

INTERPRETATION and LEGISLATIVE REFORM (SCOTLAND) BILL - Consultation

Thank you for providing the Scottish Committee with the opportunity to comment on the above consultation. As a result of Schedule 7 of the Tribunals, Courts and Enforcement Act 2007 the SCAJTC now has a wider remit, particularly in reference to access to the Administrative Justice system and in particular for the users. Under this wider remit the Council is charged with

- keeping the administrative justice system under review
- considering ways to make the system accessible, fair and efficient
- advise on the development of the system
- refer proposals for changes in the system, and
- make proposals for research into the system

Legislation both primary and secondary lies at the heart of administrative justice. Most administrative tribunals and processes are statutory creations. Many operate on the basis of statutory codes setting out rights and associated processes. The SCAJTC believes that government and the legislature should be concerned that statute law is accessible to all users, and that statute law should be as readily understandable as possible to all users. As part of that there should be a focus on ensuring that statutory provisions should, as appropriate, carry the same meaning in different statutes, and that the interpretation of statutes should in general terms be as simple an exercise as possible.

In view of the above the SCAJTC considered this consultation had many aspects that are closely associated with administrative justice and members wished to record the following responses.

Q1 Do you agree that it would be helpful to continue to have general interpretative provisions which apply to ASPs and instruments?

The approach to legislative drafting in Scotland and the UK as a whole means that general interpretative provisions as set out in the Bill are essential both to achieve consistency across the statute book and to ensure accessibility of legislation for

consumers. The majority of jurisdictions whose legislative regimes are based on or related to the Westminster model involve Interpretation Acts¹.

There is a separate issue, not relevant to the current exercise, as to whether the approach to legislative drafting in Scotland and the UK is best suited to ensure that accessibility.

Question 2:

2(a) Do you agree that the provisions about interpretation in Part 1 should apply only to future ASPs and Scottish instruments?

Yes. The statute book must be seen as a single entity. Different rules and conventions applying to different parts of the statute book would confuse consumers.

2(b) Should these provisions also apply to Westminster Acts or instruments which relate to devolved matters or to provisions in ASPs or Scottish instruments which amend or repeal Westminster Acts or instruments made under them?

These provisions should not apply to Westminster Acts or instruments which relate to devolved matters or to provisions in ASPs.

The current constitutional arrangements of the United Kingdom entail that legislative competence for the devolved Scottish context derives from the Scotland Act 1978. While as a result of that Act the Scottish Parliament has legislative competence across the entire range of activity affecting Scotland. That competence is severely constrained in particular by the specification in Sch. 5 of reserved areas within which it does not have legislative competence. Moreover the UK Parliament retains competence to legislate on devolved matters, even although it would concede that so to legislate would ordinarily require the consent of the Scottish Parliament – “Sewell Convention”.

The Bill will not provide for its provisions to apply to Scottish instruments which amend or repeal Westminster Acts or instruments made under them even although such provisions will relate to devolved matters. The reasoning is that it would create uncertainty and confusion for the reader if some provisions in Westminster Acts fell to be interpreted in accordance with the Bill while other provisions fell to be interpreted in accordance with the 1978 Act.

The outcome of that argument is however that in interpreting an ASP which may have been amended by a Westminster Act, part of the ASP will be subject to the Bill and part subject to the Interpretation Act 1978 for interpretation. This may produce confusion.

In these circumstances it is submitted that the better course would be to legislate such that UK legislation is interpreted by 1978 Act and devolved legislation is interpreted by the Bill. In the case of amending legislation the interpretation code should be that which applies to the principal legislation.

2(c) Should any of its provisions apply to deeds, documents or other instruments that are not made, given, issued or published by virtue of an ASP? If so, which documents and why? Which provisions and why?

No. The Bill should apply only in relation to legislation (including schemes, rules etc) made etc by virtue of an ASP. If any other body wishes to attract the provisions of

¹ Eg Republic of Ireland 23 of 2005; Commonwealth of Australia no2 of 1901; Republic of South Africa, RS 1985 c1-21

the Bill for the interpretation of its legislation, documents etc then it should be free to do so on a contractual etc basis.

2(e) Does section 1(2) make it clear when provisions in Part 1 are not applicable?

S 1(2) provides

- (2) This Part does not apply in so far as-
- (a) the Act or instrument provides otherwise, or
- (b) the context of the Act or instrument otherwise requires.

2(1)(b) depends on assessment of context and therefore involves an exercise in judgment. To that extent it lacks precision, and is therefore not clear in its effect.

5(a) Are there any other powers that should be expressly included when an ASP confers power to appoint a person to an office?

In this section on the consultation it is stated that

“The section contains material that would otherwise be likely to be set out in ASPs which contain provision appointing a person to an office. There are two principal advantages of the section. First, it would shorten ASPs as it would make it unnecessary for ASPs to deal with these matters (except in cases where some other provision was wanted from a policy viewpoint). Second, it would promote consistency of approach as between ASPs where there was no policy or other justification for taking a different approach in relation to the conferring of these ancillary powers.”

The Committee approves such an approach. However the Committee also considers that when rules of construction are set out in an Interpretation Act, the reader can be at a disadvantage since the statement of the law in the principal enactment is in effect more diffuse. The reader has in effect to know that the rule of construction exists and will be unable to derive a view of the provision simply from the principal enactment

7(a) Do you agree with how it is proposed to refer to ASPs, Acts of the Parliament and Acts of the Parliaments of Scotland?

The provision is highly complicated and difficult to follow.

9 Do you agree with the proposal that the section should make it clear that where an ASP or Scottish instrument refers to an enactment, the reference should be a reference to that other enactment as amended by subsequent enactments?

If there is doubt then that should be clarified

11(a) Do you agree that the Crown should be bound by an ASP, or any provision in it or a Scottish instrument, only if the Act provides so expressly?

The consultation paper sets out –

“This provision is new and proposes a substantive change to the law. At present, the Crown is bound only by a statutory provision which makes express provision or by necessary implication. This section proposes that the Crown would be bound by an ASP or a Scottish instrument only if the provision says so expressly; and the rule that an ASP or a Scottish instruments binds the Crown by necessary implication is abolished. The position as to which Westminster Acts bind the Crown remains unaffected by this provision.

There is a similar provision in section 27 of NZIA.

There are, however, arguments that this provision does not go far enough and that the Crown should be placed in the same position as any other subject and be bound by every ASP or instrument unless it is expressly provided otherwise. If such provision were made in the Bill, then express provision would be needed in ASPs to oust the application of the Bill provision in cases where the Crown was not to be bound.

The Crown's position will need to be considered when preparing any legislative provision, irrespective of how the default provision is framed.”

The Committee supports the alternative approach and considers that in general terms the Crown should be placed in the same position as any other subject and be bound by every ASP or instrument unless it is expressly provided otherwise.

11(b) Do you consider that the Crown should be placed in the same position as any subject and be bound by an ASP or a Scottish instrument unless the Act or instrument expressly provides otherwise?

Yes

13(a) Should provision be made for serving documents by electronic means?

13(b) Does the provision provide sufficient flexibility and choice in relation to delivery options?

13(c) Are there any practical difficulties relating to service of documents which this Bill could seek to resolve?

The Committee would support electronic service etc of documents subject to the relevant court or tribunal being satisfied in any particular case that such service could be effective.

16 Do you consider that the Bill should include a provision stating that non-material differences between a form prescribed by legislation and the form used should not affect the validity of the form used?

Yes.

17 Do you consider that it would be useful to include in the draft Bill a default provision about the powers that would be available where an ASP or Scottish instrument confers a power of entry on a person?

The Committee considers that the risks in this area are significant. The Committee agrees that “the need to ensure ECHR compliance possibly means that provisions of this sort do not easily translate into a standard "one size fits all" form.” The Committee strongly considers that powers of entry, search and the like should be the subject of specific legislation in any particular case. Consistency of approach can be achieved by co-ordination in preparation of legislation.

22 Do you agree with the proposal that all SSIs which are not subject to either the negative or the affirmative procedure should be laid before the Parliament?

The Committee can well understand that in certain cases rendering an instrument invalid through some minor failure in procedure can be disproportionate. However the Committee considers that the default position in any case should be that such an instrument is invalid while ensuring that actions taken, and rights and obligations entered into under the belief that the instrument was valid, are not struck down.

Yours sincerely

Secretary
SCAJTC