

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Interpretation and Legislative Reform (Scotland) Bill introduced in the Scottish Parliament on 15 June 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 27-EN.

BACKGROUND

2. The Bill deals principally with technical procedural matters concerning the making and interpretation of Acts of the Scottish Parliament ("ASPs") and Scottish instruments made under them. The Bill's provisions broadly restate, with some modifications, provisions currently found in the Transitional Orders. The Transitional Orders were enacted by Westminster in anticipation of the Scottish Parliament coming into being. The Transitional Orders are—

- The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379) ("the Interpretation Order");
- The Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096) ("the SI Order"); and
- The Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999 (SI 1999/1593) ("the SPP Order").

3. As their name suggests, the Transitional Orders were conceived to be interim measures to allow the new Parliament to operate until such time as it made its own provision. After 10 years of devolution, the Scottish Government believes that it is time for the Parliament to take ownership of these important matters and to legislate for them. This view acknowledges the similar recognition by the Session 2 Procedures Committee (2nd Report, 2007 – SP Paper 791) that action should be taken in Session 3 to replace the Transitional Orders.

4. In addition to making provision for the matters already covered by the Transitional Orders, the Bill also makes provision for two new policy measures. Section 33, in Part 2, makes provision allowing a single Scottish statutory instrument to be made using combinations of powers subject to different parliamentary scrutiny procedures. Part 4 of the Bill makes provision intended to facilitate the consolidation and codification of legislation.

SUMMARY OF MAIN PROVISIONS

5. The Bill has four main purposes, to make provision in respect of:
- the publication, interpretation and operation of Acts of the Scottish Parliament and instruments made under them;
 - the making and publication of subordinate legislation in the form of Scottish Statutory Instruments (“SSIs”) and the scrutiny procedures which apply to those instruments in the Parliament;
 - the special procedure which applies to orders that are subject to special parliamentary procedure; and
 - giving the Scottish Ministers a power, by order, to make certain amendments to enactments in order to facilitate their consolidation or codification.

POLICY OBJECTIVES OF THE BILL

Interpretation

6. Part 1 of the Bill replaces the transitional Interpretation Order and is intended to provide for the interpretation and operation of all future ASPs and future instruments made under them. The majority of the provisions simply replicate the effect of provisions in the Interpretation Order and as such closely resemble the Interpretation Act 1978, on which the Interpretation Order is based. The policy approach recognises that the existing interpretation code has operated satisfactorily and its terms are familiar to practitioners. However, there are some changes to the status quo where this is thought appropriate to modernise the legislation. Firstly, the Crown will now be bound by the terms of an ASP or instruments under them unless it is expressly exempted. Secondly, the common law position with regards to an ASP binding the Crown by necessary implication is abolished. Thirdly, a new section expands the current provision for the service of documents. Fourthly, a new provision has been added which deals with the power to appoint a person to an office. Fifthly, a new provision has been added to deal with non-material deviations from prescribed forms. Sixthly, a new provision provides for additional powers on commencement of an ASP by order. The reason for these changes is set out below under the appropriate heading.

7. The Bill also deals with matters surrounding the publication and numbering of ASPs and instruments in Part 3, which again largely replicate the current provisions in the Interpretation Order. Again, because these processes are familiar and operate satisfactorily, it is not thought necessary to introduce any major changes.

Scottish statutory instruments

8. Part 2 of the Bill makes provision for the Parliamentary scrutiny of subordinate legislation. The provisions are necessary to replace the transitional SI Order. The overall policy approach is to give effect to the recommendations in the 3rd Session Subordinate Legislation Committee (SLC) Report on the Regulatory Framework (12th Report, 2008 – SP Paper 74). The provisions in the Bill break the link with the Statutory Instruments Act 1946 in defining a SSI and give Scotland its own, more streamlined framework for Parliamentary scrutiny of

subordinate legislation. The Bill defines three procedures for the scrutiny of subordinate legislation (the negative procedure, the affirmative procedure and no procedure other than laying). References to other procedures in ASPs which pre-date the Bill will be converted to references to one of those three procedures and it is intended in future ASPs will provide for SSIs to be made under them to be subject to one of those three procedures; although the Parliament will still be able to prescribe a different procedure in any ASP where it sees fit to do so. These generic parliamentary procedures will apply to the scrutiny not only of SSIs but also to the small number of UK statutory instruments that require to be laid before the Parliament (for example, orders made under the Scotland Act 1998).

Pre-consolidation modification of enactments

9. There has been only one consolidation bill in the Parliament; consequently, the policy objective is to introduce a procedure that is intended to break down certain barriers to consolidation and codification and make the process more attractive. The provisions in Part 4 of the Bill will give the Scottish Ministers an order-making power to enable them to make amendments to legislation prior to it being consolidated or codified. This will allow the changes to be made without the necessity of either the Scottish Law Commission or the Law Commission or both Commissions making recommendations. The intention is not to allow substantive changes to policy to be introduced via such orders, but only those that will assist in providing a clean consolidation or codification of the law.

Special parliamentary procedure

10. The policy objective of Part 5 is to replace the current transitional provisions in the SPP Order. Special parliamentary procedure is rare, but it is understood by practitioners in those fields where it applies. As a consequence, the overall policy approach is to maintain the status quo.

COMMENTARY ON SECTIONS

Part 1 – Interpretation

Application of Part 1

11. Section 1 is prospective in that it applies Part 1 of the Bill to all future ASPs that receive Royal Assent on or after the day on which the Bill receives Royal Assent (if passed by the Parliament). It also applies the provisions to all Scottish instruments made on or after the date of Royal Assent. The provision will not however change the interpretation provisions for ASPs that received Royal Assent (or instruments made under ASPs) prior to the coming into force of this Part. Such ASPs (and instruments) will still fall to be interpreted in accordance with the current Interpretation Order. For these purposes, section 56 of the Bill saves the Interpretation Order. Unlike the Interpretation Order, the application of this Part does not extend to “deeds, documents and other instruments”.

Commencement

12. The provisions in section 2 provide a default position for when an ASP (or a provision of an ASP) is silent on the matter of its commencement. They provide that in these circumstances

an ASP comes into force the day after it receives Royal Assent. This changes the current position where the Act (or provision) would come into effect on the day Royal Assent was received. The change was felt necessary in order to remove any retrospective element in the current provision. This is because at present, if the Act comes into force on the day Royal Assent is received, that means that it is treated as though it has come into force at the start of that day.

13. When an ASP (or provision of an ASP) or a Scottish instrument (or a provision of it) specifies a commencement date, then in terms of section 3 the provision will come into force at the beginning of that day.

Powers

14. There are times when it is useful to be able to exercise powers contained in an enactment (i.e. to establish a body corporate or make a Scottish instrument) prior to the provisions coming into force. Section 4, which is modelled on section 11 of the New Zealand Interpretation Act 1999 (“NZIA”), is intended to allow certain powers conferred by an enactment to be exercised during the period between an ASP receiving Royal Assent and the provision coming into force, the “pre-commencement period”. It also prevents anything done during the “pre-commencement period” having any effect until the provision under which the power was exercised comes into force.

15. Section 5 introduces a new provision, modelled on section 12 of the NZIA, which deals with instances where an ASP provides for the appointment of a person to an office. Currently, if an ASP makes provision for the appointment of a person to an office then all the detail on matters such as terms and conditions, removal or suspension from an office etc. must be contained in the Act itself. This provision will remove the need to make provision in every Bill for these powers unless the policy is to have different provision than this default. This will provide consistency of approach across future legislation in relation to the conferring these ancillary powers.

16. Section 6 makes clear that the powers to revoke, amend and re-enact a Scottish instrument made under future ASPs are included in the principal power to make a Scottish instrument. These ancillary powers are no longer just “implied” powers.

17. Section 7 makes it clear that any powers conferred or duties imposed by an ASP or a Scottish instrument can be used more than once from time to time. This provision does not differ from the current equivalent provision in the Interpretation Order.

18. Section 8 is a new provision. It provides that where an ASP confers powers on the Scottish Ministers to bring an ASP into force by order that the power may be exercised to appoint different days for different purposes. It also provides that the commencement power includes the ancillary powers to make transitory, transitional or saving provision as the Scottish Ministers consider appropriate.

References to legislative provisions

19. Sections 9 to 14 make provision as to how future ASPs and Scottish instruments are to correctly refer to various types of legislation: ASPs; Acts of Parliament; Acts of the Parliaments of Scotland; European legislation; and portions of such legislation. In relation to an EU instrument the references are not to be ambulatory (section 12) unless they are expressly stated to be so. In all other instances, references to enactments in ASPs or instruments are deemed ambulatory (section 14). A reference to an enactment is ambulatory if it refers to the enactment as amended (or extended or applied) by subsequent enactments from time to time (where before, on or after the coming into force of the ASP or instrument in which the reference is made, the enactment has been amended, extended or applied by another enactment.).

Repeals

20. The effects of the repeal of an ASP or revocation of a Scottish instrument by an ASP or Scottish instrument are dealt with in sections 15 to 19. Section 15 ensures that any repeal or revocation does not affect the validity of anything previously done under the repealed or revoked enactment. Section 16 provides that any repeal or revocation does not affect any investigation, legal proceeding or remedy that relates to an existing right acquired, accrued or incurred prior to the repeal or revocation. Section 17 provides that any repeal or revocation does not affect a liability in relation to a penalty for an offence committed before the repeal or revocation or a breach of such a repealed Act or revoked instrument.

21. Section 18 extends the provisions on the repeal of an ASP or revocation of a Scottish instrument to apply to the expiry of temporary ASPs and Scottish instruments.

22. Section 19 deals with instances where an ASP or Scottish instrument has been repealed or revoked and re-enacted, most frequently for consolidation purposes. It provides that any references to a repealed ASP or a revoked Scottish instrument in other legislation are to be construed as a reference to the ASP or Scottish instrument as re-enacted.

Express provision necessary to bind the Crown

23. This is a new provision that substantially changes the law in relation to the application of legislation to the Crown. At present, the Crown is bound only by express statutory or by necessary implication. It may sometimes be difficult to ascertain whether there is any necessary implication that the Crown should be bound, hence the policy justification for abolishing the common law rule that the Crown could be bound by necessary implication. The effect of section 20 will be that an ASP or a Scottish instrument will now bind the Crown unless it is expressly stated that it does not. The purpose of the provision is to place the Crown in the same position as any other subject. The default provision can be displaced by express provision where there is a clear intention that Crown ought not to be bound.

Forms

24. This is a new provision that relates to instances where a form is prescribed under primary or subordinate legislation. The provision in section 21 has the effect that if the form actually used differs from that prescribed in legislation then, so long as any differences are of a non-material nature, the differences will not invalidate the form, or anything done in consequences of

it. It is thought that this would be a useful provision to deal with minor errors that arise in practice.

Meaning of words and expressions used in legislation

25. The provisions contained in these sections provide a number of important general clarifications. References to the singular includes the plural and vice versa (section 22). Time refers to Greenwich Mean Time (section 23). Expressions used in a Scottish instrument have the same meaning as given in the ASP under which it is made (section 24). Schedule 1 to the Bill, introduced via section 25, provides a list of words and expressions commonly used in legislation, which in terms of section 25 are deemed to have the meaning given to them in the schedule when used in any future ASP or Scottish instrument. In order to ensure that defined terms keep pace with change and development for the future, the Bill provides that this schedule may be changed by the Scottish Ministers by order to be made under the Parliament's affirmative procedure.

26. Section 26 makes provision for the service of documents on an individual or a body. At present, only service by post is covered by the Interpretation Order. This section intends to provide a far more flexible default rule extending the provisions to include the service of documents by other means rather than just by post. Service can be effected by personal delivery as well as registered post service, recorded postal service, and, if agreed in advance with the recipient, by electronic communications.

Part 2 – Scottish statutory instruments

27. Part 2 of the Bill delivers two overarching policy objectives. Firstly, as already indicated, its purpose is to replace the SI Order. Secondly, it seeks to implement a range of reforms arising from the 3rd Session Subordinate Legislation Committee (SLC) Report on the Regulatory Framework (12th Report, 2008 – SP Paper 74). The Scottish Government responded formally to the SLC Report in 2008 and undertook to bring forward legislative proposals which would reflect the SLC's recommendations.

28. The Government recognises that decisions on the form and detail of the scrutiny process properly lie with the Parliament. Scrutiny of subordinate legislation is a significant part of the work undertaken by parliamentary committees and it is therefore essential that the arrangements intended to underpin that work make best use of committee time, and enable members to hold the Government properly to account.

29. The Government has its own direct interest in the efficiency of the Parliament's processes for handling the programme of subordinate legislation. A careful balance requires to be struck between Ministers' ability to exercise the delegated powers given to them by Parliament and the delivery of effective parliamentary scrutiny.

30. It is also essential that the wider interests of external bodies and the general public are properly considered when making any reforms to subordinate legislation procedures. Questions of transparency and accessibility are of vital importance in this context. There is a special obligation on both the Parliament and the Government to ensure that the mechanisms by which subordinate legislation is made, scrutinised and implemented reflect the founding principles of the new Parliament, as expressed by the Consultative Steering Group.

31. The changes provided for in the Bill will apply to SSIs made under both pre and post commencement enactments and also to the small number of UK statutory instruments (for example, orders under the Scotland Act 1998) that are subject to procedure in the Scottish Parliament.

Definition of “Scottish statutory instrument”

32. The Bill breaks the link with the Statutory Instruments Act 1946 by providing a list of functions which will be exercisable by SSI. At present, SSIs are defined under the SI Order by reference to arrangements for statutory instruments within the Westminster system. A SSI is defined as a subspecies of statutory instrument. The new definition will mean that it is no longer necessary to define a piece of Scottish subordinate legislation as a statutory instrument in the parent ASP in order for it to be treated as a SSI. Section 27 of the Bill makes the necessary provision.

33. Section 27 introduces further innovation by removing, in some circumstances, the need to explicitly state in the parent ASP that functions are exercisable by SSI. The section provides a default position that, firstly, the functions of the Scottish Ministers, the First Minister or the Lord Advocate of making, confirming, or approving orders, regulations or rules and, secondly, a function of Her Majesty of making an Order in Council by virtue of an ASP an instrument made under an ASP or any other enactment (provided the function is exercisable within devolved competence) will, by default, be exercised by SSI. This means that it will no longer be necessary to state explicitly that such functions are to be exercised by SSI. The default position covers the functions most commonly exercised by SSI, in any other case if the function is to be exercisable by SSI it will continue to be necessary to spell this out on the face of an ASP.

34. Schedule 2 to the Bill 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 by Part 7 of the Bill.

Parliamentary scrutiny

35. The SLC Report contained a series of recommendations aiming to streamline the current 8 types of scrutiny procedure applicable to SSIs before the Parliament. The Government agreed that there was scope to refine the existing scrutiny arrangements and the Bill therefore provides for three key scrutiny procedures for instruments. SSIs are categorised as being subject to negative procedure, affirmative procedure and no procedure (other than laying). The Government also supported the recommendation in the SLC Report that the period, from the point of being laid before the Parliament, after which instruments subject to the negative procedure can come into force should be extended from 21 days (currently provided for in article 10(3) of the SI Order) to 28 days.

36. Section 28 provides that a SSI by which a power to make devolved subordinate legislation subject to the negative procedure is exercised must be laid before the Parliament as soon as practicable after being made, but not less than 28 days prior to the instrument’s provisions come into force. The Parliament will have a 40 day period, from the date of laying, in which to consider the instrument and decide whether or not to resolve to annul it. Failure to comply with this 28 day period does not invalidate the instrument’s provisions (see section 31).

Section 28 also makes provision for how the 28 and 40 day periods are to be calculated and sets out how and by whom an instrument which Parliament has resolved to annul is consequently to be revoked.

37. Section 29 provides that a SSI by which a power to make devolved subordinate legislation subject to the affirmative procedure is exercised cannot be made without it first having been laid in draft and then approved by resolution of the Parliament. The advantage of this approach is that future legislation need only use the expression “the affirmative procedure” in order to apply the requirements of section 29(2) rather than spell out those requirements in full each time. The provision promotes consistency in the statute book.

38. Any SSI, by which a power to make devolved subordinate legislation is exercised which does not fall to be scrutinised under either the negative or affirmative procedure, is to be treated as a no procedure (other than laying) instrument (section 30). Such a SSI is to be laid before the Parliament as soon as practicable after it is made and before it comes into effect. However, failure to meet the requirements of section 30, or to fulfil the requirements for laying the SSI as set down in the Parliament’s Standing Orders (see sections 31 and 32 respectively) will not invalidate the SSI.

39. It should be noted in the foregoing discussion of sections 28 to 30, that it pertains only to SSIs by which a power to make devolved subordinate legislation is exercised. That means those provisions do not apply to two types of SSI. Those which are local instruments, which are not laid before the Parliament at all and those which are subject to special parliamentary procedure, which are dealt with in Part 5 of the Bill (section 37).

40. Section 33 is one of the Bill’s innovations. It provides for the Scottish Ministers to combine powers to make devolved subordinate legislation subject to no procedure (other than laying) and negative procedure where Scottish Ministers consider this desirable so that they can be exercised together and in the same SSI, which will then be subject to the negative procedure. This will clarify the legal position around such combined SSIs.

Power to change procedure to which subordinate legislation is subject

41. The SLC Report identified a need for subordinate legislative frameworks set down in ASPs to be reviewed as part of the Parliament’s responsibility for conducting post legislative scrutiny. Recommendation 4 of the SLC Report therefore proposed a mechanism for altering the type of scrutiny that a SSI was to be subject to, to ensure that the procedures applied to the instrument remain appropriate in the light of changing circumstances.

42. The Bill therefore provides for the introduction of a new procedure whereby the Scottish Ministers may change, in response to a motion from the Parliament, the type of parliamentary scrutiny to which SSIs are subject (section 34). For instance, a SSI subject, under the parent ASP, to the negative procedure may be subjected to the affirmative procedure if the Parliament resolves there should be such a change and Ministers bring forward the necessary instrument to effect the change. The SSI used to implement that change will itself be subject to the affirmative procedure.

Part 3 – Publication of Acts and instruments

Official prints of Acts

43. Once Bills become ASPs they are to be numbered by the Clerk of the Parliament, consecutively according to the date they received Royal Assent, in each calendar year (section 38). This number is to be written on the “official print” of the ASP in accordance with section 28(4) of the Scotland Act 1998. In order to have the ASP printed the Clerk of the Parliament will send a certified copy of the ASP to the Queen’s Printer for Scotland, who will ensure it is published and printed for sale (section 39). In order to ensure the preservation of the public record, the Clerk of the Parliament is to send the official print of the ASP to the Keeper of the Records of Scotland who will preserve it (section 40).

Publication of instruments

44. In order to ensure that SSIs are made public the responsible authority will be required to send a certified copy of each instrument, as soon as practicable after it is made, to the Queen’s Printer for Scotland (section 41), who will then have it published in accordance with regulations under sections 41(2) and 42. SSIs will, for reference purposes, be required to be published and numbered; detailed provision for those matters will be made in regulations by the Scottish Ministers by virtue of section 42 of the Bill. There are also some instruments that require to be published in either the London, Edinburgh or Belfast Gazettes and the Bill, at section 43, defines what this entails.

45. In terms of section 92 of the Scotland Act 1998, the Queen’s Printer for Scotland is required to print copies of subordinate legislation referred to in subsection (4) of that section. As legislation is increasingly accessed online the Government considers it unnecessary and a waste of resources to require every SSI to be printed. Accordingly, section 41 of the Bill requires all SSIs to be published but not printed, and section 44 of the Bill removes the requirement to print SSIs in terms of section 92 of the Scotland Act. Recognising that not everyone has the facilities to access electronic copies of legislation, it is intended the regulations dealing with the publication of SSIs, to be made under section 42 of the Bill, will require the Queen’s Printer for Scotland to furnish individuals with hard copies of SSIs on request.

Queen’s Printer: delegation of functions

46. It is expedient to ensure that the Queen’s Printer for Scotland is able to delegate the functions conferred on her by the Bill. Indeed she already delegates those functions, which are currently conferred on her by the Scotland Act 1998 and the Interpretation Order. Section 45 allows for such delegation.

Part 4 – Pre-consolidation modification of enactments

47. From time to time there is a requirement to consolidate different pieces of legislation and under the present arrangements (Parliament’s Standing Orders Rules 9.18 and 9.18A) no changes except those recommended by either the Scottish Law Commission or the (English and Welsh) Law Commission and the Scottish Law Commission jointly are permitted within a Consolidation or Codification Bill.

48. Law Commission recommendations are only made in respect of changes which are considered strictly necessary to achieve a consolidation. It can however 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 or Codification Bill (section 47). An example of its proposed use would be if 3 Acts on housing are being consolidated into one. The newer Acts may define “house” as including a caravan, however, the oldest Act does not. From a policy perspective it makes sense for the material in the oldest Act to apply to caravans. At present, a Bill would have to be passed to amend the oldest Act before the consolidation Bill was dealt with by the Parliament. There might not be parliamentary time available to deal with the Bill amending the oldest Act. Under the proposals, an order could be made amending the oldest Act. If the order were agreed to by the Parliament, the consolidation Bill would reproduce the law as amended by the order.

49. The limitation on the purposes for which such an order can be made (strictly to assist consolidation or codification) means that the power cannot be used to make changes purely to achieve policy objectives. No order can be made unless and until a Consolidation or Codification Bill (or group of Bills) has been introduced to the Parliament and the order will only take effect immediately before the Bill, or Bills, is, or are, brought into force.

Part 5 – Orders subject to special parliamentary procedures

50. Some subordinate legislation in Scotland is still subject to SPP (“special parliamentary procedure”) mainly in relation to the compulsory acquisition of property belonging to local authorities and heritage organisations of (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). Many instances in which this procedure previously applied have now been brought within the new regime established by the Transport and Works (Scotland) Act 2007. To the extent that it does still apply, SPP is currently provided for in the SPP Order.

51. The provisions in Part 5 replicate the effect of provisions in the SPP Order. Before a special procedure order can be made, confirmed or approved any requirements in the enabling enactment requiring notice to be served must be complied with and notice must be given by advertisement (section 49).

52. If a special procedure order is objected to and that objection is maintained then the order has to be confirmed by an ASP (section 50).

53. Any Bill introduced to confirm a special procedure order which has been objected to in terms of section 50 will, unless an alternative procedure is provided for in the Parliament’s Standing Orders, be considered in the Parliament using the Private Bills procedure.

54. If no relevant objections are made to a special procedure order (or any relevant objections are withdrawn) the order itself is subject to scrutiny in the Parliament (section 51). In order to ensure that the fullest information is available to the Parliament when considering a special

procedure order, a confirmation Bill (where objections are made) or the order itself (where they are not or not maintained) will be accompanied by a statement from the Scottish Ministers giving details of any objections which were not withdrawn and those which may have been disregarded in terms of section 50(5) (section 52).

Part 6 – Laying documents (other than SSIs) before the Scottish Parliament

55. There are instances where enactments require certain documents, for instance annual reports, to be laid before the Parliament. These documents are not SSIs and therefore section 32, which defines what laying a SSI before the Parliament entails, will not apply to them. Section 54 is cast in similar terms to section 32. It is intended that the procedure for laying such documents should be decided by the Parliament and provided for in Standing Orders.

Part 7 – Miscellaneous and general

56. The Scotland Act 1998 (Schedule 8, paragraph 16) amended the definition of the term “enactment” in the Interpretation Act 1978 (Schedule 1) providing that it would not include “an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.” Section 55 of the Bill will amend the Interpretation Act 1978 (Schedule 1) and, in relation to legislation within devolved competence, will reverse the current definition thereby ensuring that the term “enactment” as it appears in Westminster primary and secondary legislation made prior to 1 July 1999 and after the coming into force of section 55 will include ASPs and instruments made under them. The definition of “enactment” will not be changed for that Westminster legislation enacted in the decade since devolution began as that legislation was drafted on the basis that “enactment” excluded ASPs and instruments made under them.

ALTERNATIVE APPROACHES

Interpretation

57. Whilst the Government considered the content of interpretation codes of other jurisdictions, no alternative approach for dealing with the interpretation of legislation within Scotland was considered. This is because the existing provisions in the transitional order are operating satisfactorily and it was thought appropriate to broadly re-enact the provisions with appropriate amendments needed to modernise the legislation.

Scottish statutory instruments

58. The Government considered the recommendations of the SLC’s Report on their Inquiry into the Regulatory Framework in Scotland (SP Paper 751) (14th Report) Session 2 (2006). The report recommended, that “all 8 procedures for scrutinising subordinate legislation in the Scottish Parliament should be replaced by a new procedure...”. This new procedure, to be known as the Scottish Statutory Instrument Procedure (SSIP), was aimed at introducing one procedure that all subordinate legislation would be subject to in the Scottish Parliament.

59. The Scottish Government’s view was that although the SSIP was an attempt at simplifying procedures in fact it entailed a number of procedures – SSIP, an emergency

procedure and an urgent procedure. It also considered that introduction of SSIP would increase the workload of the Parliament's Committees and the complexity of the scrutiny system.

60. As a consequence, the Scottish Government rejected the SLC's recommendations in relation to SSIP. It considers the current procedures to be well established and understood and that they should be retained with some modification. As a result the Government's approach is to follow the recommendations made by the SLC in their further report on the Inquiry into the Regulatory Framework in Scotland (SP Paper 74 (12th Report)) Session 3 (2008) and the provisions in the Bill reflect these.

Special parliamentary procedure

61. The application of SPP procedure is rare but understood by those practitioners in the area where they apply. As a result, it was thought appropriate to maintain the status quo and replicate the terms of the SPP Order. No alternative approaches were considered.

Pre-consolidation modifications of enactments

62. The proposal for an order making power to facilitate consolidation/codification is new. No alternative approach was considered.

CONSULTATION

63. The Scottish Government issued a consultation paper along with a draft Bill on 13 January 2009. The consultation was published on the internet and open to the general public. However, we targeted a number of organisations, legal academics and practitioners that we thought might have an interest in the Bill and drew their attention to the publication of the consultation document. Although the 12 week consultation ended on 12 April 2009, we accepted later responses from the Scottish Law Commission and the Court of Session Judiciary.

64. We received a total of 17 individual responses. Only one respondent asked for both their personal details and response kept confidential, all others agreed to their personal details and responses to be made public and these have been published on the Scottish Government website. The nature of the submissions varied with some providing one word responses and others more detailed discussion of sections of the draft Bill. Not all respondents answered all questions. Responses were received from:

- Aberdeenshire Council
- City of Edinburgh Council
- East Ayrshire Council
- West Lothian Council
- Law Society of Scotland
- Court of Session Judiciary
- The National Trust for Scotland
- Scottish Law Commission

- Scottish Committee of Administrative and Justice Tribunals Council
- Scottish Environmental Protection Agency
- Scottish Legal Aid Board
- Scottish Working Group on Official Publications
- Prof Gordon, Glasgow University
- Mr Iain Jamieson
- Mr Ian McLeod, Teesside University
- Prof Colin Reid and Prof Janet McLean, Dundee University

65. As part of the consultation process we held a consultation event in Edinburgh on 19 March 2009. It was attended by a number of academics, legal practitioners, representatives from the Parliament, the Scottish Law Commission and the Lord President's Office. The event took the form of a discussion forum where debate on the Bill's provisions was encouraged. There were many interesting points raised during the discussion which has assisted us with our analysis of the consultation responses. In attendance were:

- Patrick Laden, Scottish Law Commission
- Gregor Clark, Scottish Law Commission
- Judith Morrison, Scottish Parliament
- Mary Dinsdale, Scottish Parliament
- David Smith, Lord President's Office
- Alan Page, Dundee University
- Michael Clancy, Scottish Law Society
- Ross Sanderson, Scottish Law Society
- Chris Himsworth, Edinburgh University

66. A report which provides an analysis of the Scottish Government consultation on the draft Bill will be published in the near future. The respondents to the consultation generally agree with the purposes of and approach taken in the Bill. There were no novel or substantive issues raised in response to the consultation.

67. In the consultation paper we made a number of suggestions for provisions that could be included in the Bill and as a consequence of the consultation exercise we made a number of changes to the Bill's provisions, these are discussed below.

Changes arising from the consultation exercise

Part 1 – Interpretation

Definition of Scottish instrument

68. The definition of “Scottish instrument” in the consultation draft of the Bill was deliberately drafted in very wide terms and included, for example, codes of practice and statutory guidance. We invited views on the scope of the definition and asked if it would be preferable to provide a list of types of instruments that would be considered “Scottish instruments”. Respondents were generally in favour of the wider definition in the Bill of what is to be considered a “Scottish instrument”. However, some did have concerns that it would also catch items that would not have legal effect (e.g. codes of practice or guidance). The alternative approach (to provide a list of the types of instrument that are covered) was thought to be too inflexible.

69. In view of the responses received, it was decided to amend the definition and provide a list of the specific types of instrument that are to be covered by the interpretation provisions in the Bill. In order to address concerns that a list is too rigid and inflexible, it was decided that Ministers should have a power to amend the list by order, as and when appropriate.

Crown application

70. The consultation draft of the Bill provided that (a) the Crown would be bound by an Act of the Scottish Parliament or Scottish instrument only if the legislation expressly provided for this and (b) it abolished the rule that the Crown is bound by necessary implication. The consultation paper invited views on whether the Crown should be bound by legislation only where the legislation made an express provision or alternatively whether it should be bound automatically unless expressly excluded. The overwhelming view of respondents (with the exception of the Law Commission and the Lord President’s Office) was that the Crown should be placed in the same position as the general public and should be bound by legislation unless that legislation expressly stated otherwise. The Law Society of Scotland commented that “Reasons would need to be found to exempt the crown from a provision rather than the other way round and this would be more consistent with ECHR obligations.”.

71. In light of the responses received, it was decided to revise provision in the consultation draft of the Bill and provide that the Crown will now be bound by the terms of an ASP or instrument in future unless the legislation expressly says otherwise. In proposing any legislation, the Scottish Government will have to consider the position of the Crown in any event.

Forms

72. The consultation paper invited views on whether the Bill should include a provision stating that “non-material” differences between a form prescribed by legislation and the form used should not affect the validity of the instrument. The views of the consultees were that as long as any differences between the form as prescribed and that used were of a “non-material” nature then such a provision would be useful. We therefore decided to include such a provision in the Bill.

Commencement provisions

73. The consultation paper sought views on whether it would be useful to provide that, where an ASP confers on the Scottish Ministers a power to bring its provisions into force on such day as may be appointed by order, this power should automatically include the power to appoint different days for different purposes or may contain transitional, transitory or saving provision. Overall the consultation respondents agreed with the inclusion of such a power in the Bill, therefore we have included a provision to allow this.

Part 2 – Scottish Statutory Instruments

Combination of powers

74. Although this matter was not raised in the consultation paper it was discussed at the consultation event. The new provision in the Bill will allow powers subject to different levels of Parliamentary scrutiny, specifically negative and no procedure, to be exercised by the same instrument. In the past there have been disagreements with the Subordinate Legislation Committee (SLC) on the use of combined instruments. And during the consultation event it was suggested that, as we were enshrining the scrutiny procedures in statute, then the vires of combining powers may be brought further in to doubt. Therefore we have included the provision in order to put the matter beyond doubt.

Part 3 – Publication of Acts and Instruments

Publication of Instruments by the Queen’s Printer for Scotland (QPS)

75. The consultation paper sought views on whether the QPS should continue under a duty to arrange for the printing for sale of copies of SSIs. The consultation responses were mixed, however, it is evident that society has moved away from demanding printed copies of SSIs and instead accessing them electronically. The QPS confirmed that presently sales of printed copies of SSI amount, on average, to only 29 copies (excluding those supplied to the Scottish Government). Therefore, we have removed from the Bill the obligation on the QPS to print copies of every SSI for sale. We shall, however, provide in regulations to be made under the Bill an obligation too make printed copies of SSIs available on request.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

76. The provisions included in the Bill deal with questions of statutory interpretation and legislative procedures. They have no specific implications for equalities groups or other third parties. Members of the public and organisations will continue to have access to relevant information and processes as at present. The Bill will provide some improvement in terms of access to certain information by, for example, bringing together interpretation provisions for future ASPs and Scottish instruments in one place. The simplification and streamlining of SSI procedures as a result of the Bill will also contribute to ensuring that parliamentary consideration of subordinate legislation is as transparent and accessible as possible.

*This document relates to the Interpretation and Legislative Reform (Scotland) Bill (SP Bill 27)
as introduced in the Scottish Parliament on 15 June 2009*

INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

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