

SPICe Briefing

Interpretation and Legislative Reform (Scotland) Bill

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The Interpretation and Legislative Reform (Scotland) Bill was introduced on 15 June 2009 following a consultation. The Bill is a highly technical one which seeks to replace three transitional orders made under the Scotland Act 1998. The transitional orders are SI 1999/1096; SI 1999/1379 and SI 1999/1593.

The Subordinate Legislation Committee has been designated lead Committee for the Bill and the Standards, Procedures and Public Appointments Committee has been designated a secondary Committee.

Both committees will separately consider the Bill's general principles. The Standards, Procedures and Public Appointments Committee will consider the proposals in Parts 4, 5 and 6 and will report to the Subordinate Legislation Committee, which will take evidence on the Bill in its entirety and will report to the Parliament on the general principles.



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EXECUTIVE SUMMARY

The Interpretation and Legislative Reform (Scotland) Bill:

Francesca McGrath

BILL

Interpretation and Legislative Reform (Scotland) Bill is a highly technical Bill which in replacing three transitional orders seeks to provide the Scottish Parliament with its own distinct subordinate legislation procedures.

As well as providing a definition of Scottish Statutory Instruments (SSIs) the Bill also deals with the publication, interpretation and operation of Acts of the Scottish Parliament and instruments made under them.

The Bill also provides procedures for dealing with orders which require a special parliamentary procedure which were not included in the new procedures established by the Transport and Works (Scotland) Act 2007.

In addition, the Scottish Government is using the Bill to introduce the means to give Ministers the power to change the procedure to which devolved subordinate legislation is subject by amending the parent Act, following a resolution by the Parliament.

The Bill also introduces a substantive change to the law as it seeks to bind the Crown by future Acts of the Scottish Parliament and Scottish Statutory Instruments, unless the legislation specifically states otherwise. The legal community have raised concerns about this proposed change.

Finally, the Bill seeks to allow Scottish Ministers to amend Acts or instruments which are going to be the subject of a Consolidation or Codification Bill. Concerns have been raised that this power is too wide and is open to misuse.

BILL BRIEFING

This briefing describes the existing SSI procedures. It then describes the work carried out by the Subordinate Legislation Committees (SLC) in Sessions 2 and 3 on the regulatory framework in Scotland, comparing the recommendations in the two reports.

The briefing also looks at the Scottish Government's response to the Session 3 (S3) Committee's recommendations, including the draft Bill which it consulted on early in 2009, comparing the provisions of the Bill as introduced with the S3 recommendations.

In the section on the Bill as introduced the briefing highlights the sections which differ from the three transitional orders, the provisions which differ from the draft Bill and the provisions which are entirely new. This section provides comments from the respondents to the consultation on

the draft Bill, and to the call for evidence on the Bill issued by the Scottish Parliament Committees, on issues which are sources of potential debate.

The final section of the briefing discusses other issues which have been raised as sources of potential debate.

An appendix provides a detailed timeline for the Scottish Parliament's previous work on the transitional orders and the subordinate legislation procedures.

BACKGROUND

The Interpretation and Legislative Reform (Scotland) Bill was introduced on 15 June 2009. The Bill intends to replace the three transitional orders made under the Scotland Act 1998. These transitional orders are SI 1999/1096; SI 1999/1379 and SI 1999/1593.

SI 1999/1096: [*The Scotland Act 1998 \(Transitory and Transitional Provisions\) \(Statutory Instruments\) Order 1999*](#). The 'SI Order' describes a Scottish Statutory Instrument (SSI) and the parliamentary procedures necessary to deal with SSIs, including scrutiny.

SI 1999/1379: [*The Scotland Act 1998 \(Transitory and Transitional Provisions\) \(Publication and Interpretation etc of Acts of the Scottish Parliament\) Order*](#). The 'Interpretation Order' deals with certain formal procedures associated with the Royal Assent, numbering, citation and statutory interpretation of Acts of the Scottish Parliament and of subordinate legislation made under such Acts and other documents.

SI 1999/1593: [*The Scotland Act 1998 \(Transitory and Transitional Provisions\) \(Orders subject to Special Parliamentary Procedure\) Order 1999*](#). The 'SPP Order' deals with the procedures to be followed where, by virtue of a pre-devolution UK Act, orders made under that Act are subject to special parliamentary procedure. By virtue of the transitional order, such an order (a "special procedure order"), if objected to, requires to be confirmed by an Act of the Scottish Parliament and, if not objected to, requires to be laid before the Parliament and be subject to annulment within a period of 40 days.

These, and other, transitional orders were made under the Scotland Act in order to provide an initial statutory framework for matters associated with devolution. As the designation implies, all such orders were intended as temporary "stop-gap" measures until such time as the Scottish Parliament was in a position to replace them with provision of its own. Each of the transitional orders, unless previously revoked, would remain in force until the date appointed by or under an Act of the Scottish Parliament (asp).

EXISTING STATUTORY INSTRUMENTS PROCEDURES

Subordinate legislation (also called delegated or secondary legislation) is law made (or confirmed or approved), under powers granted by primary legislation, by executive bodies or individuals, usually a Minister. As such it is not 'made' by the Parliament in the sense that primary legislation is so made. The Parliament, however, has an important role in scrutinising secondary legislation (as it would other actions or decisions of the Government) and, where applicable, approve or reject it.

The SI Order sets out the procedures which Scottish Statutory Instruments should be subject to. The procedures divide into three main categories: affirmative, negative or other (for example, commencement orders). There are further subdivisions depending on whether the SSIs need to be laid in draft before Parliament, are laid after being made, or do not need to be laid.

There are 2 distinct kinds of parliamentary scrutiny: technical and policy. Technical scrutiny (set out in Rule 10.3 of the Standing Orders of the Scottish Parliament) involves determining whether the Parliament's attention needs to be drawn to an instrument or draft instrument. For example if the drafting appears defective, or if there appears to be an unexpected use of the powers conferred by the parent Act. However, a substantial proportion of subordinate legislation (for example, local instruments which have only to be published to become law) receives no parliamentary scrutiny.

There is no statutory list of the forms of Scottish parliamentary control over subordinate legislation, but in practice they tend to follow established models. It is possible to distinguish eight different types or classes of parliamentary control which are used for SSIs. These are summarised in Table 1 (below), which appeared in the SLC's 12th Report 2008 (Subordinate

Legislation Committee 2008a). The table also quantifies the number and proportion of instruments handled under each type of procedure by the Parliament during the calendar year 2006. These figures were provided by the Minister for Parliamentary Business.

Table 1: Procedures used in the Scottish Parliament

<i>Class</i>	<i>Procedures</i>
1	Affirmative procedures Instrument is laid before the Parliament in draft and cannot be made until the draft is approved by resolution of the Parliament. This is the most common form of affirmative procedure. <i>59 SSIs (13%)(this figure includes Class 8)</i>
2	Instrument is laid before the Parliament after making but cannot come into force unless and until it is approved by resolution of the Parliament. This procedure is rarely used in modern Acts. <i>1 SSI</i>
3	Instrument is laid before the Parliament after making and may come into force but cannot remain in force after a specified period (usually 28 days from the date on which it was made) unless approved by resolution of the Parliament within that period. This procedure has in the past been mainly used for emergency food orders. <i>0 SSIs</i>
4	Negative procedures Instrument is laid in draft before the Parliament and cannot be made if the draft is disapproved by the Parliament within 40 days after the draft is laid. This procedure is rarely used in modern Acts. <i>0 SSIs</i>
5	Instrument is laid before the Parliament after making but normally cannot come into effect within 21 days after being laid. It is subject to being annulled in pursuance of a resolution of the Parliament passed within 40 days after laying. This is the most common form of negative procedure. <i>242 SSIs (55%)</i>
6	Other procedures Instrument is laid before the Parliament after making but there is no provision for further parliamentary procedures (although it is subject to the scrutiny of the Subordinate Legislation Committee). <i>22 SSIs (5%)</i>
7	Instrument is not required to be laid before the Parliament (although it is subject to the scrutiny of the Subordinate Legislation Committee) <i>116 SSIs (26%)</i>
8	Super affirmative procedure This is a variant of Class 1. It generally involves (i) a draft instrument being laid before the Parliament (ii) an opportunity for comments to be submitted to the Executive on the draft (iii) if Ministers decide to proceed with the proposals, they then lay before the Parliament a draft in the normal way for affirmative procedure (as in Class 1), together with a statement of whether and how the comments have been reflected in the draft. (see <i>Class 1</i>)

As stated in the timeline (see Appendix 1 of this briefing) the Session 2 (S2) SLC report, *Inquiry into the Regulatory Framework in Scotland: final report* (Scottish Parliament Subordinate Legislation Committee 2007a) identified 10 shortcomings with this current system:

- The variety of procedures used in the Parliament to handle SSIs is confusing.
- The limitations of the parent Act determining the choice of parliamentary procedure so that, over time, the level of scrutiny does not always match the importance of the instrument.

- The lack of advance notice to committees of instruments to be laid by the Government, which hinders the planning and management of workloads.
- The large, sometime unmanageable, number of instruments laid just before Parliamentary recesses.
- The all or nothing approach to instruments, where an instrument is either approved or annulled in whole, and cannot be amended.
- The double-handling of instruments by committees (when an instrument with an error has to be withdrawn then re-laid and considered again). [In practice draft instruments can be withdrawn. However made instruments would have to be revoked and a new instrument made.]
- Timetabling pressures on the SLC and other committees under the current scrutiny timetables.
- The fact that lead committees are regularly scrutinising instruments already in force, and may therefore be reluctant to annul even an instrument that they have serious concerns about. [In practice committees can only recommend annulment to Parliament.]
- The lack of a proper emergency procedure; and the regular breach of the rule that instruments should not come into force before being laid or, where appropriate, within 21 days of being laid.
- The lack of any procedure for consolidating instruments.

In its final report, the S2 Committee made 69 recommendations, 62 of which related to statutory instruments. As well as recommending the establishment of a new Scottish Statutory Instrument Procedure (SSIP) the recommendations also called for:

- the establishment of a Consolidation Working Group with representation from the SLC clerks, Executive officials, the Scottish Law Commission and others
- the definition of SSIs not to be extended to cover all subordinate legislation or instruments of a “legislative character” whether made by the Executive or by the Parliament
- all documents made by the Executive under statutory powers, including directions, guidelines and codes of practice, even although they may not be “of a legislative character” be published in a form which renders them easily accessible
- all subordinate legislation made by the Parliament, whether in the form of Standing Orders, codes of conduct, directions, resolutions or determinations, be published in a form which renders them easily accessible
- a procedure which would allow the Finance Committee the opportunity to scrutinise costs which are delegated to subordinate legislation
- the existing procedures in Articles 5 to 9 in the SI Order for the numbering, citation and publication of instruments after they have been made, should continue to apply, subject to some modifications – including that, in future, all instruments which are made as SSIs should be published by OPSI (Office of Public Sector Information), and that the Executive, or other maker of a SSI, should be required to send it to the Queen’s Printer for publication immediately after it is made

In its report, published on 18 March 2008, the S3 Committee reiterated the 10 shortcomings in the existing system identified in the S2 report. However the new Committee rejected the SSIP proposed in the S2 report and instead decided to recommend changes to the existing procedures. The S3 SLC made 22 such recommendations.

Table 2 (below) highlights the similarities, or differences, between the Session 3 and Session 2 recommendations.

Table 2: Session 2 and 3 Recommendations

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
1	The Parliament should retain the current system and procedures for scrutinising subordinate legislation subject to the improvements recommended in this report; and legislation should be introduced in the course of this session to replace SI 1999/1096 (SI Order)	<p>SI 1999/1096 should be replaced by way of a Scottish Statutory Instruments Bill. (1)</p> <p>There should not be any change in the division between technical and policy scrutiny of subordinate legislation which is carried out by the SLC and the lead committee respectively. (4)</p> <p>It should continue to be open to any MSP to put down a motion to a lead committee seeking to have an instrument annulled or a draft instrument disapproved. (22)</p>	<p>Existing procedures for the making and parliamentary control of subordinate legislation should be replaced by new SSIP (2)</p> <p>All the existing procedures should be replaced by SSIP which would apply automatically and uniformly to all SSIs. (5)</p> <p>The new procedure should be based upon all instruments being laid in draft but subject to being disapproved within a specified period of time, such as 40 days after laying. (6)</p> <p>The SSIP should also include an exceptional procedure in terms of which instruments would be laid after being made but would be subject to being annulled within a specified period, such as 40 days after laying. (7)</p>
2	All instruments should continue to be governed by procedures set down in the parent Act.		It should no longer be necessary for the parent Act to specify the procedure. (8)
3	The Scottish Government in drafting legislation, and the Parliament in its scrutiny role, should continue to make use of more flexible approaches which allow powers to be tailored to the situation for which they are required.		
4	Post-legislative scrutiny of delegated powers should be added to the remit of the Subordinate Legislation Committee, and a power should be		

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
	conferred on Ministers enabling them to amend by order the procedure specified in a parent Act, on the recommendation of the SLC.		
5	Class 6 (no procedure) and class 7 (not laid) procedures should be amalgamated into a single “no procedure” category.		All the existing procedures should be replaced by a simplified procedure (SSIP) which would apply automatically and uniformly to all SSIs. (5)
6	Unless compelling reasons can be identified for retaining these procedures, class 2 (made affirmative) and class 4 (draft negative) procedures should be discontinued.		All the existing procedures should be replaced by a simplified procedure (SSIP) which would apply automatically and uniformly to all SSIs. (5)
7	In transiting the discontinued procedures into one of the remaining (or new) procedures, there should be no downgrading in the level of parliamentary scrutiny; and that section 29 of the Legislative and Regulatory Reform Act 2006 should be considered as providing a useful model.		
8	Classes 1 (affirmative), 5 (negative), and 8 (super affirmative) procedures should be retained.		All the existing procedures should be replaced by a simplified procedure (SSIP) which would apply automatically and uniformly to all SSIs. (5)
9	Class 3 procedure should be retained as an option for dealing with certain sorts of emergency procedure; and a specific procedure should be introduced for emergency negative instruments. This should only extend to emergency instruments and not to urgent instruments which should continue to be dealt with in the same way as breaches of the 21 day rule are at present.	There should be a separate procedure for emergency and urgent instruments where they could be made and, if necessary, brought into force before they are laid, but would be subject to being annulled within 40 days. (27) Emergency instruments should not be subject to the 28 day rule or to any rule which requires them to be laid before being brought into force but, where the	

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
		instrument is brought into force before being laid or within the 28 day period, the need for this should be explained in the Executive Note. (28)	
10	Lead committees should be made aware of the flexibility which already exists to dispense with debate on affirmative instruments and to take evidence on negative instruments.		
11	The period after which instruments subject to the negative procedure can come into force should be extended from 21 days to 28 days.	In the context of the SSIP, where an instrument is subject to the exceptional procedure, the 21 day rule should be replaced by a 28 day rule. Where it is necessary for such an instrument to breach the 28 day rule, the Executive or other maker of the instrument should be required to write to the Presiding Officer explaining why it was necessary to do so. The SLC would consider this explanation. (16)	
12	There should be a deadline for Parliament to take a motion to approve a draft instrument and this should be 10 days after the expiry of the 40 day period provided for committees to report; and motions to annul made instruments should be taken by the Parliament within 10 days after the expiry of the 40 day laying period, provided that the recommendation to annul has been made by the lead committee within the 40 day period.	<p>The period during which the draft may be disapproved or the instrument may be annulled should be 40 days after the draft or the instrument has been laid before the Parliament. (13)</p> <p>A motion in the Parliament to disapprove a draft instrument or to annul an instrument could be taken by the Parliament outwith the 40 day period, provided that— the lead committee has made a recommendation for such disapproval or annulment within that period; and the</p>	

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
		motion is considered within 10 days after the expiry of that period. (15)	
13	There should be no change to the current procedures whereby lead committees are required to take into account the report of the Subordinate Legislation Committee before they conclude their own consideration of any instrument.		<p>The SLC should be obliged to send its report to the lead committee, but the Standing Orders should remove the current requirement which obliges the lead committee to consider that report before submitting its own report. (10)</p> <p>To protect the SLC's ability to inform the lead committee of any serious issues in relation to an instrument, Standing Orders should provide that, under normal circumstances, lead committees should allow the SLC at least one consideration of an instrument, and take account of any comments or concerns expressed by the SLC, before they complete their own consideration.(12)</p>
14	The power to recommend annulment of an instrument should rest solely with the lead committee.	Lead committees should continue to be solely responsible for recommending the annulment of an instrument or the disapproval of a draft instrument to Parliament. (21)	
15	The option of conditional annulment should be discussed further with the Scottish Government to identify whether it could be a workable addition to the options available to the Parliament; if so, it could be provided for in the proposed bill.		
16	There should be a procedure for the Scottish Government to withdraw and relay draft instruments to make agreed technical changes without affecting the 40 day time limit; further consideration should be given to a procedure	The SLC should be given the power to suggest to the Executive changes of a strictly technical nature to a draft instrument subject to the general procedure. (23)	

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
	<p>which would allow minor technical changes to be made to instruments which have already been made and are subject to negative procedure; and SLC and Scottish Government officials should be asked to develop detailed proposals for the scope and operation of the proposed amendment procedures.</p>	<p>There should also be a procedure for the correction of minor drafting changes to instruments subject to the exceptional procedure which would involve a formal agreement between the Convener of the SLC and the Minister in charge of the instrument. The changes would be given effect to as a printing correction. (26)</p> <p>The Standing Orders should enable the SLC to report an instrument to the Parliament on the ground that the Executive did not give effect to its suggested technical changes. (24)</p>	
17	<p>The Scottish Government should provide Parliamentary committees with a 6 week forward programme of subordinate legislation on a monthly basis and, given that the Scottish Government's tracker system is now in place, this should begin quickly; and the content of the Scottish Government's forward programme should be kept under review and should be adjusted in the light of experience.</p>	<p>The Executive should put in place a co-ordinated approach to the making and laying of instruments across all its Departments, and should report to the Committee regularly on the progress of the development of a tracker system for SSIs. (17)</p> <p>The Standing Orders should provide that at the beginning of each 3 month period, the Executive should provide the Parliament with an indicative programme of the drafts or instruments which it plans to lay before the Parliament during that period. The programme should contain details of the likely content of the instrument, whether it is to be subject to the general or exceptional procedure, and of the Executive's views as to</p>	

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
		<p>whether it is likely to be sufficiently important to warrant debate in the lead committee and, where appropriate, the Parliament. (18)</p> <p>The Standing Orders should also provide that the SLC should be empowered to report to the lead committee and to the Parliament any instrument which was laid and which was not in the current 3 month programme as required, and where it was not satisfied with the explanation given by the Executive. (19)</p>	
18	Procedures should be established specifically for the scrutiny of consolidating instruments and these should be based on the previous SLC's recommendations.	<p>Consolidation (Recommendations 35-38)</p> <p>A Consolidation Working Group should be established with representation from the SLC clerks, Executive officials, the Scottish Law Commission and others. (32-34).</p>	
19	Local instruments should continue to be made as SSIs; publication of web versions of local instruments on the Queen's Printer for Scotland website should continue; and a clearer definition of local instruments should be adopted.	<p>Instruments which are classified as local should cease to be made as statutory instruments and, for this purpose— an instrument should be classified as being of a local nature if its provisions are of a nature which would have been included in a private Bill or which apply to a particular locality and are not of general importance. All other instruments should be classified as being of a general nature;</p> <p>the SSI Bill should provide that, where</p>	

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
		<p>any existing Act or enactment confers a power to make subordinate legislation in the form of a statutory instrument and that instrument would be a local instrument in the above sense, the requirement for it to be made by statutory instrument should cease with appropriate amendments made to any such Act or enactment;</p> <p>the Scottish Ministers should be given the power, by order made by SSI, to make appropriate amendments to any such Act or enactment making it clear that such a local instrument would no longer require to be made by statutory instrument; but</p> <p>the Executive should be required to publish such local orders on its website in a form which renders them easily accessible.(46)</p>	
20	Rules of Court should continue to be made as SSIs.		<p>Rules of court should cease to be made as statutory instruments and arrangements should be put in place by the courts for ensuring adequate publication of those rules for practitioners and the public. (44)</p> <p>It would be open to the courts to inform the Parliament of the publication of rules of court, which would allow committees to look at these if they wish; they would however have no formal scrutiny role. (45)</p>
21	The Scottish Government should continue to lay instruments as soon as possible after making but	If an instrument is to be made without either a draft having been laid in terms of	

	S3 recommendations	S2 recommendations agreed to in S3 report	S2 recommendations rejected in S3 report
	failure to lay should not invalidate an instrument.	the general procedure, or the made instrument under the exceptional procedure being laid in terms of the above requirement, such failure should invalidate the instrument, and it should be treated as never having had any legal effect as from the date when it was made. (49)	
22	SLC and Scottish Government officials should begin early discussions about the detailed content of a bill to replace SI 1999/1096 and the process of delivering changes to the subordinate legislation scrutiny process.	SI 1999/1096 should be replaced by way of a Scottish Statutory Instruments Bill. (1)	

SESSION 3 COMMITTEE RECOMMENDATIONS AND THE GOVERNMENT'S RESPONSE

In its response to the S3 Committee's report the Scottish Government (SG) said they were happy to accept the majority of the SLC's recommendations. They also indicated that, in principle, they would be willing to bring forward a Government Bill to give effect to the proposals, but that the Bill would need to be accompanied by changes to the Standing Orders.

The SLC first considered the Government's response at their meeting on 17 June 2008. The members agreed that clerks, the legal advisers and Scottish Government officials should consider the outstanding issues of Recommendations 4, 9, 12 and 15, and report back to the Committee after the summer recess.

At its away day on 16 September 2008, the Committee received a progress report on these discussions. At the 30 September meeting, the Committee considered a paper by the clerk which set out the issues discussed over the summer and sought the agreement of the members as to the next steps in the process (Scottish Parliament Subordinate Legislation Committee 2008c).

On the 2 October 2008, the Convener wrote to the Minister for Parliamentary Business recording the Committee's decisions on the issues raised in the paper (Scottish Parliament Subordinate Legislation Committee 2008d). The letter welcomed the SG's commitment to introduce a Legislative Reform Bill and stated that the Committee would be inviting the Minister to give evidence in relation to the draft Bill. The letter then went on to comment on the four outstanding recommendations plus Recommendation 16 on procedures to allow minor technical changes to instruments, and on the proposed method of reporting of the Government's performance against its commitments.

The Minister for Parliamentary Business, Bruce Crawford, responded to the Committee's letter on 23 October 2008, indicating that he intended to consult on a draft Bill before the end of the year.

Table 3: Comments on the outstanding recommendations

	Committee's comments on the outstanding recommendations and recommendation 16	Minister's response to Committee's comments
4	<p>Post-legislative Scrutiny of Delegated Powers The Committee agreed that proposals for a process for the post legislative scrutiny of SSIs, should be discussed more widely within the Parliament, particularly that they be shared with other subject committees through the Conveners' Group.</p>	<p>The Minister welcomed the Committee's response to recommendation 4 to develop mechanisms for post legislative scrutiny and to examine how they might be incorporated into the Standing Orders. He highlighted, as the "fundamental policy challenge", "the maintenance of the correct balance between any government's natural desire to progress its business as quickly and efficiently as possible and the Parliament's duty to ensure that delegated powers are exercised appropriately and responsibly".</p>
9	<p>Emergency Procedures The Committee agreed to recommend that the option of strengthening the scrutiny of compliance with the "21 day rule" be</p>	<p>The Minister also agreed with the Committee's proposals for recommendation 9 on emergency procedures</p>

	pursued, rather than introduce a new category of emergency procedure.	
12	Timescales The Committee concluded that it would be helpful to have further discussion on this issue, and looked forward to discussing it with the Minister at the evidence session held in connection with consultation on the Bill.	The Minister again reiterated the Government's position that 40 days are sufficient, and that raising the time to 50 days could "potentially result in significant delays and inefficiencies, including in situations where instruments are subject to procedure at both Holyrood and Westminster or where common implementation dates require to be met in different jurisdictions".
15	Conditional Annulment The Committee agreed not to pursue the case for a system of conditional annulment.	The Minister supported their conclusions in relation to conditional annulment in their amended recommendation 15.
16	Minor Technical Changes to Instruments The Committee agreed to receive a further progress report on the issue in due course. Subsequently (28 April 2009) it was agreed not to pursue this issue.	The Minister said that the Government remained committed to the idea that minor changes might be made to instruments, in order to remove the need to report the instrument but without altering its policy effect.
n/a	Government Commitments The Committee agreed to publish a report detailing performance against commitments and identifying and analysing trends in these other areas.	The Minister saw distinct attractions in such an annual report and suggested it could be used to pull together a range of matters on which the Parliament would wish the government of the day to respond to at a more strategic level than is possible on a case by case basis. He suggested that such a report could contain the use made of powers to make minor technical changes and review work done to consolidate SIs.

DRAFT BILL

The Scottish Government published a consultation paper in connection to its draft Interpretation and Legislative Reform (Scotland) Bill on 13 January 2009 (Scottish Government 2009a). The closing date for responses was 12 April 2009. The closing date was extended by 2 weeks for the Scottish Law Commission and the Court of Session Judiciary. In total the SG received 17 responses by, or immediately after, the closing date. Two further responses, from Francis Bennion and the Faculty of Advocates, arrived too late to be taken into account before the final version of the Bill was laid before Parliament.

As part of its consultation, the SG also held a consultation event in Edinburgh on 19 March 2009. The event included academics, legal practitioners, and representatives from the Scottish Parliament, the Scottish Law Commission and the Scottish Government.

The SLC took evidence from the Minister for Parliamentary Business on the draft Bill on 28 April 2008. The Committee was particularly interested in Part 2 of the draft Bill, which dealt with SIs.

The Minister started his evidence by outlining what he saw as the four main purposes of the draft Bill. These were:

- to deal with the publication, interpretation and operation of Acts of the Scottish Parliament and instruments made under them

- to deal with the making and publication of subordinate legislation, the definition of a Scottish Statutory Instrument and the scrutiny procedures to apply in the Scottish Parliament
- to provide procedures that will apply to orders that are subject to special parliamentary procedures
- to give Scottish Ministers a power to make certain amendments to enactments to pave the way for their consolidation

In the session, the Committee raised issues around widening the definition of SSIs; the reasons for not increasing the 40 day period for annulling instruments to 50 days; emergency orders and the printing of SSIs.

In July, the Government published its *Interpretation and Legislative Reform (Scotland) Bill: consultation analysis report* (Scottish Government 2009b). The Scottish Government concluded that, overall, the respondents to the consultation generally agreed with the purposes of, and approach taken in, the Bill. They also concluded that there were no novel, or substantive, issues raised in responses to the consultation.

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) BILL

The Bill, which is in seven Parts, was published on 15 June 2009:

Part 1 (and schedule 1)	Interpretation
Part 2 (and schedules 2, 3 and 4)	Scottish Statutory Instruments
Part 3	Publication of Acts and Instruments
Part 4	Pre-consolidation modification of enactments
Part 5	Orders subject to Special Parliamentary Procedure
Part 6	Laying documents before the Scottish Parliament
Part 7	General

While the provisions in the Bill break the link with the Statutory Instruments Act 1946 in defining an SSI and give the Scottish Parliament a more streamlined framework for the scrutiny of SSIs, the Bill will not prevent the Scottish Government, in drafting legislation, and the Parliament, in its scrutiny role, from continuing to make use of more flexible approaches which would allow scrutiny procedures to be tailored to the situation for which they are required. This is in line with recommendation 3 of the S3 SLC Committee's 2008 12th report *Inquiry into the Regulatory Framework in Scotland* (Scottish Parliament Subordinate Legislation Committee 2008a).

The Subordinate Legislation Committee was designated lead Committee for the Bill and the Standards, Procedures and Public Appointments (SPPA) Committee was designated a secondary Committee.

Both Committees will separately consider the Bill's general principles. The SPPA Committee will consider the proposals in Parts 4, 5 and 6 and will report to the SLC, which will take evidence the Bill in its entirety and will report to the Parliament on the general principles.

PART 1: INTERPRETATION

Most of this Part of the Bill deals with the subject matter of SI 1999/1379 (Interpretation Order) on how asps and instruments should be interpreted. The idea behind interpretation acts is that

they allow other Acts to be shorter as they do not need to explain certain concepts in detail. This Part also sets out how Acts and instruments should be referred to by their number, including Acts of the pre 1707 Parliaments of Scotland.

PART 2: SCOTTISH STATUTORY INSTRUMENTS

Most of this Part of the Bill will replace SI 1999/1096 (SI Order) in relation to definitions of SSIs and the scrutiny procedures. In addition, this Part introduces new provisions on combining powers (section 33) and giving Ministers powers to amend the procedure subordinate legislation is subject to in a parent Act (section 34).

PART 3: PUBLICATION OF ACTS AND INSTRUMENTS

Most of this Part of the Bill is based on the content of SI 1999/1379 and SI 1999/1096 on how asps and instruments should be published and numbered. The main difference between the Bill and the transitional orders is the removal of the requirement for the Queen's Printer for Scotland to print SSIs.

PART 4: PRE-CONSOLIDATION MODIFICATIONS OF ENACTMENTS

The purpose of Part 4 of the Bill is to allow Scottish Ministers to amend Acts or instruments which are going to be the subject of a Consolidation or Codification Bill (see rules 9.18 and 9.18A of the Scottish Parliament Standing Orders). At present such Bills are introduced to give effect to the recommendations of the Law Commissions.

PART 5: ORDERS SUBJECT TO SPECIAL PARLIAMENTARY PROCEDURES

This Part of the Bill relates to those provisions of SI 1999/1593 (SPP Order) which were not brought within the new regime established by the Transport and Works (Scotland) Act 2007. The remaining instruments which would be subject to the Special Parliamentary Procedure are mainly in relation to the compulsory acquisition of property belonging to local authorities and heritage organisations (i.e. Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, New Towns (Scotland) Act 1968, National Heritage (Scotland) Act 1991 and Crofters (Scotland) Act 1993)).

PART 6: LAYING OF DOCUMENTS OTHER THAN SCOTTISH STATUTORY INSTRUMENTS

This Part of the Bill relates to the laying of other documents, not already described in the Bill, which an enactment would require to be laid before the Scottish Parliament. It replicates the effect of Article 4(5) of the SI Order.

PART 7: MISCELLANEOUS AND GENERAL

This Part of the Bill amends the definition of "enactment" in Schedule 1 to the Interpretation Act 1978 (c.30) (words and expressions defined), to include the definition given in this Bill.

It also clarifies the days on which the three transitional orders will cease to have effect and in what circumstances the Interpretation Order will still apply.

SCHEDULE 1: DEFINITIONS OF WORDS AND EXPRESSIONS

This Schedule defines words and expressions which are commonly used in Scottish enactments.

SCHEDULE 2: SCOTTISH STATUTORY INSTRUMENTS: TRANSITIONAL AND CONSEQUENTIAL PROVISION

This Schedule adapts enactments passed before Part 2 of the Bill is brought into force to ensure that instruments made under them are appropriately classified as SSIs following the revocation of the SI Order.

SCHEDULE 3: MODIFICATION OF PRE-COMMENCEMENT ENACTMENTS

This Schedule modifies the existing procedures for dealing with SSIs for any Acts or instruments passed or made before this Bill is passed and the procedures set out in it come into force.

SCHEDULE 4: APPLICATION OF PART 2 TO STATUTORY INSTRUMENTS LAID BEFORE PARLIAMENT

This Schedule modifies the existing procedures for dealing with UK statutory instruments and draft SIs which are subject to scrutiny by the Scottish Parliament, for any Acts or instruments passed or made before this Bill is passed and the procedures set out in it come into force.

COMPARISON OF SESSION 3 RECOMMENDATIONS AND THE BILL

Table 4: The Session 3 Committee report recommendations and the Bill

	S3 report recommendation	Does the Bill comply with the recommendation?
1	The Parliament should retain the current system and procedures for scrutinising subordinate legislation subject to the improvements recommended in this report; and legislation should be introduced in the course of this session to replace SI 1999/1096	Yes it does
2	All instruments should continue to be governed by procedures set down in the parent Act.	Yes. The parent Act will still determine the relevant procedures for the powers it contains. But two new general powers are included in the Bill (Sections 6 and 8) and Section 34 would give Ministers the power to change the procedure to which devolved subordinate legislation is subject by amendment of the parent act following a resolution by the Parliament. The Bill reflects Recommendation 8 made in the S2 SLC's 14th report 2007
5	Class 6 (no procedure) and class 7 (not laid) procedures should be amalgamated into a single "no procedure" category.	Yes, Part 2 Section 30 requires all other SSIs, not subject to either the negative or affirmative procedures, to be laid before

	S3 report recommendation	Does the Bill comply with the recommendation?
		Parliament prior to them coming into force.
6	Unless compelling reasons can be identified for retaining these procedures, class 2 (made affirmative) and class 4 (draft negative) procedures should be discontinued.	Yes, in effect as the new 3 tier framework introduced by the Bill does not provide for class 2 or class 4 instruments. There is however no explicit ban on the use of such procedures.
7	In transiting the discontinued procedures into one of the remaining (or new) procedures, there should be no downgrading in the level of parliamentary scrutiny; and that section 29 of the Legislative and Regulatory Reform Act 2006 should be considered as providing a useful model.	The provisions for the translation of existing powers in devolved subordinate legislation, over into the new system, are found in Schedules 2 and 3. In the course of its scrutiny the SLC will need to check whether these Schedules deliver this recommendation.
8	Classes 1 (affirmative), 5 (negative), and 8 (super affirmative) procedures should be retained.	The Bill does not prevent the use of super affirmative procedures where primary legislation requires it. Additional consultation or other statutory requirements will still require to be satisfied before an SSI is laid in the Parliament. Once laid, the SSI will be subject to normal affirmative procedures. It remains a matter for the Parliament to decide whether to specify such additional requirements (i.e. a super affirmative procedure) when considering primary legislation. Similarly emergency procedures are not precluded.
9	Class 3 procedure should be retained as an option for dealing with certain sorts of emergency procedure; and a specific procedure should be introduced for emergency negative instruments, including the elements outlined in this report; and this should only extend to emergency instruments and not to urgent instruments which should continue to be dealt with in the same way as breaches of the 21 day rule are at present.	
11	The period after which instruments subject to the negative procedure can come into force should be extended from 21 days to 28 days.	Qualified Yes: Section 28 lays out the procedure to be used for negative instruments. It includes the SLC's recommendation to increase the period after which instruments subject to the negative procedure can come into force from 21 days to 28 days. However this 28 day rule actually waters down the existing procedures, as the transitional order is more robust. SI 1999/1096 Article 10(3) has a test of "necessity" for bringing the instrument into force against the rule. Section 31 of the Bill contains no test that has to be met. It only requires an explanation is provided to the Presiding Officer (as is also the case at present).
12	There should be a deadline for Parliament to take a motion to approve a draft instrument and this should be 10 days after the expiry of the 40 day period provided for committees to report; and motions to annul	Section 29 lays out the procedure to be used for affirmative instruments but they do not include timescales. The timescales presently in use are set out in the Standing Orders.

	S3 report recommendation	Does the Bill comply with the recommendation?
	made instruments should be taken by the Parliament within 10 days after the expiry of the 40 day laying period, provided that the recommendation to annul has been made by the lead committee within the 40 day period.	The Government remains opposed to the extension of the period within which an SSI can be annulled.
18	Procedures should be established specifically for the scrutiny of consolidating instruments and these should be based on the previous SLC's recommendations.	<p>No. Part 4 allows Scottish Ministers to amend Acts or instruments which are going to be the subject of a Consolidation or Codification Bill (see rules 9.18 and 9.18A of the Scottish Parliament Standing Orders), but does not deal with the consolidation of SIs.</p> <p>[More general arrangements for consolidation are not dealt with in the Bill because they are essentially a matter for Standing Orders. The SLC comments on consolidation procedures in their 37th Report (Scottish Parliament Subordinate Legislation Committee 2009a, paragraph 23) to the effect that it is planned to develop draft procedures for consolidation (for inclusion in Standing Orders) and that these should be available for discussion in parallel with Stage 2 of the Bill.]</p>
19	Local instruments should continue to be made as SSIs; publication of web versions of local instruments on the Queen's Printer for Scotland website should continue; and a clearer definition of local instruments should be adopted.	<p>No specific mention of local instruments or Rules of Court in the Bill. However, the definition of SSI in Section 27 and Schedule 2 are relevant here. So, for example, orders made by Scottish Ministers will be SSIs unless the enactment "contracts out" – for example, harbour orders which are currently local orders will be SSIs.</p> <p>Acts of Sederunt made under existing powers would also appear to be SSIs. This reflects representations made earlier in the process by the Lord President.</p>
20	Rules of Court should continue to be made as SSIs.	
21	The Scottish Government should continue to lay instruments as soon as possible after making but failure to lay should not invalidate an instrument.	Yes. Section 31 deals with failures to lay SSIs subject to the negative procedure or not subject to any procedure. However the Section ensures that failure to follow the laying procedures will not invalidate the relevant instrument.

DIFFERENCES BETWEEN THE DRAFT BILL AND THE BILL AS INTRODUCED

PART 1 SECTION 1: LIST OF INSTRUMENTS

Following its consultation on the draft Bill, the Scottish Government decided to set out in Part 1 Section 1(4) a fixed list of instruments which can be made under an Act of the Scottish Parliament. Some respondents to the consultation had not been in favour of a list, as over time it could become out of date.

It is the same list as appeared in the 1999 Order but without the catchall phrase “and other instruments made under an Act of the Scottish Parliament”. However subsection (7) gives Scottish Ministers the power to modify the list and subsection (8) ensures that such an order would be subject to the affirmative procedure.

PART 1 SECTION 8: ADDITIONAL POWERS ON COMMENCEMENT BY ORDER

This Section is new, and did not appear in the draft Bill. It allows Ministers to bring an Act of the Scottish Parliament into force on different days for different purposes. The Scottish Government has not explained why it has decided to introduce this new Section.

PART 1 SECTION 20: APPLICATION OF ACTS AND INSTRUMENTS TO THE CROWN

This Section will make a substantive change to the law. At present, the Crown is bound only by a statutory provision which makes express provision or by necessary implication. This Section provides a new default position whereby in future the Crown will be placed in the same position as any other subject and be bound by an Act of the Scottish Parliament or a Scottish instrument, unless the legislation specifically states otherwise.

In the draft Bill the equivalent Section, then numbered 19(1), proposed that the Crown would be bound by an asp or a Scottish instrument only if the provision said so expressly. So, for example, the draft Bill had required Section 52 Crown application, which stated that “This Act binds the Crown”.

The majority of respondents to the draft Bill consultation agreed that the Crown should be placed in the same position as any subject and be bound by an asp or SSIs, unless the enactment expressly provides otherwise. They provided as support the need to consistently adhere to the obligations under the European Convention on Human Rights.

However a number of the legal respondents (the Scottish Law Commission, the Judges of the Court of Session and the Faculty of Advocates) were concerned about moving away from the existing rule that the Crown is bound only by express provision or necessary implication.

This reworded Section abolishes the common law rule that the Crown is bound by an Act or Scottish instrument by necessary implication. However Section 20 only applies to future asps and SSIs and so the Crown’s position under current Scottish Acts and SSIs and for all UK Acts and the SIs made under them is unaffected by this provision.

In their submission to the SLC’s call for evidence on the Bill the Faculty of Advocates reiterated that they do not agree with the changes proposed in this section of the Bill:

“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 [European Convention on Human Rights], 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.”

The Scottish Law Commission was also concerned about this Section. In their submission they quoted the 1990 decision of the House of Lords in *Lord Advocate v Dumbarton District Council*, in which Lord Keith of Kinkel observed –

“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 Commission then point out that the practical effect of the judgment was to require Parliamentary counsel, in particular, to consider the question of Crown application. However they see the effect of the current provision in the Bill reversing that rule for the purposes of future legislation of the Scottish Parliament. They believe that since 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. They believe it would be better to restate the existing position than to change it.

PART 1 SECTION 21: FORMS

This Section seeks to ensure that if a form differs from that prescribed in the legislation it cannot be invalidated, unless the differences materially effect the nature of the form. This would prevent minor defeats in a form invalidating it. This is a new provision not included in the draft Bill.

PART 1 SECTION 25(2): DEFINITIONS

This section deals with the list of words in Schedule 1 (see below). The word amend in the draft Bill has been replaced with the word modify with regard to the power of Ministers to remove, or add, entries in the Schedule.

PART 2 SECTION 33: COMBINATION OF CERTAIN POWERS

This Section did not appear in the draft Bill. It allows for combining in a single instrument powers which are not subject to any procedure and powers subject to the negative procedure, making such an instrument subject to the negative procedure. The SG has not said why this would be useful.

The SLC was in correspondence with the Government over its use of this practice in Session 3. On 4 December 2007, the SLC considered a paper from the clerk on the new Scottish Government’s practice of combining of powers in single SSIs which are subject to different Parliamentary procedures. The Committee had written to the Scottish Government setting out its concerns in relation to this practice.

In response, the Government accepted that affirmative and negative procedures should not be combined in a single instrument, but took the view that it can be appropriate to combine powers subject to negative procedure and no procedure in the same instrument. It accepted it would have to make a strong case for combining powers, and that it would expect to make such cases to Parliament only rarely.

The Committee's view was that the procedure for each power is set out in the parent Act, and that is the procedure that ought to be followed. The practice of combining powers in a single instrument suggested to the Committee that whoever makes the instrument (usually Scottish Ministers) has a choice as to which Parliamentary procedure to apply. The Parliament however, could decide to annul an instrument within which there were powers subject to negative procedure and no procedure. This would, in effect, subject the power subject to no procedure, to annulment, and therefore contravene what was set out in the parent Act.

The issue of combining powers has been considered by the Joint Committee on Statutory Instruments (JCSI) at Westminster. The Civil Courts (Amendment) Order 2006 (SI 2006/1542) combined powers which were subject to being not laid, laid only, and annulment. The JCSI commented that "the combination in a single instrument of provisions which are subject to annulment with ones which are not subject to Parliamentary proceedings would cause considerable difficulties if a prayer [motion] for annulment were moved. It is therefore accepted practice that such instruments are not made."

The Scottish Government proposal appears, however, to be based on the principle that any "no procedure" provisions which it had included in a negative instrument would have no legal effect if the instrument were annulled by the Parliament.

PART 2 SECTION 34: POWER TO CHANGE PROCEDURES TO WHICH SUBORDINATE LEGISLATION IS SUBJECT

This Section is the Government's response to Recommendation 4 of the SLC's 12th report 2008, that power should be conferred on Ministers enabling them to amend, by order, the procedure specified in a parent Act, on the recommendation of the SLC. This would follow post legislative scrutiny by the Committee, which would then recommend the change to the Scottish Parliament. It will be for the Parliament to set out in Standing Orders its own internal procedure for motions to resolve that powers in parent Acts be changed.

PART 3 SECTION 41: QUEEN'S PRINTER TO PUBLISH INSTRUMENTS

The Bill as introduced removes the requirement that the Queen's Printer for Scotland (QPS) must print copies of instruments and make them available for sale. It leaves only the requirement to publish instruments in line with the regulations in Section 42 of this Bill, which also appeared in the draft Bill.

The wording in the equivalent Section in the draft bill, Section (38)(2)(a), had quoted the functions imposed by section 92(1)(a) of the Scotland Act 1998 with regard to print copies of instruments.

The lack of an official printed version of SSIs and the removal of the requirement for the Queen's Printer in Scotland to print all instruments is seen as a cause for concern for those bodies charged with preserving the published heritage of Scotland, including retaining a printed collection of all SIs, namely the Library of the Faculty of Advocates.

In their response to the call for evidence from the SLC the Faculty stated that they were

"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 lack of print versions may also be an issue for legal scholars and historians, as pointed out by the Scottish Working Party on Official Publications in its response to the consultation on the draft Bill.

PART 3 SECTION 44: NO DUTY TO PRINT SCOTTISH STATUTORY INSTRUMENTS

This new Section, in line with the changes made in section 41, seeks to amend the Scotland Act 1998 Section 92(4), which gives the QPS a duty to print copies of SSIs. The current practice of QPS is to publish all SSIs (including local instruments) in electronic format on its website. This is in addition to the printing and publication of hard copy versions of SSIs (except for the majority of local orders, which are not normally printed).

In the responses to the consultation on the equivalent Sections in the draft Bill there was a split between those who wanted the QPS to be required to publish all SSIs and those who thought, in this electronic age, there was no need to publish the instruments in hardcopy.

In their response to both the SLC's call for evidence on the Bill, and to the consultation on the draft Bill, the Faculty of Advocates raised concerns about the replacement of a duty to print SSIs (to be found Article 7 of the SI Order) with a duty to publish SSIs in the Bill. They note that the Advocates Library acts as the national law library for Scotland, with 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. They are concerned that these provisions of the Bill may endanger their ability to carry out that duty.

They highlight the need to ensure preservation, which they do not believe is assured by the use of non-print material, given the lack of preservation standard accepted, internationally or nationally, by information professionals for non-print media. They also raised concerns about the adequacy of the archiving of websites, which they contrast with well established standards for the preservation of print media, which are followed by all the national archive bodies. While they agree there is a movement towards accessing material in electronic format, they believe that long-term preservation in that context is still uncertain.

Similar concerns were raised in the response to the draft Bill consultation by SWOP (the Scottish Working Group on Official Publications), which represents librarians.

PART 7 SECTION 55: MEANING OF "ENACTMENT" IN ACTS OF PARLIAMENT AND INSTRUMENTS MADE UNDER THEM

This provision amends the definition of "enactment" in Schedule 1 to the Interpretation Act 1978 (c.30) (words and expressions defined), to include the definition given in this Bill. This Section did not appear in the draft Bill and the Scottish Government has not explained why it has decided to introduce this provision.

Iain Jamieson, a former Government lawyer involved in the drafting of the Scotland Act 1998, and a former adviser to the S2 SLC's inquiry into the regulatory framework, and to the Consolidation Committee on the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill, submitted evidence on this section of the Bill.

Mr Jamieson was concerned that this Section introduces a significant change. He pointed out that at present, the 1978 Act (as amended by the Scotland Act 1998 Schedule 8 paragraph 16(3)), 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." Mr Jamieson submitted that 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.

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

Mr Jamieson stated that Section 55 would 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.

Mr Jamieson argued that Section 55 is contrary to the approach adopted in Part 1 of the Bill. As the approach taken in Part 1 means that this Bill should only make provision for the interpretation of asps and that Westminster legislation should be left to be interpreted by the 1978 Act. He considered 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.

Although Section 55 does not expressly apply only to Westminster legislation which does not relate to reserved matters, Mr Jamieson argued that this will be its effect because, otherwise, it would be outwith the legislative competence of the Scottish Parliament. For Mr Jamieson 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.

Mr Jamieson submitted that 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. Mr Jamieson pointed out that at the time of the Scotland Act 1998, this was clearly thought to be undesirable (no doubt because of the above reasons) because no consequential amendment was made to achieve this effect.

He has provided four questions which he suggested the Committee might like to seek answers to:

- 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 (For example, Section 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) or penalty (For example, Section 226 of the 1995 Act enables Scottish Ministers to amend any enactment specifying an exceptionally high maximum fines) which would have ECHR implications;
- what trawls have been done in order to ensure that the retrospective provision would not have any untoward effects?

SCHEDULE 1: DEFINITIONS OF WORDS AND EXPRESSIONS

This Schedule defines words and expressions which are commonly used in Scottish enactments, including asps and SSIs.

The modification of the list would be subject to the “frequent use” test. This is not a statutory test and the Scottish Government does not indicate what form the frequent use test takes or how often they would use it to modify the list in Schedule 1.

ORDERS SUBJECT TO SPP (SI 1999/1593)

Part 5 of the Bill relates to those provisions of SI 1999/1593, the Special Parliamentary Procedure Order, which were not brought within the new regime established by the Transport and Works (Scotland) Act 2007. The Government states that the remaining instruments which would be subject to the special parliamentary procedure (SPP) are mainly in relation to the compulsory acquisition of property belonging to local authorities and heritage organisations. Namely, Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, New Towns (Scotland) Act 1968, National Heritage (Scotland) Act 1991 and Crofters (Scotland) Act 1993.

Those respondents to the draft Bill consultation, and to the call for evidence on the Bill by the SLC, who commented on Part 5 mostly agreed that the provisions in Part 5 simply replicated those in the SPP Order.

STANDING ORDERS AND SUBORDINATE LEGISLATION PROCEDURES

Chapter 10 of the Standing Orders of the Scottish Parliament deals with subordinate legislation procedures. Rules in this Chapter will need to be amended to reflect any changes in procedure agreed by the Parliament as a result of the impact of the Bill.

Some of the S3 Committee recommendations are matters of procedure which might need to be dealt with by amendments to the Standing Orders of the Parliament, rather than by legislation. For example, implementing Recommendation 18, depending on the suggestions which emerge from the Consolidation Working Group, may require either legislative or Standing Order changes, or both.

Some of the S3 Committee recommendations, for example 17 – the provision by the Scottish Government of a six week forward programme of subordinate legislation to Committees – can be dealt with administratively, therefore requiring neither legislative nor Standing Order changes.

OTHER KEY ISSUES

While the majority of the Bill deals with issues which are largely technical, replicating the content of the transitional orders, the following issues have been raised as sources of potential debate.

LENGTH OF TIME FOR CONSIDERATION

40 day period

In his evidence to the Subordinate Legislation Committee on 28 April 2009, the Minister for Parliamentary Business set out the reasons for not increasing the period of parliamentary scrutiny of negative instruments from 40 days to 50 days. For example, at present certain instruments are linked to legislative delivery across the United Kingdom as a whole. Westminster also operates a 40-day period, and the Scottish Government believes that having a different laying period in Holyrood would complicate the legislative process, for which co-ordination between the two Parliaments is essential. This example is relevant both to orders made under the Scotland Act 1998 and to other measures which require to come into force on the same date (for example, where new regulations are being applied simultaneously across the whole of the UK).

Interestingly, in June 2009 the House of Commons Library published a standard note entitled *Suggestions for possible changes to the procedure and business of the House- a note by the Clerks* (Rogers and Gay 2009). It reproduced the text of the letter, and accompanying set of suggestions, prepared by the Clerk of Legislation and circulated to, among others, the Leader of the House, the whips and the Members standing in the election for the Speaker.

The suggestions included changes to subordinate legislation. They called for an extension to time during which a motion to annul a Statutory Instrument can be tabled “from 40 to 60 days to provide more time for Parliamentary proceedings (and for acting on public reaction to an SI) (this would require amendment of the Statutory Instruments Act 1946).” The paper also called for model procedures for debating SIs.

No decision has been made on the suggestions made by the clerks but the new Speaker in the House of Commons, John Bercow, has indicated his wish to modernise the working practices in the Commons, in order to revive the powers of the Parliament to hold the Government to account.

28 day period

Section 28 of the Bill lays out the procedure to be used for negative instruments. It includes the SLC’s recommendation to increase the period after which instruments subject to the negative procedure can come into force from 21 days to 28 days.

However this 28 day rule actually waters down the existing procedures, as the transitional order is more robust. SI 1999/1096 Article 10(3) has a test of “necessity” for bringing an instrument into force against the rule. Section 31 of the Bill contains no such test. It only requires an explanation is provided to the Presiding Officer (as is the case at present).

PRE-CONSOLIDATION MODIFICATION OF ENACTMENTS

The purpose of Part 4 of the Bill is to allow Scottish Ministers to amend existing Acts or instruments which are going to be the subject of a Consolidation or Codification Bill (see rules 9.18 and 9.18A of the Scottish Parliament Standing Orders). At present such Bills are introduced to give effect to the recommendations of the Law Commissions.

In their response to the draft Bill consultation the Scottish Law Commission was concerned that in three respects the provisions in this part of the Bill were too radical. It was concerned, first, that Ministers could use the procedures to promote policy alterations to legislation and, secondly about the test applied to any proposals for amendments. They noted that the wording in subsection (1) “in their opinion facilitate, or are otherwise desirable in connection with” goes wider than the current rule, and while they have no objection to the wider formulation, as it may assist in securing better consolidated law, they wondered if politically it could be seen as going too far. Finally, in subsection (5) they thought describing enactment of a common law position as “consolidation” created “considerable practical and technical difficulties” because of the “perennial difficulty in securing agreement as to what common law on any matter is”. They would instead describe such a process of restating common law as being more akin to codification. They would therefore prefer to see the powers given to the Ministers in this part of the Bill be limited to amending enactment with no equivalent power in relation to common law.

Iain Jamieson also submitted evidence on this Part of the Bill.

In his evidence Mr Jamieson also raised concerns about the powers being given to Scottish Ministers in section 47(1) 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. Mr Jamieson argued that 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.”

Mr Jamieson suggested that the Parliament should consider carefully whether this is the kind of power which should be given to Scottish Ministers, particularly if such a Bill is “to continue to be regarded as a Consolidation Bill and attract the expedited procedure in the Standing Orders.” He also 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, he believed, it would seem that the expedited procedure for consolidation Bills might be open to abuse.

TRANSITION TO THE NEW PROCEDURES

Schedule 2 adapts enactments passed before Part 2 of the Bill is brought into force to ensure that instruments made under them are appropriately classified as SSIs following the revocation of the SI Order. Schedule 3 modifies the existing procedures for dealing with SSIs for any Acts or instruments passed or made before this Bill is passed and the procedures set out in it come into force.

These Schedules will need to be scrutinised to ensure that in adopting the new procedures the level of parliamentary scrutiny is maintained.

APPENDIX 1:TIMELINE UP TO THE PUBLICATION OF THE BILL

April-June 1999	The three transitional orders (SI 1999/1096; SI 1999/1379 and SI 1999/1593) were made.
March 2003	In its report into <i>The founding principles of the Scottish Parliament</i> the Session 1 Procedures Committee recommended “that our successors in

	the next Parliament should review all aspects of legislation, including subordinate legislation. In the case of subordinate legislation, we note that the current system is wholly derived from the Westminster model and was established for this Parliament through the means of a Transitional Order in the Scotland Act 1998. We recommend that the next Parliament should take the necessary steps to replace the Transitional Order with primary legislation to establish subordinate legislation procedures fit for the purposes of this Parliament. {Recommendation 45}”.
January 2004	The Subordinate Legislation Committee (SLC) agreed it should investigate drafting a bill to replace the SI order (SI 1999/1096).
June 2004	The SLC issued a consultation paper to stakeholders and other legislatures
30 June 2005	The SLC reported on the first half of its <i>Inquiry into the Regulatory Framework in Scotland</i> (Scottish Parliament Subordinate Legislation Committee 2005). This first phase of the Committee’s inquiry looked into issues such as the understandability and accessibility of regulation, the use of plain language and electronic access to legislation.
8 July 2005- May 2006	The SLC then continued its inquiry, considering how the Parliament handles and scrutinises subordinate legislation. They focused on the Parliament’s procedures, the forward planning of subordinate legislation and the timescales for scrutiny. They also examined whether the Parliament should have the power to amend subordinate legislation, consolidation and the current division of responsibilities between the Subordinate Legislation Committee and lead committees.
23 May 2006	The SLC published a draft report for the <i>Inquiry into the Regulatory Framework in Scotland</i> (Scottish Parliament Subordinate Legislation Committee 2006). This report put forward a new simplified procedure to replace the range of current procedures which were seen as complex and archaic. The Committee called this procedure the Scottish Statutory Instrument Procedure (SSIP).
8 June 2006	The Parliament debated this draft report. For the Minister the debate flagged up significant issues in the report, which she believed needed to be addressed: such as the time for lead committees to scrutinise instruments and the lack of planning for SSIs, which leads to bulges in the workload and a lack of advance notice.
September 2006- November 2006	The SLC continued to take evidence for phase 2 of its inquiry.
13 February 2007	The SLC published the final report of its <i>Inquiry into the Regulatory Framework in Scotland</i> (Scottish Parliament Subordinate Legislation Committee 2007a). The report highlighted that as most statutory law is contained in subordinate legislation and not primary legislation, the scrutiny of subordinate legislation – especially statutory instruments – is important. The Committee identified 10 shortcomings in the current system and recommended that the SSIP be accepted.
	There was no time, before dissolution of Parliament, prior to the 2007 Scottish Parliament election, for the Parliament to discuss the report.
21 March 2007	In its legacy paper the Session 2 Procedures Committee wrote about the other two transitional orders (SI 1999/1379 and SI 1999/1593) which needed to be replaced and which fell within the remit of the Procedures Committee. The Committee thought that any Bills drafted to replace the orders should be uncontroversial (and might simply replicate much of the transitional orders), but that developing them, and seeing them through their Parliamentary stages, would still be a significant piece of work. The

	<p>legacy paper suggested that the new Committee might therefore want to begin consideration at an early stage in the new session.</p> <p>The report also spoke about the work carried out by the Session 2 SLC on the SI order and said that if a Committee Bill, as recommended by the SLC, were to be introduced in Session 3 the new Procedures Committee would need to consider (in conjunction with the SLC) what changes to Chapter 10 of the Standing Orders would be needed in order to bring it into conformity with the revised statutory regime proposed in such a Bill.</p>
29 March 2007	In its legacy paper the Session 2 (S2) Subordinate Legislation Committee suggested that its successor committee might wish to consider the Executive's response to the final report and how it might take forward the recommendations in the Committee's report.
19 June 2007	The agenda papers for the first meeting of Session 3 (S3) Subordinate Legislation Committee included the previous Scottish Executive's formal response to the S2 report, dated March 2007.
6 November 2007	The SLC was given a progress report on the Consolidation Working Group which was set up during the summer. The Working Group was formed to consider Recommendations 32-34 of the S2 SLC's report.
6 November 2007	The Session 3 Finance Committee considered its approach to the scrutiny of subordinate legislation in light of the S2 Finance Committee's response to the Session 2 SLC's inquiry. The Finance Committee agreed that it would scrutinise subordinate legislation relating to parent Acts where the Committee had raised concerns over costs in its report on a Financial Memorandum. The Committee also agreed that the Convener should write to the Minister for Parliamentary Business regarding accompanying documents for subordinate legislation.
8 November 2007	The Finance Committee Convener wrote to the Minister for Parliamentary Business asking that the SG consider producing a Financial Memorandum for all subordinate legislation in order to aid scrutiny.
4 December 2007	<p>The SLC considered a paper from the clerk on the new Scottish Government's practice of combining of powers in single Scottish Statutory Instruments (SSIs) which are subject to different Parliamentary procedures. The Committee had written to the Scottish Government setting out its concerns in relation to this practice.</p> <p>In response the SG accepted that affirmative and negative procedures should not be combined in a single instrument, but took the view that it can be appropriate to combine powers subject to negative procedure and no procedure in the same instrument. It accepted it would have to make a strong case for combining powers, and that it would expect to make such cases to Parliament only rarely.</p>
December 2007- January 2008	For its inquiry into the regulatory framework the S3 SLC decided not to repeat a consultation process, instead they arranged a series of informal briefings and formal evidence sessions with witnesses including members of the previous SLC and the Minister for Parliamentary Business.
18 March 2008	In its report <i>Inquiry into the Regulatory Framework in Scotland</i> (Scottish Parliament Subordinate Legislation Committee 2008a) the S3 SLC rejected the new SSIP proposed in the S2 report and instead decided to recommend changes to existing procedures. The S3 SLC report made 22 recommendations.
April 2008	The Minister for Parliamentary Business responded to the Finance Committee's letter of November 2007. The Minister declined to provide a

	guarantee that a Financial Memorandum would be provided for all SSIs, instead he promised to ask Scottish Government officials to pursue their discussion on how best to develop the Executive Note procedures to ensure that such procedures are, in practice, fit for purpose. He recognised that an appropriate and thorough assessment of any financial implications attached to an instrument is clearly essential to the Parliament in its scrutiny work. He also told the Convener that the Government is committed to supporting the rigour and transparency of the process of financial scrutiny.
June 2008	In its response to the Committee's report (Scottish Parliament Subordinate Legislation Committee 2008b <i>SL/S3/08/21/5</i>) the Scottish Government said it was happy to accept the overwhelming majority of the SLC's recommendations. It also indicated that in principle it would be willing to bring forward a Government Bill to give effect to the proposals, but that the Bill would need to be paralleled by changes to the Standing Orders. However the Government did not support recommendations 12 or 15, and stated that it wanted give further consideration to recommendations 4 and 9.
17 June 2008	The SLC considered the Government's response. The members agreed that clerks, the legal advisers and Scottish Government officials should consider the outstanding issues of recommendations 4, 9, 12 and 15, and report back to the Committee after the summer recess.
16 September 2008	At its away day the Committee received a progress report on those discussions.
30 September 2008	At its meeting the Committee considered a paper, by the clerk, which set out the issues discussed over the summer and sought the agreement of the members as to the next steps in the process.
2 October 2008	The Convener wrote to the Minister for Parliamentary Business recording the Committee's decisions on the issues raised in the paper. The letter welcomed the SG's commitment to introduce a Legislative Reform Bill and that the SLC would be inviting the Minister to give evidence in relation to the draft Bill. The letter then went on to comment on the four outstanding recommendations plus recommendation 16 and on the proposed method of reporting of the Government's performance against its commitments.
13 January 2009	The Scottish Government published a consultation paper on its draft Interpretation and Legislative Reform (Scotland) Bill. The closing date for responses was 12 April 2009.
15 June 2009	Interpretation and Legislative Reform (Scotland) Bill introduced

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