Inquiry by the Scottish Parliament’s Devolution (Further Powers) Committee

Implementing the Smith Agreement: The UK Government’s Draft Legislative Clauses

March 2015
Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Law Reform Sub-Committee on Constitutional Law, Tax Law, Administrative Law and Licensing Law. The committees are comprised of senior and specialist lawyers (both in-house and private practice)

We welcome the opportunity to consider and respond to the call for written evidence on the implications of draft Scotland clauses and have the following comments to make. Where we have not commented on a clause, this indicates that we consider that it will effectively devolve competence to the Scottish Parliament in the area concerned.

This written evidence focusses on the Draft Scotland clauses 2015 in the appendix to “Scotland in the United Kingdom: an enduring settlement” (CM 8990) (the Command Paper).

Part 1 – Constitutional Arrangements

Clause 1 – The Scottish Parliament and the Scottish Government

The Smith Commission reported on 27 November 2014. The five political parties which participated in the Smith Commission Agreement process agreed that new powers should be devolved to the Scottish Parliament and to Scottish Ministers.
Pillar 1 of the Agreement relates to providing a “durable but responsive constitutional settlement for the governance of Scotland”. Paragraph 21 of the report concerns the permanence of the Scottish Parliament and provides that “UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions”.

Clause 1(1) inserts a new subsection (1A) into Section 1 of the Scotland Act 1998. It states that “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements”. Similar phraseology is used for the purposes of amending Section 44 of the Scotland Act 1998 which makes provision for the Scottish Government. That Section, which was amended by the Scotland Act 2012 will now have a new subsection 1 which declares that “there shall be a Scottish Government and that a Scottish Government is recognised as a permanent part of the United Kingdom’s constitutional arrangements…”

The phrasing in the draft clause does not literally implement the terms of Paragraph 21 of the Smith Report. The use of the phrase “recognised as permanent” has a different nuance from a statement that “the Scottish Parliament and Scottish Government are permanent institutions”. The difference in wording between the Smith Report and the draft clause is significant. The draft clause could be said to acknowledge or declare a matter of fact rather than provide a statement in law. There are a number of observations to be made about how this draft legislation fits with the current theory of the sovereignty to the UK Parliament.

The classic theory of UK Parliamentary sovereignty is stated in AV Dicey’s “Introduction to the Study of the Law of the Constitution” which has been subject to academic study and judicial interpretation over the years. Parliament can, in theory, make law on any subject which it pleases and there are no fundamental laws which restrict its power. Parliament cannot fetter itself for the future and cannot bind its own successor Parliaments. The “continuing” theory of Parliamentary supremacy means that Parliament possesses as Dicey stated “the right to make or unmake any law whatever”. Furthermore, no person or body according to Dicey has the right to override or set aside the legislation of Parliament.
This theory reflected in the rulings of the courts presents drafting problems for any statement of the permanence of the Scottish Parliament or the Scottish Government. It is clearly in an effort to meet the intentions of the Smith Commission but also to work within the confines of the theory of the sovereignty of Parliament that the draft clauses have been framed in the way they have. However, even an amendment to Draft Clause 1 would not, of itself achieve “permanence”. This is because a Parliament cannot, according to the orthodox theory bind a future or successor Parliament. Accordingly, the conclusion must be that Clause 1 is designed to be, in fact, declaratory of political intention rather than an attempt to re-write the existing theory of the sovereignty of Parliament.

Permanence as a concept

Some attempts have been made to create permanent institutions by statutory arrangements:-

1. In the Treaty of Union Article XIX, enacted into law by the Union with England Act 1707 and the Union with Scotland Act 1706, it is stated that “the Court of Session… do, after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted … and that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland”.

2. The Northern Ireland Act 1998 provides in Section 1:-

“(1) it is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
(2) but if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a United Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland).“

These are two examples of how the United Kingdom Parliament has sought to make law which, in strict theory does not comply with the theory of Parliamentary sovereignty, while at the same time sets out political and legal objectives.

The Draft Clauses are not designed to reformulate constitutional theory; therefore Clause 1 will have to be amended in order to align it more closely to the views of the Smith Commission. At the same time we need to acknowledge the theory of the sovereignty of Parliament and the limitations that theory puts on achieving, in legal terms, the intentions of the Smith Commission.

There are a number of cases, such as Ellon Street Estates v The Minister of Health [1934] 1 KB 590 and Thorburn v Sunderland City Council [2002] EWHC 195 (Admin) which adhere to the classic position but recently, in decisions such as Jackson v The Attorney General [2005] UKHL 56 and AXA General Insurance Limited and Others v The Lord Advocate and Others [2011] UKSC 46, there was some discussion about the nature of the principle of the sovereignty of the United Kingdom Parliament. In the AXA case, Lord Hope at Paragraph 50 stated “the question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances, is still under discussion”. That discussion, however, cannot take place in the context of dealing with these clauses and would require a more searching investigation into the nature of the constitution. We ought to acknowledge that the world is different since Dicey wrote his text and recently issues have been raised about whether Parliament can be relied upon to control an abuse of its legislative authority by the Executive. It has been observed that Parliamentary sovereignty and the rule of law are “not entirely in harmony” with each other. These clauses however are not the place to decide where the proper balance should lie.
Amendments to Clauses 1 and 2 might be by language aimed at indicating a limit on Parliament’s authority to legislate on the matter or by including a conditional qualification on the legislative authority as in the case of the Northern Ireland Act 1998.

Other declaratory statements in the law, such as the Statute of Westminster 1931 the Canada Act 1982 and the Hong Kong Act 1985 are all geared to permanently relinquishing Parliamentary sovereignty for the future over former colonies or dominions. As such they are not strictly precedents but they do demonstrate that sometimes Parliament can pass what appears to be legislation which contradicts the established constitutional theory.

Similarly, EU law and the doctrine of supremacy of EU law clearly modify the orthodox theory. Factortame Ltd v Secretary of State for Transport (No.2) [1991] 1 AC 603.

Clause 2 – The Sewel Convention

The Sewel Convention was declared in the House of Lords during the passage of the Scotland Bill 1998 on 21 July 1998, during a debate on an amendment by Lord Mackay of Drumadoon concerning Clause 27(7) – now Section 28(7). New Clause 28(8) seeks to recognise that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

In one sense, this does place the Sewel Convention on a statutory footing as required by Paragraph 22 of the Smith Report. It essentially quotes Lord Sewel at Column 791 where he stated that “we would expect a Convention to be established that Westminster would not normally legislate, with regard to devolved matters in Scotland, without the consent of the Scottish Parliament”. As a Convention, the Sewel Convention has worked relatively well. Since the establishment of the Scottish Parliament, there appear to have been no significant problems with the operation of the Convention. It applies when UK legislation makes provision specifically designed for a devolved purpose. The Convention has been agreed in Memoranda of Understanding and by the House of Commons Procedure Committee and its practical usage is explained in Devolution Guidance Note Number 10 (DGN10).
DGN10 does not apply to incidental or consequential provisions in relation to a reserved matter. It does apply to draft bills and private members' bills. It will also apparently continue to apply to any statutory formulation of the Convention.

It is significant that DGN10 also requires the consent of the Scottish Parliament in respect of provisions of a Bill before the UK Parliament which would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers (see DGN 10 at paragraphs 4(iii) and 9). It would seem, however, that Clause 2 would not apply to this latter category of provision.

The Convention at present has no legal effect in limiting the power of the UK Parliament but a breach of the Convention would have considerable political impact. It would not only be unconstitutional to disregard the Convention but that action could also have significant political and constitutional consequences. A similar Convention applying to the Southern Rhodesian Legislative Assembly was referred to in the case of Madzimbamuto v Lardner-Burke PC [1969] 1 AC 723 where a breach would have been considered unconstitutional.

Is a breach of the Convention, even formulated in a new Scotland Bill, justiciable? Lord Sewel indicated in Column 791 that he expected that differences of opinion would be negotiated between the Parliaments or Governments rather than being argued in court. So, in theory, it might be litigated upon but would a court strike down UK legislation affecting a devolved area where the consent of the Scottish Parliament had not been given? Under the terms of Section 28(7) the answer to that question is probably not. However, purposive interpretation and declarations of incompatibility under the Human Rights Act 1998 as well as an enhanced sense of constitutionalism under devolution legislation indicate that when the courts consider UK legislation to be seriously flawed Parliament has considered itself bound to alter that legislation. It may therefore be the case that the courts will be called upon to adjudicate in a declaratory way in the event of a statutory formulation of the Sewel Convention being breached. The outcome of such a case is a matter for the court concerned.
Part 2 – Tax

The provisions devolving income tax rates, assignment of VAT, Air Passenger Duty and aggregates tax will achieve the policy intention of increasing the competence of the Scottish Parliament in these areas.

Part 4 - Other legislative competence

Clause 25 – Scottish Tribunals

Purpose

The comments relate to para 6.3 of the Command Paper and Clause 25 of the draft clauses.

In general terms we welcome the inclusion of Clause 25 which is directed at tribunals dealing with reserved matters in Scotland. We however have reservations about the drafting of Clause 25, believing it does not give effect to Paragraphs 63 and 64 of the Smith Commission Report. We believe that Clause 25 sets limitations on the transfer of responsibility for management of transferred tribunals.

Smith Commission Report - Paragraphs 63 and 64

Para 63 and 64 of Smith Commission Report set out that,

63 All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission.

64 Despite paragraph 63, the laws providing for the underlying reserved substantive rights and duties will continue to remain reserved (although they may be applied by the newly devolved tribunals)."
These are linked statements but Paragraph 64 is not necessarily a limitation on Paragraph 63 but an explanation of intention.

In implementing Paragraph 63 of the Smith Commission Report there must be some scope for the continued reservation of the substantive law and that that may take forms which require some limitation on the functions transferred. However limitations on the transfer should be only such as are objectively necessary and that they must not be unduly restrictive of the principle in Paragraph 63.

Clause 25

The Command Paper qualifies the original recommendation in Paragraph 63. While it envisages transfer being effected by Order in Council with a separate Order for each relevant Tribunal, it also suggests that each Order in Council will set out:–

a) the precise nature of the matters that will be able to be heard;
b) the specific tribunal within the devolved system that will be responsible for hearing those matters; and also
c) any limits, constraints and requirements on the exercise of the powers transferred that are necessary to ensure the continuing effective delivery of the overarching national policy.

Sub-paragraphs a), b) and c) qualify the Smith Commission recommendation.

The Command Paper (p.6.3.4) offers justification for such restrictions by reference to the need for consistency with undefined features of the reserved tribunal system. However there needs to be a more developed argument in support of any restriction on the Smith proposals.

With reference to point a) above, any restriction on the nature of the matters which may be heard would constitute a limitation on Scottish Tribunals. It could impede the development of a Scottish Tribunals system.
The restriction at point b) would limit the discretion of Scottish institutions to organise the Scottish Tribunals. Standardisation and harmonisation of practice within a unified tribunal framework are along with flexibility to adjust structures, desirable policy outcomes, which we support, but they are more difficult to achieve with the suggested restrictions. Prescribing the tribunal to which jurisdiction is to be transferred ought to be focussed on obtaining a better outcome for users rather than a need for harmonisation.

The restriction at point c) comes closest to addressing the position of para 64 in relation to para 63 of the Smith Commission Report, and we agree with its inclusion.

The complete transfer of responsibility is needed to avoid questions as to the status of tribunals which deal with Scottish matters but which were not within the devolved responsibility of the Scottish Parliament. Without clarification in statute questions might arise as to whether such tribunals dealing with Scottish issues (while not part of the Scottish Tribunals system) were in fact part of the English legal structure.

**Detailed comment on Clause 25**

We have the following preliminary and provisional comments on the detail of Clause 25, namely:-

a) The definition of ‘tribunal functions’ at 2A(12) may remove tribunals functions beyond those of Special Immigration Appeal etc. as recommended by Smith;

b) There is no provision in the Smith Report for the exclusion of Employment Tribunals from transfer - 2A(2)(b);

c) Leave out 2A(2)(3) and (4).

We do not object to the general power as in (5).

**Clause 33 – Power to change number of fixed odds betting terminals**

Our comments relate to paragraph 6.7 of the Smith Report and draft clause 33.
We welcome Clause 33 which devolves, by way of an exception from the current reservation in Schedule 5 of the Scotland Act 1998, power to vary the number of fixed odds betting terminals (FOBTs) authorised by a betting premises licence granted by a Licensing Board in Scotland where the stake is more than £10.

We question whether this provision will give proper effect to paragraph 74 of the Smith Commission Agreement which stated ‘The Scottish Parliament will have the power to prevent the proliferation of Fixed-Odds Betting Terminals’.

We note that the exception will only permit the variation of the number of FOBTs authorised by a new betting premises licence, but does not in terms of Clause 33(6), apply to existing betting premises licences.

Consideration should be given to devolve competence to permit the variation of the number of gaming machines authorised by existing gaming licences.

Furthermore the Gambling Act 2005, Section 172 provides the authority for allowing various categories of gaming machines, defined in the relative regulations according to stake and prize money. Clause 33(1) excepts from the reservation the setting of the number of gaming machines where the stake is more than £10. The Scottish Parliament should be able to limit the number of machines irrespective of the value of the stake.

Other Executive Competence

We have no comment to make.

Other reforms arising from the Smith Commission process

As part of our submission to the Smith Commission we also suggested further areas where devolution could be considered.
The following areas were included in our submission and we hope can be taken into account as drafting of the Bill progresses:

**Section C1: Business associations**

C1 the reservation of the law of business associations should be amended to enable the Scottish Parliament to legislate.

- updating the law on (unlimited) partnerships and unincorporated associations;
- creating new forms of co-operative enterprise;
- creating new (or re-inventing older) forms of mutual enterprise;
- the creation of economic interest groupings (EIGs) where the EEIG form (see attachment) is unavailable only because the founder members do not come from more than one Member State.

**Section C7: Consumer Protection**

The majority of the reservations under this section are important for completion of the UK single market. It would be difficult to devolve much of this area without significant disruption to that market; however, some aspects could be devolved without upsetting the public policy objective of maintaining equal consumer redress across the UK. In particular, the regulation of estate agency and the law concerning sale and supply of goods and services could be devolved. These last two issues are clearly linked to the Scottish law of obligations (augmented by European legislation) and in our view could be devolved.

**Head G: Regulation of the Professions**

**Regulation of the legal professions**

There is no provision which reserves the regulation of the Scottish legal professions. Nevertheless, in the Legal Profession and Legal Aid Scotland) Act 2007, which regulates “the making of complaints about legal services”, it was provided that that Act did not apply to complaints about the provision of advice, legal services or activities relating to consumer credit, insolvency practitioners, financial services or immigration.
This was because the Scottish Government took the view that the supervision of the legal profession when giving advice or providing services about these reserved matters was itself reserved and was therefore a matter for the UK Parliament to regulate.

In other words, the Scottish legal professions are regulated partly by the Scottish Government and partly by the UK Government according to what advice or services they are providing.

In Section C3 there is an exception from the reservation of Competition Law which covers the regulation of the legal profession but that exception only applies for the purposes of that section. The problem is that the provision of advice, legal services or activities relating to consumer credit, insolvency practitioners, financial services or immigration is considered to be reserved.

Irrespective of whether or not this view is correct (and other views may be held), it is suggested that the Scottish Parliament should be able to regulate all aspects of the Scottish legal professions.

**Section H2: Health and safety**

The Health and Safety at Work etc. Act 1974 set out the general principles for the management of health and safety at work in the United Kingdom resulting in the creation of the Health and Safety Commission (since merged with the Health and Safety Executive).

Enforcement of Health and Safety in Scotland is already practically devolved and control over Occupational Health issues, many of which are practically unique in profile to Scotland such as offshore oil and agriculture, should now be formally devolved to Scotland.

If Health and Safety Law is devolved to Scotland, MSPs will be able to deal with Health and Safety at Work specific to Scotland through a Scottish Health and Safety Commission. Such a Commission would assist by informing practice in England and Wales on improving Health and Safety and vice versa, building on the, at present, (non-binding) concordat between the Health and Safety Executive and Scottish Government.
Devolution of Health and Safety would avoid legal uncertainty around the interpretation of s29(4) of the Scotland Act 1998 as seen in Adams and others, petitioners - 2002 Scot (D) 1/8, Kennedy and another v Lord Advocate and Scottish Ministers - 100 BMLR 158 & Imperial Tobacco Ltd v The Lord Advocate 2012 (Scot) 12/12.

Section L2: Equal Opportunities

It should be debated whether discrimination law should be devolved to the Scottish Parliament. Discrimination issues closely interrelate with devolved issues recently addressed by Scottish legislation, such as incapacity, mental health and vulnerability and could benefit from detailed consideration by the Scottish Parliament. This would put the Scottish Parliament on the same footing as the Northern Ireland Assembly.
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