Dear, Graham,

It was a pleasure to meet with the Committee to discuss its sixth annual report on 11 December 2018. This letter covers both the issues raised in the report and the points raised during my attendance at Committee. Please consider the section on the Scottish Law Commission (SLC) as a response to your letter of 21 December.

I would like to take this opportunity to reiterate my appreciation of the role the Committee fulfils in scrutinising the new and existing delegated powers.

**Number of Instruments Reported and Quality Control**

While I am pleased that the Committee has recognised the overall improvement in the quality of secondary legislation I am not complacent. I can assure the Committee that the Government is committed to bringing forward legislation that is of the highest quality.

As we discussed in December the Government’s Legal Directorate has robust quality assurance procedures and systems in place to support drafters of instruments. It recognises the importance of achieving the maximum quality in instruments and will continue to work closely with the committee and its legal advisers in order to achieve and maintain the highest possible standards.

**Accessibility of legislation**

We also share a desire to ensure that the legislation which the Government produces is accessible. To support this, from this month we will include at the beginning of all policy notes a summary box which will provide a short summary explanation of the purpose of the instrument. The Government will review monthly a sample of policy notes to consider the effectiveness of that innovation and to consider the accessibility of the Policy Note more
generally. I would welcome any views the Committee may have once you have considered a number of new Policy Notes.

I also promised to consider the Committee’s point regarding the Housing (Scotland) Act 1987 (Tolerable Standard) (Extension of Criteria) Order 2019 SSI. The Policy Note accompanying this SSI did not, in the Committee’s view, contain enough information to make it accessible for readers. The intention in this case was to provide a Policy Note which provided a simple explanation of the purpose of the instrument. The detail about the operation of the instrument is set out in the accompanying guidance which is referenced in the Policy Note and which was provided to the Local Government and Communities Committee for their consideration of the instrument on 19 December 2018. Our view was that the Policy Note would provide any lay reader with sufficient explanation to understand what the instrument was designed to achieve and that any person with an interest, such as housing staff and other professionals who will work in implementing the instrument, as well as the general public, would then be able to refer to the guidance should they wish to do so. I believe that this was a reasonable approach to take in this instance, but would welcome the Committee’s view now that you have an explanation of the approach which was taken.

Number of notifications

Alison Harris raised the issue of minor points, in particular that there has been an increase in the number notified by the committee compared to the previous reporting period. As I have previously said I am committed to bringing forward legislation that is of the highest quality and we will continue to work to drive the number of points as much as possible.

Delegated Powers in Bills

The issue of bills containing a high number of delegated powers was also raised by Alison Harris. As I emphasised at the meeting there is no trend towards having more Bills that include a significant number of delegated powers. Our approach is that detail should be provided on the face of a Bill where that is appropriate and delegated powers should be taken where that is proportionate and where we can provide justification for that approach. If the Committee has concerns about specific Bills I am very happy to consider them.

Historical Commitments

As I indicated on 11 December the Government is committed to fulfilling the current commitments by the end of this parliament, and to fulfil as many new commitments as arise, as quickly as possible.

Of the 15 outstanding commitments I can confirm that 2 have recently been met with the laying of the Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) (Scotland) Regulations 2018 (SSI/2018/291) on 21 December 2018, and 1 has been met with the laying of the Foods for Specific Groups (Medical Foods) (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI/2018/392) on 19 December 2018.

A further commitment is expected to be met by the Food Standards and Food Hygiene (Scotland) (Miscellaneous Amendments) Regulations, which is provisionally due to be laid in February 2019.
I will keep the Committee informed on a regular basis of plans to meet the remaining 11 commitments. If the Committee would find it helpful my officials will provide regular updates to the Committee on the fulfilling of the outstanding commitments.

**Brexit**

Currently 71 notifications covering 110 SIs have been sent to the Scottish Parliament and Parliament has agreed to the Government consenting to 104 SIs. As I emphasised at our meeting this is a fluid situation and we are dependent on the UK Government in respect of when the final notification might be. My officials are working closely with the UK Government to gain an understanding of what its overall SI programme looks like and to ensure the Scottish Government and Scottish Parliament’s interests are given appropriate weight.

Stuart McMillan raised a point regarding the 28 day notification period and how we will work with the lead committee to ensure that there is sufficient time to consider notifications when the timetable is constrained. We are working closely with the UK Government to ensure that it adheres to the 28 day period required under the protocol and we will do whatever we can to mitigate issues when it is not possible to adhere to the protocol. We are currently profiling the remaining notifications in order to anticipate any issues regarding the notification period, and to give committees early notice in situations where the full 28 day period may not be possible.

For SSIs we currently anticipate that 28 Brexit-related SSIs will be laid before the end of March 2019 with most being laid in January and February. We are paying careful attention to the Government’s existing convention on laying periods for negative and affirmative instruments, and the minimum time periods in Parliament’s Standing Orders, to ensure the Parliament will have as much time as possible to scrutinise instruments. Five Brexit-related SSIs have been laid to date, and our latest estimate is that 12 of the instruments will meet the convention requirements and we will seek that the remaining 16 SSIs will meet the standing orders’ requirements where possible.

As yet we have no definite volumes or timetable assumptions for when the remaining SSIs that will be required under the European Union (Withdrawal) Act 2018. Should an implementation period be agreed we will provide the Committee with revised planning assumptions. Any agreement on an implementation period would mean that the date by which corrections would be required to be made would be December 2020 at the earliest rather than March 2019. The absence of an agreement on a framework for a future relationship does not mean that the number and content of the corrections would necessarily change. However, as 29 March 2019 is not only the default position for EU exit but also the only concrete date that we have to work towards our planning is geared towards that.

**Number of Instruments Laid**

The Committee noted that the total number of instruments laid in 2017-18 is on a par with the total laid in 2016-17 (256 SSIs compared to 252 respectively) and that this shows an overall reduction in SSIs over recent years. We regularly assess volumes of instruments and I will write to you and other Committee Conveners shortly on the projected totals which will be referred to Parliament in the coming months, including an update where these volumes have been managed in light of Brexit pressures.
Scottish Law Commission

The Committee raised the issue of SLC reports. You asked if the Government had any intention to revisit some of the Reports which had not been implemented and bring them forward as legislation. I undertook to give thought to this particular issue and write back to the Committee in detail. You subsequently wrote to me on 21 December attaching correspondence from the Chair of the SLC regarding, amongst other things, reviewing the existing criteria for referral of SLC Bills to the Committee.

I have considered the SLC’s suggestion that the Government could bring forward multi-topic Bills to increase the rate of implementation of SLC reports. I am not personally convinced that this approach is the right way to achieve the outcome that is being sought – it would be a significant challenge to identify topics which will satisfy the referral criteria and which can be developed to the same timescale and which can cohere together into one Bill. In my view, arguably the best way to increase the best way to increase the rate of implementation is to revisit the criteria for referral to DPLRC. It is currently very restrictive and moving away from having to ensure that there are no significant policy, finance or stakeholder issues should mean that more Bills can be referred to DPLRC. If the Committee is interested in pursuing that idea we could remit our respective officials to work together to explore it further and report back on how this might be changed for next session.

The Committee may be aware that in the Programme for Government we set out our intention to consult on a number of SLC Reports. These include their Report on Defamation published in December 2017; their Report on Judicial Factors published in August 2013; and further aspects of their Report on Succession as part of a wider consultation on the reform succession law. That Report was published in April 2009 and has been partially implemented through the Succession (Scotland) Act 2016. It is the Government’s intention to try to include at least one SLC Bill suitable for deferral to your Committee in each annual legislative programme, and I would be happy to keep you updated on that.

In addition we are currently reflecting on the Reports on Trust Law; Moveable Transactions; and Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses.

While the Cabinet has not yet taken a decision on the content of the Government’s next legislative programmes I hope the Committee is reassured that the Scottish Government remains committed to ongoing consideration of the work of the Scottish Law Commission and where that results in legislation being brought forward, its suitability for scrutiny by the Committee.

I hope that you find this response helpful and I look forward to working with you and the Committee in the year ahead.

GRAEME DEY

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