All Change – the new Scotland Bill

When the new Scottish Parliament does return after May’s elections it can look forward to changes to the devolution settlement later in the year, when the Westminster Parliament is expected to pass the Scotland Bill which is currently before it.

The Scotland Bill has of course been the subject of widespread comment in relation to the tax measures which would see Scotland having greater responsibility for raising the revenue which the Scottish Parliament authorises the Government to spend. Yet the Scotland Bill deals with a range of important matters beyond taxation – and despite being a Westminster Bill it has been scrutinised in detail by the Scottish Parliament’s own Scotland Bill Committee, which recommended that the Parliament ‘consent’ to the Bill subject to future debate upon further amendments.

One contentious area addressed by the Committee has been the role of the Supreme Court in deciding certain legal questions which can come up in Scottish criminal prosecutions. Since devolution, the Supreme Court (and before that the Privy Council) has been the court with ultimate authority to decide whether, in prosecuting an accused person, the Crown has gone beyond the limits of ‘devolved competence’ – in practice, whether the Lord Advocate or a Procurator Fiscal has breached the human rights of the accused or has contravened European law.

The UK Government has proposed that the existing procedure for deciding these issues should be reformed in a way which would likely see far fewer cases being taken to the Supreme Court – in response to concerns expressed by, among others, Scottish judges who were of the view that the existing procedure introduced excessive and unnecessary delays in dealing with criminal cases. The reform has not, however, pleased everyone. Some have argued that the proposed reform removes important protections from those accused of criminal offences, while the outgoing Scottish Government has argued that retaining any right to have criminal issues decided by the Supreme Court jeopardises the integrity of Scots law.

In a recent lecture, Lord Hope, one of the two Scottish judges who sit on the Supreme Court, noted that there was a high level of respect afforded to the distinctive nature of Scots criminal law in the Supreme Court, and a significant degree of deference given to the Scottish Justices when considering Scottish matters. Lord Hope also emphasised that the Supreme Court will not insist upon the application of uniform solutions across the UK, and is aware of the scope of different solutions which may be available.

With the dissolution of the Scottish Parliament pending the forthcoming election, further consideration by the Committee will not be undertaken until May at the earliest. In the interim, the Advocate General has invited interested parties to comment upon issues raised in relation to acts of the Lord Advocate until 13 May 2011. Comment can be submitted here.
The Scottish Parliament was dissolved on 22 March with the general election (and indeed the Alternative Vote Referendum) scheduled to take place on Thursday 5 May as required by the Scotland Act 1998. There are, therefore, no MSPs at this point in time. However, Scotland is not without a hand at the rudder during the period leading up to the election - the Scotland Act ensures that the First Minister and his/her Ministers are not removed from office by virtue of the dissolution of the Parliament. Nevertheless the effect of the dissolution of the Parliament does have implications for Parliamentary business and also for the actions of the Scottish Ministers and the civil servants that support them.

At dissolution all outstanding motions in Parliament fall, although there is no barrier to similar motions being introduced after the Parliament has been reconstituted. All Bills in process at the point of dissolution of Parliament will also fall, which a good reason for any Administration making sure that the Bills it wants through are introduced in the early life of the Parliament. While some statutory instruments can be made, they cannot be laid before Parliament, so effectively they cannot come into force until after the Parliament is up and running post-election.

Petitions that have been lodged with the Public Petitions Committee do survive but, as parliamentary business is suspended, consideration of petitions will also be suspended until the new Parliament meets. This will offer some reassurance to petitioners who may have invested a good deal of time, money and effort in bringing forward a petition.

The Scottish Ministers are governed by the Scottish Ministerial Code while their civil servants are bound by the Civil Service Code. Although the Scottish Ministerial Code does not specifically mention how Ministers ought to behave during the election period, the Code does emphasise the political neutrality of civil servants and that public resources are not to be used for party political purposes. Party political activity should therefore be organised through local constituency offices, but what is and what is not party political business can often be the subject of disagreement.

Prior to each Scottish Parliamentary election the Scottish Executive / Government has issued Guidance that is specifically aimed at Scottish civil servants. The underlying thrust of the Guidance is that the impartiality of the Civil Service must be maintained and that any criticism of an inappropriate use of official resources is to be avoided. The Guidance reminds Scottish civil servants that the Scottish Government retains its responsibility to govern after dissolution of the Scottish Parliament and Ministers remain responsible for their portfolios. Civil servants are to continue to provide official support for Ministers in relation to any essential business that cannot be deferred until after the election.

The Guidance defines essential business as including “discharging statutory functions, responding to a major incident, or any case where postponing a decision or activity would prove detrimental to Scotland’s interest, or would be wasteful of public resources”. Official support for Ministers engaged in essential business is defined as including briefings, communications support and attendance at any necessary meetings or official engagements”.

It also includes offering advice on new arguments which are likely to be put by others at events which form part of essential business. However the Guidance warns against devising new arguments for use in election campaign debates. While the Guidance is undoubtedly helpful, much of what is contained in the definition of essential business and official support might (inevitably) be subject to different interpretations – and there is clear potential for differing views to give rise to tensions between civil servants and Ministers, and civil servants and other parties with an interest in the political arena. Achieving the aims that are at the core of the Guidance will more often than not be dependent on the experience and expertise of the Civil Service and the reasonable behaviour of politicians.
**Legislation tracker**

**Damages (Scotland) Bill**
Changes to the law on how damages for injury and wrongful death should be calculated, including: (1) a ‘standard’ deduction of 25% to take account of a victim’s future living expenses (amended at Stage 2 to allow the Court to apply a different percentage if this would be necessary to avoid a ‘manifestly and materially unfair result’); (2) a standardised approach to calculating damages payable to dependants; (3) retention of which relatives can claim for financial support under existing damages legislation.

**Double Jeopardy (Scotland) Bill**
A Government Bill to create a statutory rule for Double Jeopardy. This creates a statutory Double Jeopardy rule which can be subject to a number of exceptions, many of which are based upon Scottish Law Commission recommendations. The current common law rule, which prevents someone being tried twice for the same crime, would be restated in statute to include certain specific exceptions - such as where new evidence comes to light, or where an admission of guilt is made. The Bill also provides an exception for acquittals arising due to offences ‘against the course of justice’, such as where a witness has been intimidated into committing perjury.

**Local Electoral Administration (Scotland) Bill**
http://www.scottish.parliament.uk/s3/bills/57-LocalElecAdmin/index.htm
A Government Bill intended to establish an Electoral Management Board for Scotland and to enable the Electoral Commission to consider Local Government elections in Scotland. This sets out arrangements to establish an Electoral Management Board to handle the administration of Local Government elections. Part 2 seeks to increase the remit of the Electoral Commission, allowing them to provide guidance and prepare reports on Local Government elections in Scotland. Currently, these are the only elections in the United Kingdom which the Electoral Commission has no formal authority to consider.

**Public Records (Scotland) Bill**
A ‘technical’ Government Bill which is intended to place record keeping obligations on certain Scottish public authorities. The Bill imposes duties on certain Scottish public authorities to implement ‘Record Management Plans’ which should cover all of their public records. The Keeper of the Records of Scotland will be responsible for issuing guidance about the form and content of these plans, which will also cover records produced by contractors fulfilling functions on behalf of the authorities. The Bill also seeks to make amendments to legislation concerning Scottish Court records.

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