s provisions work as effectively and efficiently as possible; in order to meet concerns raised in response to the Parliament’s call for evidence; or to provide further clarification of the policy intention. However, as the committees will see, the matters under consideration are not significant and, so far as I am aware, are unlikely to be controversial.

It may be that further amendments will become necessary as the Bill progresses. I will endeavour to keep the Committees informed of the need for any further amendment as soon as practicable.
Post laying modification to instruments

The SLC recommended in the 14th Report, 2007, Inquiry into the Regulatory Framework in Scotland and in the 12th Report, 2008, Inquiry into the Regulatory Framework in Scotland (recommendation 16) that consideration be given to creating a mechanism to allow minor changes to be made to instruments after they have been laid in draft.

The Government in its response to both Reports agreed that there appeared to be merit in the proposal and that it was certainly one worth exploring further. As a result, my officials have been discussing it with the clerking team. In considering the matter in greater depth, however, it has been recognised that there may be practical and technical issues to be overcome in devising such a mechanism. Whilst these may not be insurmountable, we have come to the view that the necessary provision would add complexity to a process which the Bill is intended to streamline. In the circumstances, we do not propose to pursue this policy option further and do not at present propose to bring forward an amendment to the Bill to implement the committee’s recommendation. I wish to assure the Committee that we have given the matter our full consideration and have come to this conclusion for reasons that seem to us to be consistent with the general principles of the Report.

Regulations under section 44 (Queen’s printer to publish instruments)

I would also like to take this opportunity to provide the committees with a draft set of regulations to be made under section 44 of the Bill. The draft is still work in progress however I would hope that it will illustrate how we intend to exercise the power.

Can I also take this opportunity to clarify the Scottish Government’s position in relation to Recommendation 9 of the SLC’s 12 Report (2008). During an exchange with Ian McKee MSP at the Committees meeting on 28 April 09 regarding the Scottish Government’s position in relation to Recommendation 9, I had unintentionally indicated that the Bill departed from the SLC’s recommendation, in that it does not retain the Class 3 procedure affirmative procedure. As you will be aware from my response to the SLC’s 12th Report (2008) the Scottish Government welcomed the retention of this procedure, whilst rejecting the introduction of an “emergency negative procedure”. The Bill does nothing to alter this position and I wish to confirm this to the committee in order to avoid any confusion on the point.

My officials will continue to cooperate with the clerking team and provide whatever assistance they can.
Thank you for your letter of 6 October to Jan Marshall. As Bill Manager I have been asked to respond to the issue raised in your letter.

**Section 4 – pre-action requirements**

Q.1. The Committee asks the Scottish Government to explain in more detail why it is appropriate to have a power to completely revise the pre-action requirements which are set out in the Bill through subordinate legislation given the significance of such changes for the relationship between debtor and creditor and the market in secured lending over residential property (as opposed to a power to make further provision about how specified pre-action requirements are to be fulfilled).

The Scottish Government replies as follows:

A.1. It is appropriate for the Bill to contain a power which will permit Ministers to make changes to the pre-action requirements as and when they consider it necessary to do so, in light of experience of the operation of these provisions in practice. As set out in the DPM, changes will be needed over time to reflect changes in best practice. These changes cannot be anticipated, so a broad power is needed though in practice it is more likely to be used to amend the requirements rather than to revise them completely. However, Ministers recognise the potential breadth of this power and have therefore made its exercise subject to affirmative procedure.

Q.2. The Committee asks the Scottish Government to explain whether it is considered that it will be necessary to use the power in order to give sufficient definition to the pre-action requirements which are to be specified in primary legislation because their meaning is currently determined by reference to imprecise terms such as what are “reasonable efforts” or what is a “likely result”.

The Scottish Government replies as follows:

A.2. These terms have been used to ensure that the Bill gives flexibility to Sheriffs to determine what is suitable in the circumstances of individual cases. It is considered appropriate to have a power to make further provision about the pre-action requirements in order to give flexibility to give further definition to and supplement them. An SSI is being drafted and will be lodged with the lead committee to assist its consideration. This will give an indication of the types of provision that might be made through use of the power.

Q.3. The Committee asks the Scottish Government to explain in more detail the relationship between legal requirements set out in the Bill, further legal requirements in subordinate legislation made under this power and non-binding requirements of
The Scottish Government replies as follows:
A.3The pre-action requirements set out in the Bill constitute the legally binding requirements which creditors must comply with before making an application for repossession. The subordinate legislation will explain and supplement these and will be binding as to their effect on creditors. The guidance will detail matters that Ministers expect creditors to have regard to in carrying out their duties which, although it is not considered require to be made legally binding, would assist in enabling each case to be considered on its individual circumstances.

Q.4The Committee asks the Scottish Government to explain what types of matters might be covered by the power to issue statutory guidance and the intended effect of the guidance.

The Scottish Government replies as follows:
A.4Statutory guidance will clarify what could be considered reasonable in a creditor’s attempts to satisfy the pre-action requirements described on the face of the Bill and in secondary legislation. The guidance will cover issues where it is impractical to specify precisely in the legislation every example of what would count as “reasonable” but where a non-exhaustive list of possible examples, with reference to other guidance, is likely to be useful in helping creditors, debtors, Sheriffs and advice agencies interpret the legislation.

It will also allow Government quickly to respond to changes in the wider regulatory landscape, which do not require change to the legislation, but which Sheriffs will wish to take into account when reaching decisions on whether lenders have acted reasonably and fulfilled the pre-action requirements. Any guidance offered would have to be consistent with primary and secondary legislation, and within the powers vested in Scottish Ministers.

Examples of matters that might be covered by guidance include:

- details of the types of sources of advice and assistance to which a creditor is obliged to direct a debtor under sections 24A(5) of the 1970 Act and 5B(5) of the 1894 Act (which might, for example, include reference to Citizens Advice Bureaux and Shelter advice services);

- reference to Financial Services Authority Mortgage Code of Business Chapter 13, and guidance issued by the Council of Mortgage Lenders which seeks to outline industry-agreed principles as to what may be considered reasonable action when dealing with mortgages in arrears; and

- suggested best practice should a debtor make a complaint to the Financial Ombudsman Service.

Section 9 – certificate for sequestration
Q.5The Committee asks the Scottish Government to clarify the scope of the power in new section 5B(5)(e). The DPM suggests that the power can be used to add further
The Committee seeks clarification as to why a power to specify additional substantive conditions may be necessary, and whether such conditions could override the primary definition of when a certificate can be issued set out in section 5B(1) – for example by stating that certain debts were to be excluded from consideration.

The Scottish Government replies as follows:
A.5 The power in new section 5B(5)(e) is not meant to detract from the entitlement of a debtor to a certificate in section 5B(3), if the authorised person is satisfied that the debtor is unable to pay debts as they become due. Accordingly it cannot be used to impose additional substantive conditions for the granting of a certificate. Rather it is to do with formalities of process that must be followed such as adding requirements to provide advice and information to debtors, similar to regulations currently in place for protected trust deeds and the debt arrangement scheme, as mentioned in the DPM. There is also a power in the same terms in section 5A(5)(f) in relation to low income low assets applications, which has been used in the way described above.

Section 15 – ancillary provision
Q.6 The Committee asks the Scottish Government to explain why it has considered that, in the context of this particular Bill, it is not thought appropriate that all orders under section 15(1)(a), which must go beyond the terms of the Bill itself should be subject to affirmative procedure. The Committee asks whether, as the DPM suggests, it is more likely in this context that significant supplementary or consequential changes affecting primary legislation are required, should these powers not always be subject to affirmative procedure?

The Scottish Government replies as follows:
A.6 It is not thought appropriate that all orders under section 15(1)(a), should be subject to affirmative procedure. The Bill makes provision of comparatively limited extent and so the supplemental, incidental or consequential provisions which are for the purposes of the Act will be similarly limited. They will fall within a predictable narrow scope. Some changes under section 15(1)(a) could be of a minor nature, making it disproportionate to attract affirmative procedure for all changes. We would expect to make more significant changes (including those in exercise of the “supplemental” power) by textual amendment and it is thought appropriate that such changes should attract affirmative procedure.
SUBORDINATE LEGISLATION COMMITTEE

27th Meeting, 2009 (Session 3)

Tuesday 27 October 2009

Paper by the Clerk

Tobacco and Primary Medical Services (Scotland) Bill – Response to SLC Stage 1 Report

Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Tobacco and Primary Medical Services (Scotland) Bill to the Health and Sport Committee, as lead committee for the Bill, on 5 June 2009.

2. On 23 October 2009, the Minister for Public Health and Sport, Shona Robison MSP, wrote to the Convener of the Health and Sport Committee responding to its Stage 1 report.

Scottish Government Response

3. The response\(^1\) indicates that the Scottish Government intends to seek to amend the Bill in line with the Subordinate Legislation Committee’s recommendations on the delegated powers contained in section 17 (Vehicles, vessels and moveable structures) and schedule 1 (fixed penalties).

Progress of the Bill

4. The Bill passed Stage 1 on 24 September 2009. Day 1 of Stage 2 will be held on 11 November 2009.

Recommendation

5. Members are invited to note the Scottish Government’s response to the Health and Sport Committee’s report on the Tobacco and Primary Medical Services (Scotland) Bill at Stage 1.

Dougie Wands
Clerk to the Committee

SUBORDINATE LEGISLATION COMMITTEE

27th Meeting, 2009 (Session 3)

Tuesday 27 October 2009

Scottish Government Responses

The Water Environment (Groundwater and Priority Substances) (Scotland) Regulations 2009 (SSI 2009/draft)

On 9 October 2009 the Scottish Government was asked:

1. To explain the effect of delegating the function of determining what is a hazardous substance to SEPA in accordance with new schedule 2 to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 ("CAR") inserted by these regulations as follows:
   
o How it is ensured there will be legal clarity as to what hazardous substances have been "identified" by SEPA and whether the intention is that it is the list of substances published by SEPA which is determinative of the matter or otherwise,

   o Whether there will be a list of hazardous substances in place upon commencement of these regulations, or if not, how hazardous substances are to be legally identifiable for the purposes of the scope of the regulations (under regulation 4(1) of CAR as amended), offences under regulation 40(1) of CAR (contravention of regulation 5 or a GBR), and the general binding rule in rule 16 of Schedule 3 of CAR.

2. For its view on whether the amendment of rule 16 of Schedule 3 by prohibiting the discharge to groundwater of the new hazardous substances to be identified by SEPA is "specifying rules" referred to in paragraph 3(2) of schedule 2 to the 2003 Act (GBRs) and whether therefore the requirements of section 21(2) to (4) of the 2003 Act are required to be met and whether consultation was carried out in accordance with section 21(2).

3. To explain the effect (if any) of the error in the proper citation of the Surface Waters (Dangerous Substances) (Classification) (Scotland) (No. 2) Regulations 1998 intended to be revoked by regulation 5 and Schedule 3.

4. Given that the power in section 20 of the 2003 Act does not appear to have been used to textually amend primary legislation, whether the basis for use of affirmative procedure in relation to section 20 is founded on the choice of procedure available under section 36(5) and, if so, why this section has not been cited in the preamble and headnote to the draft instrument.

The Scottish Government responds as follows:

1. Under the proposed amendments to Schedule 2 to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 ("CAR"), basic parameters of what constitutes a hazardous substance are defined by paragraphs 1 and 2 of that Schedule. These include toxicity, persistency and liability to bioaccumulate. SEPA is required to
publish and maintain a list of the substances that it identifies as falling within those parameters. The Scottish Government considers that the list, to be published and made freely available to the public, will provide the necessary transparency, notwithstanding that the list is not contained within the four corners of the Regulations themselves. It is the list which will be determinative of what is a hazardous substance.

The reason why Schedule 2 has been drafted in this way is to respond to the difficulty that scientific knowledge as to what ought properly to be considered as a hazardous substance is in a constant state of evolution. By delegating to SEPA the function of identifying which substances constitute hazardous substances, we hope to avoid the need for frequent minor amendments to the Regulations.

A list of hazardous substances will be in place upon commencement of these Regulations. The obligation placed upon SEPA to publish the list enters into effect contemporaneously with the coming into force of the Regulations, such that SEPA will have to ensure that the list is in place immediately.

2. We do not consider that the proposed amendment of Rule 16 to Schedule 3 to CAR constitutes "specifying rules" in terms of section 21(2) of the Water Environment and Water Services (Scotland) Act 2003 ("the 2003 Act").

The Regulations amend Rule 16 by the deletion of the words "substances listed in Schedule 2 of these regulations" and their substitution with the words "any hazardous substances". "[H]azardous substance" is in turn defined as "a substance identified in accordance with Schedule 2;". We do not consider that a potential alteration in the list of hazardous substances listed or identified in accordance with Schedule 2 to CAR constitutes "specifying rules" so as to engage the consultation provisions of section 21(2) to (4) of the 2003 Act.

3. We acknowledge that a typographical error has been made in Schedule 3 in that "The Surface Waters (Dangerous Substances) (Classification) (Scotland) Regulations 1998", where it occurs for the second time, should read "The Surface Waters (Dangerous Substances) (Classification) (Scotland) (No. 2) Regulations 1998". We are grateful to the Committee for spotting this.

In light of the fact that the correct SI numbers have been cited for both Regulations, we consider that this typographical error will not prevent the correct revocations taking effect as intended.

4. We are grateful to the Committee for spotting the point about the absence of references in the headnote and preamble to section 36(5) of the 2003 Act. Such references should have been included and we apologise for their omission.
On 8th October the Scottish Government was asked:
(a) whether the reference to the definition of Council Regulation 834/2007 inserted into Schedule 1 of SSI 2008/100 by regulation 7(b) of these regulations can be construed as an ambulatory reference to that instrument as amended from time to time (as the preamble to the instrument suggests) given that no express provision to that effect has been made as required by paragraph 1A of Schedule 2 to the European Communities Act 1972; and
(b) whether the reference to the title of Council Regulation 834/2007 in the preamble to the regulations is correct and if not, what the effect of any error is.

The Scottish Government responds as follows
(a) The Scottish Government is grateful to the Committee for pointing this matter out and specific references will be added in respect of the ambulatory reference at the first appropriate legislative opportunity.

(b) The Scottish Government agrees that the reference to the title of Council Regulation 834/2007 is incorrect as it uses the same wording "indications referring thereto" as was contained in the previous instrument 2092/91 whereas the title to 834/2007 simply refers to "labelling". It is not considered that this error has any effect on the instrument.