SUPPLEMENTARY SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

The Society has considered briefly the Scottish Government's Illustrative Provisions sent to the Committee on 26 October.

The Society has the following comments to make on these provisions:-

Sub-section (2)

The Society does not agree with sub section (2) which would ensure that section 57(2) does not apply to Acts of the Lord Advocate in relation to prosecutions or in his capacity as Head of the Systems of Criminal Prosecution and investigation of death.

Sub-section (3)

The Society questions the redefinition of 'devolution issues' to exclude compatibility with any convention rights or with EU law arising from criminal proceedings in relation to:

- acts of the Scottish Parliament;
- any function purported or proposed;
- exercise of a function; or
- a failure to act.

In the Society's view, this considerably extends the exception from devolution issues proposed under clause 17 in the Scotland Bill and would run contrary to section 29 of the Scotland Act 1998 which makes it clear that an act of the Scottish Parliament is "not law" to the extent that it breaches convention rights or EU law.

This amendment, if accepted, appears to raise a number of anomalies.

By way of illustration, an accused charged with a statutory offence contained in an Act of the Scottish Parliament is entitled to challenge, by way of a preliminary objection, the validity of that offence on the grounds that it is incompatible with ECHR and is therefore outwith the legislative competence of the Scottish Parliament and "not law" in terms of section 29(1) and (2) (e) of the Scotland Act 1998.

However, if he or she does so, it may not be possible to seek to appeal the High Court's decision upon such a question to the Supreme Court under the proposed section 288ZA of the Criminal Procedure (Scotland) Act 1995. This is because this may not be a compatibility question within the meaning of that section unless it can be said that, for the purposes of section 6 of the Human Rights Act, the Scottish Parliament is a public authority and that the Act of the Scottish Parliament is an "act" of that Parliament.

The definition of public authority in section 6 expressly excludes both Houses of Parliament but does not exclude the Scottish Parliament. However, even although an Act of the Scottish Parliament is included in the definition of subordinate legislation for the purposes of the Human Rights Act, it would seem to be a rather strained interpretation of the word “act” to regard it as including a legislative act of
that Parliament which has been given Royal Assent. It is certainly different from an act of a Minister making subordinate legislation.

Paragraph 13 of the Explanatory Note states that any question "about the compatibility of an Act of the Scottish Parliament with ECHR can always be raised in civil proceedings". However, it is questionable whether a civil court would entertain a judicial review action if there were pending criminal proceedings. The civil court might well take the view that this would be inappropriate. Even if the civil court was willing to entertain the action and found that it was incompatible, it is not clear whether it would declare the Act of the Scottish Parliament null and void because it was “not law” in terms of the Scotland Act or whether it would proceed under the Human Rights Act 1998, if it could. In the latter case, it would not attract the devolution issue procedure.

In the Society's view, Acts of the Scottish Parliament dealing with criminal law should continue to be subject to the vires controls, and be capable of challenge as a devolution issue.

The Society questions why this approach is being proposed without any prior consultation.

Sub-section (8)

In relation to sub-section (8), this extends the issue of compatibility questions to any "public authority". This would create a potential appeal to the Supreme Court in relation to the actions of the Police or other public authorities if they were thought not to have been compatible with convention rights. This may not make much difference in practice with the current system because the behaviour of the Police is already subject to challenge via the devolution issue procedure but again such a change should not proceed without consultation on this proposal.

New section 288ZA

In new section 288ZA(3) the appeal to the Supreme Court lies only if the question raises a point of "general public importance".

The Society has already indicated that it does not agree with a certification requirement of this nature.

Certification can only take place after the final determination of the proceedings. This is different from clause 17 which refers only to "a determination". The Society reads this as allowing for an appeal against the determination on a preliminary issue. The effect of the Scottish Government's amendment is to make it clear that the person would require to go through the whole prosecution and be convicted before he or she could bring an appeal against an alleged breach of his or her convention rights. This accords significantly less protection for those who are accused than under the current system.
New section 288ZB

The Society notes that in relation to references by the Lord Advocate or the Advocate General there appears to be no need for certification that the matter is of general public importance.

New section 288ZC

The Society has no comment to make, pending response to the earlier questions raised.

The Constitutional Law and Criminal Law Committees may have further comments in which case I will let you know.

I hope that these comments are helpful.

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