



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Standards, Procedures and Public Appointments Committee**

### **Report on the Interpretation and Legislative Reform (Scotland) Bill at Stage 1**

The Standards, Procedures and Public Appointments Committee reports to the Subordinate Legislation Committee as follows—

#### **BACKGROUND**

1. In its 14<sup>th</sup> Report 2007, *Inquiry into the Regulatory Framework in Scotland*, the Subordinate Legislation Committee (SLC) recommended changes to the current system of scrutiny and handling of subordinate legislation. The aim was to instruct a bill to replace the Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999 (“the SI Order”). The Scottish Government subsequently agreed to provide for the replacement of this Transitional Order and two other remaining Transitional Orders: the Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999 (“the SPP Order”) and the Scotland Act 1998 (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (“the Interpretation Order”). This is to be achieved by means of the *Interpretation and Legislative Reform (Scotland) Bill*<sup>1</sup> (“the Bill”).
2. The Bill has four main purposes and deals specifically with—
  - the publication, interpretation and operation of Acts of the Scottish Parliament (ASPs) and instruments made under them;
  - the making and publication of subordinate legislation under an ASP in the form of a Scottish statutory instrument (SSI) and the scrutiny procedures that apply in the Scottish Parliament;
  - the procedure that applies to orders that are subject to special parliamentary procedure;
  - giving the Scottish Ministers a power, by order, to make certain amendments to enactments in order to facilitate their consolidation.
3. The SLC was designated as lead committee on the Bill and the Standards, Procedures and Public Appointments (SPPA) Committee as secondary committee.

---

<sup>1</sup> Interpretation and Legislative Reform (Scotland) Bill. Available at:  
<http://www.scottish.parliament.uk/s3/bills/27-InterpretLegRef/index.htm>

At its meeting on 23 June 2009, the SPPA Committee agreed to scrutinise the following parts of the Bill—

- Part 4 Pre-consolidation modification of enactments;
- Part 5 Orders subject to Special Parliamentary Procedure;
- Part 6 Laying documents before the Scottish Parliament.

4. It was also agreed that the SLC and the SPPA Committee would issue a joint call for written evidence. Five responses were received that were relevant to the SPPA Committee<sup>2</sup> and these are attached at Annexe 1. All the responses received to the joint consultation are available on the Scottish Parliament website<sup>3</sup>.

## SUMMARY OF RECOMMENDATIONS

**The SPPA Committee makes the following recommendations to the SLC—**

### **Pre-consolidation**

**1. The SPPA Committee is concerned that, whatever the current government's intentions, this is potentially a very broad power which goes well beyond existing powers to amend primary legislation by order. The Committee recommends to the SLC that it seeks further reassurances from the Scottish Government about the safeguards which would prevent this power from being used to make policy changes without full parliamentary scrutiny.**

**2. In relation to the inclusion of codification (subsection 5), that the Scottish Government should be pressed on the appropriateness of including re-statement of the common law and whether the correct and workable mechanism for this would be through a substantive bill on the policy issue in question.**

**3. That the SLC queries with the Scottish Government why this broad approach is necessary and why the approach adopted in the UK Parliament is not viewed as being adequate.**

**4. That the SLC clarifies with the Scottish Government why it is thought necessary to include the provision for UK Parliament legislation at section 47(2)(b).**

**5. That the Scottish Government is probed further on—**

- **whether the SLC or the subject committee would be expected to be responsible for the final decision on whether the provisions of a pre-consolidation instrument facilitated consolidation, given that there is the possibility of the new power being used to make policy changes;**

---

<sup>2</sup> The Faculty of Advocates submitted evidence which, although not providing any specific comments on Parts 4, 5 and 6 of the Bill, indicated that the Faculty supports the provisions on the pre-consolidation modification of enactments and Special Parliamentary Procedure.

<sup>3</sup> Available at: <http://www.scottish.parliament.uk/s3/committees/subleg/inquiries/ILRBill/ILRBill-evid.htm>.

- whether the consolidation bill committee should have a role in considering the order, particularly in relation to whether the changes facilitate consolidation;
- the detail of the timing of laying the draft order and bill – the usual 40 days for considering an affirmative order may not be sufficient for scrutiny of a wide-ranging pre-consolidation order;
- whether a super-affirmative procedure (requiring consultation with the Parliament on a draft of the order) might be more appropriate for pre-consolidation orders.

6. That, in relation to UK legislation (section 47(6)(b)), further information is sought from the Scottish Government on how scrutiny of the instrument would sit with the requirements for the subject committee to consider a legislative consent motion.

7. That the Scottish Government should be asked whether it would plan to consult stakeholders on any draft orders under this section.

8. The Committee shares Mr Jamieson's concerns that, without resources being allocated to consolidation, this power is unlikely to increase the number of consolidations introduced. The Committee recommends to the SLC that the Scottish Government be invited to comment on Mr Jamieson's proposals and on what other steps it is taking to increase the number of consolidations.

#### **Special Parliamentary Procedure**

9. That, as the Bill had been drafted prior to the inclusion of hybrid bills procedures in Standing Orders, the SLC seeks the views of the Scottish Government as to whether the private bills procedure remains the most appropriate mechanism to consider the bill for an order which is made by Scottish Ministers other than on application of another person.

10. That the SLC also considers seeking clarification from the Scottish Government on—

- whether it has given any consideration to replacing SPP in the longer term;
- whether consideration was given to changing orders subject to SPP to affirmative (rather than the current negative) procedure.

#### **Delegated powers in Part 4**

11. The SPPA Committee shares the SLC's concerns as to the width of the power proposed in Section 47(i) on pre-consolidation and considers that if the power is approved by Parliament in the current or amended form, that, again, further consideration should be given to increasing the level of scrutiny through super-affirmative procedure.

## PART 4 – PRE-CONSOLIDATION MODIFICATION OF ENACTMENTS

### **Definition of consolidation**

5. Consolidation bills are bills which re-state the existing statute law on the same subject into one Act without substantially amending the law. These types of bill are subject to Rule 9.18 in Standing Orders—

A Consolidation Bill is a Bill the purpose of which is the consolidation of enactments, whether or not with amendments to those enactments to give effect to recommendations of the Scottish Law Commission...

6. The term “Codification Bill” is usually used to refer to a bill that re-states both statute law and common law (Rule 9.18A).

### **Current procedure**

7. Consolidation bill procedure differs from other public bill procedure in that—

- Consolidation bills are considered by a Consolidation Committee established for the purpose;
- the Parliament decides on the bill at Stage 1 and Stage 3 without a debate;
- there are special restrictions on the amendments that may be lodged at Stage 2 and Stage 3.

8. The only changes permissible to the law being consolidated by a consolidation bill are those which are recommended by the Scottish Law Commission or the Law Commission and any proposed changes which meet the test of being necessary for the purpose of producing a satisfactory consolidation. Commission recommendations are published in a report and considered by the Consolidation Committee along with its consideration of the bill.

9. Once introduced, a consolidation bill is referred to a Consolidation Committee. Where possible, at least one member of the committee should be a member of the relevant subject committee. At Stage 1, rather than considering the general principles of the bill, the committee is required to report only on whether the bill should proceed as a consolidation bill (ie not whether the committee approves of the law that the bill re-states, but whether it approves of it being consolidated). At Stages 2 and 3, amendments are inadmissible if their effect would be that the bill would no longer qualify as a consolidation bill (Rule 9.18.8). Amendments may, however, propose changes to how the bill re-states the law and how it gives effect to Commission recommendations.

### **Bill’s provisions**

10. The provisions of the Bill are as follows—

## PART 4

### PRE-CONSOLIDATION MODIFICATION OF ENACTMENTS

#### 47 Pre-consolidation modifications of enactments

- (1) The Scottish Ministers may by order make such modifications of enactments relating to a particular subject as in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the law on the subject.
- (2) No order is to be made unless a Bill, or a group of Bills, consolidating the law on the subject has been—
  - (a) introduced in the Scottish Parliament, or
  - (b) presented to either House of Parliament.
- (3) If an Act, or a group of Acts, resulting from such a Bill, or group of Bills, is passed, the order comes into force by virtue of this subsection immediately before the commencement of that Act, or group of Acts.
- (4) An order is subject to the affirmative procedure.
- (5) In this section, “consolidation”, in relation to the law on a particular subject, includes the re-statement of common law in relation to the subject.

#### The case for change

11. In its consultation paper on the draft Bill, the Scottish Government expressed the view that, while Scottish Law Commission recommendations prove a useful means of effecting changes to secure a satisfactory consolidation of the legislation in question, “there are a number of limitations...The Commission may be reluctant to make recommendations in relation to matters which involve significant policy changes or which are likely to provoke political controversy.”<sup>4</sup>

12. The proposed change in procedure is for a pre-consolidation amendment power to provide scope for consolidation-related changes to the existing law to be made by order by the Scottish Ministers. The consultation paper on the draft Bill stated that the changes would include, “but would not be confined to”, those which could have been made by a Commission recommendation and would therefore allow a greater degree of simplification of existing legislation in preparation for its consolidation.

13. The Bill’s Policy Memorandum states that: “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.”<sup>5</sup>

14. The Bill’s provisions in relation to pre-consolidation were welcomed by Professor Colin Reid of the University of Dundee, the Law Society of Scotland and the Faculty of Advocates, as providing a mechanism to start work on consolidation to bring Scotland’s statute law up to date.

15. In his written evidence to the Committee, however, Iain Jamieson<sup>6</sup> states—

---

<sup>4</sup> Scottish Government consultation paper on the draft Bill, page 49. Available at: <http://www.scotland.gov.uk/Publications/2009/01/12112118/0>

<sup>5</sup> Interpretation and Legislative Reform (Scotland) Bill, Policy Memorandum, paragraph 9. Available at: <http://www.scottish.parliament.uk/S3/bills/27-InterpretLegRef/index.htm>

“...it is open to question whether these are the kind of amendments which Scottish Ministers should be able to make simply by order. Section 47(1) would enable Scottish Ministers to make amendments which they consider not only to be necessary or desirable to facilitate the consolidation but which are considered to be “desirable in connection with” the consolidation. This is an extremely wide power because it is not limited to amendments which are desirable to facilitate the consolidation. It would enable not only minor policy changes to be made, such as the example given in the Policy Memorandum but significant policy changes to be made as long as they can be dressed up as being somehow “connected with” the consolidation. This is a very wide Henry VIII power<sup>7</sup> for the Parliament to give to the Government. The fact that the order requires an affirmative resolution is not really a very effective parliamentary control because Parliament is being denied the opportunity to scrutinise each amendment on its merits which it would have if they were made by an Executive Bill.

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

16. Similarly, the Scottish Law Commission<sup>8</sup> expressed concern that consolidation “should not be used to promote policy alterations to legislation” and queried “whether it might be preferable if any amendments to be proposed for the purposes of a consolidation were, as at present, required to be based upon recommendations of the Scottish Law Commission”.

17. Consolidation can currently only restate the law unless the Law Commission recommends changes. The provisions in the Bill give the Scottish Ministers greater powers than are currently available to the Law Commission. Policy issues brought forward through this process would receive less scrutiny than if they had been made by primary legislation, where changes could be considered and, if necessary, amended individually. Whether policy changes “facilitate or otherwise are desirable in connection with consolidation” could be difficult to determine, with the only option for rejecting changes being rejection of the entire order.

**18. The Committee is concerned that, whatever the current government’s intentions, this is potentially a very broad power which goes well beyond**

---

<sup>6</sup> Iain Jamieson. Written submission to the Standards, Procedures and Public Appointments Committee

<sup>7</sup> A Henry VIII power is a power to enable the modification or repeal of primary legislation by secondary legislation, with or without further parliamentary scrutiny

<sup>8</sup> Scottish Law Commission. Written submission to the Standards, Procedures and Public Appointments Committee

**existing powers to amend primary legislation by order. The Committee recommends to the SLC that it seeks further reassurances from the Scottish Government about the safeguards which would prevent this power from being used to make policy changes without full parliamentary scrutiny.**

*Common law*

19. Section 47(5) of the Bill states that "...‘consolidation’, in relation to the law on a particular subject, includes the re-statement of common law in relation to the subject."

20. The Scottish Law Commission expressed concern that—

"We would see considerable practical and technical difficulties in describing any enactment of a common law position as "consolidation", because of the perennial difficulty in securing agreement as to what the common law on any matter is. Even if a particular issue may have been settled by a decisive judgement, there are almost certainly related issues where the Court's position is not clear, and where what are essentially policy decisions have to be made. We would ourselves have described the process of restating the common law in statute as more akin to codification than to consolidation. And, in that connection, we note that the power proposed to be conferred upon Ministers to make orders amending the law is limited to power to amend "enactments". There is no equivalent power in relation to the common law."

**21. The Committee shares these concerns and recommends to the SLC that the Scottish Government should be pressed on the appropriateness of including re-statement of the common law within this power and whether the correct and workable mechanism for this would be through a substantive bill on the policy issue in question.**

**UK provisions**

22. Similar powers to that proposed in the Bill have been used in UK Parliament legislation but only in relation to sections of specific Acts. UK Parliament Acts containing provisions to allow an order to be made include the National Health Service Reform and Health Care Professions Act 2002 (which enables the Secretary of State to make an order amending the legislation relating to the health service in England and Wales). This power was exercised by the Secretary of State in the National Health Service (Pre-consolidation Amendments) Order 2006 (No. 1407). Other examples of UK Parliament Acts containing a pre-consolidation power are: section 407 of the Communications Act 2003, section 321 of the Pensions Act 2004, section 72 of the Electoral Administration Act 2006 and section 146 of the Pensions Act 2008.

23. The Bill proposes a general power being provided to the Scottish Ministers which extends to all subject areas, including common law changes, rather than taking powers for specific areas as required (as appears to be the UK approach).

24. The Committee recommends to the SLC that it asks the Scottish Government why this broad approach is necessary and why the approach adopted in the UK Parliament is not viewed as being adequate.

25. The SLC may also wish to clarify with the Scottish Government why it is thought necessary to include the provision for UK Parliament legislation at section 47(2)(b).

### **Previous consideration by the Procedures Committee of consolidation of legislation**

26. To date, there has only been one Consolidation Bill in the Scottish Parliament – the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill. In its Stage 1 report on the bill, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee identified a number of areas where improvements might be made to the procedures involved. Consequently, the Session 2 Procedures Committee carried out an inquiry into the issues raised and proposed a number of recommendations in its 8<sup>th</sup> Report 2006, *Consolidation Bill procedure*<sup>9</sup>.

27. In its written evidence to the Procedures Committee, the Scottish Executive<sup>10</sup> referred to the mechanisms available in UK Parliament procedures for making amendments to existing legislation, namely, on the recommendation of the Law Commission or the Scottish Law Commission or under the Consolidation of Enactments (Procedure) Act 1949. (It was understood that little use had been made of the latter procedure for some time, as it had been overtaken by the Law Commission procedure agreed by the Joint Committee on Consolidation Etc Bills at Westminster in 1983.)

28. The Scottish Executive at that time also referred to other options that it considered could be used for making pre-consolidation amendments, including a programme bill on the same subject as the consolidation bill to confer a limited power on Ministers to make changes to the existing enactments by order, subject to parliamentary procedures. This procedure had been employed in the UK Parliament (see paragraph 26 above).

29. The Procedures Committee at that time made no recommendations in relation to the possibility of the Scottish Parliament adopting the latter mechanism for making pre-consolidation amendments.

### **How the new provisions would operate**

30. The Minister for Parliamentary Business has provided the SLC with the following illustration<sup>11</sup> of how the Scottish Government envisages that the new proposed power to make pre-consolidation amendments would operate.

---

<sup>9</sup> Available at: <http://www.scottish.parliament.uk/business/committees/procedures/reports-06/pr06-08.htm>

<sup>10</sup> Scottish Executive. Written submission to the Procedures Committee

<sup>11</sup> Letter dated 8 June 2009 from Bruce Crawford MSP, Minister for Parliamentary Business, to Jamie Stone MSP, Convener, Subordinate Legislation Committee

31. The example of its use is illustrated by three housing acts being consolidated into one act. Two of the newer acts may define “house” as including a caravan, whereas the oldest act does not. If caravans were to be included in the context of the oldest act, it would currently require a bill to be passed to amend before the consolidation was dealt with by the Parliament. Under the new proposals, an order could be made amending the oldest act and, if agreed to by the Parliament, the consolidation bill would reproduce the law as amended by the order.

### **Timing for laying of order and introduction of consolidation bill**

32. An illustrative parliamentary timeline for the order and consolidation bill was also provided by the Minister—

• The Consolidation Bill Team identifies change in existing law;
• Change is put in a Scottish Government draft Order;
• A draft bill reproduces the laws as proposed to be amended by the draft Order;
• A draft SSI containing the Order is laid before the Parliament;
• A draft Bill is introduced in the Parliament/presented in either House of Parliament;
• The draft Order is considered by the SLC and subject committee;
• If the draft order is approved, a Consolidation Committee checks the draft Bill accurately incorporates changes to the existing law provided in the draft Order;
• If the draft Order is not approved, the draft Bill is amended so as to reproduce the existing law (and strip out the changes provided in the Order);
• If the draft Order is approved, the Order comes into force an instant before the Bill comes into force.

33. Rule 9.6.2 requires the SLC to consider the provisions conferring power to make subordinate legislation in any bill. This applies to consolidation bills even though many of the provisions they contain will simply have been restated without amendment from existing enactments.

34. In the Procedures Committee’s report on Consolidation Bill procedure, the Committee considered whether the SLC should be expected to consider all relevant provisions of a consolidation bill or only those that are new (reflecting Law Commission recommendations) or altered (as part of the exercise of making a satisfactory consolidation). The Committee was of the view that a rule to limit the SLC to considering only new or altered provisions would add complexity, requiring the relevant provisions in a Consolidation Bill to be divided into two categories (those for consideration by the SLC and those for consideration by the Consolidation Committee).

35. The illustrative timeline provided by the Scottish Government indicates that the order would be referred at the same time to the SLC and the appropriate subject committee. The Minister also recognises that the outcome of the draft Order would need to be known before the Bill reached Stage 3 as, if the draft Order were not

approved, the Bill would need to be amended to delete the changes that the Order proposed to make to the law.

36. The provisions of the Bill allow for an order to be made at any stage after a bill is introduced. In his letter of 8 June 2009 to the SLC, the Minister for Parliamentary Business recognises that the precise timing for laying and considering the draft Order and for introducing and considering the draft bill would be a matter for business managers.

**37. The Committee recommends to the SLC that the Scottish Government is probed further on—**

- **whether the SLC or the subject committee would be expected to be responsible for the final decision on whether the provisions of a pre-consolidation instrument facilitated consolidation, given that there is the possibility of the new power being used to make policy changes.**
- **whether the consolidation bill committee should have a role in considering the order, particularly in relation to whether the changes facilitate consolidation.** At present the bill committee's role is only to consider whether the changes in the order have been consolidated in the bill (not whether those changes require to be made at all).
- **the detail of the timing of laying the draft order and bill – the usual 40 days for considering an affirmative order may not be sufficient for scrutiny of a wide-ranging pre-consolidation order.**
- **whether super-affirmative procedure (requiring consultation on a draft of the order) might be more appropriate for pre-consolidation orders.**

38. Section 47 states that—

- (6) No order is to be made unless a Bill, or a group of Bills, consolidating the law on the subject has been—
- (a) introduced in the Scottish Parliament, or
  - (b) presented to either House of Parliament.

**39. The Committee recommends to the SLC that, in relation to UK legislation (section 47(6)(b)), further information is sought from the Scottish Government on how scrutiny of the instrument would sit with the requirements for the subject committee to consider a legislative consent motion.**

## **Consultation**

40. The Law Society of Scotland suggests that there should be consultation with relevant stakeholders on any exercise of this power.<sup>12</sup>

---

<sup>12</sup> Law Society of Scotland. Written submission to the Standards, Procedures and Public Appointments Committee

41. **The Committee recommends to the SLC that the Scottish Government should be asked whether it would plan to consult stakeholders on any draft orders under this section.**

### **Wider consolidation issues**

42. Iain Jamieson<sup>13</sup> noted that there is an implication in the Scottish Government's position that the new power will increase the number of consolidations carried out. He suggested that it is not the absence of this power which has delayed consolidations but the fact that the necessary resources have not been made available to enable them to be carried out. The Scottish Law Commission has a statutory duty to prepare programmes of consolidation and draft bills can only be prepared at the request of Scottish Ministers. Mr Jamieson felt that there is no evidence that consolidations have been inhibited because of the limited scope of the amendments which the Commission can recommend and that "failure to have regular consolidations has meant that it is almost impossible to find the up-to-date state of Scots law in virtually all legislative areas. This was not meant to happen. One of the arguments for devolution was to provide a greater legislative opportunity to bring our statute law up-to-date. This has simply not happened. The position is now worse than before devolution".

43. Mr Jamieson suggested that the Committee may wish to consider what steps could be taken to increase the number of Consolidation Bills and proposed the following possible mechanisms to achieve this—

- to impose a statutory obligation upon the Scottish Law Commission to consolidate the main areas, if not all, of devolved legislation every 10/15 years and to keep that legislation up to date either by having a running consolidation online or to have further regular consolidations within each successive 10 year period;
- to require Scottish Ministers to provide the Commission with adequate resources to carry out this duty so that it does not interfere with the other work of the Commission. In other words, it should not be possible for Scottish Ministers, as they can at present, to prevent the Commission from being able to prepare consolidations by withholding approval or resources;
- to require the Commission, after consultation with the Scottish Parliament and Scottish Ministers and other relevant interests, to draw up a programme of consolidations every three years or so and to prepare draft consolidation Bills to implement that programme. The Government should be required to assist the Commission in the preparation of those Bills. It may be necessary for Scottish Ministers to set up some kind of a specialist unit within the Government which is responsible for dealing with consolidation Bills rather than having the task spread amongst different departments which may not know what to do but this is a matter for them; and

---

<sup>13</sup> Iain Jamieson. Written submission to the Standards, Procedures and Public Appointments Committee

- to require Scottish Ministers, within two months of the submission of the Commission report containing a draft Consolidation Bill, to introduce the Bill or, if not, to give reasons why not. If the Government does not introduce the Bill, the Standing Orders should permit the subject Committee or any MSP to do so without any further procedure, such as further consultation. The Parliament may also wish to consider having a standing committee to deal with such Bills.

**44. The Committee shares Mr Jamieson’s concerns that, without resources being allocated to consolidation, this power is unlikely to increase the number of consolidations introduced. The Committee recommends to the SLC that the Scottish Government be invited to comment on Mr Jamieson’s proposals and on what other steps it is taking to increase the number of consolidations.**

#### **SLC comments on delegated powers in Part 4**

45. The Committee considered a letter from the Convener of the SLC (attached at Annexe 2) which comments on the delegated powers in Part 4. The SLC highlighted the following concerns as to the width of the power available in relation to the pre-consolidation provisions—

- the power is available in respect of all subject matter and there may be some areas of the law considered too sensitive to permit substantive policy changes to be fast tracked in this way;
- the threshold which must be met before the power is available to Ministers is currently very loose and subjective;
- further consideration should be given to the potential for changes to the common law in the course of codification;
- interaction between a Scottish instrument and a Westminster Bill raises issues of control of the process.

46. The SLC also had concerns as to the level of scrutiny proposed and considered that if the power is approved by Parliament in the current or amended form that consideration should be given to increasing the level of scrutiny through super-affirmative procedure.

**47. The Committee shares the SLC’s concerns and recommends that these issues should also be raised with the Minister.**

#### **PART 5 – SPECIAL PARLIAMENTARY PROCEDURE**

48. Special Parliamentary Procedure (SPP) is a form of parliamentary scrutiny. Orders subject to SPP are a form of subordinate legislation, effectively comparable to a variation on a private bill. Under the Scotland Act 1998, the procedure is currently governed by the Scotland Act 1998 (Transitory and Transitional Provisions) (Orders Subject to Special Parliamentary Procedure) Order 1999 (“the SPP Order”).

No Special Parliamentary Procedure Orders have been considered by the Scottish Parliament to date.

49. Each instance of SPP is specifically provided for in an enabling statute and involves procedures for notification of an order, making objections to an order and the making/confirmation of an order by Scottish Ministers. It is at the final stage that parliamentary scrutiny may be involved, with a different process in place for orders to which objections have been made and not withdrawn and orders to which no objections have been made.

50. Historically, the types of works for which SPP has been used have included transport or harbour developments involving the compulsory purchase of land. However, some developments that were previously subject to SPP were brought within the scope of a new procedure established under the Transport and Works (Scotland) Act 2007 (“the TWA procedure”).

### **Bill’s provisions**

51. The provisions in Part 5 of the Bill replicate the effect of the SPP Order, although not in the exact terms of the SPP Order. Part 5 of the Bill is split into 6 sections as follows—

- Application of Part 5
- Notice of special procedure orders
- Orders to which objections are made
- Orders to which no objections are made
- Statement of objections
- Interpretation of Part 5.

### **Consultation responses**

52. The only comments received on the Committee’s consultation on the Bill came from The National Trust for Scotland, which stated that it would oppose the replacement of SPP as it “would wish to ensure the protection afforded to inalienable land is retained.” (“Inalienable land” cannot be sold, mortgaged or given away, and can only be subject to compulsory purchase after parliamentary scrutiny.)

### **Comparison of SPP with the TWA procedure**

53. The Committee noted that the TWA procedure replaced SPP in relation to certain enactments.

54. In comparing the procedures members noted the reasons for the establishment of the TWA procedure: for example, the wish to move to a system with more emphasis placed on local proceedings than parliamentary scrutiny and greater power being transferred to Scottish Ministers to make local orders in instances where the development is not of national significance (i.e. that the development is not included in the National Planning Framework).

55. In SPP the Parliament has a role in scrutinising any order subject to SPP that is brought forward, by means of the private bills procedure in the case where objections are not withdrawn or by the negative procedure for statutory instruments where no objections to the order remain. For the TWA procedure, greater weight is given to the local proceedings for considering objections, heard by a reporter rather than being made direct to Ministers. Under the TWA procedure, parliamentary scrutiny of the order occurs only where the proposed development is considered to be of national significance.

### **Current position in relation to SPP**

56. SPP now remains in place for a very limited number of enactments, primarily relating to the compulsory purchase of land from heritage bodies. The enactments where a power for Scottish Ministers to make, approve or confirm orders exists are—

- Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947
- Coast Protection Act 1949
- Countryside (Scotland) Act 1967
- Forestry Act 1967
- New Towns (Scotland) Act 1968
- Local Government, Planning and Land Act 1980
- National Heritage (Scotland) Act 1991
- Crofters (Scotland) Act 1993
- Town and Country Planning (Scotland) Act 1997.

57. The Bill provides that an order to which objections are lodged and not withdrawn must be confirmed by an act of the Scottish Parliament and that the bill for such an act should be considered under private bills procedure, or such a procedure as Standing Orders may provide.

### **Recommendations**

**58. The Committee recommends to the SLC that, as the Bill was drafted prior to the inclusion of hybrid bills procedures, the SLC should seek the views of the Scottish Government as to whether the private bills procedure remains the most appropriate mechanism to consider the bill for an order which is made by Scottish Ministers other than on application of another person.**

**59. The SLC may also wish to seek clarification from the Scottish Government on—**

- **whether it has given any consideration to replacing SPP in the longer term;**
- **whether consideration was given to changing orders subject to SPP to affirmative (rather than the current negative) procedure.**

## **PART 6 – LAYING OF DOCUMENTS**

60. Section 54 of the Bill makes provision in relation to an enactment that requires or authorises that a document is to be laid before the Parliament.

## **54 Laying of certain documents before the Scottish Parliament**

(1) This section applies where an enactment authorises or requires the laying of a document (other than a Scottish statutory instrument or a statutory instrument), or a draft of such a document, before the Scottish Parliament.

(2) Unless the contrary intention appears, the reference to the laying of the document, or draft document, is to be construed as a reference to the taking of such action as is specified in standing orders of the Parliament as constituting the laying of such a document, or draft of such a document, before the Parliament.

(3) Failure to lay a document, or draft document, in accordance with the enactment does not affect the validity of the document.”

61. By virtue of section 54(3), failure to lay a document does not affect the validity of the document – this replicates the current provision in relation to statutory instruments under the SI Order and which is incorporated into this Bill at section 32(3).

62. Section 54(2) links the laying of documents to Standing Orders. Members will wish to note that Rule 14.1 of Standing Orders already makes provision for documents that are required or authorised to be laid before the Parliament. This Rule specifies:

- What action shall be treated as the laying of a document
- That the Clerk may require provision of additional copies
- That a document may only be laid when the office of the Clerk is open
- What can be laid
- Provides the notice of any document laid under this Rule is to be given in the Business Bulletin.

63. This is an area on which consultees expressed no strong views.

**64. The Committee noted that the Scottish Government has chosen to keep the provisions relating to the laying of other documents separate from those on the laying of statutory instrument, and has no comment on the proposed provisions.**

## ANNEXE 1: WRITTEN EVIDENCE

IAIN JAMIESON

*Extract from general submission – comments on Part 4 of the Bill: Pre-consolidation modification of enactments*

General

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

Section 47(1)

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

At present, the Parliament’s Standing Orders provide for an expedited Bill procedure to be available for Consolidation Bills<sup>14</sup>. A Consolidation Bill for this purpose is defined as a Bill which consolidates certain enactments and the only changes which are allowed are those necessary to give effect to recommendations from the Scottish Law Commission, the Law Commission or both Commissions. The Law Commissions can only recommend amendments which are necessary for the purpose of producing a satisfactory consolidation<sup>15</sup>.

The Policy Memorandum explains that the power proposed in section 47(1) will enable amendments to be made to the legislation to be consolidated which are more extensive than those which the Scottish Law Commission can recommend<sup>16</sup>. The Consultation Paper argued that the recommendations which the Commission can make is too limited because the Commission “may be reluctant to make recommendations in relation to matters which involve significant policy changes or which are likely to provoke political controversy”.<sup>17</sup> The Policy Memorandum is more circumspect in its justification for this power and simply argues “that it can be useful to make somewhat wider changes to bring about a cleaner and more satisfactory consolidation of the legislation concerned. It is intended that the Scottish Ministers will be able to assist consolidation by using an order making power, subject to the affirmative procedure, to make changes which facilitate, or are otherwise desirable in connection with, a Consolidation ...Bill”<sup>18</sup>

---

<sup>14</sup> Standing Orders Rule 9.18. There is a similar provision in relation to Codification Bills in Rule 9.18A.

<sup>15</sup> See paragraphs 17-23 of the 1st Report 2003 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee

<sup>16</sup> Policy Memorandum paragraph 48

<sup>17</sup> Scottish Government, *Interpretation and Legislative Reform (Scotland) Bill: Consultation Paper* (available at <http://www.scotland.gov.uk/Publications/2009/01/12112118/0>) paragraph 49.

<sup>18</sup> Policy Memorandum paragraph 48

However, it is open to question whether these are the kind of amendments which Scottish Ministers should be able to make simply by order. Section 47(1) would enable Scottish Ministers to make amendments which they consider not only to be necessary or desirable to facilitate the consolidation but which are considered to be “desirable in connection with” the consolidation. This is an extremely wide power because it is not limited to amendments which are desirable to facilitate the consolidation. It would enable not only minor policy changes to be made, such as the example given in the Policy Memorandum but significant policy changes to be made as long as they can be dressed up as being somehow “connected with” the consolidation. This is a very wide Henry VIII power for the Parliament to give to the Government. The fact that the order requires an affirmative resolution is not really a very effective parliamentary control because Parliament is being denied the opportunity to scrutinise each amendment on its merits which it would have if they were made by an Executive Bill.

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

### Consolidation Bills generally

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

Although the Scottish Law Commission has a statutory duty to prepare comprehensive programmes of consolidation and to draft Bills pursuant to such a programme, this can only be done at the request, and with the approval, of Scottish Ministers.<sup>19</sup> Every annual report of the Commission since devolution has expressed regret that successive Scottish Governments have not been able to commit the resources necessary to support such a programme. There has only been one consolidation since devolution and most of the work for that was done beforehand.<sup>20</sup> It is only at the end of last year that the Commission has begun work on consolidating the legislation relating to bankruptcy in Scotland, resources for which are being supplied by the Accountant in Bankruptcy.<sup>21</sup> In these circumstances, there is absolutely no evidence that consolidations have been

---

<sup>19</sup> Law Commissions Act 1965 s 3(1)(d).

<sup>20</sup> The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

<sup>21</sup> See Scottish Law Commission, *Annual Report 2008* (Scot Law Com No 214) 8, 22.

inhibited because of the limited scope of the amendments which the Commission can recommend.

Failure to have regular consolidations has meant that it is almost impossible to find the up-to-date state of Scots law in virtually all legislative areas.<sup>22</sup> This was not meant to happen. One of the arguments for devolution was to provide a greater legislative opportunity to bring our statute law up-to-date. This has simply not happened. The position is now worse than before devolution.

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

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

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

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

to require Scottish Ministers, within two months of the submission of the Commission report containing a draft Consolidation Bill, to introduce the Bill or, if not, to give reasons why not. If the Government does not introduce the Bill, the Standing Orders should permit the subject Committee or any MSP to do so without any further procedure, such as further consultation<sup>23</sup>. The Parliament may also wish to consider having a standing committee to deal with such Bills.

## LAW SOCIETY OF SCOTLAND

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

---

<sup>22</sup>The Statute Law Database (<http://www.statutelaw.gov.uk/>), which provides an online database of statute law in the UK, is of considerable assistance, but it is incomplete and not completely up-to-date. In any event, it is no substitute for a proper consolidation.

<sup>23</sup> Such as the consultation required for Members' Bills by rule 9.14.3 of the Parliament's Standing Orders.

The Society welcomes this technical but important Bill and, in the interests of accessibility of legislation, supports the replacement of the three transitional orders which form the current regime.

The Society has written to the Subordinate Legislation Committee and given evidence on Parts 1, 2, 3 and 7 of the Bill. In relation to parts of the Bill which the Standards, Procedures and Public Appointments (SPPA) Committee are considering (namely Parts 4, 5 and 6), the Society has only one specific comment to make.

#### Section 47

The Society fully supports the efforts of the Scottish Law Commission in consolidation of legislation and would like to emphasise to the Scottish Government that such a project is a worthwhile one which should be given greater priority.

The Society welcomes the pre-consolidation modification power contained in section 47. Proposals to exercise this power should be consulted on with relevant stakeholders.

I hope that these comments are helpful.

### NATIONAL TRUST FOR SCOTLAND

#### Introduction

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

#### Overall View

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

#### Background

The Trust's statutory purposes as set out in 1935 include 'promoting the permanent preservation for the benefit of the nation of lands and buildings in Scotland of historic or national interest or natural beauty and also articles and objects of historic or national interest...'<sup>24</sup>.

One of the means by which the Trust carries out this statutory purpose is through ownership. Under the Trust's enabling Acts of Parliament<sup>25</sup>, the Trust's Council may declare lands or buildings in its care inalienable which gives them protection

---

<sup>24</sup> From Section 4 of the National Trust for Scotland Order Confirmation Act 1935.

<sup>25</sup> Specifically Section 22(2) of the National Trust for Scotland Order Confirmation Act 1935.

against creditors and compulsory purchase. Inalienability therefore gives potential donors the strongest assurance which is realistically available that any property given to the Trust will be owned by it in perpetuity.

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

PROFESSOR COLIN T REID, SCHOOL OF LAW, UNIVERSITY OF DUNDEE

In response to the invitation to submit evidence on the above Bill, I wish to make the following points. I am submitting separate evidence to the Subordinate Legislation Committee on other parts of the Bill. These comments are made in a wholly personal capacity and do not represent the views of any institution or organisation.

1. The provisions in Parts 4, 5 and 6 of the Bill are welcome as providing clarity and certainty on matters of significance to the proper working of the legislative process.

2. Part 4 of the Bill is particularly welcome and any measure that removes obstacles to effective consolidation should be supported. The state of our statute book is a disgrace, with repeated “cut-and-paste” amendments rendering many enactments virtually unusable to those without access to expensive commercial databases to help them ascertain what the legislation says (the Statute Law Database is still a long way from providing the complete and convenient coverage it has long promised). Indeed some pre-1999 Acts now exist in two quite different forms following separate amendments at Holyrood and Westminster, e.g. Part I of the Wildlife and Countryside Act 1981. The provision here is welcome but comes at a late stage in the process of consolidation and every encouragement should be given to devoting the time and resources to ensure that the work of consolidation is increased and begins to make inroads into the current appalling state of our legislative material.

SCOTTISH LAW COMMISSION

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

2. We are responding separately to the Subordinate Legislation Committee on those aspects of the Bill which they are considering as lead committee. Accordingly, this response deals only with the Commission’s views on Part 4.

## Part 4

3. We have a particular interest in part 4 because of our statutory responsibilities in relation to consolidation of enactments. Generally, we welcome the idea that amendments necessary for the purposes of a consolidation may be able to be made by means of an affirmative resolution instrument rather than requiring to be put into primary legislation.

4. There are three respects in which we wonder whether the provisions set out in section 47 may be too radical.

5. First, while it is entirely understandable that it is for the Scottish Ministers to promote an order containing modifications of enactments for the purposes of a consolidation, we are conscious that there is a continuing and equally understandable concern on the part of Parliamentarians that consolidation, and the relatively relaxed procedure which it attracts, should not be used to promote policy alterations to legislation. It is of course very much a matter for the Parliament, but we wonder whether it might be preferable if any amendments to be proposed for the purposes of a consolidation were, as at present, required to be based upon recommendations of the Scottish Law Commission. It would certainly be desirable if it were made clear that any new power conferred on Scottish Ministers was without prejudice to the existing powers of the Scottish Law Commission.

6. The second matter relates to the test to be applied to any such proposals for amendment. In that connection we note that the formulation in section 47(1) – “facilitate, or are otherwise desirable in connection with” goes wider than the current rule. While we have no objection to that wider formulation, and consider that it may well assist in the process of securing better law in the context of consolidation, we wonder whether such a formulation might risk the kind of policy arguments which objective proposals for amendment are designed to avoid.

7. The third concern is in relation to sub-section (5). We would see considerable practical and technical difficulties in describing any enactment of a common law position as “consolidation”, because of the perennial difficulty in securing agreement as to what the common law on any matter is. Even if a particular issue may have been settled by a decisive judgement, there are almost certainly related issues where the Court’s position is not clear, and where what are essentially policy decisions have to be made. We would ourselves have described the process of restating the common law in statute as more akin to codification than to consolidation. And, in that connection, we note that the power proposed to be conferred upon Ministers to make orders amending the law is limited to power to amend “enactments”. There is no equivalent power in relation to the common law.

8. Nevertheless, if something along the lines of section 47, adjusted to remove the limitation just mentioned, could be introduced, we would see that as a positive step in assisting the process of consolidation, which we, as a Commission, are anxious to promote.

## Conclusion

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

LETTER FROM THE SUBORDINATE LEGISLATION COMMITTEE ON DELEGATED POWERS IN PARTS 4 AND 5

At its meeting on 15 September, the Subordinate Legislation Committee agreed to highlight areas of concern in the delegated powers provisions in Parts 4 and 5 of the Interpretation and Legislative Reform (Scotland) Bill. We therefore submit this to your Committee for consideration.

**Section 47(1) – Pre-consolidation modifications of enactment**

The Committee highlights the following concerns as to the width of the power to SPPA—

- the power is available in respect of all subject matter and there may be some areas of the law considered too sensitive to permit substantive policy changes to be fast tracked in this way;
- the threshold which must be met before the power is available to Ministers is currently very loose and subjective;
- further consideration should be given to the potential for changes to the common law in the course of codification;
- Interaction between a Scottish instrument and a Westminster Bill raises issues of control of the process.

The Committee has concerns as to the level of scrutiny proposed and considers that if the power is approved by Parliament in this or amended form that further consideration should be given to increasing the level of scrutiny through super-affirmative procedure.

We look forward to receiving your report in due course.

Jamie Stone MSP  
15 September 2009