

## **Drafting against a background of differing legal systems: Scots law and the UK statute book**

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### **The UK statute book**

The UK statute book does not exist in any physical sense. We use the expression to refer to the body of legislation having effect in some or all of the parts of the United Kingdom at a given time.<sup>2</sup> It carries with it implications of coherence and continuity—the idea that the legislation extending to the different territorial jurisdictions within the United Kingdom forms part of a single coherent body of law drafted to a common standard and subject to similar rules of construction.

In practice it falls to the three drafting offices in the United Kingdom, working in cooperation, to ensure that legislation extending to each part of the United Kingdom works properly as a matter of English law, Scots law or the law of Northern Ireland, as the case may be, and meshes properly both with pre-existing legislation extending to the jurisdiction in question and with the legislation for other parts of the United Kingdom.

### **How different is Scots law?**

Scots law is a mixed system, with elements of Roman–Dutch law as well as common law characteristics. Its historical roots are particularly evident in Scots private law, in areas such as the law of persons, the law of obligations and the law of property, and in Scots criminal law. The Treaty of Union between England and Scotland in 1707 guaranteed the continuance of Scots private law, the Scottish court system and the Scottish legal profession (but not, interestingly, their English equivalents). It is not surprising that most Scottish legislation on those matters extends only to Scotland. The differences from English law are generally much less in the public law area, particularly where the matter is one which is mainly or completely regulated by statute.

Someone wishing to find out the statutory position in relation to a matter governed by Scots law may be faced with Acts of the Parliament of the United Kingdom (both pre- and post-devolution), Acts of the Scottish Parliament, and regulations and orders under either or both. In the case of a Westminster Act and instruments under it, the relevant provisions may extend to Scotland only or to Scotland together with one or more of England, Wales and Northern Ireland. The user is entitled to expect that legislation extending to Scotland, regardless of its provenance, is drafted with proper regard to the principles, concepts and terminology of Scots law, while integrating fully with pre-existing law and with the corresponding legislation extending to the other parts of the United Kingdom. As First Scottish Parliamentary Counsel said in an address to the Statute Law Society in 2003, in relation to Acts of the Scottish Parliament:

Our devolved legislation should ... slip easily into the warp and weft of pre-devolution Scottish legislation and of GB and UK legislation whether pre- or post-devolution.<sup>3</sup>

The same is of course true in relation to provisions of Westminster Acts which extend to Scotland.

### **Devolution**

Since 1999 we have had a Scottish Parliament with legislative competence to pass Acts relating to devolved matters, that is to say matters other than those reserved to the Westminster Parliament by the

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<sup>1</sup> Scottish Parliamentary Counsel, Office of the Scottish Parliamentary Counsel.

<sup>2</sup> *Craies on Legislation*, 8th edition, para 1.1.7.

<sup>3</sup> (2004) 25 Statute Law Review 136 at p. 138.

Scotland Act 1998.<sup>4</sup> The Scottish Parliament can, for example, legislate about justice, health, education and housing but not about immigration, terrorism or social security. Although the Westminster Parliament retains the right to legislate for Scotland on devolved matters as well as reserved matters a convention, known as the Sewel convention, operates to ensure that Westminster will not normally legislate on devolved matters without the consent of the Scottish Parliament. Experience shows that that consent cannot always be taken for granted.

There are other limits on the Scottish Parliament's legislative competence. The most significant for present purposes is that the Parliament cannot legislate to amend the law of a country or territory outside Scotland. That limitation, while readily understandable, can cause problems in practice.

The Office of the Scottish Parliamentary Counsel (OSPC) is answerable to the Scottish Ministers, who constitute the devolved Scottish Government. We draft most Bills for Acts of the Scottish Parliament (ASPs). But we also, on behalf of the United Kingdom Government, draft Scottish provisions for inclusion in Westminster Bills.

### **Bills for Acts of the Scottish Parliament**

The Scottish Ministers initiate most Bills for ASPs. They have no responsibility for Westminster legislation on reserved matters that extends to Scotland. Their interest in Bills for ASPs is, understandably, primarily a political one, focusing on getting the Bill onto the statute book. Unless there is a possibility of the resulting Act being successfully challenged in the courts, or failing to deliver the policy, Ministers are not generally interested in how easy or difficult it is for the end user to understand or use the legislation. It falls to the drafters in the OSPC, in drafting a Bill, to try to look after the interests of the end user.

Bills for ASPs are drafted by drafters in the OSPC on written instructions from lawyers in the Scottish Executive. ASPs are very similar in layout and style to Westminster Acts. The careful reader may notice one particular difference—from the outset, ASPs have been drafted in gender-neutral (or, more accurately, gender-avoiding) language. The rules of construction are similar to those for Westminster legislation. An Interpretation Order under the Scotland Act 1998 makes provision for ASPs and subordinate legislation under them similar to much of that in the Interpretation Act 1978<sup>5</sup> for Westminster legislation.

You might think that a Bill instructed by Scots lawyers, drafted by Scottish Parliamentary Counsel and passed by the Scottish Parliament stood a reasonable chance of paying proper regard to Scots law, and you would, for the most part, be correct. The challenges that we face are those common to drafters everywhere—issues such as inadequately worked out policy (sometimes mirroring policy south of the border without proper analysis), unrealistic deadlines for drafting, and pressure to include buzz words and phrases in a Bill to ease its passage through the Scottish Parliament.

There is, however, one particular difficulty in relation to Scottish Parliament Bills. Few areas of legislation operate in isolation. A Bill changing Scots law on a devolved topic often gives rise to the need for consequential changes to Scots law on a reserved matter or to English law or the law of Northern Ireland. Legislation in other parts of the United Kingdom may contain references to provisions or expressions being amended by the Scottish Bill; or it may be necessary to have cross-border provisions dealing, say, with the transfer of court orders or prisoners from Scotland to another part of the United Kingdom, or vice versa. Before devolution, the Scottish Bill (in the Westminster Parliament) would have contained the appropriate provisions, drafted by or cleared with Parliamentary Counsel in Whitehall or Legislative Counsel in Belfast. But the Scottish Parliament does not have competence to make those changes. An order under section 104 of the Scotland Act 1998 and subject to procedure only in the Westminster Parliament is required to complete the legislative endeavour begun by the Scottish Parliament Bill.

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<sup>4</sup> 1998 c 46.

<sup>5</sup> 1978 c 30.

Although section 104 orders are drafted in Edinburgh, they need to be checked and cleared by the UK government departments responsible for the legislation being amended. Those departments sometimes see the orders as a low-priority irritation. And United Kingdom Government Ministers are unenthusiastic about having to sponsor the orders in the Westminster Parliament. But the consequences of not completing the legislative package begun by the Act of the Scottish Parliament are that the statute book will quickly begin to fragment, with cross-border provisions that do not work properly, provisions of Great Britain or United Kingdom extent that have been amended for Scotland only, and out-of-date references that serve only to confuse. Like Humpty Dumpty, it is easy to break the statute book but much harder to put it together again.

The good news is that there is an emerging acceptance and understanding by those responsible for the devolution settlement in the United Kingdom Government and the Scottish Executive that we need to find a way of tackling these difficulties. With goodwill on both sides, I have some hope that they can be overcome.

### **Westminster Bills**

The role of Scottish Parliamentary Counsel in relation to Bills for Acts of the Parliament of the United Kingdom varies greatly from one Bill to another. At one extreme, legislation about some topics such as tax or social security usually extends to Great Britain or to the United Kingdom and requires little adaptation to take account of Scots law. The adaptations are often predictable and precedented (for example, delict instead of tort and interdict instead of injunction). Drafters in the Parliamentary Counsel Office (PCO) will sometimes include the Scottish adaptations in their drafts in the reasonable certainty that they are correct. Our role in the OSPC is simply to check that the provisions, with the Scottish adaptations, achieve the policy for Scotland and work as a matter of Scots law.

At the other extreme, there is the possibility of a Westminster Bill extending only to Scotland, although there has been, I think, only one example of that since the establishment of the Scottish Parliament. Such a Bill would be drafted by the OSPC.

In the middle there is a wide range of Bills intended to give effect to a similar policy for Scotland and for England and Wales but requiring significant input from the Scottish drafter to make the Bill work in Scots law. That may involve drafting freestanding Scottish provisions or extending the provisions for England and Wales to Scotland with or without modification. The aim is to arrive at a text which takes proper account of Scots law and is accessible to the Scottish reader, while being consistent, as far as possible, with the structure and drafting approach of the Bill, for which counsel in the PCO has overall responsibility.

Unless the Scottish provisions are to be freestanding and different, it often makes sense for the Scottish drafter to wait to see the first drafts of the provisions for England and Wales before tackling the drafting of the Scottish provisions. He or she can then consider how best to make provision for Scotland. But the Scottish drafter is trying to hit a moving target—the English drafting will be developing as comments and further instructions are received from the Whitehall department and acted upon by the PCO, and the Scottish drafter is usually playing a game of catch-up. As the deadline for finalising the drafting approaches, last-minute changes of policy and drafting in relation to England and Wales may need to be replicated for Scotland. Close cooperation between the Scottish drafter and the drafting team in the PCO is essential at this stage. The prize is a Bill which properly reflects Scots law on introduction in Parliament, avoiding the need for amendments during its parliamentary passage that might suggest that we are merely “putting a kilt on” English legislation as an afterthought.

There are some constraints on what we can do by way of Scottish provisions in a Westminster Bill. We need to work within the structure and approach adopted by counsel in the PCO in relation to the Bill, although colleagues in the PCO are always happy to discuss how best to incorporate the Scottish provisions. There may be difficult drafting decisions about whether a provision which is to extend to Scotland requires adaptation at all. Sometimes a provision is drafted in language which does not sound quite right to a Scots lawyer, but there is no real doubt that it would be correctly interpreted by a court in Scotland. Does the Scottish drafter press for an adaptation or not? The answer may depend

on whether or not the Bill has been introduced in Parliament—if it has, there may be a reluctance to agree to later non-essential amendments.

The Sewel convention may also constrain the drafting of a Bill and the underlying policy. If it has been agreed that a Westminster Bill is not to require a Sewel motion giving the Scottish Parliament's consent to the Bill so far as it amends devolved Scots law, the drafter needs to be careful to avoid including provisions that would trigger the need for Sewel consent, for example, provisions conferring functions on the Scottish Ministers.

## **Conclusions**

To sum up, the strength of the working relationship between the three United Kingdom drafting offices is the glue that holds the UK statute book together. There was a period following the establishment of the Scottish Parliament when we in the OSPC were concentrating almost exclusively on the drafting of Bills for the Scottish Parliament. Scottish provisions for Westminster Bills were being drafted by one of our number billeted in the PCO in Whitehall. There was little reason for the two Offices to be in touch with each other, and such contact as took place was intermittent. But now that we are doing the Scottish drafting for Westminster Bills in Edinburgh, the Offices are in touch on a daily basis and it is much easier to build and maintain a positive working relationship.

Drafters in the OSPC and in the PCO are answerable to Ministers in different administrations. In theory that could cause problems about communications between the Offices and the sharing of information. But we share a professional pride in our work and a commitment to producing good legislation—even where those who instruct us would be content with something that is merely “fit for purpose” in delivering the policy. The Offices are happy to share with each other general information and experience about drafting practice, parliamentary procedure, matters of statutory interpretation, etc.

It falls to the drafters in the OSPC, working with our colleagues in the PCO in relation to Westminster Bills, to try to ensure that the legislative output of the Scottish Parliament and of the Westminster Parliament works as a matter of Scots law and dovetails properly with the UK statute book. We in the OSPC see that as an important part of our function. If we do not do it, it is probable that no one else will. And the loser would be the end user of what we draft.