SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

The Law Society of Scotland welcomes the opportunity to comment on the Scotland Bill.

The Scotland Act 1998 is one of the most important pieces of legislation to have affected the Scottish legal system since the European Communities Act of 1972. It was central to the programme of constitutional change which began in 1997. In tandem with the Human Rights Act 1998, the Act underpins the exercise of power by the Scottish Parliament.

The Society has the following particular comments to make:-

Clause 6 – Bills: statements as to legislative competence

The Society agrees with this provision which will ensure that any person who introduces the Bill, whether he or she is a Minister, a backbench MSP, a committee convener introducing a committee bill or a private individual or organisation introducing a private bill, should certify the legislative competence of the measure. However, the Society considers that the explanatory notes should detail the main considerations that inform the statement on legislative competence under Section 31(1) of the 1998 Act and the reasons which were taken into account for the views taken in that statement. This means that neither the Parliament nor the public are given any idea of what those considerations and reasons are and are unable to challenge or test them in the Parliament. The fact that disclosure may provide those who wish to challenge the legislation with information is not a sufficient reason for non disclosure.

The Presiding Officer is required by the Standing Orders to give reasons if she does not consider that a Bill is within legislative competence. It is hoped that the Scottish Parliament will amend its Standing Orders to require the Presiding Officer also to give reasons if she considers that a Bill is within legislative competence.

Clause 7 – Partial suspension of acts subject to scrutiny by Supreme Court

The power of the law officers to refer a bill to the Supreme Court is potentially valuable, allowing questions about the constitutionality of the legislation to be considered in advance of that legislation being relied upon by the public. A limited reference is attractive and will address the concern that the existing Section 33 reference power is not being used because the effect of a reference would be to “freeze” the whole of a bill, even where only one or a limited number of provisions might be thought to give rise to a question about competence. Further detail is required as to how this provision would work in practice.
Clause 10 – Continued effective provisions where legislative competence conferred for limited period

Clause 10 amends Section 30 of the Scotland Act 1998 which gives Her Majesty the power by Order in Council to make any modifications of Schedules 4 or 5 which she considers necessary or appropriate. It would be possible for such an Order in Council to give the Scottish Parliament legislative competence in relation to one or more matters for a limited period of time.

In any event the Society is of the view that section 113(4)(b) of the Scotland Act 1998 would authorise any Order in Council under section 30 – even one with temporary effect- to contain a savings provision which would save not only the previous operation of an ASP but also its continued validity. Nevertheless, the Law Society accept that there could be doubts about the matter and it would be preferable to clarify that such an Order in Council could contain such a provision.

Clause 11 – Air weapons

Clause 11 brings the regulation of air weapons within the legislative competence of the Scottish Parliament. The Society does not envisage any practical cross border difficulties within the United Kingdom which could not be accommodated in subsequent legislation. Such legislation would require to provide for reciprocity in dealing with licensing regimes, should the Scottish Parliament, in the future, decide to regulate air weapons.

Clause 12 – Insolvency

The Society agrees with this clause. The Insolvency (Scotland) Rules 1986 regulate the procedure in company voluntary arrangements (CVAs). Under the Scotland Act 1998, CVAs and administration were reserved to Westminster and receivership and winding up were devolved to Holyrood. This had the effect that the procedures relating to insolvent companies, under Scots law were governed by rules which were partly the responsibility of the UK Parliament and partly the Scottish Parliament. This is a situation in which confusion and error was a significant risk and to that extent unsatisfactory in principle. This was demonstrated when Parts 1 and 2 of the Scottish Rules were amended by the Insolvency (Scotland) Amendment Rules 2009. An error in the 2009 statutory instrument has resulted in the existence of two sets of rules for the submission of claims in an administration.

The professional bodies closely involved in insolvency matters, ICAS, the Law Society and R3, have criticised the Scottish Rules. The overlap of responsibility for the Rules prompted R3 to propose to the Calman Commission that responsibility for the Insolvency Rules should be rereserved to Westminster. Rereservation may result in a more coherent and practical set of insolvency rules for Scotland consistent with those applying in the rest of the UK.
Clause 17 – The Lord Advocate Convention Rights and Community Law

The Law Society has considered clause 17 and is of the view that clause 17 should not be included in the Bill and that the acts of the Lord Advocate:–

(a) in prosecuting any offence; or
(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland

should continue to be subject to Section 57(2) of the Scotland Act 1998. In other words, the Lord Advocate should have no power to do any such acts which are incompatible with the Convention rights or with EU law and any question as to whether they are incompatible should continue to be a devolution issue.

The amendment made by new clause 17(2) amends Section 57(3) of the 1998 Act to provide that Section 57(2) does not apply to those acts of the Lord Advocate. The effect of this amendment is that, if those acts of the Lord Advocate are incompatible with Convention rights or with EU law, they will no longer be open to challenge as being ultra vires under the Scotland Act 1998.

New Clause 17(4) goes further and makes it clear that any question whether those acts are incompatible will no longer be a ‘devolution issue’ as defined in the Scotland Act.

The Lord Advocate will remain subject to Section 6 of the Human Rights Act 1998 which makes it unlawful for him to do any act which is incompatible with ECHR, subject to Section 6(3) of that Act. However, it is not clear what is the difference between the effect of an act of the Lord Advocate being unlawful under Section 6 of the Human Rights Act 1998 and being ultra vires under Section 57(2) of the Scotland Act. In particular, does it mean that an unlawful act renders it less likely that a prosecution or conviction will be rendered invalid and that instead damages will be awarded against the Lord Advocate in favour of the accused or convicted person? The Society considers that this difference in effect should be clarified.

However, there is one difference which is clear, that is the matters concerning appeals to the Supreme Court. Under the Human Rights Act, there is no appeal to the Supreme Court on the question whether the act of the Lord Advocate is unlawful because it is incompatible with Convention rights but under the Scotland Act, as long as such questions were devolution issues, they were treated the same and provided for an appeal, with leave, on such issues originally to the Privy Council and now to the Supreme Court

This inserts a new section, Section 98A, into the Scotland Act 1998 which applies only to the determination of any question as to whether an act, or failure to act, of the Lord Advocate in prosecuting any offence and in the capacity as head of the systems of criminal prosecutions is compatible with Convention rights or with EU law.
In view of the fact that new clause 17(4) provides that all those acts will no longer be a devolution issue, it is assumed that this section is intended to make provision for the procedure to be followed for the purpose of determining such questions.

However, new Section 98A gives rise to the following issues and questions on which clarification is required:-

(a) The section is silent as to how any question of incompatibility is raised in the trial proceedings. For example, is it to be raised and determined as a preliminary issue prior to the trial or is it to be determined after the trial? Is this to be left to be determined by Acts of Adjournal?

(b) The section is silent as to whether any such question is to be intimated to the Advocate General so that he can take part in the proceedings? The Law Society is firmly of the view that provision should be made for the Advocate General to be involved in the determination of such questions, given the fact that what is being determined is a possible breach of the UK Government’s obligations under the ECHR. If this is not intended, how is the Advocate General to know whether or not to refer any such question to the High Court under Section 288A(2A) of the 1995 Act as proposed to be amended by clause 17(8)(b). However, if such intimation is given, how will this differ from the existing position of intimation of devolution issues to the Advocate General? Clarification on these points would be welcome.

(c) Section 98A(4) has the effect of providing that “any appeal under this section”, that is from the High Court to the Supreme Court under Section 98A(3), is subject to the leave of the High Court or of the Supreme Court. The Law Society is content that this section does not provide any criteria upon which leave should be granted. In particular, the Society would not be in favour of any further limitation or threshold for such an appeal, such as certification that the issue was one of ‘general public importance’ as highlighted by Lord McCluskey’s review group or requiring certification such as that prescribed under English law, in view of the different circumstances which apply to criminal appeals in England, such as the fact those appeals to the Supreme Court are not restricted, as are the Scottish criminal appeals under Section 98A(7) and (8), to questions of incompatibility which give rise to a miscarriage of justice.

I append a copy of the Society’s response to Lord McCluskey’s Review Group paper for your information.

(d) Section 98A(5) and (6) appear to have the effect of providing that any appeal to the Supreme Court is only after the High Court has determined the case on appeal and the accused has either been convicted or acquitted. However, this is not clear.

(e) Section 98A(7) and (8) appear to have the effect of providing that any appeal to the Supreme Court can only be on grounds of miscarriage of justice and that any alleged miscarriage of justice may only be brought under review for the purpose of determining a question relating to compatibility. However, it is not clear whether, if the
act of the Lord Advocate is unlawful in terms of Section 6 of the HRA, this automatically means that a miscarriage of justice has occurred or whether it does not affect a conviction unless it also amounts to a miscarriage of justice.

Clause 17(8)

The clause substitutes a new Section 288A(2) of the Criminal Procedure (Scotland) Act 1995.

I am currently engaged in a course of correspondence with the Advocate General’s office on related issues regarding this clause which may mean that I will write to you again concerning Clause 17(8).

Clause 18 – Time limit for human rights actions against Scottish Ministers, etc.

The clause repeals and re-enacts the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 which was passed by the Scottish Parliament as emergency legislation to provide for a one year limitation period for human rights cases brought under the Scotland Act.

This clause goes some way to fulfilling a joint statement by the First Minister and the then Secretary of State dated 9 March 2009. Both Ministers agreed that they would “work together to deliver first a one year time bar by the Summer” (of 2009) – which became the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 and later, the UK Government will seek the support of the UK Parliament to bring forward a comprehensive solution extending the “same protections…to Wales and Northern Ireland on a consistent footing”. That proposed change was included in the Constitutional Reform and Governance Bill which was considered before the 2010 election. However in the wash up before the 2010 General Election the provisions for Scotland, Wales and Northern Ireland were removed from the Bill. The question remains therefore if the amendment in the Bill changes the position for Scotland, what plans does the Government have to make corresponding alterations in Wales and Northern Ireland?

In any event the Society questions whether a one year period is the correct period for time bar in human rights cases arising out of competence questions under the Scotland Act 1998. It may be consistent with the Human Rights Act 1998 but is it the “correct” period when considered along with other time bar provisions?

Clause 19 (Power to vary retrospective decisions about non legislative acts)

The Society agrees with the amendment proposed in this clause which amends s.102 of the Scotland Act 1998. Section 102 enables a court to remove or limit the retrospective effect of its decision or to suspend the effect of its decision where it decides that:-
(a) An Act of the Scottish Parliament or any of its provisions is not within legislative competence; or

(b) A Scottish Minister does not have the power to make, confirm or approve subordinate legislation.

The power does not include where the court has decided that an act of a Scottish Minister (other than the making of subordinate legislation) is outside devolved competence.

Clause 19 changes the law on this point and will enable the court to limit the retrospective effect of a decision that any act of a Scottish Minister is outwith competence.

Therefore non legislative decisions will come within the ambit of Section 102.

Clause 23 – Misuse of drugs

The Society supports the amendment of the Misuse of Drugs Act 1971 to allow Scottish Ministers the power to issue licences for some controlled drugs to be legally prescribed.

Clause 24 – Power to prescribe drink driving limits

The Society notes that this provision implements recommendations of the Calman Commission. There may be an issue about whether having different drink driving levels, within the United Kingdom may create confusion in the minds of motorists and could result in difficult issues of application of the law.

Clause 25 – Speed limit

The Society agrees with this provision which would allow Scottish Ministers the power to set speed limits on all Scottish roads without the need to consult the Secretary of State.

Clauses 28 – 37 - Taxation

There are a number of issues arising from the taxation provisions. These include:-

a) the nature and cost of the administration of the Scottish Variable Rate. More information is needed on how this will work in practice;

b) HM Treasury and HM Revenue and Customs are currently consulting on a “Statutory Definition of tax residence”. In the Society’s view, it would be sensible to apply a statutory definition of “residence” to the Bill in connection with the definition of “Scottish taxpayer”.

c) notwithstanding the consultation, the interpretation of ’resident' and 'main
residence’ for tax purposes requires to be made simpler and clearer; and

d) the disapplication provisions need further explanation and detail to be given of the circumstances when they will be applied retrospectively.

I have written in similar terms to Peers in advance of the Second Reading scheduled for 6 September 2011.

Michael P Clancy
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