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# DRAFTING MATTERS!

SECOND EDITION



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## Foreword by the Lord Advocate, James Wolfe QC



**James Wolfe QC**  
The Lord Advocate

While the cut and thrust of Parliamentary debate enriches our democracy, it is one of the essential functions of a Parliament to pass laws.

Legislation is the engine through which policies are translated into binding rules which govern us all. If legislation is to fulfil its purpose, it is essential that it reflects accurately the policy intention of the legislators and communicates clearly to the people who are affected by the legislation.

Those who draft the laws which apply to us fulfil an essential public function in our constitutional democracy.

The Parliamentary Counsel in the Scottish Government are highly skilled and strive to produce the best legislation in the world.

Parliamentary drafting is an art and it is right that we share our guiding principles. This shows our strong commitment to ensuring that Scottish legislation is drafted in language which is as plain, clear and concise as the subject allows.

Sharing this material will allow the drafting of primary legislation to be better understood by everyone, not least the Parliament, the judiciary, the wider legal community as well as all the interested bodies across the public and third sector for whom the impact of legislative drafting is so important.

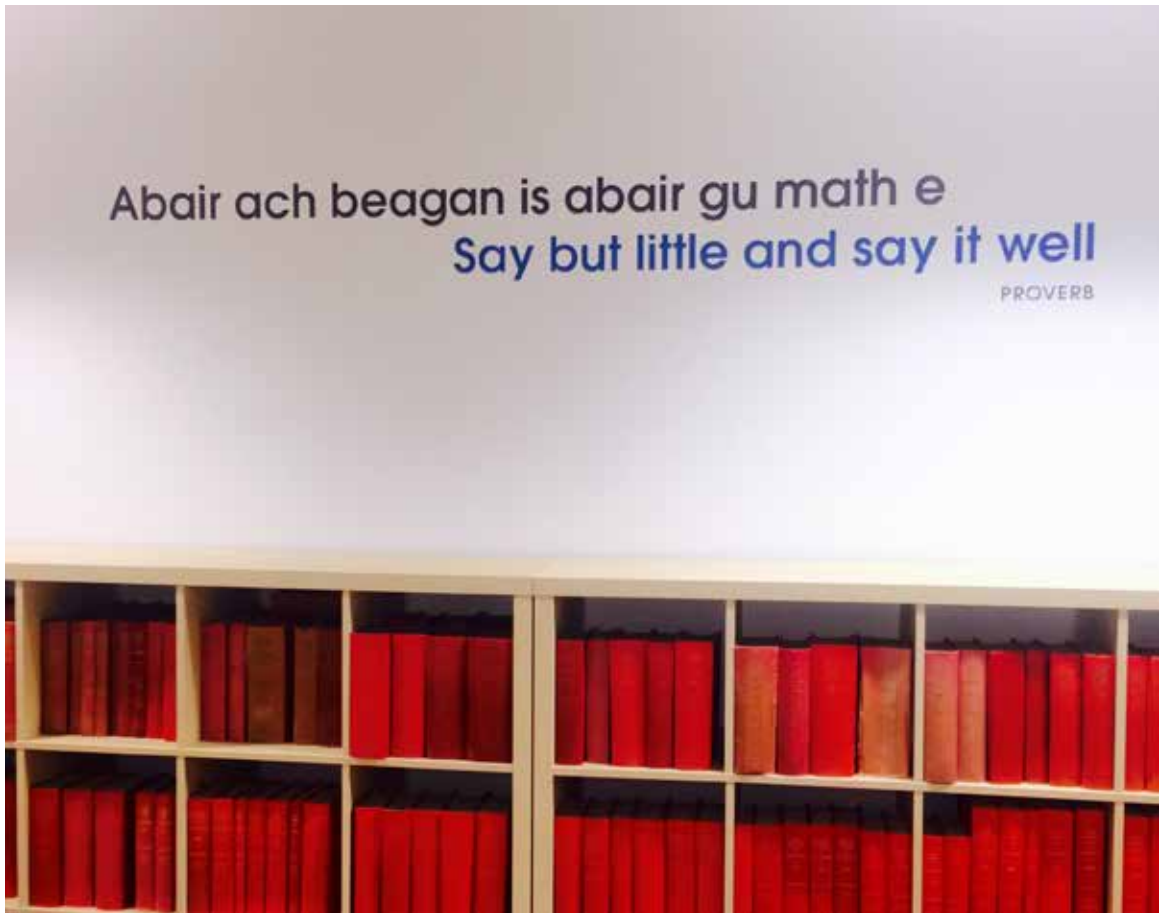
I am delighted the Scottish Government has decided to make this document publicly available, increasing the transparency of this important process which will in turn raise confidence in our legislation.

A handwritten signature in black ink, appearing to read 'James Wolfe'.

James Wolfe QC  
The Lord Advocate

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Abair ach beagan is abair gu math e  
Say but little and say it well  
PROVERB



## Preface to the second edition by Andy Beattie, Chief Parliamentary Counsel

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WE WILL CONTINUE  
TO DEVELOP  
AND SHARE OUR  
GUIDANCE MATERIAL.

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Two years have passed since we published the first edition of Drafting Matters!

The reaction we received for the first edition has been fantastic and well beyond our expectations. There is a real enthusiasm for understanding how Scotland's law is made and a desire to contribute ideas to how we should best do so. It has also been particularly pleasing to see members of law faculties at Scotland's universities passing it to students to help inform the next generation of Scotland's lawyers.

For this edition, we have reviewed our guidance to make sure that it is still relevant and representative of what we think constitutes best drafting practice. We have also added a number of new topics to our guidance as we continue to develop the materials available to the parliamentary counsel who shape Scotland's laws.

We will continue to develop and share our materials and are looking at new ways to inform the debate about legislation and the legislative processes in Scotland. As ever, we welcome comments and suggestions on how we can go about this.



Andy Beattie  
Chief Parliamentary Counsel

Parliamentary Counsel Office | Victoria Quay | Edinburgh | EH6 6QQ

## Why drafting matters by Andy Beattie, Chief Parliamentary Counsel

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**Andy Beattie**  
Chief Parliamentary  
Counsel

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If you don't think drafting matters, think again!

A robust, cohesive, principled and well drafted statute book is an essential element of a civilised, well-governed society. The Parliamentary Counsel Office has been drafting Acts of the Scottish Parliament for over 15 years and we always strive to draft clear, effective, accessible law which can be easily understood by everyone affected by it.

As we go about drafting the Scottish Government's Bills, we are inspired by the Gaelic proverb adorning the walls of our office, which, says 'abair ach beagan is abair gu math e'. Translating as 'say but little and say it well', this is an excellent rule of thumb for anyone seeking to make good law.

It is now easier than ever to access legislation, with statutes most commonly searched for and read online. There has been an explosion in the numbers and types of people seeking out the law in its raw state and a corresponding onus on drafters to make it easier to navigate and read.

We try to create legislation that is direct and straightforward and which delivers its message to its intended readers without fuss. Clear and effective writing doesn't happen by accident and involves much more than simply using intelligible words and expressions. Good grammar is needed for any written text to be readily understood. Organising material logically and designing a simple physical layout allows information to be absorbed more easily, something which becomes more and more important with legislation increasingly being read electronically on mobile devices.

Parliamentary counsel have accumulated a wealth of legislative experience and expertise and we have begun capturing and sharing our knowledge both among the members of the drafting office and with others who are engaged or interested in the drafting of Scottish legislation. We have now drawn this material together in the form of a drafting manual.

The manual is not a guide on how to draft a Bill or on how to interpret statutes. It is a collection of the internal guidance which parliamentary counsel use when drafting Bills for the

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Scottish Government. Its main purpose is to allow drafters to inject a degree of cohesion and consistency into the overall Scottish statute book, with a view to helping users of legislation to understand it better.

Legislative drafting is a highly creative activity and parliamentary counsel need to be free to evolve and adjust drafting practice to ensure that modern legislation continues to improve and adapt to the needs of those who use it. Each topic covered is no more than a snapshot of our guidance as at the date of publication. All the material is kept under constant review and we hope to engage and involve others to help us to develop new ways of making law more accessible.

It is a great privilege to be responsible for helping shape the law of Scotland. We hope that sharing this drafting manual will give some insight into how a Bill is prepared and will encourage comments on our approach to drafting legislation and suggestions for how we should continue to improve the quality of Scotland's law.

*Andy Beattie*

Andy Beattie  
Chief Parliamentary Counsel

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# Background

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WE ARE INNOVATIVE,  
PROVIDING ADVICE  
AND DRAFTING  
LAW WHICH BEST  
DELIVERS POLICY  
OUTCOMES.

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## Parliamentary Counsel Office (PCO)

PCO is the Scottish Government's legislative drafting office.

Our purpose is:

- to draft and help deliver clear, effective and accessible law for the Scottish Government,
- to maintain and enhance our position as Scotland's centre of legislative excellence and help improve the overall quality of Scotland's law.

## About this manual: status and use

This drafting manual provides guidance and advice on common drafting issues. It has been agreed within PCO for use in connection with every Scottish Government Bill.

The purpose of the manual is to encourage consistency of approach by parliamentary counsel in the matters covered by the manual. It is expected that each counsel will have careful regard to the manual when drafting Bill provisions but it is not to be adhered to slavishly in every case as a different approach may deliver a policy outcome in a clearer or more effective way.

For example, deviations may be needed for the sake of:

- clarity, accuracy or emphasis of meaning
- operation in conjunction with the existing law (including an enactment in the same area)
- achieving an overriding policy or presentational result (including as attributable to the known interests of any category of end-users)
- maintaining consistency of style or approach when textually amending a provision in another enactment.

In a few places, there is special mention of grounds for deviation from the manual. In certain other places, the latitude for deviation will naturally be slight.

**Note:** this document sets out the Scottish Government's approach to drafting primary legislation (Acts of the Scottish Parliament) only. Other writing and style guides exist for other Scottish Government communications.

# PART 1

## **IMPROVING**

WE LOOK FOR WAYS TO IMPROVE HOW WE DRAFT LEGISLATION AND HOW WE WORK.

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## **LEADING**

WE USE OUR EXPERTISE AND EXPERIENCE TO INFLUENCE AND LEAD OTHERS INVOLVED IN DRAFTING LEGISLATION.

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## **SHARING**

WE SHARE OUR WEALTH OF EXPERIENCE AND KNOW-HOW WITH OTHERS TO IMPROVE SCOTLAND'S LAWS.



## Part 1: Drafting technique

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### Language

#### Plain language

Where possible, use simple words and short sentences.

Do not use archaic or legalistic words such as 'foregoing', 'notwithstanding', 'said', 'same' or 'here/there-after-by-in-to-with'.

Aim for clarity, including by:

- devising accessible structures
- in particular, where possible:
  - giving due prominence to the main proposition
  - breaking up the various propositions in play
  - stating particularities, exceptions or qualifications separately
  - avoiding sections of 10 or more subsections.

#### *Grammar and usage*

Observe proper rules of grammar and usage.

To note:

- use the subjunctive, 'who/whom' and 'may/might' properly and take care to place 'only' correctly
- split infinitives are unobjectionable so long as the right meaning is given clearly
- words such as 'and', 'but', 'however', 'despite' and 'accordingly' may be used (sparingly) at the start of sentences where doing so aids sense and readability.

#### Punctuation

Use punctuation properly.

Rules:

- try to avoid structures in ordinary text that require using semi-colons (it tends to indicate there are too many propositions in the subsection)



- use linking commas between subsection paragraphs etc (but it is fine for consistency to use semi-colons when adding to a list in an Act that uses them)
- if linking semi-colons cannot be avoided, use a comma immediately before any following full-out text
- end a sentence or completed block of text with a full stop (this includes having one after the quotation marks indicating inserted text even if that text ends with a full stop).

## **Gender neutrality**

Always give effect to the Scottish Government's policy on gender neutrality.

To note:

- avoid gender-specific pronouns such as 'he or she'. Bear in mind that some people who identify as non-binary do not use either of those gender-specific pronouns for themselves so this may have particular relevance for them
- use an alternative word in place of a gender-specific noun (for example, 'convener' or 'chairing member' for 'chairman')
- treat labels such as 'ombudsman', 'landlord', 'executor' and 'manager' as gender-neutral
- actual gender-specificity need not be concealed in some exceptional contexts
- unlike the Interpretation Act 1978, the Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA) does not make the masculine or feminine cover the other.

## **Choice of language**

### *Using English and Gaelic*

Always use English as far as possible.

Gaelic wording may be appropriate in a special context (for example, specifying the body Bòrd na Gàidhlig (see the Gaelic Language (Scotland) Act 2005)).

To note:

- use the English version of an adopted foreign word
- foreign expressions (including non-adopted words) do not usually need to be italicised when used.

### *Latin words*

Use Latin words only where there is no suitable translation or another good reason for preferring them.

To note:

- terms such as 'ex proprio motu' and 'ex officio' are to be avoided (since the ready alternatives 'of its own accord' and 'by reason of holding the office' are more easily understood by the ordinary reader)
- examples of acceptable Latin are:
  - terms of art (for example, nobile officium, solatium, per stirpes, pro loco et tempore, curator ad litem)
  - scientific terminology (for example, for detailed botanical, medical or veterinary classification of plants, diseases or animals)
  - simple and recognised terms (for example, 'vice versa' or 'ante-natal', noting that terms such as these can probably be regarded as having been adopted into English)
- in general, pluralise normally Latin words that have been adopted into English (for example, 'indexes', 'formulas', 'forums', 'memorandums', 'referendums', 'stadiums'). However, there are some peculiarities:
  - from Latin, 'agenda/agendas' has become the norm
  - the Latin 'data' is often used for the singular too
  - 'crises' shows the adoption of the Greek plural alongside the singular 'crisis'
  - the Greek plural 'criteria' has been adopted but is often used for the singular too.

### **Particular words and expressions**

#### *shall v must*

Avoid the legislative 'shall' when imposing an obligation.

Rules:

- use 'A must' or 'B is/are to' instead
- 'it is the duty of C' or 'C has the duty' may be appropriate in a rare case
- which option to use is a matter of context (especially in view of the emphasis required).

To note:

- 'shall' may be used in textual amendment of an Act that already uses 'shall' nearby if 'must' or equivalent would cause confusion within it (but this is less important in the case of self-contained provisions with little or no read-across to other provisions)
- 'shall' remains appropriate exceptionally in the high-level declaratory sense (for example, 'There shall be a Scottish Parliament.').

*any*

Try not to overuse 'any'.

To note:

- 'a' (or 'an') is often just as good
- ensure that the correct sense is imparted, for example:
  - for a list, it may be better to say, for example, 'one/any one/at least one of the following' depending on what exactly is to be achieved
  - for the 'each and every' sense, it may be better to use 'all'
  - 'any or all' may be needed in some instances.

To note also:

- 'any' may be useful:
  - to emphasise that something is of universal application or without qualification (but only where it is really necessary to do so)
  - to refer to both a singular noun and an uncountable one (for example, 'any document or information').

*being*

Avoid the cumbersome (and archaic) 'being' formula to cover or exclude something.

To note:

- a typical example of the negative is '(1) This section applies where a person, not being a child, ...'
- find a neater way of setting out the description (for example, use a defined term or narrate separately what is covered or excluded).

*deem*

Use the formal 'X is deemed to be...' only where it is the best way of conveying the intended sense.

To note:

- as alternatives:
  - say that 'X is to be regarded/treated as Y'
  - state the two aspects separately
  - use a definition so as to make one include the other
- do not overstretch the meaning of the main term (and see the similar rule below in relation to definitions).

*if & where*

Use 'if' and 'where' carefully for sense.

To note:

- 'where' is useful for stating a case or a set of circumstances in which a later proposition applies
- 'if' is used for stating a contingency
- so, although there is little clear-cut distinction:
  - 'where' may be better for cases which inevitably will occur
  - 'if' for conditions which may or may not be satisfied.

To note also:

- in some cases, it may depend on from whose perspective you are looking at the situation. For example, suppose a regulator has power to serve notices on defaulters:
  - in 'where the regulator serves a notice on a person, the regulator must...', we are speaking of the regulator (who will frequently serve notices)
  - in 'if the regulator serves a notice on a person, the person must...', we are speaking of the person (for whom the notice is not at all inevitable).

Separately, 'if' (or a different formulation) is preferable to 'provided that'.

*such*

Use the old-fashioned 'such' sparingly.

To note:

- as alternatives:
  - often 'the/that' or 'a' will do just as well
  - 'any... that' may work instead of 'such... as'
- it remains of some use for making shorthand reference to a type of thing previously mentioned.

*that/the*

Try not to overuse 'that' as a demonstrative pronoun.

Note:

- 'the' will often be sufficiently specific
- this is especially true when referring back to something previously mentioned with the indefinite article (for example, referring first to 'a body' then 'the body').

## Style

### Conjunctions

This relates to the use of a linking 'and' and 'or', as a matter of style and for meaning.

#### *between paragraphs*

To note:

- try to use conjunctions sparingly for situations where something truly cumulative or additional or (as the case may be) disjunctive or alternative is intended
- it will usually suffice to put the appropriate conjunction at the end of the penultimate paragraph and rely on the implication (in the absence of a contrary indication) that each of the preceding paragraphs is separated by the same conjunction
- if that approach would not provide sufficient certainty, consider spelling out the intended effect in the introductory words (for example, 'either/each/both or at least one/any/all of the following')
- also consider spelling out the intended effect where putting a single conjunction towards the end of a long list of paragraphs might cause difficulties for the reader
- in contexts where normal usage would dictate the inclusion of a conjunction in un-paragraphed text (and its inclusion would not disturb the intended meaning), the conjunction should be included
- often no conjunction is needed in the case of a simple list of things
- there should not be a mixture of conjunctions, i.e. different conjunctions at the ends of different paragraphs in the same provision.

#### *repeals and amendments*

To note:

- the starting point is the assumption that the conjunction does not form part of the paragraph
- so, when removing or inserting a paragraph:
  - watch out for stray conjunctions
  - add or reinstate the conjunction where required
- use something simple when repealing (for example, by including or excluding the 'and/or' (immediately) preceding or following the relevant paragraph).

*non-exclusive 'or'*

To note:

- often 'or' falls naturally to be read in an inclusive sense (so a power to impose conditions relating to cats, dogs or rabbits would be read as allowing conditions relating to one or more of these)
- the sense of 'and/or' may sometimes be conveyed by having no conjunction at all
- sometimes it will be important to spell out that both of two alternatives is a permissible option (for example, in a penal provision, allowing the imposition of imprisonment or a fine (or both)).

**Paragraphing**

To note:

- long un-paragraphed sentences should be avoided
- clause sandwiches (i.e. sentences consisting of lead-in text, paragraphs and then full-out text) should be avoided if difficulties would be caused for the reader as a result of, for example, the separation of the introductory text from the final text or the gap between the subject of the sentence and its verb.

To note also:

- full-out text at (a), (b) etc level should be avoided
- use the (i), (ii) etc level sparingly
- avoid going to a level lower than (i), (ii) etc
- never frame provisions with a set of paragraphs, some full-out text and then a further set of paragraphs, for example:

'If [.....]—

(a) [text]; and

(b) [text],

the person [.....]—

(i) [text]; and

(ii) [text].'

- avoid putting too much of the overall weight into (or saying more than one thing in) a full-out, for example:

'If a person ("A")—

(a) without another person ("B") consenting, and

(b) without any reasonable belief that B consents, either intentionally engages in an activity and for a purpose mentioned in subsection (2) does so in the presence of B or intentionally and for a purpose mentioned in that subsection causes B to be present while a third person engages in such an activity, then A commits an offence, to be known as the offence of forcing a person to be present during a prescribed activity.'

- a subsection may have more than one sentence (Annex B of the Scottish Parliament Guidance on Public Bills). See:
  - entries for two sentence subsections in the material on Form and content of Scottish Parliament Bills, below, and
  - by way of example, see sections 1 and 9(4) of the Arbitration (Scotland) Act 2010
- bear in mind that it may be difficult to refer to a subsection's second sentence if later amending it
- never use the old-fashioned style of proviso (i.e. in an un-numbered free-standing block starting 'Provided that' immediately following the main provision that it qualifies).

## Periods of time

Take care when expressing periods of time since the various ways of expressing periods lead to different results.

### *Beginnings and endings*

To note:

- consider framing a period by reference to its 'beginning with' or 'beginning on' a particular day. The same goes when framing a period by reference to its end date or by reference to both its start date and its end date. Generally, if a period is framed in this way, the full day on which the period begins (or ends) will be counted for the purpose of calculating the period (even though the event that triggers the beginning of the period, such as serving a notice, may occur part way through a day). Here are some examples which include the day (or days) referred to:
  - 'The notice expires at the end of the period of two months *beginning with* the day on which the notice is served'
  - 'A review may be requested within the period *beginning on* the day on which the notice is served and *ending on* the date specified in the notice'



- be alert to whether the day of an event is to be excluded. Here are some examples which exclude the day referred to:
  - ‘An appeal may be made within the period of 14 days *beginning with the day after the day on which* the decision appealed against was made’
  - ‘The return must contain information about regulated activity which occurred within the period of 5 years *ending on the day before the day on which* the return is made’
- if a power or duty to do something applies within a period, consider using ‘within’ (instead of ‘before’, ‘by’ or ‘until’ the end of a period which may, depending on the context, allow the thing to be done before the period starts). For example:
  - ‘The payment must be made *within* the period of 14 days beginning with the day on which the payment becomes due’
- if a period is triggered by – or is to end because of – an event at a particular time of day that is unpredictable, consider framing the period by reference to the event, or to the time ‘immediately before’ or ‘immediately after’ the event. For example:
  - ‘...within the period beginning *when* the property is purchased and ending *when* it is transferred’
  - ‘...within the period of 3 days beginning *immediately after* the death of the person’

#### *Which days count?*

To note:

- consider whether to make express provision about which days count for the purpose of calculating a period. Here is an example of a definition of ‘working day’:
  - ‘working day’ means any day other than a Saturday, a Sunday or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland

#### *Calculations involving months or years*

To note:

- under schedule 1 of ILRA:
  - ‘month’ means calendar month
  - ‘financial year’ means a year ending with 31 March

- depending on how a period is framed and in which month it begins, it might expire: (a) on the eve of the corresponding date (for example, a period of one month *beginning with* 10 July and ending 9 August), (b) on the date corresponding to that with which it began (for example, one month beginning 10 July and ending 10 August) or (c) if there is no corresponding date, on the last day of the month (for example, one month beginning 31 January and ending 28 February). Consider whether to deal expressly with how a period of months – or years – is calculated. Here are some examples which provide for
- a period to end on the date corresponding to that with which it began (and for what happens when there is no corresponding date):

### **1 Calculations involving months**

- (1) Where a day (“day 1”) is described as falling a specified number of months before or after another day (“day 2”), the date of day 1 is to be calculated as follows.
- (2) Count backwards or forwards (as the case may be) the specified number of months from the month in which day 2 falls.
- (3) If day 2 falls on a day that the month arrived at in accordance with paragraph (2) has, day 1 falls on the same day of the month as day 2.
- (4) Otherwise, day 1 falls on the last day of the month arrived at in accordance with paragraph (2).

### **1 Calculations of periods**

- (1) Where a period is described (in whatever terms) as ending after a specified number of months or years—
  - (a) if the final month has the same number of days as, or more days than, the month in which the period began, it ends in the final month on the same day of the month as it began, or
  - (b) if the final month has fewer days than the month in which the period began, it ends on the last day of the final month.
- (2) In sub-paragraph (1), “the final month” means the month arrived at by counting forwards the specified number of calendar months or years from the month in which the period began.
- (3) For example, if a period described as ending after 6 months begins on 31 August it ends on 28 February (or 29 February in a leap year).

## **Dates**

### **Rules:**

- specify a date like this: 25 December 2015

- that is:
  - the 3 elements in that order
  - this also applies when using the short form (but with no further abbreviation (for example, 25/12/15))
  - no<sup>st, nd, rd</sup> or<sup>th</sup> with the number.

## Numbers and symbols

### *numbers generally*

#### Rules:

- use figures where possible for:
  - sums of money
  - percentages
  - times or periods
  - dates (see above)
  - ages of persons
  - units of measurement
  - mathematical contexts
- in other situations, use figures where natural or appropriate.

#### To note:

- minor points:
  - it is common to spell out 'one' and 'two'
  - something 'first class' is more natural than '1st class'
  - a sentence should normally start with a word.
- avoid mixing words and figures in a single context (except where another rule prevails).

### *statutory references*

#### Rules:

- Arabic numbers are to be used, for example, when creating or otherwise mentioning a schedule or Part of an Act

- use Arabic numbers even if the result is a mixture of styles after inserting or substituting a new schedule or Part 00 (where it otherwise has Roman numbering)
- the exception is where referring to an existing Part or schedule XX (in Roman numbering) is necessary for clarity, including when amending it.

### *symbols*

Always use:

- % not 'per cent' with a figure (for example, 10%)
- for money, express the figure in full (i.e. £1,000 not £1K).

To note:

- other well-known symbols or abbreviations may be used, for example, standard SI units such as kg or m<sup>2</sup>.

### *Powers to amend amounts etc from time to time*

Care should be taken when creating a power to amend a figure in an enactment not to inadvertently limit the power to a single use. Consider the following example:

- (1) The Scottish Ministers may charge an applicant £100.
- (2) The Scottish Ministers may by regulations amend subsection (1) so as to substitute for the sum "£100" a higher sum.

The question that might arise is whether this power may be exercised more than once. If the first exercise of the power raised the amount charged to £150, subsection (2) cannot operate because the figure of £100 will no longer appear in subsection (1).

The general principle (see section 7 of ILRA) is that a power may be exercised from time to time. But that can be displaced where the contrary intention appears. The formulation above might cause the reader to think that this power is exercisable only once.

If the intention is for such a power to be used on more than one occasion, use a formulation like:

- (2) The Scottish Ministers may by regulations amend subsection (1) so as to substitute for the sum for the time being specified there a different sum [(which sum must exceed £100)].

### **Letter labels (Tag letters ('A'))**

A letter label (sometimes called a tag letter) may be useful to label persons or things referred to so as to avoid gender-specificity, wordiness, or confusion (for example, '... a person ('A')... another person ('B)'), noting that:

- the Sexual Offences (Scotland) Act 2009 employs this technique in many places
- if a label is used, try to make it reasonably intuitive (for example, P for purchaser, S for seller)
- it may be neater to do without a label (or definition) by simply:
  - repeating the noun (for example, 'the body'), or
  - relying on the context (for example, 'the applicant').

## Form and key components of Bills

### Form and content of Scottish Parliament Bills

#### *Proper form*

A Bill introduced to the Scottish Parliament must be in 'proper form' (see Rule 9.2.3 of the Scottish Parliament's Standing Orders). The determination of proper form falls to the Presiding Officer and the current determination, published in the Business Bulletin on 22 May 2017, is reproduced here.

#### **'Presiding Officer determination (Public, Private and Hybrid Bills): proper form of Bills**

The Presiding Officer has determined, under Rules 9.2.3, 9A.1.4 and 9C.1.6 of the Standing Orders, that the "proper form" of Bills is as follows. (Note: this determination supersedes previous determinations under these rules).

#### **Structure**

The text of a Bill should be set out in numbered sections, supplemented where appropriate by schedules, which should be numbered unless there is only one. Bills may be divided into numbered Parts and Chapters (as may schedules). Each section, schedule, Part and Chapter should have a brief descriptive title. The sections of a Bill (or the paragraphs of a schedule) may also be grouped under italic cross-headings as a guide to the structure of the Bill (or the schedule).

Sections may be divided into numbered subsections, which in turn may be divided into paragraphs, sub-paragraphs etc. Schedules may be similarly divided into numbered paragraphs, sub-paragraphs etc.

Each Bill should be prefaced by a long title beginning 'An Act of the Scottish Parliament to ...'. Preambles to Bills are not permitted.

#### **Style and presentation**

Section numbers and titles should appear in bold, with each section title appearing above the text of the section. Units of text smaller than sections and schedule paragraphs should appear as indented blocks of text with straight left margins.'

### **Presiding Officer's recommendations as to style and content**

The Presiding Officer has also made recommendations on the content of Bills. The most recent recommendation was published in the Business Bulletin on 22 May 2017.

## **‘Recommendations on the content of Bills**

The Presiding Officer has made the following recommendations about the content of Bills. (Note: these recommendations do not form part of the determination of ‘proper form’ and supersede previous recommendations about the content of Bills).

### **Style and content**

A Bill should be drafted so that, when read with any relevant existing statutory provision, its intended legal effect is clear.

A Bill should include provision for the short title by which the Act is to be known. The long title should set out the principal purposes of the Bill.

The text of a Bill – including both the short and long titles – should be in neutral terms and should not contain material intended to promote or justify the policy behind the Bill, or to explain its effect. The text of the Bill itself should be identical to the text of the Act to which it is intended to give rise and, in particular, should refer to the Bill as “this Act”.

Any Bill that has such severe deficiencies in drafting that it could not readily be understood or, if enacted, would be manifestly incapable of consistent legal application, should not be introduced.

A Bill whose principal purpose (or one of whose principal purposes) is to make provision manifestly outside the legislative competence of the Parliament should not be introduced.

A Public Bill, other than a Hybrid Bill introduced by the Scottish Government under Rule 9C.1, should not normally contain provisions that would adversely affect a particular private interest of an individual or body in a manner different to the private interests of other individuals or bodies of the same category or class. Any Bill intended to extend other than to the whole of Scotland should set out that intended extent.

Any Bill intended to come into force other than on the day after Royal Assent should either (a) give a date or dates for commencement, or (b) make provision for the appointment of the relevant date or dates. Under the Interpretation and Legislative Reform (Scotland) Act 2010 the default provision for commencement where a Bill is silent on the point is for the Bill to come into force on the day after Royal Assent. This does not, however, prevent the Bill from expressly providing for commencement on that day.

Any Bill containing provisions that would confer power to make subordinate legislation should specify what powers, if any, the Parliament is to have to approve or reject the subordinate legislation (or draft subordinate legislation) laid before it under those provisions.

Any Bill introduced to give effect to a proposal for a Member's Bill (under Rule 9.14) or a Committee Bill (under Rule 9.15) should only contain provisions that are broadly in conformity with the terms of the successful proposal.

### **Preparation for introduction**

The text of a Bill should be submitted to the Clerk in sufficient time before the proposed date of introduction to allow it to be prepared for printing. No Bill may be published under the authority of the Parliament except by the Clerk.

The Clerk will ensure that the published version of the Bill conforms to the following presentational conventions:

The text of Bills (sections, schedules and the long title) should appear in Times New Roman font, fully justified. The text size should be 11.5 point when the Bill is printed at A4 size.

- There should be a running header throughout the body of the Bill containing the Bill's short title and page number together with, where appropriate, any Part and Chapter titles or schedule and schedule Part titles.
- Bills of more than around six sections should be published with a Contents page or pages.
- The text of the Bill, including the long title, should be published with line numbers every fifth line.
- The Bill should be published with a back sheet setting out the short and long titles, the name of the member who introduced it, the names of any supporters, the date of introduction, and the type of Bill.'

### **Order of final provisions**

'Final provisions' are provisions of a general nature that appear towards the end of a Bill and deal with, for example, subordinate legislation, interpretation and commencement. They are also frequently referred to as 'general provisions'.

#### *Order*

There is no fixed order in which final provisions must appear (as there may be good reasons to adopt a different approach) but the default position is:

- General provisions about offences (for example, offending by bodies corporate)
- Regulations
- Ancillary provision
- Directions / Guidance



- Interpretation (see also the material on Definitions)
- Modifications of enactments / repeals
- Crown application
- Index of defined expressions
- Commencement
- Short title

As an alternative to an index provision before the short title, consider using a schedule appearing as the last schedule of the Bill - this makes it more accessible to the reader of the hard copy (for example, see schedule 5 to the Protection of Vulnerable Groups (Scotland) Act 2007).

### **Long title**

Long titles are a mandatory component of a Bill (see the material on Form and content) and preface the substantive content of the Bill.

Long titles must be distinguished from preambles, which are not permitted in Scottish Bills.

Long titles do not determine the scope of a Bill for the purpose of the admissibility of amendments. However, as a summary of the principal purposes of the Bill they can be helpful in the consideration of scope. It follows that amending a long title does not change the scope of a Bill.

### *Content*

Generally:

- the long title must start with the words 'An Act of the Scottish Parliament to'
- it should set out the Bill's principal purposes; to that end, it may have multiple limbs
- it should be in neutral terms, i.e.:
  - it should not contain material intended to promote or justify policy or explain the Bill's effect, and
  - it should accurately describe what the Bill does.

### *Use of 'and for connected purposes'*

To note:

- it is common for long titles to end with the expression 'and for connected purposes'. This covers topics or provisions (short of being principal purposes) which are not obviously caught by any of the previous limbs of the long title

- it is not always required, for example, if its inclusion is not justified by reference to specific provisions that aren't otherwise covered.

### *Amending the long title*

The long title of a Bill may be amended.

It is appropriate to amend a long title if amendments to the Bill result in the long title being inappropriate or inaccurate (having regard to its requiring to set out the principal purposes of the Bill).

Procedurally, amendments to the long title are always taken last (see Standing Orders, rule 9.7.4) - this is done on the basis that it is necessary to know whether the substantive amendment has been voted in before amendments are made to the long title.

It is uncommon for amendments to be made to the long title of an Act which has been passed, even where the textual amendments being made in a Bill change the content of the Act significantly.

### **Short title**

Rules:

- the provision in a Bill which provides for the short title of the Bill and the resulting Act is to be in a section of its own and not combined with any other provision (such as Commencement)
- the section is to be headed 'Short title'
- the section is to be the last section in the Bill
- the provision is to be worded as follows:

'The short title of this Act is ...'

### *Example provision*

#### **1 Short title**

The short title of this Act is [*title*].

### **Commencement provisions**

The provision in a Bill that provides for the commencement of the resulting Act is to be in a section of its own and not combined with any other provision such as the short title provision.

The section is to be titled 'commencement'.

The section is to be the second last section in the Bill, before the short title section (unless there is a sunset provision).

The section is to contain a comprehensive statement of commencement covering all provisions of the Act, including those that are intended to come into force on the day after Royal Assent in accordance with the default rule in section 2 of ILRA.

The wording 'comes into force on' rather than 'commences on' is to be used.

For provisions that are to come into force on the day of Royal Assent, the following wording is to be used:

Sections [x] come into force on the day of Royal Assent.

For provisions that are to come into force on the day after Royal Assent (i.e. where it is intended to replicate the default rule in section 2 of ILRA), the following wording is to be used:

Sections [x] come into force on the day after Royal Assent.

For provisions that are to come into force at the expiry of a specified period (for example, 2 months) after Royal Assent, the following wording is to be used:

Sections [x] come into force at the end of the period of [2 months] beginning with the day of Royal Assent.

For provisions that are to come into force on a specified day, the following wording is to be used:

Sections [x] come into force on [day].

For provisions that are to come into force on a day appointed by commencement regulations, the following wording is to be used:

Sections [x] come into force on such day as the Scottish Ministers may by regulations appoint.

Powers to commence by subordinate legislation are to be exercisable by regulations rather than order (see the material on Forms of subordinate legislation, below). Note that this makes it necessary to make provision for different days to be appointed for different purposes, as section 8 of ILRA cannot be relied on in relation to regulations. This is done by including provision allowing commencement regulations to make different provision for different purposes.

Where provisions are to come into force in accordance with provision for which there is no form of wording set out in this Manual, the provision is to be drafted in a way that is, as far as possible, consistent with the forms of wording set out here.

### *Example provision*

#### **1 Commencement**

- (1) This section [and sections [X] and [Y]] come[s] into force on the day of Royal Assent.
- (2) Sections [A] and [B] come into force on the day after Royal Assent.

- (3) Sections [C], [D] and [E] come into force at the end of the period of [*m*] months beginning with the day of Royal Assent.
- (4) Sections [F] to [K] come into force on [date].
- (5) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (6) Regulations under this section may—
  - (a) [include transitional, transitory or saving provision,]
  - (b) make different provision for different purposes.

### **Powers to make subordinate legislation**

The approach to take in relation to drafting powers to make subordinate legislation will depend on whether the provision is to be a freestanding Bill provision, an amendment to an Act passed after 6 April 2011 or an amendment to an Act passed before that date.

#### *Freestanding Bill provisions and amendment of Acts passed after 6 April 2011*

##### *Application*

The following applies when drafting a freestanding provision creating a function of the Scottish Ministers to make orders, regulations or rules or a textual amendment inserting such a function into an Act passed on or after 6 April 2011.

See also the material on Form of subordinate legislation, below.

##### *Power to be exercisable by Scottish statutory instrument (SSI)*

There is no need to state in the provision or Bill containing the provision that the function is to be exercised by SSI (i.e. section 27 of ILRA should be relied upon with the effect that the function is exercisable by SSI).

In drafting provisions for UK Bills, any general provision that functions are to be exercisable by statutory instrument will need to be adjusted so as not to apply to devolved subordinate legislation.

##### *Instrument to be subject to affirmative or negative procedure*

If an order, regulations, rules, etc made in the exercise of the function are to be subject to parliamentary procedure, then provision should be included stating that the order, regulations, rules, etc are subject to the negative or affirmative procedure. (If the order, regulations, rules etc are to be subject to a form of parliamentary procedure other than the negative or affirmative procedure, then that procedure will have to be set out in full. In such a case, consideration should also be given as to the application of section 30 of ILRA.)

*Example provision*

- (1) The Scottish Ministers may by regulations specify ...
- (2) Regulations under subsection (1) are subject to the affirmative procedure.

*Amendment of Acts passed before 6 April 2011**Application*

The following applies when drafting a function of the Scottish Ministers to make orders, regulations or rules which is to be inserted into a pre-ILRA-commencement Act (whether an Act of the Scottish Parliament or a Westminster Act).

See also the material on Form of subordinate legislation.

*Power to be exercisable by Scottish statutory instrument (SSI)*

Section 27 of ILRA should be relied upon with the effect that the function is exercisable by SSI.

Any existing provision to the effect that all subordinate legislation under the pre-commencement Act is to be exercisable by statutory instrument can be treated as impliedly repealed and so can be left alone.

*Instrument to be subject to affirmative or negative procedure*

The existing procedural provision in the Act should apply (the only change that may be necessary will be to add a reference to the new function in the appropriate place within the provision (for example, to ensure it attracts affirmative procedure)). (If the order, regulations, rules etc are to be subject to a form of parliamentary procedure other than the negative or affirmative procedure and that other procedure is not already provided for in the Act, then the procedure will have to be set out in full. In such a case, consideration should also be given as to the application of section 30 of ILRA.)

The glosses in schedule 3 of ILRA (in conjunction, where appropriate, with the glosses in section 118 of the Scotland Act 1998) should be relied upon to modify the existing procedural provision so it fits with ILRA and so that the new function is subject to the appropriate ILRA procedure.

*Exceptions*

There will be cases where it is necessary or appropriate to depart from the above, either by amending the existing provision relating to statutory instruments or by making explicit that a particular function is subject to the negative or affirmative procedure.

*Example provision*

- (1) After section 50 of the Representation of the People Act 1983 insert—

**"50A Form of ballot papers**

The Scottish Ministers may by regulations make provision about the form of ballot papers."

- (2) In section 201 (regulations)—
- (a) in subsection (2), after "section" where first occurring insert "50A or",
- (b) in subsection (2A), after "section" insert "50A or".

For reference, section 201 of the 1983 Act reads:

- (1) Any power conferred by this Act to make regulations shall, except where this Act otherwise provides, be a power exercisable by the Secretary of State and except in the case of regulations under section 29(8) by statutory instrument.
- (2) No regulations shall be made under this Act by the Secretary of State otherwise than under section 110(7) above or section 203(4) below unless a draft of the regulations has been laid before and approved by a resolution of each House of Parliament.
- (2A) Any regulations under section 110(7) above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

## Form of subordinate legislation

Rules:

- A power in a Bill for the Scottish Ministers to make subordinate legislation exercisable by Scottish statutory instrument should be expressed as a power to make regulations rather than as a power to make an order, rules or any other form of instrument.
- This applies to powers which are amended into existing Acts of the Scottish Parliament or UK Acts as well as to stand-alone powers in Bills.

*Exception:*

- There is an exception for powers to make rules of procedure. A power may be expressed as a power to make rules if it is a power to make procedural rules for a court, tribunal or other body.

*Example provisions:*

**1 Power to modify schedule**

The Scottish Ministers may by regulations make such modifications of the list in the schedule as they consider appropriate.

## 2 Commencement

- (1) This Act comes into force on such day as the Scottish Ministers may by regulations appoint.
- (2) Different days may be appointed for different purposes.

## 3 Rule making power

The Scottish Ministers must make rules as to the practice and procedure of the Tribunal.

To note:

- In the example of a commencement power expressed as a regulation-making power, express provision is needed for the regulations to appoint different days for different purposes. This is done by allowing different provision for different purposes to be made in the commencement regulations. This did not need to be done when commencement powers were exercisable by order because section 8 (additional powers on commencement by order) of ILRA provides a general gloss to that effect for commencement orders. See also the discussion of commencement provisions above.

## Ancillary provision

### *General*

The section in a Bill that provides for the making of ancillary provision by regulations is to be in a section of its own and not combined with any other provision, such as a general regulations section.

The section is to be headed 'Ancillary provision'.

The section is to be placed among the final provisions of the Bill. See the material on Final provisions, above.

The content of the power is determined partly by which of the ancillary limbs are included, partly by whether the power can be used in relation to other regulations made under the Act and partly by whether the power can be used to modify enactments. The content of the power is also a function of the Bill within which it is contained - to a large extent, the Bill determines the areas of law in relation to which ancillary provision can be made.

### *Ancillary limbs*

The ancillary limbs (or those included) are to be in the following form and in the following order:

- incidental
- supplementary

- consequential
- transitional
- transitory
- saving

*References to things other than the Act itself*

If it is considered necessary or desirable in policy terms to allow ancillary provision to be made in relation to subordinate legislation made under the Act, the provision may include a descriptor that the power may be used for the purposes etc of the Act 'or any provision made under it'.

*Power to modify enactments*

If the power is to be capable of modifying other legislation, the section (rather than, say, the general regulations section) should say so. Generally, that power should include power to modify the Act itself.

*Procedure and relationship with general regulations section*

Procedure for regulations under this section should be dealt with in the general regulations section. Where there is no general regulations section, procedure should be dealt with in the ancillary provision section itself.

*Example provision:*

**1 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act [or any provision made under it].
- (2) [Regulations under this section may modify any enactment (including this Act)].



## Technicalities

### Citation of enactments

#### *Primary legislation*

In citing an Act of Parliament or an Act of the Scottish Parliament, a Bill should not include a reference to the chapter number or asp number. This applies to citation in both inserted text and freestanding provision.

#### *Subordinate legislation*

In citing a statutory instrument or a Scottish statutory instrument, a Bill should include reference to the appropriate series number. This should appear immediately following the title of the instrument and be in the form of the following examples (including the punctuation of the abbreviation):

- The Housing (Northern Ireland) Order 1983 (S.I. 1983/1118)
- The Public Contracts (Scotland) Regulations 2012 (S.S.I. 2012/88)

#### *European legislation*

For EU law, cite as follows:

- Council Regulation (EEC) No 1462/86
- Commission Regulation (EU) No 495/2010
- Regulation (EU) No 439/2010 of the European Parliament and of the Council
- Council Directive 86/609/EEC or Council Directive 2010/24/EU
- Directive 2010/13/EU of the European Parliament and of the Council
- Council Decision 2010/299/EU

### Cross-references

#### *'above/below' & 'of this Act'*

To note:

- do not use these words when cross-referring to other provisions
- exceptions are where elaboration is necessary or desirable:
  - to avoid uncertainty or ambiguity

- in textual amendment of an Act, for consistency within the Act (but this is less important in the case of provisions with internal cross-references being inserted at the same time).

### *exceptions and elaborations*

To note:

- try to rely on context where possible to avoid referring back or forward to a numbered provision containing the general rule or category, for example:
  - instead of referring to 'X mentioned in subsection (1)', you could refer to the X by a suitable description or defined label (but do not use 'first-mentioned' to distinguish between two persons or things)
  - instead of saying that 'subsection (1) does not apply to X', you could say positively that X is exempt from the relevant requirement
- never use the old-fashioned style of proviso (i.e. in an un-numbered free-standing block starting 'Provided that' immediately following the main provision that it qualifies).

### *subject to & without prejudice to*

To note:

- if possible, do not delay the main proposition by starting a sentence with 'subject to'
- try to do without 'subject to' altogether by relying where possible on the natural context (but a flag to the conflicting provision may be useful)
- if useful in order to reconcile competing provisions, try to explain the relationship between them instead of merely saying that 'X is subject to Y'
- similar considerations arise with 'without prejudice to'.

## **Definitions**

### *purposes*

Use definitions in line with their recognised purposes:

- expressing key concepts (for example, the types of domestic or protected animal to which animal welfare rules apply)
- clarifying, adjusting, extending or restricting meaning (for example, a reference to animal includes or excludes fish or bird)
- drafting convenience (for example, in creating a label such as 'the 2010 Act').

*form of words*

To note:

- most definitions take the following form: "the 2010 Act" is/means...
- it is perfectly acceptable in some contexts to narrate things in the following ways: 'For the purposes of this Part, the regulatory objectives are the objectives of...' 'In this Part, the references to being responsible for an animal include being in charge of it'.

*where to put them*

To note:

- where the defined term is used only once or twice, keep the definition in the same provision (for example, the same section)
- where the defined term is used more than once, place the definition as prominently as is useful to the reader, for example:
  - if detailed, in its own section
  - if fundamental, possibly even at the start
  - ordinarily, in a definitions section towards the end
- bear in mind the implications of section 24 of ILRA in relation to the meaning of Act-defined terms when used in subordinate legislation made under the Act.

*definitions section or index*

To note:

- a traditional interpretation section often includes:
  - index entries for definitions that have already been given
  - the only definition for a widely-used term
- a full index of defined expressions may sometimes be helpful to the reader where there is a large number of defined expressions (and, if used, should be placed in the last schedule).

*operative material*

To note:

- it is bad practice to include operative material in a definition. For example, it may be permissible to say that 'regulations' means regulations made by the Scottish Ministers but it would be going too far to include the Parliamentary procedure in the definition.

*borrowing v stating*

To note:

- if a required term has already been defined in the way desired in another Act, it may be useful to borrow the definition from that Act
- for example: 'X has the same meaning as in Y Act (see section 00)' 'X has the meaning given/is as defined by section 00 of Y Act'  
  
(but note: 'within the meaning of section 00' is to be avoided)
- style varies, for example, 'X is to be construed in accordance with Y Act'
- a set of definitions in the same Act may be attracted at once along the following lines (taking care not to include something unwanted):
  - 'an undefined expression used in this Act (but defined in section X of Y Act) is to be construed in accordance with section X of Y Act'
  - 'an expression used in this Act and in Y Act is to be construed in accordance with section X of that Act'
- always consider whether it would be better to restate the definition in full
- try to point the reader exactly to the definitional provision
- there may be logical reasons for opting for a particular approach, for example, for narrow concision or to capture jurisprudence.

*relying on natural context*

To note:

- do not define a term artificially if you may safely rely on context to give meaning:
  - for example, a person who is allowed to apply for something may, from then on, be referred to simply as 'the applicant'. There is no need to define the term 'the applicant'.
- do not clutter provisions with unnecessary explanation:
  - for example, an exception to an offence along the lines of 'A person who does X commits an offence' could be 'But the person does not commit an offence if X is done in accordance with a licence.'
- in each of the preceding examples, it is obvious that it is the same person throughout (without being labelled), in the second example, the first proposition is clearly subject to the second (without needing a cross reference etc).

*context otherwise requiring*

To note:

- this sort of wording is often useful to allow the general definition to cede gently to the particular elsewhere
- take care to:
  - avoid saying 'unless the context otherwise requires' if there is no case where the context would otherwise require
  - consider reconciling the relationship more clearly in such a case.

*listing definitions*

To note:

- in some cases, it may make sense to list definitions in conceptual order (for example, where each definition builds on the previous one)
- in most cases, definitions should be listed alphabetically
- definitions involving numbers (for example, 'the 2010 Act') should appear first
- some drafters dislike the use of a definition only for another definition (unless that is the only way to make the other definition manageable).

*punctuation etc*

To note:

- punctuate a definitional list in the usual way, i.e. linking commas, but with no conjunction
- do not number the entries as for normal paragraphs (for example, (a), (b) etc) but where a definition is split into paragraphs, those paragraphs should be numbered in the usual way.

*miscellaneous techniques*

To note:

- instead of prospective definition (say, where a global definition is not worthwhile), for example, 'in this section and [the next section], X means Y', consider repeating the definition
- do not define a term to mean something that the reader would not expect. For example, it may be misleading to say that 'fingerprints include footprints'
- a defined term should ideally in itself give the reader some clue as to what it means. For example, 'the 2002 Act' or 'the FOI Act' would be a better label for the Freedom of Information (Scotland) Act 2002 than 'the Principal Act'

- equally, colourless terms such as 'the relevant person' should where possible be replaced with something more helpful (for example, 'the entitled person')
- using the same label to denote different things in the same Bill may confuse
- on the use of letter labels / tag letters, see the section above on plain language.

### *obvious points*

To note:

- it should be made clear to which portion of the resulting Act the definition will apply
- in most cases, 'for the purposes of this section,' has no advantage over 'in this section' (but a possible exception is where the definition is in narrative form).

Rely wherever possible on ordinary dictionary meanings.

If a word or expression is defined in schedule 1 of ILRA, it does not need to be defined again. Rely on the definition in ILRA unless there is a good reason to repeat the ILRA definition of a particular word or expression or to give it a different definition.

## **Numbering**

### *un-numbered provisions*

To note that the usual way of numbering un-numbered provisions is as follows:

‘In section S—

- (a) the existing words from "X" to the end become paragraph (a),
- (b) after that paragraph (as so numbered) there is inserted—  
"(b) [text]."

### *re-using numbers*

To note:

- this relates to re-using for new provisions the numbering of provisions that are being replaced or have been repealed
- when substituting a complete sub-division of text (for example, a subsection), the numbering of the old provision should generally not be used for the new provision unless (as will frequently be the case) the subject matter of the new provision corresponds to that of the old provision

- when inserting a complete sub-division of text (for example, a subsection) in a place where a corresponding sub-division has been repealed, the numbering of the repealed provision should generally not be used for the new provision
- occasionally the drafter may decide that there is good reason to depart from the above approaches (for example, where a repealed provision was repealed many years ago).

#### *adding at beginning of series*

To note:

- this relates to inserting a provision at the beginning of an existing series of provisions (for example, a subsection at the beginning of a section or a schedule before the first schedule)
- new sections inserted before the first section of an Act are preceded by a letter, starting with A
- the same approach is taken in relation to all other divisions of text (other than lettered paragraphs)
- a provision inserted before A1/(A1)/(ai) is ZA1/(ZA1)/(zai)
- in the case of lettered paragraphs:
  - new paragraphs inserted before paragraph (a) are (za), (zb) etc
  - new paragraphs inserted before (za) are (zza), (zzb) etc
  - new sub-paragraphs inserted before (i) are (zi), (zii) etc.

#### *adding at end of series*

To note:

- this relates to adding a provision at the end of an existing series of provisions of the same kind (for example, a subsection at the end of a section or a schedule at the end of the schedules)
- the numbering should continue in sequence from the last existing number.

#### *inserting between provisions*

To note:

- this relates to inserting whole provisions between existing provisions:
  - new provisions inserted between 1 and 2 are 1A, 1B etc
  - new provisions inserted between 1A and 1B are 1AA, 1AB etc
  - new provisions inserted between 1 and 1A are 1ZA, 1ZB etc (not 1AA etc)

- new provisions inserted between 1A and 1AA are 1AZA, 1AZB etc (do not generate a lower level identifier unless you really have to)
- a new provision between 1AA and 1B is 1AB (not 1AAA)
- a new provision between 1AA and 1AB is 1AAA
- the above points apply equally to sub-paragraphs with roman numerals and lettered paragraphs:
  - new sub-paragraphs between sub-paragraphs (i) and (ii) are (ia), (ib)
  - new paragraphs between paragraphs (a) and (b) are (aa), (ab)
  - new paragraphs between paragraphs (a) and (aa) are (aza), (azb).

### *more than 26 inserted blocks*

To note:

- this relates to the rare occasions when the insertion of sections/paragraphs into an Act would result in a series of more than 26 inserted sections/paragraphs
- for sections, after Z use Z1, Z2, Z3 etc
- for paragraphs, after (z) use (z1), (z2), (z3) etc.

## **Schedules**

### *introduction*

To note:

- to introduce a schedule, do so in short terms as a signpost and to indicate its contents
- that is:
  - there is no need to say expressly that it has effect (because this is necessarily implied)
  - just say simply what it does (for example, that it makes further provision for X, Y and Z)
- a schedule falls to be regarded as part of the section introducing it (including for matters of definition or commencement).

To note, in an Act of the Scottish Parliament:

- reference should be made to a schedule 'of' an Act (not 'to' an Act)



- a schedule takes a lower case 's' (including in relation to describing or amending a schedule of a UK Act)

except where doing so would introduce ambiguity.

*lists of Acts*

To note:

- the usual way of setting out amendments to various Acts is as follows:

*'Criminal Procedure (Scotland) Act 1995*

1 (1) In the Criminal Procedure (Scotland) Act 1995, after section [X] [...].'

- the name of the Act needs to be given in the text of the amendment as well as in the heading

## Amendments and repeals

### Textual amendments

#### *operative words*

This relates to the form to be used when making textual amendments by adding, removing or replacing specified words in provisions or specified blocks of provisions.

Rules:

- use either:
  - the declaratory form 'after/for [the word] "X" there is inserted/substituted...', or
  - the imperative form 'after/for [the word] "X" insert/substitute...'

(noting that the trend seems to be towards the latter (but see the declaratory form of repeals below))

- where several related amendments are to be made, they may be introduced by 'X is amended as follows'.

#### *specifying blocks of provisions*

To note:

- specify the provision being amended at the appropriate level, for example:
  - 'in/after section 1(1)' or 'subsection (1) of section 1'
  - 'in/after section 1(1)(a)' or 'subsection (1)(a)' or 'paragraph (a) of subsection (1) of section 1'
- this point:
  - may turn on how precisely the lower level needs to be identified
  - is especially important in relation to repeals.

#### *lead-in and full-out text*

To note:

- where there is lead-in or full-out text before or after, for example, subsection paragraphs:
  - the former may be referred to as the 'opening words/text' (or 'the words/text before paragraph (a)')

- the latter may be referred to as the 'closing words/text' (or 'the words/text after paragraph (z)')
- this does not matter much if the relevant word appears only once in the provision.

#### *new numbered blocks*

To note:

- this relates to insertion of a whole new section, subsection or paragraph
- it is usual to specify that it is to be inserted 'after' another one
- 'before' can be useful in order to ensure that:
  - a section goes in after a Part or other heading
  - a subsection goes in ahead of the first of the existing subsections
  - a paragraph goes in ahead of the existing paragraphs (including after any lead-in words).

#### *where words occur*

To note:

- to refer to a particular occurrence of a word, the following formulations are acceptable:
  - 'after/for [the word] "X" in the first place where it occurs/appears'
  - 'after/for [the word] "X" where first occurring/appearing'
- for multiple amendments, the following formulations are acceptable:
  - 'after/for [the word] "X" in each place where it occurs/appears'
  - 'after/for [the word] "X" wherever it occurs/appears'
- while either formulation (whether for a particular occurrence or multiple amendments) is acceptable, be consistent in the chosen approach throughout a Bill
- in principle, a single amendment could be used to change a term used throughout a whole Act, but there are probably relatively few cases where this approach will be appropriate (and obviously a global amendment should only be used if the drafter is certain that it achieves the right result in every place).

*inserting text at beginning or end*

To note:

- this relates to the insertion of words at the very beginning or end of the text in a provision (but not a new numbered block, as mentioned above)
- the usual form is to say 'at the beginning/end' rather than to say that X is inserted 'before/after' particular words
- it is correct to refer to insertion, including of such a numbered block, even where adding something at the end (but some drafters continue to prefer to refer to addition here).

*adding to lists*

To note:

- when inserting an entry into a list (for example, defined terms or named bodies), where possible specify the exact entry point by reference to:
  - existing numbering (for example, 'after paragraph 00')
  - an existing entry by description (for example, 'the entry relating to X')
- refer to 'the appropriate place' only as a last resort (but even then try to guide the insertion, for example, by referring to alphabetical order).

*how much text to refer to*

To note:

- the starting point when drafting an insertion is that the insertion point should be referred to by reference to a single identified word (as this is sufficiently accurate if properly described)
- the starting point when drafting a substitution is that the minimum amount of text should be replaced (so as to avoid suggesting that more than the actual change is being made)
- however, removal and reinstatement of the odd extra word may sometimes be useful in order to:
  - identify the right place or occurrence without needing to spell out the relevant one in detail (for example, refer to inserting after 'appropriate person' if 'person' appears unqualified several times)
  - deal at once with multiple substitutions in the same provision (especially when little of the existing text is to be left)
  - get rid of previously-glossed words (for example, where it is unclear what version to refer to)

- add a word previously omitted in error (for example, to substitute 'court is to make' for 'court make')
- generally, give a better sense of what is being achieved
- note that, where a cross-reference to a paragraph expressed as 'subsection (1)(a)' is being updated or corrected, the numeric unit is '(1)(a)' not just '(a)'
- there are some risks in fiddling with extra words, for example:
  - increasing the chance of missing a cross-reference, non-textual modification or an old saving
  - making it more difficult for the reader to work out what the substantive change is.

### *schedules*

- See the material on Schedules, above, for some peculiarities of amending schedules.

### **Non-textual amendments**

This relates to 'glossing', i.e.:

- translating a provision so that it reads in a new way for all or some specified purposes (for example, for X read Y), or
- extending the operation of a provision to a newly stated purpose (for example, X applies also for Y).

Rules:

- avoid textual amendment form for any modifications when glossing, so:
  - say something like 'as if the references to X were to Y'
  - do not say anything like 'for "X" there is substituted "Y"' (but some drafters still use this in an 'as if' sense)
- often restatement will be preferable to glossing for the sake of the reader.

### **Formal headings and framework**

Rules:

- section titles, Part/Chapter titles and italic headings in Acts are amendable by referring to them as follows:
  - the title of section X or Part/Chapter Y
  - the italic heading immediately preceding section 00

- additionally:
  - a title/heading should be amended only if it has been falsified by amendments to the contents of the provision in question
  - do not amend a title/heading merely because amendments have made it less than ideal.

To note that the style 'the title/heading of X... becomes...' may be preferred to substitution of quoted words so as to:

- avoid textual amendment form (which is consistent with the approach to numbering un-numbered provisions (see also the material on Numbering, above))
- replace the whole thing (for neatness given that a title/heading can be seen as standing as a single and complete entity).

To note also:

- a title/heading should typically be formatted as it is meant to appear as amended (for example, bold font for a section title)
- it is common practice to deal with a title/heading after the substantive changes (and to treat it as distinct from the substantive text).

## **Repeals**

### *general*

This relates to the different categories of repeals:

- substantive, i.e. repeal of provisions that, while not obsolete or spent, are not replaced by positive provisions
- consequential, i.e. repeal of provisions that are superseded (and thus impliedly repealed) by positive provisions
- revisory, i.e. repeal of obsolete or spent provisions.

All repeals should be placed where clarity (and the interests of proper Bill debate) dictate they should appear.

To note:

- in particular:
  - a repeal may be put in a prominent section or a schedule of modifications or repeals
  - different groups of repeals may be dealt with differently (for example, in order to distinguish substantive from minor repeals)

- all repeals should be stated expressly and not left to implication (but noting that substitution of X for Y does not necessitate a further repeal of the over-written Y).

#### *double repeal*

##### Rule:

- while a repeals schedule may be useful in some cases, never specify in it anything repealed elsewhere, i.e. avoid double repeal.

#### *operative words*

##### Rules:

- refer to repeals as such, i.e. not as omissions (noting that section 15 etc ILRA refers to repeals as such)
- use the declaratory form '[the word/provision] X is repealed' (even though 'repeal [X]' would be consistent with the imperative form of amendments).

##### But:

- 'ceases to have effect' may be appropriate:
  - where the repeal is partially by reference to, for example, stated circumstances or categories
  - in the case of sunset provisions
- 'Y is revoked' is technically correct for revocation of subordinate legislation.

#### *effect of repeals - transitional and saving provisions*

The relevant interpretation legislation contains default transitional and saving provision in relation to repeals. These provisions should be considered as the starting point. Specific transitional and saving provision should be made if the default provisions do not produce the right result in policy terms or if their effect is not clear in the context.

##### As to which relevant interpretation code applies:

- where an Act of the Scottish Parliament (ASP) repeals a provision in an earlier ASP:
  - if the repealing ASP is post-commencement of Part 1 of ILRA (which occurred on 4 June 2010), sections 15, 16, 17 and 19 of ILRA apply
  - if the repealing ASP is pre-commencement of Part 1 of ILRA, the equivalent provisions in the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order (S.I. 1999/1379) apply

- where an ASP repeals provisions in an earlier UK Act, the equivalent provisions in the Interpretation Act 1978 apply (see section 23A of the 1978 Act)
- where a UK Act repeals provisions in an earlier ASP, the equivalent provisions in the 1978 Act apply



## Specific legal expressions and terms

### Referring to a Bill in another Bill

There is no rule about what can and cannot be part of the text of a Bill. (But see the material on Form and Content of Scottish Parliament Bills, above, which details the Presiding Officer's recommendations on style and content.)

A Bill could refer to a non-legislative document, such as a semi-official publication. This can raise issues however and so needs to be done with caution. If the document changes name or ceases to exist, it can render the provision defunct.

Accordingly, there is nothing to stop a Bill ('Bill A') from referring to another Bill ('Bill B') regardless of the stage that Bill B is at.

To note:

- Scottish Parliament Bills are not generally referred to until they have had their general principles approved following the Stage 1 debate
- it is generally the practice at Westminster for Bill A not to refer to Bill B unless Bill B has received its Second Reading in both Houses
- there may be situations where it is appropriate for a Bill to be referred to by another Bill even though the first Bill hasn't got as far as approval of its general principles at Stage 1.

### Referring to bodies corporate

Rules:

- treat a local authority or other body corporate as a singular noun
- the exception is where it would cause confusion when textually amending an Act that uses the plural.

### Referring to the Scottish Ministers (individually and collectively)

#### *Conferring functions on Ministers*

Section 52(1) of the Scotland Act 1998 provides that statutory functions may be conferred on the Scottish Ministers by that name. Subsection (3) of the same section goes on to provide that statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Government. This underpins collective responsibility.

In Bills, therefore, functions should be conferred on 'the Scottish Ministers'.

Allocation of functions to a particular member of the Scottish Government is an administrative matter for the First Minister.

The phrase 'member of the Scottish Government' includes the First Minister and the Lord Advocate (and also the Solicitor General for Scotland) so they could be allocated functions of the Scottish Ministers.

Bills should not attempt to confer statutory functions on a particular member of the Scottish Government (but see below in relation to the First Minister and the Lord Advocate). This is because:

- such a provision would undermine collective responsibility
- any such function would not be a function of the Scottish Ministers and how it would fall to be treated in terms of the Scotland Act 1998 is not clear
- the titles (and portfolios) given to particular members of the Scottish Government are subject to administrative change from time to time and from administration to administration.

#### *Conferring functions on the First Minister and Lord Advocate*

The Scotland Act 1998 does contemplate that functions could be conferred specifically on the First Minister or the Lord Advocate (see section 52(2), (5) and (6)).

Such functions would not be 'functions of the Scottish Ministers' and so could not be exercised by any other member of the Scottish Government. Such functions are also not subject to collective responsibility.

So, in appropriate cases, a Bill can confer a function on the First Minister or the Lord Advocate.

Functions may be conferred on the Lord Advocate to reflect the Lord Advocate's role as head of the systems of criminal prosecution and investigation of death, to reflect the Lord Advocate's role as a law officer (and legal representative of the Scottish Government), or to reflect a wider role as guardian of the public interest.

Conferral of functions specifically on the First Minister is rare. See, for example, Chapter 5 of Part 2 of the Judiciary and Courts (Scotland) Act 2008 (removal of judges from office) and sections 21 to 25 of the Courts Reform (Scotland) Act 2014.

#### *Referring to Ministers as an entity*

Occasionally a Bill may need to refer to the Scottish Ministers as an entity, for example, in a Bill setting out a regulatory regime that is to apply to a defined list of public bodies (for example, the Public Records (Scotland) Act 2011, which sets out provisions regulating the management of records by public bodies, or the Freedom of Information (Scotland) Act 2002, which sets out a scheme regulating the disclosure of information by public bodies). Here, it would be appropriate to refer simply to 'the Scottish Ministers'.

The references to the Scottish Ministers would not, however, be apt to cover the First Minister or the Lord Advocate in relation to any functions conferred on them specifically. In particular, such a reference would not be apt to cover the Lord Advocate in respect of Crown Office functions.

Consideration would therefore need to be given to whether the First Minister or the Lord Advocate need to be mentioned separately, in addition to the Scottish Ministers. See, for example, section 1(1) of the Judiciary and Courts (Scotland) Act 2008.

#### *Referring to a member of the Scottish Government*

Sometimes it may be appropriate in a Bill to refer to 'a member of the Scottish Government'.

This may be appropriate where the Bill is providing for a member of the Scottish Government to be a member of a committee or body. See, for example, paragraph 9 of schedule 9 of the Public Services Reform (Scotland) Act 2010 (committees of Creative Scotland).

It may also be appropriate to refer to a member of the Scottish Government in relation to things done, or in some other context not involving the actual conferral of a function. See, for example, section 7(3) of the Scottish Public Services Ombudsman Act 2002. Such a reference would be apt to cover things done by the First Minister or Lord Advocate as well as by the Scottish Ministers.

### **Mode of trial**

#### *Summary only*

- JP court or sheriff court

#### *Triable summarily or on indictment*

- summary - JP court or sheriff court
- indictment - sheriff court or High Court
- 'either-way' offence is not a known term here (but is often used informally)

#### *Indictment only*

- sheriff court or High Court

The mode of trial is normally implied by the terms of the penalty provisions as these will mention summary conviction and/or conviction on indictment

Solemn proceedings covers proceedings on petition as well as on indictment, but the petition is pre-trial.

## Referring to 'charge' and 'proceedings'

### *References to 'charging'*

Try to avoid an unqualified reference to charging a person with an offence.

If the provision is about charging by the police, it is often worth saying so explicitly. If the provision is about charging by the prosecutor, there may be a ready alternative (for example, a reference to initiation of criminal proceedings).

This matter is subject to the reforms contained in the Criminal Justice (Scotland) Act 2016 implementing the Carloway Report. Part 1 of that Act includes 'official accusation' as a blanket concept to cover the status of a person who has been charged by the police and/or is subject to criminal proceedings.

### *References to 'proceedings'*

There has historically been a degree of variation in provisions referring to the initiation of proceedings by the prosecutor.

This matter is not yet resolved so consider what is most appropriate (and the possibility of differences between a general expression and something more specific). For reference, some of the specific forms of initiating criminal proceedings are:

- serving a complaint or indictment
- in summary cases, citation of the accused or starting proceedings by warrant
- in solemn cases, proceedings on petition.

Even if using something general, there may be a reason to adopt particular words, for example:

- initiation, instigation or commencement of proceedings,
- proceedings being raised or a prosecution being brought or more broadly as to proceedings by the prosecutor or against the person.

See also – Conviction of alternative offences.

## Types of court

### Sheriffs and sheriff courts

#### *Background*

- Individual sheriffs have jurisdiction in their own right - inferred from section 38(1) of the Courts Reform (Scotland) Act 2014 and, prior to that, section 7 of the Sheriff Courts (Scotland) Act 1971

- In civil matters, this is in contrast to the Court of Session, which acts as a collegiate body (with the Court as a body having the judicial function - sections 2(4) and (5) of the Court of Session Act 1988)
- In criminal matters, compare to the High Court - reference may be made to the Court or a judge of it as the context requires
- Originally there was only one sheriff per sheriffdom (others being sheriff substitutes)
- There are now a number of sheriffs for a sheriffdom (with a sheriff principal above them)
- But the judicial function is still that of the sheriff and not of the court as such
- So the court may be regarded as the forum in which the sheriff's judicial function is exercised (and this is confirmed by section 1(3) of the Courts Reform (Scotland) Act 2014).

#### *Statutory reference*

- Accordingly, legislation often refers to the sheriff (or, where appropriate, more narrowly to the sheriff principal)
- This is most suitable where the judicial function is key (for example, referring to an application to, or a decision or order of, the sheriff)
- We may rely on general jurisdictional provision for geographical application of a reference to the sheriff
- Note that under ILRA as amended by the Courts Reform (Scotland) Act 2014, 'sheriff' is to be construed in accordance with section 134(2) and (3) of the 2014 Act.
  - This means that the term will cover the other various categories of judiciary in the sheriff courts (for example, sheriffs principal, summary sheriffs and part-timers etc) so far as they are exercising the jurisdiction of a sheriff.
  - So even though it may be intended that a certain judicial function conferred on a sheriff should as a matter of practice be exercised by a summary sheriff, it will still be appropriate to draft in terms of conferring the function on the 'sheriff' and rely on section 134 of the 2014 Act, provided that the summary sheriff is otherwise enabled to exercise the sheriff's function in relation to that matter - see sections 44 and 45 of the 2014 Act for the competence of a summary sheriff.

#### *Other points*

- It may be appropriate to refer to the sheriff court where some organisational or procedural (as distinct from jurisdictional) aspect is being dealt with

- Also, referring to the court may be useful where the sheriff/court is not the only relevant judge/court (say where other courts/similar proceedings are also being referred to (i.e. justice of the peace court, the High Court or the Court of Session))
- But, generally, there is nothing wrong with mentioning:
  - proceedings (civil and/or criminal) in the sheriff court (rather than before the sheriff),
  - a person who has been convicted in the sheriff court (rather than by the sheriff)

The wording selected will simply depend on the context.

- Consider section 136(3) of the Courts Reform (Scotland) Act 2014
- It may be necessary to distinguish between criminal and civil functions (for example, the sheriff exercising criminal/civil jurisdiction).

## **Justice of the peace courts and relevant judicial officers**

### *Judicial officers*

A justice of the peace court may be constituted by:

- one or more justices of the peace (see section 6(2) of the Criminal Procedure (Scotland) Act 1995), or
- a summary sheriff (see section 129 of the Courts Reform (Scotland) Act 2014).

### *Proceedings in justice of the peace courts*

The justice of the peace court itself should be seen as the judicial authority (as distinct from the type of judge in it).

There should be no reason to pick out the justice of the peace court constituted in a particular way, as justices of the peace and summary sheriffs have the same sentencing powers when sitting in justice of the peace courts.

Since it is the court itself that has the authority, drafting practice should therefore be to refer to the court rather than the judicial officer constituting the court.

Note the contrast between this and the common way of referring to things done by the sheriff (rather than in the sheriff court).

Although the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 uses the acronym 'JP court', that use is not authorised for all purposes. Therefore, Bills should use the proper name of the court - justice of the peace court (noting lack of capitalisation) - or may use 'JP court' with an interpretative provision defining it to mean a justice of the peace court.

*Stipendiary magistrates*

Section 128 of the Courts Reform (Scotland) Act 2014 provides for the abolition of the office of stipendiary magistrate (effective 1 April 2016). Accordingly, references to stipendiary magistrates ought to be avoided except in a limited range of circumstances such as when the status of a person as a stipendiary magistrate at a particular point in time may have consequences (for example, Part 1 of schedule 1 of the Law Reform (Miscellaneous Provision) (Scotland) Act 1980 (ineligibility for jury service)).

# PART 2

## EXCELLENCE

WE ARE LEGISLATIVE EXPERTS,  
DEDICATED TO DELIVERING POLICY  
THROUGH HIGH QUALITY LEGISLATION.

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## OBJECTIVITY

WE BRING A FRESH PERSPECTIVE,  
ANALYSING AND TESTING POLICY.

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## CREATIVITY

WE ARE INNOVATIVE,  
PROVIDING ADVICE AND DRAFTING LAW  
WHICH BEST DELIVERS POLICY OUTCOMES.

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## TEAMWORK

WE ARE COLLEGIATE AND COLLABORATIVE,  
SUPPORTING EACH OTHER AND COLLEAGUES  
ACROSS THE SCOTTISH GOVERNMENT.





## Part 2: Guidance on specific topics

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### I. Arbitration

#### Arbitration

The Arbitration (Scotland) Act 2010 (the 2010 Act) applies to statutory arbitration. This has the effect that the Scottish Arbitration Rules set out in schedule 1 of the Act, and its substantive provisions, will govern any arbitration carried out under a legislative provision.

The Rules set out a scheme which allows an arbitration to proceed from appointment of arbitrator to final and binding determination of dispute. All that is needed to attract the 2010 Act is for legislation to say that a dispute is to be resolved by arbitration or words to that effect (as per section 16(2) of the 2010 Act). This is all that is needed to provide a mechanism for resolution of the dispute.

But note that the 2010 Act rules may not always be appropriate for particular arbitrations. Section 16(3) of the 2010 Act makes clear that the 2010 Act does not apply where an enactment makes contrary provision for a particular arbitration. Each proposal for a statutory arbitration should therefore consider on a case-by-case basis whether it is appropriate to adopt the entirety of the 2010 Act scheme in relation to the dispute concerned.

The vast majority of the 2010 Act will be appropriate in each case but there are likely to be some disputes for which distinct provision requires to be made. For example, it may be policy that the arbitrator should hold particular qualifications (for example, be a chartered accountant) or hold a particular office (for example, Dean of Faculty), depending on the type of dispute concerned. Bespoke provision would be needed to this effect to bolster or displace the rules on appointment of arbitrator.

Schedule 1 of the 2010 Act contains 'mandatory rules' and 'default rules'. This distinction is relevant mainly for contractual arbitrations as parties are free to contract out of default rules but may not opt to arbitrate in a manner inconsistent with a mandatory rule (or with a substantive provision of the Act). However, the fact that certain provisions are considered mandatory for contractual arbitrations means that greater consideration should be given to any proposal to adopt a different approach for a particular statutory arbitration (for example, to change position on finality of award set out in section 10 and rules 67 to 70).

An illustration of arbitration provisions drafted in light of the 2010 Act is section 3D of the Solicitors (Scotland) Act 1980 as inserted by section 133 of the Legal Services (Scotland) Act 2010.

**Note:** As at the date of publication, section 16 of the 2010 Act is not in force for statutory arbitrations. Until it is commenced, it may be appropriate to include a transitional provision giving effect to it in relation to new statutory arbitrations.

## II. Criminal law, justice and procedure

### Creating offences and penalties

#### Structure of offence and penalty provisions

Where an offence is substantive or free-standing, the offence and penalty provisions should be placed together in their own section (along with any ancillary material that is required). By way of example:

##### *Example provision*

#### **1 Offence of shooting the messenger**

- (1) A person commits an offence if the person shoots the messenger.
- (2) A person who commits an offence under subsection (1) is liable—
  - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

Conversely, a minor offence that depends heavily on substantive material may be left in the same section as that material.

In every case, the offence and penalty provisions should be stated respectively as a distinct set of propositions in different blocks of text. Even if they are short, do not run them together in the same sentence.

But:

- separate ways of committing the same offence may be narrated together (including by tabulated paragraphs)
- two or more related offences may be put into a single section
- a general section or schedule covering the penalties for variously-located offences is occasionally acceptable if that aids accessibility or comprehension or it is convenient for another reason (for example, where related offences have identical penalties).

Note that there is sometimes an important policy or practical difference between:

- a single offence committed by doing X or Y (where it may not matter which is proved), and
- a separate offence for each of X and Y (where it is essential which is proved).

An example of the first bullet is the vandalism offence under section 52 of the Criminal Law (Consolidation) (Scotland) Act 1995 - this can be committed wilfully or recklessly as respects destruction or damage.

## Formulations for creating offences

### *Common formulations*

The most common formulations are along the following lines:

- The **traditional method**, for example:
  - ( ) A person who [narrate] commits an offence.
- The **descriptive method**, for example:
  - ( ) A person commits an offence if the person [narrate].
- The **command method**, for example:
  - ( ) A person must not/must [narrate].
  - ( ) A person who [contravenes/fails to comply] commits an offence.
- The **declaratory method**, for example:
  - ( ) It is an offence to/for a person to [narrate].

### *Choosing method*

Which formulation to use should be based on something more than individual habit. As well as the need to keep things as simple as possible for ease of readability, the following factors are in play.

Whether to opt for the traditional or descriptive method may depend on how long the narration is and whether it involves a list. As ever, it is undesirable to keep the subject and the verb far apart. So the traditional method is often better for shorter descriptions, and the descriptive method for longer (especially if involving any qualification or tabulation).

A few minor points here. Adjustment of the traditional method so as to say 'A person commits an offence who...' is questionable on syntactic grounds. Repetition of the noun for gender-avoidance in the descriptive method is a small price to pay for using it. In the descriptive method, it is not unknown to have the 'if...' clause first.

The command method may be especially useful for an administrative situation in which the prohibition or compulsion in the first limb is itself important. Even though the offence aspect would be necessarily implied by the penalty provision, do not omit the second limb. Note that, where there are several rules in play, the second limb may allow for each respective breach to be caught as an offence at once.

The declaratory method is probably best where something of a declaratory nature is especially useful to announce the offence (perhaps even in anticipation of the

wording being replicated in public notices). Variations of the declaratory method include:

'( ) An offence is committed by a person who...'

'( ) [Doing/failure to do X] is an offence.'

Within a single Bill, consistency of approach is an important consideration but this can cede to the requirements of the particular offence in hand (without forgetting the possible tensions of style when amending an existing Act).

Also, do not forget that the formulation of the offence needs to be translatable into a prosecutorial charge (which must reflect the statutory form for complaints and indictments).

### *Identifying the person*

The settled position is that 'a person' should be used in identifying the person in question. The reason for this is that the required sense is achieved without resorting to 'any' (i.e. 'a person' catches each and every person who acts as narrated).

However, it is recognised that provision may need to be made for the commission of an offence in a special capacity or in particular circumstances only. This should be done by adapting one of the methods discussed above. For example:

- for a special capacity, this would involve:
- in the traditional, descriptive or command method, describing the person more fully (for example, 'A person [describe]')
- in a version of the declaratory method, doing the same (for example, 'It is an offence for a person [describe]')
- alternatively, mentioning the capacity by direct reference to a status, position or office (for example, the master of a ship or the holder of a licence)
- for particular circumstances, break up the detail if it is not possible to accommodate it all comfortably within the narration of the offence.

Examples of where considerable detail is broken up are:

- section 38 or 39 of the Criminal Justice and Licensing (Scotland) Act 2010
- sections 1 and 2 of the Domestic Abuse (Scotland) Act 2018.

For a special capacity or particular circumstances always consider the purpose for which the limitation is relevant. For example, it may be essential to state in the narration of the offence by whom or the exact circumstances in which the offence can be committed (for example, where appropriate, excluding responsibility or behaviour when the person is off-duty or off-premises). But, if taking a narrow approach, it is also worth considering whether there is desire for or risk of displacing the general rule on art and part offending. On the possibility of displacing that rule

where such an approach is taken, see the discussion in Gordon, *Criminal Law*, Vol 1 (3rd ed) para 5.09 to 5.11. Section 255 of the Criminal Procedure (Scotland) Act 1995 deals with proof of a special capacity.

### *'Commits an offence'*

The settled position is that 'commits an offence' should be used when using the traditional, descriptive or command method. This does not arise in the declaratory method.

The reason for preferring this over the alternative 'is guilty of an offence' is that it is a straightforward (and concept-free) way of expressing culpability. The concept of guilt (versus innocence) should be left to judicial application of the law. At the stage of the offending, the offender is not yet guilty in the legal sense.

### **Giving offences names**

If possible where the offence is substantive, it is suggested that the section title or another heading should mention the offence and give an indication of its nature (see the example provision in the material on Structure of offence and penalty provisions).

This may be helpful to the reader and lend itself to adoption as the informal name of the offence. For example, see the provisions for the smoking ban in sections 1 and 2 of the Smoking, Health and Social Care (Scotland) Act 2005 and the sets of offences in Part 8 of the Licensing (Scotland) Act 2005.

If the offence is very important (or it is otherwise useful to do so), it may be appropriate to give it a formal name by which it is to be known at large. For example, see the various offences in the Sexual Offences (Scotland) Act 2009 or section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. Despite the approach in these examples, it is suggested that the statement to this effect may be made apart from the narration of the offence for the sake of avoiding clutter.

Typical wording for this is:

- '... who does X commits an offence, to be known as the offence of X', or
- '... who does X commits the offence of X'.

If not relying on a section title or other context, it is recommended that the name is given in its own subsection within the offence provisions, for example:

- '( ) An offence under X is to be known as the offence of [name].'

In some contexts where there is a previous common law offence that is being modified or abolished in some way (for example, rape) it may be useful to use the label of the 'statutory' offence in order to distinguish it from its common law predecessor, even if only for transitional purposes. Having two different offences with the same name may cause confusion.

*Examples of practice*

Several offences in the Glasgow Commonwealth Games Act 2008 are given definitional labels for the sake of cross-referencing in that Act.

Schedule 5 of the Scottish Independence Referendum Act 2013 uses the style 'A person commits an offence of [personation] [a corrupt practice]...', but this is for technical reasons within election law and does not really inform other contexts.

**Drafting penalty provisions***Referring to the offence*

For referring back to the offence (however framed), it is settled that the following formulation should be used:

'( ) A person who commits an offence [cross-refer].'

The cross-reference here should be by mention of the offence provision or its name or label (if given one - see naming conventions), without regurgitating the words narrating the offence.

This wording is consistent with the 'commits' approach to offence-creation, and the offender's actual guilt at the sentencing stage is clear from the express reference to conviction in the specification of the penalty itself. Here, 'a person' suffices even if the offence provision mentions a special capacity (see Formulations for creating offences).

*Specifying the penalty*

If both summary and solemn penalties are being accommodated, use tabulation with the less serious first (and deal as required with rare situations where different courts are specified):

- (3) ... is liable:
- (a) on summary conviction, [specify],
  - (b) on conviction on indictment, [specify].

Where an offence is both imprisonable and finable, use:

( ) ... to imprisonment [specify] or a fine [specify] (or both).

In addition:

- 'conviction on indictment' and 'summary conviction' are recognised expressions
- summary-only offences are not usually imprisonable (subject to policy)
- in specifying a term of imprisonment, it has become the norm to use 'term' in preference to 'period' (but it is correct to say 'life imprisonment' or 'imprisonment for life')

- for imprisonment or fining with a given limit, 'not exceeding' is standard
- when specifying liability to imprisonment or fining:
  - for consistency, refer to imprisonment first and fining second
  - for style, use one 'to' throughout and no commas
  - for avoidance of doubt over the strength of the first 'or', use '(or both)' while keeping the words within parentheses
  - for the sake of simple narration, no tabulation is needed for the separate elements.

#### Example

- (2) A person who commits an offence under subsection (1) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both).



## Guidance on other aspects of criminal law and procedure

### Secondary offending

#### *Art and part generally*

Art and part liability operates generally at common law but section 293(1) of the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') removes any doubt about the position for statutory offences. The effect is that secondary offenders commit the same common law or statutory offences as the principal actors (albeit in a different capacity).

Therefore:

- in creating offences for Scotland, it is usually unnecessary to provide expressly for the secondary capacity (for example, by mentioning aiding and abetting)
- for penalty provisions, explicit reference to the offending capacity is unlikely to be needed.

An exception may arise where assisting someone in the act is the substantive mischief or a special rule is wanted for the accessory, or there is need to maintain the operation of the general rule in relation to a special capacity or particular circumstances where that rule would otherwise be displaced as highlighted in the material on Formulations for creating offences under the heading 'Identifying the person'.

### Inchoate offences

#### *Attempts*

Attempts are automatically imported into all common law and statutory offences by section 294 of the 1995 Act. The importation covers both summary and solemn prosecution. Section 294 automatically feeds through to the penalties arising. The starting point is that section 294 should usually be relied upon when creating offences.

Therefore:

- for most new offences for Scotland, it suffices to provide for the completed act
- for penalty provisions, explicit reference to attempt is unlikely to be needed
- generally, it is difficult to displace section 294 by implication: an express reference to attempt in one provision does not imply that section 294 is ousted in connection with another provision in the same Act that is silent on attempt.

Even though an attempt-offence is distinct from the completed offence, the penalty for the completed offence applies to the attempt implied by section 294 without needing to say so.

This is borne out by the first of the matters mentioned above.

There is no need in the ordinary case to mention section 294 in the Explanatory Notes accompanying an Act of the Scottish Parliament.

In addition, paragraph 10(1) and (2) of Schedule 3 of the 1995 Act allows for conviction for attempt where a completed offence is charged.

*Attempts: exception to general rule*

An exception may arise where attempting to do something is the substantive mischief or a special rule is wanted for the attempt.

In some areas, it may be justifiable to refer expressly to an attempt-offence. This is where an attempt would amount (or just about amount) to a substantive offence in its own right alongside the completed act (for example, trying to drink drive, take drugs into a prison or buy cigarettes for a minor). Here, the statutory context may tend to favour non-reliance on section 294.

For examples, see:

- section 41(1) of the Prisons (Scotland) Act 1989 (as amended by section 34 of the Criminal Justice and Licensing (Scotland) Act 2010)
- section 6(1) of the Tobacco and Primary Medical Services (Scotland) Act 2010.

*Attempts: limit to section 294 of the Criminal Procedure (Scotland) Act 1995*

Section 294 of the 1995 Act does what it does and no more. It does not for all purposes gloss a reference to a completed-act offence so that it always includes the attempt-offence. So the distinctiveness of attempts may be relevant when referring in other contexts to an offence narrowly by its name or description, perhaps when doing this in order to attract another rule applying beyond offence-creation. For example, as to the recording of a conviction on a register of offenders.

In this context, the point is that - for common law offences at least - a conviction for murder must be seen as distinct from a conviction for attempted murder.

For statutory offences, it could be argued that conviction of the attempt-offence is as much by virtue of the enactment as the completed offence even though the attempt-offence is otherwise distinct. As well as being consistent with the above approach to the creation of offences, for statutory offences this is consistent with the approach of not referring to section 293(2) of the 1995 Act in the case of secondary offending.

However, if specification of the attempt-offence is required, it is better to treat common law and statutory offences as one in order to avoid giving rise to any implication that they are to be treated differently from each other.

For examples of places where specification of the attempt-offence is also required, see:

- the list in section 210A of the 1995 Act or the one in Part 1 of schedule 1 of the Sexual Offences (Scotland) Act 2009
- the extension in section 288BC(3)(a) of the 1995 Act (as inserted by section 63 of the Criminal Justice and Licensing (Scotland) Act 2010).

Note that the proper approach is to refer to attempting to commit offences rather than to section 294 of the 1994 Act, for example:

'[an offence of] attempting to commit an offence [specify]'.

#### *Incitement and conspiracy*

In the case of incitement or conspiracy, the equivalent position to that for attempts is less clear for drafting purposes (noting that the former may in some circumstances also amount to art and part participation and is mentioned in that regard in section 293(2) of the 1995 Act (but see the material on Secondary Offending, above)).

If inchoate offending in either respect is to be caught for any reason, it may be safer to provide for this expressly. Again, see the examples given above of places where specification of the attempt-offence is also required.

#### *Attempts: UK Act peculiarity*

Beware of a reference to an attempt-offence that has roots in a UK Act, when replicating something done for England and Wales (E+W). The equivalent rule in E+W to section 294 of the 1995 Act does not extend to summary-only offences, so for E+W there is sometimes a reference to an attempt-offence to fill the gap.

This has occurred on occasion. For example, see section 41(1) of the Prisons (Scotland) Act 1989 (both as enacted and amended). Section 294 of the 1995 Act could have been relied on through silence in the provision in hand.

That said, there lurks the question of giving rise to the wrong impression through omission of the attempt-offence in comparison with the E+W equivalent (as enacted around the same time) or with the previous version on subsequent amendment. So, for example, if re-enacting in a Scottish Parliament Bill something from a UK Act, the unnecessary reference to attempt is excised in favour of reliance on section 294 of the 1995 Act. It might be worth flagging this in the Explanatory Notes so that the apparent omission does not invite the question whether the attempt element remains in play. However, as noted above, it would be difficult to oust section 294 by implication.

## Conviction of alternative offences

It is usually unnecessary to provide expressly that a person can be convicted of a different offence from the offence libelled in the indictment or specified in the complaint. As discussed below, the Criminal Procedure (Scotland) Act 1995 provides some general rules in this regard (many of which restate the common law).

Note that this is distinct from conviction of one of two offences that are, as is occasionally done by the prosecutor at the outset, charged expressly as alternatives to be picked from on the face of the complaint or indictment. In turn, this is distinct from the situation envisaged by paragraph 9(1) of schedule 3 of the Criminal Procedure (Scotland) Act 1995.

### *Provision at large in the 1995 Act*

For alternative charges for the purposes of prosecution and conviction, see paragraphs 7 to 10 and 14 of Schedule 3 of the Criminal Procedure (Scotland) Act 1995. This material is mainly a restatement of common law rules.

In particular, see:

- paragraphs 7, 9(2) and (3) and 10(3) for convicting of parts or aspects,
- paragraph 8 for interchangeability of offences of dishonesty (and implied alternative of reset),
- paragraph 10(1) and (2) for attempt as implied alternative - see also inchoate offences
- paragraph 14 for substitution of common law offences for statutory offences (but not vice versa).

Paragraphs 7 and 9(2) and (3) come close to creating general rules for lesser or subsumed alternatives. So the accused may be convicted of any part or aspect of a charge that could constitute a charge in its own right. Examples by reference to assault and robbery are as follows, but the rules are far from limited to these offences:

- X faces a single charge of assaulting and robbing Y: X may be convicted of either the assault or the robbery (instead of the whole thing) since each is capable of standing its own.
- X faces the same charge: X may (similarly) be convicted of assault with intent to rob.
- X faces a charge of assault with intent to rob: X may (similarly) be convicted of assault without the intention-aggravation.

Note also the specific example of culpable homicide always being an implied alternative to murder.

In addition, see sections 96 and 159 of the 1995 Act, which enable charges on complaints or indictments to be amended in the course of proceedings. Subject to certain restrictions, this extends to allowing a different offence to be specified in light of what the evidence emerging at trial supports (but there is substantial case law on what may be done by reference to the character of the offence).

*Providing expressly for alternatives*

For new statutory offences, specific provision is needed for particular statutory alternatives. The reason is that the rules in the 1995 Act do not generally allow for substitution of one statutory offence for another. Whether something beyond these rules is wanted is a matter of what makes sense in policy terms in the relevant context. For examples of specific provision like this being made, see:

- sections 23 and 24 of the Road Traffic Offenders Act 1988 (noting the ‘without prejudice’ list of enactments in section 24(6)),
- section 50 and schedule 3 of the Sexual Offences (Scotland) Act 2009 (noting that this Act put many sexual offences at common law onto a statutory footing for the first time (even rape)),
- section 39(8) and (9) of the Criminal Justice and Licensing (Scotland) Act 2010,
- section 8 of the Domestic Abuse (Scotland) Act 2018,
- section 2(3) and (4) of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Act 2018,

Our common law rules (whether or not restated) are fairly flexible.

### III. Crown Application

#### What is Crown application?

This part of the guidance concerns Crown application, meaning the application of an Act to the Crown.

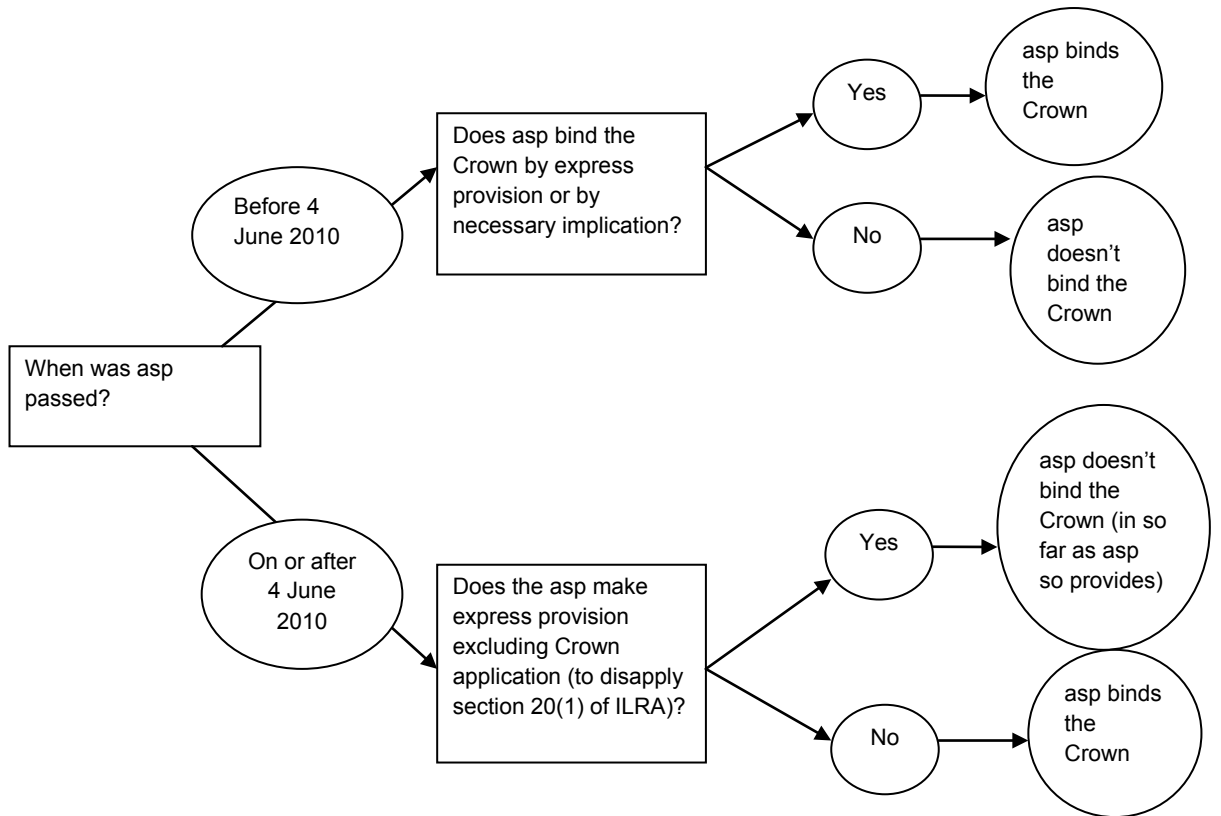
The well-established common law doctrine of Crown immunity is that the Crown is not bound by statutory provisions except by express words or necessary implication.

In *Lord Advocate v Strathclyde Regional Council and Dumbarton District Council* [1990] 2 AC 580 (“the Faslane case”), the House of Lords reaffirmed this doctrine and confirmed that it applied under Scots law. The UK Supreme Court has confirmed this as a rule of statutory interpretation in *R (on the application of Black) v. Secretary of State for Justice* [2017] UKSC 81. Nevertheless, the Supreme Court urged the UK Parliament to consider abolishing the rule or reversing the presumption (per Lady Hale’s judgment, paragraphs 33 to 35).

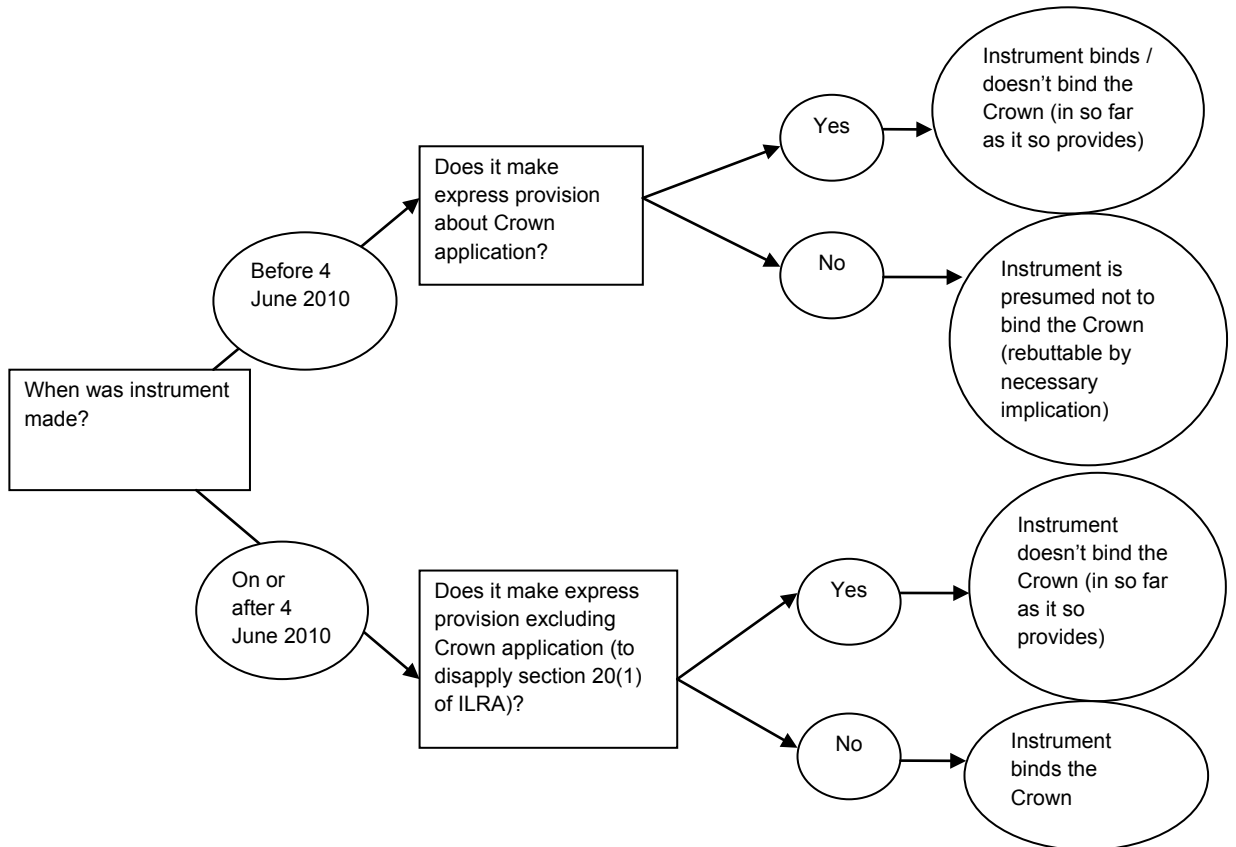
By contrast though, under Scots law, since 4 June 2010, section 20(1) of ILRA has reversed that presumption for asps and “Scottish instruments” (defined by section 1(4) of ILRA). As such, an asp whose Bill received Royal Assent on or after 4 June 2010, or a Scottish instrument made on or after that date, is presumed to apply to the Crown unless express provision is made to the contrary.

The decision trees on the following page set out the basic steps in making an initial assessment of whether an asp or a Scottish instrument binds the Crown.

*Decision tree 1: does an asp bind the Crown?*



*Decision tree 2: does a Scottish instrument bind the Crown?*



Furthermore, section 20(2) of ILRA abolishes the common law rule that the Crown is bound by an asp or a Scottish instrument by necessary implication.

Previously the onus was placed on the party alleging that the Crown is bound to prove that the relevant enactment did apply to the Crown and it was sometimes difficult to determine whether there was the necessary implication that the Crown should be bound. The ILRA rule assumes that the Crown is bound by an asp or a Scottish instrument and is in the same position as an ordinary citizen unless the asp or Scottish instrument makes express provision to the contrary.

The change in the default rule does not remove the requirement to consider whether an asp, or a Scottish instrument to be made under it, should apply to the Crown. Whether an Act is to apply to the Crown is a matter of policy and there are practical issues arising from the application of an Act to the Crown - see material on Examples of special considerations regarding Crown application.

## Who is the Crown?

### Background

Traditionally, a distinction is made between the Monarch in Her personal (or “private”) capacity and the Monarch or the Crown in its “public” capacity exercising governmental power.

The Crown’s public capacity embraces Ministers (UK and Scottish), government departments (including the Scottish Administration), civil servants and members of the armed forces.

### Crown bodies

The extent to which other bodies and office-holders with public functions are to be treated as Crown bodies is not altogether clear. Where it is unclear from the relevant legislation whether a body or an office-holder with public functions has Crown status, the matter will be determined by a court. In practice, it is necessary to consider the extent of the control exercisable over the body or person by Ministers (*Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property* [1959] All ER 969).

As a general guide, bodies which act as “agents of the executive government” will be Crown bodies (*British Broadcasting Corporation v Johns* [1965] Ch 32).

Bodies carrying out functions for the purpose of the administration of government, particularly in areas which were formerly the particular prerogatives of the Crown, will usually be Crown bodies. The extent to which a body operates in a commercial manner may however be influential – e.g. the BBC, despite its Royal Charter, has been held not to be a Crown body (*British Broadcasting Corporation v Johns op cit.*).



See Part 2 – public bodies - Crown status regarding provisions excluding Crown status from a public body.

A body (or an individual) may be a Crown servant or agent for some purposes but not for others. For example, Orders in Council made under paragraph 7 of schedule 2 of the Scotland Act 1998 may provide that the Scottish Parliamentary Corporate Body is to be treated as a Crown body but only for certain purposes (see, for example, SI 1999/677 which provides that the Scottish Parliamentary Corporate Body is a Crown body for the purposes of legislation dealing with planning, ancient monuments and archaeological areas, buildings, fire precautions, VAT and data protection). See also section 6 of the Atomic Energy Authority Act 1954 which provides that the Authority is to be treated as a Crown body for the purpose of the payment of property rates but not otherwise.

### **Servants and agents of the Crown**

A person employed in the public service of the Crown acting in the course of the person's duties is not bound by, and therefore cannot be convicted of an offence under an Act which does not bind the Crown. However, it may be difficult to assess whether a person was acting in the course of the person's duties. Generally, a person will not be acting in the course of the person's official duties as a servant of the Crown when doing something that is prohibited by the general law.

A servant of a Crown body is a Crown servant (and is likely to, but need not, be a civil servant).

### **Crown contractors**

Another potentially unclear area is the extent to which third parties acting on behalf of the Crown are affected by enactments which exempt or limit their application to the Crown.

The liability of the Crown for the acts or omissions of third parties acting for the Crown does not differ from the liability of any other individual. But the ability of such third parties to benefit from any Crown immunity or privilege (and the extent to which third parties are authorised to act for the Crown) should preferably be made explicit in the contractual arrangements under which the third party acts (*Stair Memorial Encyclopaedia*, paragraph 741 of Volume 7 citing *Dixon v London Small Arms Co Ltd* (1876) 1 App Cas 632 (HL)).

There are three basic principles that apply when assessing the applicability to independent contractors of Acts which do not bind the Crown (see also paragraph 763 of *Stair Memorial Encyclopaedia* (status of Crown contractors), Volume 7):

- Crown status or exemption obtained by a contractor who is carrying out work for the Crown under a contract entered into with the Crown is obtained in the context of carrying out that work i.e. it is not obtained in the contractor's own right;

- Where statutory authority to execute works is conferred on Ministers, that authority will also protect a contractor through whom the works are executed (as the instrument or agent of the Crown) to the same extent as it protects Ministers;
- A contractor cannot claim exemption from statutes where it is acting outwith the scope of the Crown's statutory authority or outwith its contractual authority.

On the basis of these principles, where a Bill confers authority on Ministers to carry out works but does not bind the Crown, it will not generally be necessary to include provisions in the Bill exempting contractors who are engaged by Ministers for the purpose of carrying out those works.

## What to do if an asp is to bind the Crown

Section 20 of ILRA provides as follows:

### **"20 Application of Acts and instruments to the Crown**

- (1) An Act of the Scottish Parliament or a Scottish instrument binds the Crown except in so far as the Act or instrument provides otherwise.
- (2) Any rule of law under which the Crown is by necessary implication bound by an Act of the Scottish Parliament or a Scottish instrument is abolished."

Accordingly, the basic default position is that an asp or a Scottish instrument binds the Crown except in so far as it provides otherwise. Furthermore, the rule that an asp or a Scottish instrument binds the Crown by necessary implication is abolished.

"Scottish instrument" is defined by section 1(4) of ILRA as meaning an Order in Council, an order, regulations, rules (including an act of sederunt, an act of adjournal and other rules of court), a scheme, a warrant or byelaws made under—

- (a) an asp (whenever passed), or
- (b) an asp and an Act of Parliament (in each case, whenever passed).

Since 4 June 2010, section 20(1) of ILRA has meant that express provision is not necessary for an asp to apply to the Crown.

Accordingly, if an asp is to apply to the Crown, the Bill for the asp should be silent. However, drafters will need to consider whether any special provision is needed to make that work e.g. in relation to Crown land – see material on Examples of special considerations regarding Crown application.

Part 1 of schedule 5 of the Scotland Act 1998 reserves the Crown. However, it does not of itself prevent the Scottish Parliament from conferring devolved functions on Her Majesty or on other Crown servants or agents. Nor does it reserve Crown property held by Her Majesty in right of the Crown or personally (other than in some

limited respects – e.g. the compulsory acquisition of property held or used by a UK Minister).

## What to do if an asp is not to bind the Crown

In light of section 20(1) of ILRA, if an asp or any part of it is not to apply to the Crown, express provision is required.

Since the default position in section 20(1) of ILRA is that an asp or a Scottish instrument "binds" the Crown (except in so far as the Act or instrument provides otherwise), for consistency, any provision of a Bill that is not to apply to the Crown should be carved out by saying it does not "bind" the Crown (rather than saying it does not "apply to" the Crown) as follows:

### 1 Crown application

[This Act][Part X] does not bind the Crown.

## Subordinate legislation

### Introduction

Consideration should be given to whether subordinate legislation to be made under an asp should bind the Crown. There are three options:

- the regulations (or part of them) are to bind the Crown,
- the regulations (or part of them) are not to bind the Crown, or
- the regulations may bind the Crown (in whole or in part).

### Effect of the default interpretative rule under section 20 of ILRA - regulations being made under an asp whose Bill received Royal Assent before 4 June 2010

It is necessary to consider whether the default interpretative rule under section 20 of ILRA (that regulations bind the Crown except in so far as the regulations provide otherwise) applies where regulations are being made under an asp and:

- the Bill for the asp received Royal Assent before section 20 of ILRA came into force on 4 June 2010, and
- that asp does not apply to the Crown.

Section 20 of ILRA applies to regulations (and other Scottish instruments) made under an asp "whenever passed" (see section 1(4)(a) of ILRA). We therefore take the view that the same default interpretative rule established by section 20 of ILRA applies to all regulations made under an asp regardless of whether the Bill for the asp

which confers the delegated power received Royal Assent before or after 4 June 2010.

### **Where regulations are to bind the Crown**

Where regulations are made under an asp (regardless of whether the Bill for the asp received Royal Assent before or after 4 June 2010 and no matter whether the asp itself applies to the Crown) the regulations will have Crown application unless the asp or the regulations themselves make express provision that the regulations do not bind the Crown.

Accordingly, it is not necessary for an asp (or any regulations made under it) to make any express provision in order to bind the Crown. Silence in the asp and the regulations as to Crown application achieves that intended effect in light of the default rule in section 20(1) of ILRA.

Of course, it is a policy consideration whether regulations made under an asp that does not apply to the Crown should themselves apply to the Crown (and whether that is workable under the asp).

### **Where regulations are not to bind the Crown**

Specific provision will be needed, either in the asp or in the regulations themselves, if regulations (or any part of the regulations) to be made under an asp (irrespective of whether the Bill for the asp received Royal Assent before, on or after 4 June 2010) are not to bind the Crown.

Such a provision could be as follows—

#### **1 Crown application**

This Act [and any regulations made under it] do not bind the Crown.

Alternatively, where any regulations to be made under an asp are not to bind the Crown, this could be provided for in the regulations themselves. However, if it is known that the regulations to be made under an asp are not to bind the Crown, it may be better to provide for the exclusion of Crown application in the asp. This avoids the risk of failing to make express provision in the regulations themselves disapplying Crown application. This, of course, is a matter for discussion with legal and policy colleagues.

### **Where the regulations may bind the Crown**

In practice, if it is not known whether regulations to be made under an asp are to bind the Crown, the asp should remain silent as to whether or not the regulations are to bind the Crown.

When the regulations are to be made, if they are to bind the Crown, they should remain silent which means that the default rule under section 20(1) of ILRA will apply. Alternatively, if when the regulations are to be made, the policy is that they

are not to bind the Crown, express provision excluding the application of the regulations (or any provision in the regulations) to the Crown can be made in the regulations themselves.

## Textual amendment of an Act

### General approach

The fact that Act A binds the Crown does not automatically mean that textual amendments of Act B contained within Act A will bind the Crown. The normal rule is that the application of the amendments will, in the absence of contrary provision, be determined by the Act that is being amended (i.e. Act B).

It is important to consider the context of the amending Act (Act A), the amending provisions and the Act being amended. Whether specific provision should be made in the amended Act regarding Crown application depends on whether the amending provision is to apply to the Crown and the existing position regarding Crown application in the amended Act.

### Amendment of an Act of Parliament or pre-ILRA asp

In the case of an amendment of an Act of Parliament or an asp which received Royal Assent before 4 June 2010 (a "pre-ILRA asp"), there is a general presumption against Crown application. An Act of Parliament (or a pre-ILRA asp) is presumed not to apply to the Crown except by express statement or necessary implication.

It may sometimes be difficult to determine whether there is any necessary implication that the Crown should be bound. The possibility of binding the Crown by implication (albeit a tough test given the requirement of *necessary* implication) means that the better legislative approach is to make specific provision about Crown application. Lord Keith, in the *Faslane* case (*Lord Advocate v Strathclyde Regional Council and Dumbarton District Council* [1990] 2 AC 580), stated that "it is most desirable that Acts of Parliament should always explicitly state whether or not the Crown is intended to be bound by any, and if so which, of their provisions" (at p.604).

Therefore if a Bill which will textually amend an Act of Parliament or a pre-ILRA asp is silent on Crown application, it is necessary to consider whether this leaves the position sufficiently clear in relation to amendments to the Act of Parliament or pre-ILRA asp. Much will depend on the particular context of the legislation that is being amended and the nature of the amendments.

### Textual amendment of any Act

The following table explains the differing contexts and the provision that may be needed in the Act to be amended depending on whether:

- the amendment is to bind the Crown; and

- the Act that is to be amended binds the Crown.

As shown in the first column of the table, it makes no difference whether or not the amending asp applies to the Crown.

<b>Amending asp</b>	<b>Amendment</b>	<b>Amended Act/asp binds the Crown – what provision is necessary in that Act/asp?</b>	<b>Amended Act/asp does not bind the Crown – what provision is necessary in that Act/asp?</b>
Binds the Crown (by silence)  OR	Binds the Crown	No specific Crown application provision may be needed if the amendment fits in with the amended Act/asp and it can be implied that the new provision applies to the Crown too	May need to amend amended Act/asp to ensure that the new provision applies to the Crown
Does not bind the Crown (by express provision)	Does not bind the Crown	May need to amend amended Act/asp to ensure that the new provision does not apply to the Crown	No specific Crown application provision may be needed if the amendment fits in with the amended Act/asp and it can be implied that the new provision does not apply to the Crown either

**Examples where express provision is made regarding the Crown application of textual amendment of another Act**

As mentioned, the position of the amending Act as respects Crown application does not determine whether the amendment it makes applies to the Crown. However, in some cases, provision is made in an amending Act addressing the Crown application of amendments made by it. Whilst this may be strictly unnecessary, in some cases provision appears to be made in order to assist the reader.

For example, section 110(1) and (2) of the Reservoirs (Scotland) Act 2011 provides:

**“110 Crown application**

- (1) Part 1 of the Act binds the Crown and applies to any Crown land as it applies in relation other land.
- (2) The modifications made by Part 2 bind the Crown to the extent that the enactment modified binds the Crown.”.

Section 109 is the only section in Part 2 of the 2011 Act and it textually amends Part 1 of the Water Environment and Water Services (Scotland) Act 2003. Section 35 of the 2003 Act provides that Part 1 of that Act applies to the Crown. Therefore, the implication is that the provisions being inserted by the 2011 Act into the 2003 Act also bind the Crown. Accordingly, the 2011 Act could have made no provision about the extent of the Crown application of Part 2 of that Act and section 110(2) appears not to be strictly necessary. However, the provision is made in the context of the particular asp, where a new schedule is being inserted into the 2003 Act and separate provision is made about the Crown application of Part 1 of the 2011 Act. It therefore appears that express provision about the Crown application of Part 2 of the Act (as binding the Crown to the same extent that the 2003 Act that is being amended binds the Crown) is made in this case to assist the reader in the context of the 2011 Act.

Similarly, section 162(3) of the Marine (Scotland) Act 2010 and section 91(2) of the Flood Risk Management (Scotland) Act 2009 provide that consequential amendments made in schedules of those asps bind the Crown to the extent that the enactments modified bind the Crown. This is set against provision in both of those asps that the asp itself binds the Crown - see section 162(1) of the Marine (Scotland) Act 2010 and section 91(1) of the Flood Risk Management (Scotland) Act 2009.

In the context of these provisions, the references to the modifications of the amended Act having the same extent as the amended Act really just serve as a signpost for the reader to look to the amended Act (rather than any Crown application provision in the amending Act) to determine whether the modifications apply to the Crown. This may be of some assistance in certain contexts even though it is not strictly necessary.

If provision is to be made regarding the Crown application of textual modifications of another Act, drafters may wish to consider whether something more helpful than a signpost (which does not actually state whether the amended Act applies to the Crown) could be provided. A more specific approach is taken in section 77(1) of the Civil Aviation Act 2012, which confirms that the modifications of the Competition Act 1998 made by Chapter 2 of Part 1 of the 2012 Act apply to the Crown stating: "Chapter 2 of this Part binds the Crown to the extent that it applies or modifies provisions of the Competition Act 1998, subject to section 73 of that Act."

This is a more detailed approach as Chapter 2 of Part 1 of the 2012 Act also modifies some provisions of the Enterprise Act 2002 which do not apply to the Crown (but all of the Competition Act 1998 applies to the Crown).

There are no post-ILRA asps (which are silent as to the Crown application of the asp, in reliance on section 20(1) of ILRA) which make express provision regarding the Crown application of textual amendments of another Act being made by the asp.

It is generally unnecessary to make express provision in the text of the asp itself regarding the Crown application of textual amendments of another Act. It is, however, necessary to consider the textual amendments in the context of the amending asp and the Act(s) being amended. In particular, drafters need to ensure

that any express Crown application provisions in a Bill and the Act that is to be amended do not contradict each other.

In conclusion, following ILRA, express provision about Crown application in asps is rare. Even where express provision is being considered to exclude the Crown from the application of an Act, this may not be necessary where the Act will have no practical effect in respect of the Crown.

In addition, explanatory notes could be used to assist the reader in relation to Crown application of textual amendments of another Act (Act B) (which, say, applies to the Crown) in the case where express provision in the amending Act (Act A) that Act A does not apply to the Crown could appear misleading regarding the Crown application of the textual amendments of Act B.

## Providing that an Act applies to the Crown

It may be necessary to amend an asp or Act (or part of an asp or Act) to which section 20 of ILRA does not apply and which does not apply to the Crown so that it will in future have Crown application. In that case, provision along the following lines should be made:

### 1 Crown application

After [section 60] of the [name of Act] insert—

#### “Crown application

[60A] [This Act]/[Part [2]] binds the Crown.”.

Examples of an asp inserting material into other Acts making express provision about Crown application are—

- section 41 of the Wildlife and Natural Environment (Scotland) Act 2011 which inserts the following provisions into the following Acts to expressly provide that those Acts apply to the Crown: section 27A of the Hill Farming Act 1946; section 66B of the Wildlife and Countryside Act 1981; section 13A of the Protection of Badgers Act 1992, section 44(1) of the Deer (Scotland) Act 1996; section 13A of the Protection of Badgers (Scotland) Act 1992;
- section 34 of the Aquaculture and Fisheries (Scotland) Act 2013 which substitutes a new section 67 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

## Examples of special considerations regarding Crown application

It is necessary to consider the effect of the default rule under section 20(1) of ILRA on a Bill and whether some or all of the provisions of an Act should not be applied to the Crown.



The simple form (“This Act etc. does not bind the Crown”) of exempting the Crown from the application of an asp or part of it is insufficient where only part of an asp is to apply to the Crown.

In addition, it may be necessary to make special provision for the manner of Crown application. In particular, it is often necessary to make special provision about Crown land or Crown employees.

Policy and legal colleagues need to carry out an assessment of matters such as:

- The **capacities of the Crown** to which the provisions are or are not to apply - for example, Her Majesty in Her personal capacity; the Crown in right of Her Majesty’s Government or Ministers of the Crown; or the Crown in right of the Scottish Administration or any office-holder in the Scottish Administration - see the material on Who is the Crown? and Exempting the Sovereign in Her private capacity
- **Criminal liability of the Crown** – but bearing in mind that the Scottish Government’s policy is that the Crown should not generally be exposed to criminal liability - see the material on the Criminal liability of the Crown
- **Contravention by the Crown** – whether to provide that the Court of Session may declare acts or omissions by the Crown to be unlawful and, if so, who should be able to apply to the Court for such a declaration - see the material on Criminal liability of the Crown
- Application to **persons in the public service of the Crown** – for example, enforcement powers being exercised in relation to a person who is in Crown service – see the material on Criminal liability of Crown servants
- Application to **land or premises owned or occupied by the Crown** – for example, Ministry of Defence premises or the private estates of Her Majesty in Scotland and whether, for example, powers of entry in respect of certain Crown land should be exercisable only with the consent of an “appropriate authority” – see the material on Crown land
- Application to **Crown vehicles, ships and vessels** - in particular those of the armed forces.

## Exempting the Sovereign in Her private capacity

For some Bills, the policy may be for the Sovereign in Her private capacity to be exempt from the application of an Act. Her Majesty may act in Her personal capacity rather than as Monarch.

This is an example of a simple provision exempting Her Majesty in Her private capacity:

## 1 Crown application: Her Majesty

Nothing in this Act affects Her Majesty in Her private capacity.

Some examples of this type of provision are in—

- Section 18(4) of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011
- Section 69 of the Land and Buildings Transaction Tax (Scotland) Act 2013
- Section 42 of Landfill Tax (Scotland) Act 2014
- Section 259 of the Revenue Scotland and Tax Powers Act 2014.

By slight contrast, section 10A(2) of the Inshore Fishing (Scotland) Act 1984 (as inserted by section 50(3) of the Aquaculture and Fisheries (Scotland) Act 2013) includes the following provision:

### “10A Crown application: Scotland

(1) [ ]

(2) Nothing in that section is to be taken as in any way affecting Her Majesty in Her private capacity.”. [emphasis added]

However, the simpler form as set out above is preferred.

## Criminal liability of the Crown

### The Sovereign

The Crown Proceedings Act 1947 does not confer any right of action against Her Majesty in Her private capacity. The Sovereign has personal immunity from prosecution on the basis that there is no court in which the Sovereign can competently be tried (other than perhaps in the UK Parliament itself or in a special court established by Act of Parliament - consider the case of the trial of King Charles I). *Craies on Legislation* explains the doubts of being able to prosecute Her Majesty in Her private capacity stating: “The reason why the Sovereign cannot personally be prosecuted for a criminal offence is now generally agreed to be simply that there is no court in which to try him, his own courts being incompetent to do so.” (D Greenberg, *Craies on Legislation* (11th edn Sweet & Maxwell, London 2017) paragraph 11.5.15.)

For further discussion, see *Craies on Legislation* (11th edn) paragraphs 11.5.1 to 11.5.21. Note also that the law regarding the criminal liability of the Sovereign has developed differently in Scotland and England (see *Stair Memorial Encyclopaedia*, Volume 7, paragraph 740).

Section 20 of ILRA does not oust the personal immunity of the Sovereign. If that can competently be done at all in an asp (and there must be doubt about that), it would

have to be done expressly. *Craies on Legislation* notes: "...the notion of personal immunity from, in particular, criminal jurisdiction of the courts is so ingrained in the constitution of the United Kingdom that it would take more than express application of a statute to the Crown to admit the possibility of prosecuting the Sovereign personally." (11th edn, paragraph 11.5.1, fn. 151)

## **The Crown (apart from the Sovereign)**

### *General considerations*

The Sovereign apart, there is in law no criminal immunity for the Crown. There is no personal immunity from legislation for any member of the Royal Family other than the Sovereign. Therefore, if an asp creates a statutory offence and that asp applies to the Crown (e.g. by virtue of reliance on section 20 of ILRA) Crown bodies and servants can be prosecuted for the offence.

Although the default legal position is that the Crown (apart from the Sovereign) has no immunity from prosecution, where a statute creates a criminal offence, the usual approach as a matter of Scottish Government policy is that a breach of the criminal rule should be enforced against the Crown not by way of criminal prosecution for the offence but through a civil process of seeking a declarator of unlawfulness. Accordingly, where an offence could have effect in relation to the Crown's activities, the usual approach involves making express provision which exempts the Crown from criminal liability but which also provides that the Court of Session may declare, on an application, that a breach of the criminal rule by the Crown is unlawful.

It is necessary to consider whether the Crown is capable of being engaged by the particular offence being created. We don't routinely exempt the Crown from liability for general offences. For instance, an offence that is committable only by a natural person cannot be committed by Crown bodies. If the Crown cannot be engaged by an offence in the first place, the issue of Crown liability or exemption does not arise. For example, as the offence of domestic abuse committed against a spouse or partner is committable only by a human being acting in a personal capacity, the Domestic Abuse (Scotland) Act 2017 is silent on the matter of Crown liability or exemption (although it applies to the Crown by virtue of section 20(1) of ILRA in the absence of any express provision to the contrary). By contrast, as the offence of abstracting water unlawfully where prohibited is committable not only by a human being acting in a personal capacity but also by a Crown body or a Crown servant acting in an official capacity, the Water Resources (Scotland) Act 2013 includes provision on Crown liability/exemption in section 52.

### *Drafting considerations*

Now that the Crown will be bound unless contrary provision is made, if a Bill contains criminal offences drafters will need to consider whether additional provision is required to prevent the Crown being prosecuted.

Also, drafters should watch out for criminal offences being added to a Bill at Stage 2 or 3. If the Bill at introduction did not contain offences, it may be necessary to add

wording, as a consequential amendment, to prevent the Crown being subject to potential prosecution.

A provision along the following lines has become a typical variation of the model set out in section 54 of the Food Safety Act 1990 (see, for example, section 128 of the Land Reform (Scotland) Act 2016 and section 62 of the Food (Scotland) Act 2015):

#### **1 Crown application**

- (1) The Crown is not criminally liable in respect of any contravention of a provision [of or under] this Act.
- (2) But the Court of Session may [, on an application by the Lord Advocate,] declare unlawful any act or omission of the Crown which constitutes such a contravention.
- (3) Despite subsection (1), any such provision applies to persons in the [public] service of the Crown as it applies to other persons.

In relation to subsection (2), we have reflected on the reference to an act or omission of the Crown being “a contravention” of a provision of (or under) an Act. This is appropriate where a provision in or under an Act creates an offence in terms of providing that a person must or must not do something (or that a person must comply with a requirement), and where that is then followed by an offence specifying that a contravention of that requirement (or rule) amounts to an offence.

However, the straightforward and more common method of creating an offence in or under an Act is to provide: “A person commits an offence if the person [does X].” In this case, the commission of the offence does not involve a contravention as such of the provision creating the offence but it is instead a matter of determining whether or not someone’s conduct falls within the ambit of the offence as specified.

In light of this, the following more generalised wording is preferred - see subsection (1) below. It refers to criminal liability generally and avoids referring to the “contravention” of a provision. As such, we take the view that it works better for any offence, irrespective of the language adopted in its formulation:

#### **1 Crown application**

- (1) Nothing [in or under] this Act makes the Crown criminally liable.
- (2) The Court of Session may, on an application by [the Lord Advocate], declare unlawful any act or omission for which the Crown would be criminally liable if it were not for subsection (1).
- (3) Subsection (1) does not affect the criminal liability of persons in the service of the Crown.

In subsection (1), we include a marker for what is “in or under” an Act, noting that a provision of the Act itself is to be distinguished from a provision made under it i.e. in subordinate legislation. It is a matter of judgement in context whether to refer in subsection (1) to the whole or some part of the Act, but referring to the whole Act will often suffice. It may not be necessary, for example, to exclude reference to part of

an Act only because that other part is not capable of engaging the Crown (or at least it is not capable of imposing criminal liability on the Crown).

In relation to subsection (2), the appropriate enforcement authority is discussed below.

In subsection (3), it is not thought necessary to limit the reference to criminal liability of persons in the “public” service of the Crown. Subsection (3) seeks to maintain individual liability of persons in the service of the Crown where the conduct does not amount to exempted conduct of the Crown itself.

A possible exception to this generalised formulation in subsection (1) may be required where it is necessary to be more specific about the nature of the exemption from criminal liability for a contravention of an Act, part of it or any provisions made under it.

For example, section 24A(3) of the Sea Fisheries (Shellfish) Act 1967 (inserted by section 57 of the Aquaculture and Fisheries (Scotland) Act 2013) provides—

“No contravention by the Crown of section 4D(2) in respect of a failure to comply with a requirement under a power conferred by section 4CA makes the Crown criminally liable.”. [emphasis added]

A more generalised formulation along the following lines may work equally well, depending on the context:

“Section X does not make the Crown criminally liable.”.

*Who makes an application to the Court of Session for a declaration of unlawfulness?*

Where an asp is to provide for a declaration of unlawfulness by the Court of Session in relation to any contravention by the Crown, the asp needs to identify who is to be able to make an application to the Court of Session.

The nature of the Bill or the policy behind it may require it to be someone other than the Scottish Ministers or body or office-holder “having responsibility for enforcing such a provision” as mentioned in the model provision above.

It is quite common to refer to a “public body or office-holder having responsibility for enforcing” the Act (or a provision of the Act) as being able to apply to the Court of Session for a declaration that any contravention of the Act etc. is unlawful. See, for example, section 18 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, section 95 of the Climate Change (Scotland) Act 2009 and section 127 of the Public Health etc. (Scotland) Act 2008. However, drafters should consider whether it is clear who might be a “public body or office-holder having responsibility for enforcing the provision” in the circumstances of the legislation in question. “Public body or office-holder” is intended to be wide but there may be uncertainty at the edges as to whether certain bodies or office-holders are included.

Furthermore, drafters should consider, in the context of the Bill in question, whether it is clear which body or office-holder will have “responsibility for enforcing the provision”.

Where a particular person with enforcement responsibility can be identified, it is preferable to specify that person as the person who may apply to the Court of Session seeking a declaration that an act or omission by the Crown which constitutes a contravention of a provision made by or under an Act is unlawful.

See, for example, section 36(2) and (3) of the Tobacco and Primary Medical Services (Scotland) Act 2010—

- “(2) No contravention by the Crown of any provision made by or under this Part makes the Crown criminally liable.
- (3) But the Court of Session may, on the application of the council in whose area the contravention is alleged to have taken place, declare unlawful any act or omission of the Crown which constitutes such a contravention.”. [emphasis added]

This has the advantage of being clear and certain but limits who can apply for a declaration.

Other examples of specific persons being expressly mentioned as being able to apply to the Court of Session for a declaration of unlawfulness include—

- The Keeper of the Registers of Scotland (or a person authorised by the Keeper) – see section 121(2) of the Land Registration etc. (Scotland) Act 2012
- The Scottish Ministers – see section 32(2) of the Property Factors (Scotland) Act 2011
- Scottish Environment Protection Agency (or a person authorised by SEPA) – see section 110 of the Reservoirs (Scotland) Act 2011
- The Lord Advocate, see the following—
  - section 24A(4) of the Sea Fisheries (Shellfish) Act 1967 (inserted by section 57(5) of the Aquaculture and Fisheries (Scotland) Act 2013)
  - section 10A(4) of the Inshore Fishing (Scotland) Act 1984 (inserted by section 50(3) of the Aquaculture and Fisheries (Scotland) Act 2013)
  - section 54(4) of the Animal Health and Welfare (Scotland) Act 2006
  - section 39(3) of the Aquaculture and Fisheries (Scotland) Act 2007
  - section 65(2) of the Aquaculture and Fisheries (Scotland) Act 2013

- section 67(3) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (as substituted by section 34 of the Aquaculture and Fisheries (Scotland) Act 2013)
- section 257(2) of the Revenue Scotland and Tax Powers Act 2014
- section 29(2) of the Historic Environment Scotland Act 2014
- section 62(3) of the Food (Scotland) Act 2015
- section 128(2) of the Land Reform (Scotland) Act 2016
- Chief Constable of the Police Service of Scotland (or the Scottish Ministers or any other public body or office-holder having responsibility for enforcement) – see section 37(2) of the Air Weapons and Licensing (Scotland) Act 2015.

## **Criminal liability of Crown servants**

Notwithstanding the policy that legislation should stop short of exposing the Crown to criminal prosecution, this is not the case for Crown servants. Persons in the public service of the Crown should not be exempt from criminal liability.

Accordingly, where an asp is to provide that some or all of its provisions or those made under it do not bind the Crown, provision should be made to ensure that persons in the service of the Crown can be criminally liable (whether acting in the course of their official duties or not).

“This Act binds the Crown” appears to make the Crown criminally liable in all its manifestations, including government Ministers or Crown servants and whether acting in the course of their official duties or not.

Section 100(1) to (3) of the Police and Fire Reform (Scotland) Act 2012 provides:

- “(1) No contravention by the Crown of any provision made by or under this Part makes the Crown criminally liable.
- (2) But the Court of Session may, on the application of the Scottish Ministers or any public body or office-holder having responsibility for enforcing that provision, declare unlawful any act or omission of the Crown which constitutes such a contravention.
- (3) Despite subsection (1), any provision made by or under this Part applies to persons in the public service of the Crown as it applies to other persons.”.

In relation to subsection (3), it seems that “persons in the public service of the Crown” will include Ministers as well as their public servants. In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property* (1954) All ER 969, 981-982 the House of Lords made it clear that Ministers of the Crown are servants of the Crown. It also includes other persons such as members of the armed forces.

Subsection (1) of that section exempts all of the Crown and then subsection (3) provides for an exception from the exemption in subsection (3). This approach, while appearing clumsy, avoids the alternative of positively setting out which persons fall within the residual exempt category of the Crown (excluding persons in the service of the Crown). That approach could create the risk of a gap by failing to exempt parts of the Crown.

Please also note the suggested reformulation of the equivalent of subsection (2) of that section in the material on Criminal liability of the Crown - drafting considerations.

## Crown land

### Background

Legislation sometimes makes special provision in relation to Crown land. It may, for example, provide that powers of entry or powers of compulsory purchase are not exercisable without the consent of the appropriate Crown authority (e.g. the Scottish Ministers for land held by the Scottish Administration).

Whether special provision is needed should be determined on a case-by-case basis. It may not be necessary to treat all Crown land alike. For example, an exception might be appropriate only for Her Majesty's private estates but not for the other types of Crown land. See, for example, section 60(6) of the Animal Welfare Act 2006 which provides that the Queen is exempt from inspectors entering her land.

### Application of asp to Crown land

Where the relevant provisions are to apply to Crown land, we take the view it is not necessary to mention this in addition to the rule binding the Crown generally, especially when then going on to make rules for entry onto Crown land.

Writing against the background of Crown immunity from statute being the default position for Westminster legislation, *Craies on Legislation* notes "The exemption of the Crown from statute applies in relation to land belonging to the Crown as it does in relation to things done by the Crown" (D Greenberg, *Craies on Legislation* (11th edn Sweet & Maxwell, London 2017) paragraph 11.5.13).

The corollary of that must be true: an Act that applies to the Crown applies as much in relation to Crown land as it does in relation to things done by the Crown. Accordingly, silence in a Bill presumably means the Bill will apply to Crown land as it applies to other land. We take the view that where a Bill applies in relation to land (and there is no express exception providing that the provision(s) do not bind the Crown), it is not necessary to say expressly that it applies to Crown land (assuming that is the policy).

A number of asps do expressly provide that it applies to Crown land (see, for example, section 162(1) of the Marine (Scotland) Act 2010 and section 110(1) of the Reservoirs (Scotland) Act 2011). However, the purpose of this sort of provision



appears to be to act as a hook to introduce the concept of "Crown land"; to then provide in some detail what "Crown land" means and, in the case of the Reservoirs (Scotland) Act 2011, provide for a consent regime regarding access to that land.

Section 162(1) of the Marine (Scotland) Act 2010 provides an example of where there is provision that the Act applies in relation to "Crown land" but this appears to be so that subsection (7) of that section can then set out a limited definition of Crown land as including only land an interest in which:

- belongs to Her Majesty in right of the Crown or in right of Her private estates, or
- belongs to an office-holder in the Scottish Administration or a government department or is held in trust for Her Majesty for the purposes of the Scottish Administration or a government department.

### **Permission required for powers of entry onto Crown land**

In cases where a power of entry onto land is conferred, again, based on the presumption under ILRA that a Bill binds the Crown unless there is express provision to the contrary, it is unnecessary to provide for the power to be exercisable in relation to Crown land (assuming that is the policy). But it will often be the policy (for reasons of national security, for example) that the power cannot be exercised over Crown land without consent from an official source.

In such cases, provision should be made so that the powers conferred by the Act etc. are exercisable in relation to "Crown land" only with consent of a particular person, often defined as the "appropriate authority". Similarly, it is necessary to define the various types of "Crown land" to which each "appropriate authority" relates.

See, the following examples of provisions where provision is made for consent relating to the exercise of powers of entry over Crown land:

- Section 91 of the Flood Risk Management (Scotland) Act 2009 provides an example of detailed provision relating to powers of entry over Crown land (including Her Majesty's private estates).
- In the Water Resources (Scotland) Act 2013, the detail of the consent regime for entry onto Crown land was placed in a schedule (schedule 3), which drew on but restructured text in section 110(6) to (8) of the Reservoirs (Scotland) Act 2011 and section 91 of the Flood Risk Management (Scotland) Act 2009).

A different approach is taken in section 258 of Revenue Scotland and Tax Powers Act 2014 and section 30 of the Historic Environment Scotland Act 2014 by use of a table setting out the type of interest in land that is Crown land and the person that is the "appropriate authority" for each type of interest in land mentioned in the table.

We take the view that the approach of including a table means that it is easier to identify the person who is the "appropriate authority" for each different type of Crown land.

On this basis, we offer the model provision set out below but drafters should liaise with the Bill team as to who should be the “appropriate authority” in the context of individual Bills.

With reference to the first entry in the table below, by virtue of the Crown Estate Transfer Scheme 2017 (SI 2017/524) made under section 90B(1) of the Scotland Act 1998, on 1 April 2017 the Crown Estate Commissioners' functions relating to the following rights transferred to Crown Estate Scotland (Interim Management):

- property, rights or interests in land in Scotland (excluding property, rights or interests forming part of the Crown Estate before 1 April 2017 held by a limited partnership registered under the Limited Partnerships Act 1907 or a partner in such a partnership), and
- rights in relation to the Scottish zone.

Crown Estate Scotland (Interim Management) was established by the Crown Estate Scotland (Interim Management) Order 2017 (SSI 2017/36) (an Order in Council) and was nominated by the Scottish Ministers as the transferee for the purposes of section 90B(1) of the Scotland Act 1998.

The table in the model provision setting out the appropriate authority in each case continues to refer to the Crown Estate Commissioners in the first entry as the appropriate authority in relation to the Crown Estate (defined by section 1(1) of the Crown Estate Act 1961 as “the property, rights and interests under the management of the Crown Estate Commissioners”). This is because it is possible that the Crown Estate Commissioners could, in the future, acquire new interests (whether or not held by a limited liability partnership) in Scotland (separate from assets whose management transferred to Crown Estate Scotland (Interim Management)) which will be managed by the Crown Estate Commissioners.

The second entry of the table refers to “the person managing the land” (being land forming part of the Scottish Crown Estate) as the appropriate authority in relation to the Scottish Crown Estate. The Scottish Crown Estate means the property, rights and interests to which section 90B(5) of the Scotland Act 1998 applies. The Scottish Crown Estate Bill (passed by the Scottish Parliament on 21 November 2018 and, at the time of publication, awaiting Royal Assent) provides for the transfer of the function of managing assets forming part of the Scottish Crown Estate (with all assets being managed by Crown Estate Scotland (Interim Management) at the time of publication) from the current manager to:

- the Scottish Ministers;
- Crown Estate Scotland (Interim Management);
- a local authority;
- another Scottish public authority with mixed functions or no reserved functions;

- a harbour authority in relation to a harbour in Scotland; or
- a community organisation.

The Bill also provides for the delegation of the function of managing a Scottish Crown Estate asset by a manager (except where the manager is a harbour authority in relation to a harbour in Scotland or a community organisation) to a local authority, another Scottish public authority with mixed functions or no reserved functions, such a harbour authority, or a community organisation.

The Bill also provides for Crown Estate Scotland (Interim Management) to be renamed Crown Estate Scotland.

The penultimate entry has been changed from previous legislation to now refer to “land an interest in which is held in trust for Her Majesty by an office-holder in the Scottish Administration for the purposes of the Scottish Administration” in respect of which the appropriate authority is “the relevant office-holder in the Scottish Administration”. This provides a greater link between the trust and the “relevant office-holder” (see section 66B(7)(d) of the Wildlife and Countryside Act 1981 and section 44(7)(e) of the Deer (Scotland) Act 1996 (inserted by section 41(3) and (5)(b) respectively of the Wildlife and Natural Environment (Scotland) Act 2011)).

Subsection (3), provides that the Scottish Ministers will determine who the appropriate authority is in the event of any dispute. Similar provision is made in a number of other asps including section 91(9) of the Flood Risk Management (Scotland) Act 2009 (but it is not included in section 258 of Revenue Scotland and Tax Powers Act 2014 or section 30 of the Historic Environment Scotland Act 2014).

## Model provision

### 1 Crown application: powers of entry

- (1) A power of entry conferred by or under this Act is exercisable in relation to Crown land specified in column 1 of the following table only with the consent of the person specified in the corresponding entry in column 2 of the table (the “appropriate authority”).

<b>Crown land</b>	<b>Appropriate authority</b>
Land an interest in which belongs to Her Majesty in right of the Crown and which forms part of the Crown Estate (that is, the property, rights and interests under the management of the Crown Estate Commissioners)	The Crown Estate Commissioners
Land an interest in which belongs to Her Majesty in right of the Crown and which forms part of the Scottish Crown Estate	The person managing the land
Land an interest in which belongs to Her Majesty in right of the Crown other than land forming part of the Crown Estate or the Scottish Crown Estate	The office-holder in the Scottish Administration or, as the case may be, the Government department managing the land
Land an interest in which belongs to Her Majesty in right of Her private estates	The person appointed by Her Majesty in writing under the Royal Sign Manual or, if no such appointment is made, the Scottish Ministers
Land an interest in which belongs to an office-holder in the Scottish Administration	The office-holder in the Scottish Administration
Land an interest in which belongs to a Government department	The Government department
Land an interest in which is held in trust for Her Majesty by an office-holder in the Scottish Administration for the purposes of the Scottish Administration	The office-holder in the Scottish Administration
Land an interest in which is held in trust for Her Majesty for the purposes of a Government department	The Government department

- (2) In subsection (1)—
  - (a) the reference to Her Majesty's private estates is to be construed in accordance with section 1 of the Crown Private Estates Act 1862,
  - (b) “Government department” means a department of the Government of the United Kingdom,
  - (c) “Scottish Crown Estate” means the property, rights and interests to which section 90B(5) of the Scotland Act 1998 applies.
- (3) It is for the Scottish Ministers to determine any question that arises as to who in accordance with subsection (1) is the appropriate authority in relation to any land, and their decision is final.

## IV. Statutory bodies and legal persons

### Common provisions

#### Establishment of public bodies

##### General considerations

Consideration should be given to whether the body is to have corporate status at all. (Not all public bodies do.)

There is an increasing trend towards giving bodies a name in Gaelic as well as in English. If a body is to have two names, consider which is to be the commonly used one.

##### Drafting considerations

Where provision is made establishing a body corporate, the body should be established by name in one subsection, with its corporate status conferred in another subsection.

Where the body is to have a Gaelic name in addition to an English name, that name should be given immediately after its English name, in brackets (unless the Gaelic name is to be the commonly used one).

The provision establishing the body should be in the following terms:

'The [name of body] [(in Gaelic, [name of body])] is established.'

The provision conferring corporate status should be in the following terms:

'The [name of body] is a body corporate.'

The section heading should be the name of the body.

##### *Model provision*

#### **1 The Drafting Commission**

- (1) The Drafting Commission (in Gaelic, Coimisean Dreachdaidh) is established.
- (2) The Commission is a body corporate.

## Exclusion of Crown status

### General considerations

The usual style of referring to a body not being a servant or agent of the Crown should be departed from with caution, as omitting either of these elements or using alternative wording (for example, 'acting on behalf of the Crown') may alter the legal effect.

It is not clear what a statement that the body's property is not property of, or held on behalf of, the Crown adds to a statement that the body does not enjoy any status, immunity or privilege of the Crown. Such provision is not thought to be needed.

In some cases, it may be desirable from a policy perspective to further provide that 'the body's members or employees are not to be regarded as civil servants'. This occasionally arises in circumstances where an existing body is being continued (with changes to its constitution), or staff are being transferred between bodies and the status of the body's staff may be called into question.

### Drafting considerations

A provision excluding Crown status from a public body should specify that '[the body] is not a servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown'.

If provision is to be made about the status of the body's members and staff, it should specify that '[the body's] members and employees are not to be regarded as civil servants'.

The section or paragraph heading should be 'Exclusion of Crown status'.

#### *Model provision*

#### **1 Exclusion of Crown status**

- (1) The Drafting Commission—
  - (a) is not a servant or agent of the Crown, and
  - (b) does not enjoy any status, immunity or privilege of the Crown.
- (2) [The Commission's members and employees are not to be regarded as civil servants.]

## Membership

### General considerations

#### *Overview*

Consideration needs to be given to:

- the number of members
- any different categories of membership
- the chairing member
- method of appointment (including by whom)
- whether former members can be re-appointed
- whether members need to have any particular skills and expertise
- any grounds for disqualification from appointment
- any other criteria in relation to appointment (for example, encouraging equal opportunities)
- terms and conditions (including period), and who determines them
- remuneration and pensions
- termination of membership.

#### *Appointment of members*

It may not be strictly necessary to provide that a body has members, but such provision is universally made (and is necessary if providing for who is to appoint them and regulating their number).

It is usual to provide for a minimum, or a minimum and a maximum, number of members (but not usually for a maximum only), and a power for the Scottish Ministers to vary the number of members by regulations.

Members are commonly appointed by the Scottish Ministers, but there may be different categories of member who are appointed differently, or some of whom are elected or *ex officio* members (for example, the Lord President).

Provision will be needed about the period of appointment. Most commonly this is left to Ministers' discretion, in some cases with a maximum period set out in the Act. In other cases the Act fixes the period of appointment.

Most Acts allow for members to be reappointed on or after the end of the period of appointment. In some cases the Act allows for reappointment of a person who is or has been a member, and in others for reappointment of a person on ceasing to be a member. This may be the result of a policy choice between allowing any person who has been a member to be reappointed and allowing a person to continue as a member (but not to be reappointed after a gap). In some cases, reappointment is expressly disallowed or restricted (for example, to reappointment for one further term).

Note that appointments will normally (but not always) be regulated by the Commissioner for Ethical Standards in Public Life in Scotland under the Public



Appointments and Public Bodies etc. (Scotland) Act 2003. Bill teams should be reminded of this and of the Code of Practice published under section 2(1) of that Act.

### *Chairing member*

It is usual to provide for a member to chair the body (although sometimes this is expressed as a member to chair meetings of the body). Consider whether the role is truly one of chairing the body (i.e. the chairing member is the head of the body). Only provide for the member to chair meetings if that provision is simply intended to clarify who, amongst a body of equals, is to preside at meetings.

The chairing member is often appointed directly to that office, but may be selected from the members. The latter approach envisages a two-appointment process (first as a member and then as chairing member) and that the chairing member can cease to be the chairing member but continue to be a member. The former approach is more straightforward and should be followed unless there are policy reasons not to do so.

Occasionally, provision is made for a deputy to the chairing member. This may be to cover periods where the chairing member is unable to act or where there is a vacancy, or to enable the deputy to share some of the work of the chairing member. The same method of appointment should be followed for appointment as deputy as for appointment as the chairing member.

Provision may be needed for times when the office of chairing member is vacant or the chairing member is unable to act. This may depend on whether the chairing member has specific functions. (See the material on Validity of things done, below, on vacancies in membership generally.)

### *Terms and conditions*

It is usual to make provision for the Scottish Ministers to determine the terms and conditions of membership so far as not set out in the Act. Occasionally the body may do so.

### *Persons who may or may not be appointed*

It is not common to make provision about people who may be appointed (except in relation to relevant skills etc), but it is common to make provision about people who may not be appointed. The grounds on which a person may not be appointed are a matter of policy, but the most common ground is taking up another position (for example, membership of the Scottish Parliament, House of Commons, etc).

Membership of various bodies is grounds for disqualification as an MSP or an MP (see the House of Commons (Disqualification) Act 1975, section 15 of the Scotland Act 1998, and the Scottish Parliament (Disqualification) Order 2015).

### *Relevant skills and expertise*

Provision is sometimes made requiring Ministers to appoint as members only people with skills, expertise, knowledge or experience relevant to the body. Whether this is

wanted is a policy choice, as is the description of the necessary characteristics. That is likely to depend on the nature of the body. Occasionally provision is made which does not require each member to possess these characteristics, but requires the membership as a whole to have certain skills and experience.

### *Equality*

It is increasingly common for Acts to require Ministers to make appointments in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements. When making such provision, regard must be had to the equal opportunity reservation in Section L2 of schedule 5 of the Scotland Act 1998 (but see the proposed amendments to the Act in the Scotland Act 2016).

### *Payments to members*

Provision is commonly made about payments to members. In most cases the Scottish Ministers determine the payments to be made, but in some cases the body determines the payments with the approval of the Scottish Ministers. It is usual to allow for payment of remuneration and allowances and/or expenses.

If the body is able to appoint non-members to its committees, separate provision will be needed to allow payments to be made to them if that is the policy intention.

It is common to enable payment of pensions to be made to former (and sometimes current) members. In most cases, the Scottish Ministers determine the payments to be made, but in some cases the body determines the payments with the approval of the Scottish Ministers.

Note that the reservation of pensions in Section F3 of schedule 5 of the Scotland Act 1998 does not reserve pensions payable to members or staff of Scottish public authorities with mixed or no reserved functions.

### *Early termination of membership*

Provision is universally made enabling a member to resign by giving written notice, usually to the Scottish Ministers (but occasionally to someone else such as the chairing member).

It is common to enable a member to be removed. The usual grounds are insolvency or bankruptcy, absence from meetings (generally either a certain number of meetings or for a certain period of time, but sometimes both), inability to perform the functions of a member and unsuitability to continue as a member. Removal is usually by giving notice in writing to the member, and it is usually for the Scottish Ministers to remove the member.

Where absence from meetings is a ground for removal, it is usual to provide that the member can be removed unless the body gave permission for the absence or the member had a reasonable excuse for it.

Physical or mental incapacity has occasionally been given as a ground for removal, but this has been criticised in the House of Lords and it is better simply to refer to inability to perform functions in general terms.

Other grounds of removal may be needed for particular circumstances (for example, conviction of a criminal offence is a ground for removal from the Scottish Police Authority).

Membership may be automatically terminated on the occurrence of certain events. This is commonly taking up another position (such as membership of the Scottish Parliament etc) or becoming insolvent.

Consideration should be given to whether a ground for termination of membership should be automatic, or whether Ministers should be given a discretion whether to remove the member.

## **Drafting considerations**

### *Appointment of members*

Where there are different categories of membership (for example, appointed members and *ex officio* members) it may be useful to use labels to differentiate between them.

It has been reported that some readers find it confusing if the number of members mentioned does not include the chairing member (for example, if the body must have a chairing member and between 3 and 6 other members, it must have between 4 and 7 members). If the chairing member is to be appointed separately (rather than from amongst the appointed members) it is difficult to avoid this without some overly-complicated drafting and it is recommended that the accompanying documents make the overall number of members clear.

If a label is needed, 'chairing member' is recommended for the member who chairs the body. But this might give way to particular policy preferences, so long as the chosen expression is gender-neutral (for example, President or Chair). 'Chairperson' should be avoided (unless expressly asked for).

The most straightforward approach is to provide for the appointment of the chairing member along with the other members, unless there is to be special provision about that member (for example, if the Scottish Ministers are to make the first appointment but not subsequent ones, or the chairing member is appointed on different conditions from the other members). In that case it may make sense to drain all of the provisions concerning the chairing member into a self-contained provision.

If the chairing member is not appointed but is an *ex officio* chairing member, provision for that can be made where the provision would otherwise be made for the appointment of the chairing member.

If providing for a deputy to the chairing member, the use of labels may be helpful (for example, 'the chairing member' and 'the deputy to the chairing member').

Provision about the appointment of members and their terms and conditions should generally be made in one section or paragraph, with the heading 'appointment of members'. But in some cases this may result in a lengthy provision, for example, if there is a complex membership structure. In that case, it is recommended that provision about the period of appointment, reappointment of members and other terms and conditions of membership is made in a separate section or paragraph headed 'period and conditions of membership'.

Where only some of the members are appointed, it is recommended that provision about who the members are is made in a section or paragraph headed 'members'.

#### *Persons who may or may not be appointed*

It is helpful to deal with people who may or may not be appointed in one section or paragraph. If only providing for people who may not be appointed, this should be headed 'Persons who may not be appointed'. If provision is made about people who may be appointed (for example, those with relevant skills), the provision should be headed 'Persons who may be appointed'.

If requiring members to have relevant skills, expertise, knowledge, experience, training or qualifications, the description of the characteristics required will depend on the nature of the body and the sort of functions its members exercise.

The wording of the model provision on equal opportunities is clearly influenced by the equalities reservation in Section L2 of schedule 5 of the Scotland Act 1998 and should be departed from with caution.

Where providing that a person may not be appointed if the person holds another office, the choice of offices will be a matter of policy. But the most common ones should be provided for in the following order (omitting any that are not wanted, and adding any others at an appropriate place):

- member of the Scottish Parliament
- member of the House of Commons
- member of the House of Lords
- member of the European Parliament
- office-holder in the Scottish Administration
- councillor of a local authority
- civil servant
- employee of a local authority

#### *Payments to members*

It is recommended that provision is generally made for the payment of 'remuneration and allowances (including expenses)' to members as this should cover all payments

which might be made. But this may need to be adapted if the policy is to restrict the sort of payment that can be made.

### *Early termination of membership*

Provision about the different ways in which membership can end early should be made in one section or paragraph headed 'early termination of membership'.

### *Model provisions*

#### **1 Appointment of members**

- (1) The Drafting Commission is to consist of—
  - (a) [a member appointed by the Scottish Ministers to chair the Commission, and]
  - (b) at least [x] but no more than [y] [other] members appointed by the Scottish Ministers.
- (2) A member is appointed for [such period [not exceeding [z] years] as the Scottish Ministers determine] [[z] years].
- (3) The Scottish Ministers may [not] reappoint as a member of the Commission a person who is, or has been, a member.
- (4) The Scottish Ministers may determine other terms and conditions of membership, in relation to matters not covered by this Act.
- (5) The Scottish Ministers may by regulations amend subsection (1)[(b)] by substituting a different number for a number for the time being mentioned there.

#### **2 Appointment (where different types of member)**

- (1) The Drafting Commission is to consist of—
  - (a) a member appointed by the Scottish Ministers to chair the Commission,
  - (b) the legal members, and
  - (c) at least [x] but no more than [y] other members appointed by the Scottish Ministers.
- (2) The legal members are—
  - (a) the Lord President, and
  - (b) the Lord Justice-Clerk.
- (3) The Scottish Ministers may by regulations amend subsection (1)(c) by substituting a different number for a number for the time being mentioned there.

### **3 Period and conditions of membership (*where different types of member*)**

- (1) A member of the Drafting Commission appointed under section 2(1)(a) or (c) holds office for [such period [not exceeding [z] years] as the Scottish Ministers determine] [[z] years].
- (2) The Scottish Ministers may [not] reappoint as a member of the Commission a person who is, or has been, a member.
- (3) The Scottish Ministers may determine other terms and conditions of membership, in relation to matters not covered by this Act.

### **4 Persons who may [not] be members**

- (1) The Scottish Ministers may appoint a person as a member of the Drafting Commission only if they consider that the person has [skills] [expertise] [knowledge] [experience] relevant to the functions of the Commission.
- (2) The Scottish Ministers may appoint a person as a member of the Commission only if [...].
- (3) The Scottish Ministers may not appoint a person as a member of the Commission if the person is—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.
- (4) When appointing members of the Commission, the Scottish Ministers are to have regard to the desirability of [...].
- (5) The Scottish Ministers must, when appointing members of the Commission, do so in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements.
- (6) In subsection (5), "equal opportunities" and "equal opportunity requirements" have the same meanings as in Section L2 (equal opportunities) of Part II of schedule 5 of the Scotland Act 1998.

### **5 Members' remuneration, allowances and pensions**

- (1) The Drafting Commission [may] [must] pay each member such remuneration and allowances (including expenses) as [the Scottish Ministers may determine] [it may, with the approval of the Scottish Ministers, determine].
- (2) The Drafting Commission [may] [must] pay, or make arrangements for the payment of, such pensions, allowances and gratuities to, or in respect of, any person who is or has been a member of the Commission as the Scottish Ministers may determine.

- (3) Those arrangements may include—
  - (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (4) The reference in subsection (2) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

## **6 Early termination of membership**

- (1) A member of the Drafting Commission may resign by giving notice in writing to the Scottish Ministers.
- (2) The Scottish Ministers may, by giving notice to the member in writing, remove a member of the Commission if—
  - (a) the member [is] [becomes] insolvent,
  - (b) the member has been absent, without [reasonable excuse] [the permission of the Commission], from [3 consecutive meetings of the Commission] [meetings of the Commission for a period of longer than 6 consecutive months],
  - (c) the Scottish Ministers consider that the member is—
    - (i) unable to perform the functions of a member, or
    - (ii) unsuitable to continue as a member.
- (3) For the purpose of subsection (2)(a), a person becomes insolvent if [...].
- (4) A person's membership of the Commission ends if the person becomes
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.

## **Chief executive and other staff**

### **General considerations**

Provision is usually made for a chief executive, who is commonly a member of staff. Occasionally it is expressly provided that the chief executive must not be a member of the body.

The chief executive is normally appointed by the body, but occasionally by the Scottish Ministers. Sometimes Ministers appoint the first chief executive, and the

body appoints subsequent ones. Ministerial approval is often needed for an appointment by the body, and for the terms and conditions of the appointment.

It may not be necessary to state expressly that a body is able to employ staff. This may be implied if its functions are such that it could not exercise them without staff. But it is better to provide for this expressly to avoid doubt, in particular if providing for a chief executive who is a member of staff.

It is common to require the Scottish Ministers' approval of the terms and conditions on which staff are appointed.

It is not common to give the body a power to make payments of remuneration to staff, probably because that can be implied from the power to appoint staff and determine their terms and conditions.

It is common to give the body a power to pay pensions to former (and sometimes current) staff including the chief executive. In most cases, the body determines the payments to be made with the approval of the Scottish Ministers, but sometimes that approval is not needed, or Ministers themselves determine the payments to be made. Payment of compensation for loss of office is commonly allowed.

### **Drafting considerations**

The chief executive and staff should normally be provided for in one section or paragraph headed 'chief executive and other staff'.

But separate provision may be more sensible if complex provision is needed which would result in an overly-long section or paragraph. In that case, the headings 'chief executive' and 'other staff' (or 'staff' if the chief executive is not a member of staff) should be used.

'Staff' is considered to be a broader term than 'employee' and is to be preferred.

It is not thought necessary to say that the body may employ staff 'necessary for the exercise of its functions' unless as a way to limit the number of staff that may be employed.

#### *Model provisions*

##### **1 Chief executive and other staff**

- (1) The Drafting Commission is to appoint, as a member of staff, a chief executive.
- (2) [The Commission is to appoint each chief executive with the approval of the Scottish Ministers.]
- (3) [The chief executive may not be a member of the Commission.]
- (4) The Commission may appoint other staff.



- (5) The chief executive and other staff are to be appointed on such terms and conditions as the Commission, with the approval of the Scottish Ministers, determines.

## **2 Chief executive**

- (1) The Drafting Commission is to have, as a member of staff, a chief executive.
- (2) [The chief executive may not be a member of the Commission.]
- (3) The Scottish Ministers are to appoint the first chief executive—
  - (a) after consulting the Commission,
  - (b) on such terms and conditions as they determine.
- (4) The Commission is to appoint each subsequent chief executive—
  - (a) with the approval of the Scottish Ministers,
  - (b) on such terms and conditions as it, with the approval of the Scottish Ministers, determines.

## **3 Other staff**

- (1) The Drafting Commission may appoint staff other than the chief executive.
- (2) Those staff are appointed on such terms and conditions as the Commission, with the approval of the Scottish Ministers, determines.

## **4 Pensions of chief executive and other staff**

- (1) The Drafting Commission may, with the approval of the Scottish Ministers, pay or make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, any person who is or has been a member of staff of the Commission.
- (2) Those arrangements may include—
  - (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (3) The reference in subsection (1) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

## Establishment of committees

### General considerations

There is no need to confer a power on a body to establish committees as it can do that under the general law. It is also thought that determining the committee's composition is an inherent part of the establishment of the committee and no express power is needed.

But express provision will be needed to allow it:

- to delegate functions to a committee, or
- to appoint people who are not members of the body as members of a committee.

If providing for non-members to be committee members, consideration needs to be given to the following matters:

- remuneration and terms and conditions of those committee members
- whether those members are allowed to vote
- whether the committee can consist entirely of those members
- whether only certain non-members may be committee members (for example, staff of the body).

If making provision about the ability of non-member committee members to participate in voting and decision-making, note that a restriction on participating in decisions may go further than a restriction on voting (for example, affect the member's ability to take part in consensus decisions or discussion of the issues).

Consideration should also be given to whether provision is needed requiring a committee to comply with a direction given to it by the body.

Express provision is probably not needed to enable the body or committee to establish sub-committees, but would be needed to allow the committee to delegate functions to the sub-committee.

If the body is given the power to establish sub-committees and a power to delegate functions to a committee, it could delegate the power to establish sub-committees to the committee.

### Drafting considerations

In a Bill establishing a public body, where it is intended that the body should have a general power to establish committees and also that the body should have the power to delegate any of its functions to a committee or to appoint persons who are not members of the body to a committee, express provision enabling the body to establish committees should be provided.

The provision to that effect should be in the following terms:

'[X body] may establish committees'.

Where it is intended that the body should also be able to establish sub-committees and have power to allow sub-delegation of functions to a sub-committee, the provision on establishment of committees should also mention sub-committees as follows:

'[X body] may establish committees and sub-committees'.

The provision should be in a section or (where located in a schedule) a paragraph of its own and not combined with any other provision.

The section or paragraph is to be headed 'Committees'.

Where it is intended that the body should have a general power to allow persons who are not members of the body to be members of a committee, provision to that effect should be included as follows:

'The membership of a committee [or sub-committee] may include persons who are not members of [X body]'.

Where it is intended that the membership of a committee (or sub-committee) should not consist entirely of persons who are not members of the body, provision to that effect should be included as follows:

'The membership of a committee [or sub-committee] may include (but may not consist entirely of) persons who are not members of [X body]'.

Where it is intended that any such member should not be entitled to vote at meetings, provision to that effect should be included as follows:

'The membership of a committee [or sub-committee] may include persons who are not members of [X body] but those persons are not entitled to vote at meetings'.

### *Model provision*

#### **1 Committees**

- (1) The Drafting Commission may establish committees [and sub-committees].
- (2) The membership of a committee [or sub-committee] may include [(but may not consist entirely of)] persons who are not members of the Commission [but those persons are not entitled to vote at meetings].

## Authority to perform functions

### General considerations

Most Acts of the Scottish Parliament establishing public bodies include provision under which the body can authorise persons to perform its functions. This is usually limited to the members, staff and committees of the body.

There is a distinction between agency arrangements for the exercise of functions by another person and delegation of functions to that person. A statutory body cannot delegate its functions without express or implied legislative authority but can exercise its functions through agents. *Craies on Legislation* (11th ed., 12.3.2) suggests that delegation denudes the person making it of the power delegated.

Express provision on internal authorisation prevents challenges on the basis of unauthorised sub-delegation.

Separate provision should be made for delegation to third parties (if wanted).

Consideration needs to be given to whether the body is to retain the ability to exercise the relevant functions. If it is, express provision should be made for that.

Consideration also needs to be given to whether there are any functions which must always be exercised by the body itself, and whether the delegated power can be exercised in all circumstances or only in some. It is increasingly common to prevent the body from delegating significant planning or reporting functions.

### Drafting considerations

Where a Bill creates a public body, an express provision allowing the body to authorise others to perform its functions should always be provided. The standard provision should be limited to internal authorisation of members, staff or committees. As a starting point, provision along the following lines can be suggested:

- '( ) [X body] may authorise—
- (a) any of its members,
  - (b) any committee established by it,
  - (c) [its chief executive,] or
  - (d) any [other] member of its staff, to perform such of its functions (and to such extent) as it may determine.'

Variation may be needed where individuals have specific roles in relation to the body (for example, chief executive or chairing member).

An exception should be added where certain functions are not to be capable of being performed by others. For example:

- ' ( ) [X body] may not authorise another person to perform any of the following functions—
- (a) approving any [annual] budget or financial plan,
  - (b) approving annual reports or accounts,
  - (c) the function set out in section [x]'.

The provision must also clarify whether granting authority will deprive the body of responsibility for, or ability to perform, the function concerned. In most cases the policy will be that it should not do so, so the most common policy position would be achieved by saying:

- ' ( ) The giving of authority under this section to perform a function does not—
- (a) affect [X body's] responsibility for the performance of the function, or
  - (b) prevent [X body] from performing the function itself.'

The provision should be placed alongside provision giving the body general powers to act in pursuance of its functions and should be entitled 'Authority to perform functions'.

*Model provision*

**1 Authority to perform functions**

- (1) The Drafting Commission may authorise—
- (a) any of its members,
  - (b) any committee established by it,
  - (c) [its chief executive,] or
  - (d) any [other] member of its staff, to perform such of its functions (and to such extent) as it may determine.
- (2) But the Commission may not authorise another person to perform any of the following functions
- (a) approving any [annual] budget or financial plan,
  - (b) approving annual reports or accounts,
  - (c) the function set out in section [x].
- (3) The giving of authority under this section to perform a function does not—
- (a) affect the Commission's responsibility for the performance of the function, or
  - (b) prevent the Commission from performing the function itself.

## Regulation of procedure

### General considerations

Acts of the Scottish Parliament establishing public bodies almost invariably include a provision enabling the body to regulate or determine its own procedure.

In the absence of an express power to regulate its own procedure or proceedings, it is thought that the procedure would be regulated by common law rules relating to statutory corporations. In most cases, express provision should be made to make the position clear.

The main exceptions to this are where specific provision regarding procedural matters is to be made in the Bill, and where regulation of the body's procedures is to be done by regulations.

If the Bill provides an express power to establish committees (and sub-committees), the provision about regulation of procedure should also mention committees (and sub-committees) to avoid any doubt that they are included.

Special rules may be needed about quorum, for example, if there are different categories of membership which should each be represented.

### Drafting considerations

In a Bill establishing a public body, where it is intended that the body should have the power to regulate its own procedure, a provision to that effect should be included in the following terms:

'[X body] may regulate its own procedure (including quorum).'

The provision should be in a section or (where located in a schedule) a paragraph of its own and not combined with any other provision such as that about the body's membership or validity of things done.

The section or paragraph is to be headed 'regulation of procedure'.

Where the Bill includes express provision enabling or requiring the body to establish committees (and sub-committees), the provision should include reference to committees (and sub-committees) as follows:

'[X body] may regulate its own procedure (including quorum) and that of any committee [or sub-committee]'.

#### *Model provision*

##### **1 Regulation of procedure**

The Drafting Commission may regulate its own procedure (including quorum) [and that of any committee [or sub-committee]].

## Validity of things done

### General considerations

Acts of the Scottish Parliament establishing public bodies almost invariably include a provision intended to ensure that their proceedings and actings cannot be challenged on the grounds of a vacancy in the membership of the body or some defect in the appointment of a member or qualification of a person for membership.

Consideration should be given to whether such a provision is necessary. Cases where it may not be needed are where the body is an advisory body as it is unlikely that its decisions or actings could be challenged anyway, and where provision about these matters is to be made in regulations (for example, along with provision about procedures).

### Drafting considerations

A Bill establishing a public body (other than a purely advisory body) should include an express provision providing that the validity of things done by the body is not affected by vacancies etc (a 'validity provision'), unless such provision is to be made by regulations.

The validity provision should be in a section or (where located in a schedule) a paragraph of its own and not combined with any other provision such as that about the body's membership or regulation of its procedure.

The section or paragraph is to be headed 'Validity of things done'.

The following wording is to be used:

- '( ) The validity of anything done by [X body] is not affected by—
- (a) a vacancy in membership,
  - (b) a defect in the appointment of a member.'

Where the Bill includes express provision regulating disqualification from appointment as a member of the body (however that provision is expressed), a third paragraph should be included in the validity provision in the following terms:

- '(c) the disqualification of a person as a member after appointment.'

Provision about disqualification will only be needed if provision is made for automatic termination of membership (see the material on Membership, above).

Where the Bill includes express provision enabling or requiring the body to establish committees and provides for persons who are not members of the body to be appointed to committees, the validity provision should include reference to committees as follows:

- 'The validity of anything done by [X body] or its committees is not affected by [...].'

*Model provision***1 Validity of things done**

The validity of anything done by the Drafting Commission [or its committees] is not affected by—

- (a) a vacancy in membership,
- (b) a defect in the appointment of a member,
- (c) [the disqualification of a person as a member after appointment].

**General powers****General considerations**

Acts of the Scottish Parliament establishing public bodies nearly always include an express provision providing the body with additional powers to act in pursuance of its main functions.

At common law, a body will have power to do things that are 'fairly incidental' to its main purposes. Case law has considered what this means. Notably, it has been held that using assets in a way that brings in money and so assists the main undertaking is not of itself considered to be a use incidental to the main purpose, and that the body's powers are not to extend to whatever is consistent with the main purposes and may be conducive to achieving them, and are not to be enlarged just because the activity engaged in appears to be sensible, convenient and profitable.

Consideration should be given to any need to restrict the general powers given to a body in a Bill. Common examples of restrictions relate to acquiring and disposing of land, and borrowing and lending money. Restrictions might be absolute, or require the consent of the Scottish Ministers to particular actions. Common examples of activities requiring consent are the acquisition or disposal of land, giving of guarantees or indemnities or creating trusts or securities over property.

Provision is commonly made authorising a body to acquire or dispose of land (and sometimes other property) where doing so is conducive to the carrying out of its functions. Most provisions about land restrict the body's powers so that they may be exercised only with the Scottish Ministers' consent.

Note that bodies funded by the Scottish Government are required to comply with the requirements of the Scottish Public Finance Manual ("SPFM"), including a requirement for prior Ministerial approval for the acquisition of property and consultation with the Scottish Ministers before disposing of property (subject to some exceptions for specific bodies which generally relate to property used in line with the body's core activities).

Provision is sometimes made imposing more specific controls over land transactions, usually where the body will own substantial property and have more operational



independence than the norm. Bespoke policy instructions will be needed for this case.

There has been a tendency to give examples of things that can be done in exercise of incidental powers, perhaps as an attempt to avoid doubts about what can be done. Note that the power is restricted to being incidental to the body's main functions, and cannot be used for other purposes. So any powers that are critical to the operation of the body should be set out in a separate provision rather than as an extension of the incidental power. In particular, if the acquisition, holding and disposal of property is to be part of the body's main functions, then this should be provided for in the provisions dealing with the body's main functions and objectives.

On occasion, provision has been made requiring the approval of the Scottish Ministers for the body's choice of office location. If such provision is wanted, it is recommended that it is made in a separate section or paragraph from the one dealing with general powers.

### **Drafting considerations**

In a Bill establishing a public body, an express provision providing the body with general powers to act in pursuance of its functions should always be provided.

The provision conferring general powers should be in the following terms:

- '( ) [X body] may do anything which appears to it—
- (a) to be necessary or expedient for the purposes of, or in connection with, the performance of its functions,
  - (b) to be otherwise conducive to the exercise of those functions.'

Where it is intended that this power should be restricted in certain cases (for example, in relation to powers to acquire or dispose of land, give guarantees or grant securities) the provision should go on to provide for this as follows:

- '( ) [X body] may not however—
- (a) do [Y], or
  - (b) do [Z] without the consent of the Scottish Ministers.'

The provision should be in a section or (where located in a schedule) a paragraph of its own and not combined with any other provision.

The provision is to be headed 'General powers'.

#### *Model provision*

### **1 General powers**

- (1) The Drafting Commission may do anything which appears to it—
- (a) to be necessary or expedient for the purposes of, or in connection with, the performance of its functions, or

- (b) to be otherwise conducive to the performance of its functions.
- (2) The Commission may not however—
  - (a) do Y, or
  - (b) do Z without the consent of the Scottish Ministers.

## Funding and use of resources

### General considerations

Bodies which are part of the Scottish Administration are required to have their funding allocated through the annual Budget Act, and it is not appropriate to provide for the making of grants and loans to them when establishing them.

#### *Borrowing by the body*

In the absence of express provision, a body only has the power to borrow if it can be reasonably implied from the statutory context. The SPFM policy is to set out the body's borrowing powers (if any) in the legislation.

The current policy set out in the SPFM is that there is a presumption that all borrowing, excluding agreed overdrafts, should be from the Scottish Ministers via portfolio budgets authorised by a Budget Act. Provision about terms and conditions is not usually made.

Lending to statutory bodies by the Scottish Ministers has to be at a rate of interest at least as high as the lowest rate determined by the Treasury in respect of similar loans made out of the National Loans Fund on the day of the loan (section 68(1) of the Scotland Act 1998). An Act of the Scottish Parliament (ASP) accordingly cannot make contrary provision on the rate of borrowing from Ministers.

Section 68(2) of the Scotland Act 1998 prevents a statutory body from borrowing money under a power conferred by an ASP in a currency other than sterling except with the consent of the Scottish Ministers given with the approval of the Treasury.

If borrowing is likely to account for a substantial amount of a body's funding, provision can be made to allow the upper annual borrowing limit to be set by the annual Budget Act (for example, section 42 of the Water Industry (Scotland) Act 2002 and section 14 of the Water Services etc. (Scotland) Act 2005).

#### *Grants to the body*

If giving a power to make grants, consider whether the purposes of those grants need to be specified. There is perhaps less need to do so where the Scottish Ministers are making grants to the body (which has specific statutory functions) than where the body is itself empowered to make grants to third parties not operating under the same constraints or with the same degree of public accountability.

A power to make grants may be unrestricted (as in the model provision). If restrictions are wanted, additional wording will be required.

A general power to make grants will usually suffice. Occasionally, an additional power to make grants for particular purposes has been included, but arguably that is unnecessary as an unqualified power to pay grants should allow for their payment for particular purposes.

#### *Conditions attached to grant or loan*

There may be doubt as to whether a general reference to the imposition of conditions in relation to a grant includes conditions about repayment. If the policy intention is to allow for such conditions to be imposed in relation to a grant, this should be mentioned expressly.

It is thought that the power to impose conditions includes the power to impose conditions as to the use of the grant, and that this should not be mentioned expressly. If the ability to make grants for particular purposes is wanted, this could be expressed as a power to make a grant for particular purposes.

Express mention of conditions about repayment of grants and loans should also be made to ensure sufficient versatility to deal with conditions such as varying repayment dates or the manner of repayment.

In general, no express mention of interest is needed. Note section 68 of the Scotland Act 1998, which requires lending by the Scottish Ministers to be at a rate of interest not less than the lowest rate determined by the Treasury under section 5 of the National Loans Act 1968 in respect of similar loans. But express provision may be needed to deal with a particular policy intention (for example, as to the variation of interest rates).

It is not common to make express provision allowing for the conditions of a grant or loan to be varied. The initial conditions of making the grant or loan could provide for the circumstances in which they may be varied. If unilateral variation is wanted as a possibility, it should be mentioned expressly as it could have significant operational and commercial consequences.

#### *Other forms of financial assistance*

Provision about other forms of financial assistance generally deals with a situation where the intention is to facilitate more than simple payments of sums of money. It may include loans or, more unusually, offering guarantees or indemnities or making payments direct to third parties for services etc provided to the body. What is wanted will be a matter of policy in each case, but the model provision about financial assistance can be offered as a starting point if this sort of provision is instructed.

#### *Grants and loans by the body*

Some bodies are given the power to make grants and loans to third parties. Consideration should be given to specifying the purposes for which they may be

made as the recipients may not be subject to the same degree of public accountability as the body itself.

### *Use of resources*

Provision is sometimes made allowing a body to make investments, probably because of case law to the effect that local authorities have no implied power to make speculative investments.

Provision is also sometimes made allowing a body to accept gifts, usually in cases where the body is likely to receive donations. It is difficult to see how a body would not have inherent power to do so, although there may be doubt about powers to incur expense in holding or maintaining a gift or about the purposes for which a gift can be used. Note that section 85 of the Local Government (Scotland) Act 1973 expressly authorises local authorities to 'accept, hold and administer' gifts for the purpose of discharging their functions.

Provision is commonly made authorising a body to acquire or dispose of land (and sometimes other property) where doing so is conducive to the carrying out of its functions. This sort of provision should ordinarily be made in the provision dealing with general powers, but if the Bill does not include such provision it can be made in a provision about funding and use of resources.

If the acquisition, holding and disposal of property is to be part of the body's main functions, then this should be provided for in the provisions dealing with the body's main functions and objectives.

### **Drafting considerations**

How best to draft provisions about funding and the use of resources will depend to a certain extent on the policy to be implemented. Care should also be taken to avoid overlap with the body's general powers (see the material on General powers, above).

Where the Scottish Ministers are to be given the power to make grants and loans to the body, these should be dealt with together, rather than giving the body a power to borrow and Ministers a power to make grants.

If there is to be no power to make grants to the body, but the body is to be able to borrow money, this should be expressed as a power to borrow (rather than a Ministerial power to lend) and can be combined with any other provision about the use of resources.

Powers to borrow money, to hold and invest reserves, and to accept, hold and administer gifts represent information about how a body is funded and should be located beside or close to other provisions about funding. This will resolve any ambiguity about the body's power to do these things where conducive to the discharge of its functions and provide the reader with a full explanation of how the body is funded.

Different provision will be needed where there is a policy intention to restrict or extend powers of this type, and may be needed where one of the body's principal functions is to maintain or preserve property which may be gifted to it.

Powers for the body to make grants and loans to others should be contained in a separate provision from a provision enabling grants and loans to be made to it. The former sort of provision may be better placed beside provision about the body's functions than provision about its funding.

### *Model provisions*

#### **1 Funding and use of resources**

- (1) The Drafting Commission may, where it appears to it to be necessary or expedient for the purposes of, or in connection with, or to be otherwise conducive to, the performance of its functions
  - (a) borrow money from the Scottish Ministers or, with the consent of the Scottish Ministers, from other persons,
  - (b) invest sums not immediately required for the performance of its functions,
  - (c) accept, hold and administer gifts of any kind,
  - (d) hold and maintain land or other property.
- (2) [The Commission may acquire or dispose of land only with the consent of the Scottish Ministers.]

#### **2 Grants to the Commission**

- (1) The Scottish Ministers may make grants to the Drafting Commission.
- (2) [In addition to any grants made under subsection (1), the Scottish Ministers may make grants to the Commission for particular purposes.]
- (3) A grant under subsection (1) [or (2)] is subject to such conditions (including conditions as to repayment) as the Scottish Ministers may determine.
- (4) [The Scottish Ministers may, from time to time after the grant is made, vary the conditions on which it was made.]

#### **3 Grants and loans to the Commission**

- (1) The Scottish Ministers may make grants and loans to the Drafting Commission.
- (2) A grant or loan under subsection (1) is subject to such conditions (including conditions as to repayment) as the Scottish Ministers may determine.

- (3) [The Scottish Ministers may, from time to time after the grant or loan is made, vary the conditions on which it was made.]

#### **4 Financial assistance**

- (1) The Scottish Ministers may provide such financial assistance to the Drafting Commission as they consider appropriate.
- (2) For the purposes of subsection (1), 'financial assistance' includes grants, loans, guarantees and indemnities.
- (3) The Scottish Ministers may attach conditions (including conditions as to repayment or the payment of interest) in respect of any financial assistance provided.

#### **5 Grants and loans by the Commission**

- (1) The Drafting Commission may make grants and loans to such persons as it considers appropriate for the purposes of, or in connection with, or where it appears to it to be otherwise conducive to, the performance of its functions.
- (2) A grant or loan under subsection (1) is subject to such conditions (including conditions as to repayment) as the Commission may determine.

## **Ministerial directions and guidance**

### **General considerations**

Whether to include provision about Ministerial directions or guidance is a matter of policy.

Consideration needs to be given to any exceptions to the matters about which Ministers may issue directions or guidance, and any publication requirements.

### **Drafting considerations**

Where provision is to be made about the giving of directions or guidance to the body by Ministers, it should be drafted in accordance with the following model provisions.

#### *Model provisions*

##### **1 Ministerial guidance**

- (1) The Drafting Commission must have regard to any written guidance given by the Scottish Ministers about the performance of its functions.

- (2) The Scottish Ministers must publish any such guidance (as soon as practicable after it is communicated to the Commission).

## **2 Power of Ministerial direction**

- (1) The Scottish Ministers may direct the Drafting Commission as to the performance of its functions.
- (2) But not in relation to the following—
  - (a) [...],
  - (b) [...].
- (3) A direction under subsection (1)—
  - (a) may be general or relate to a particular function or matter,
  - (b) must—
    - (i) be in writing, and
    - (ii) be published (as soon as practicable after it is communicated to the Commission).
- (4) The Scottish Ministers may revise or revoke a direction under subsection (1).
- (5) Subsection (3)(b) applies to the revision or revocation of a direction under subsection (1) as it applies to such a direction.

## **Annual reports**

### **General considerations**

Acts of the Scottish Parliament establishing public bodies frequently include express provision imposing an annual reporting duty.

What reporting requirements (if any) a body is to be subject to is a matter of policy. This section is concerned with a duty to make annual reports.

There may be a separate requirement to give information to Ministers, or a separate power to make other reports.

The detail of the reporting requirement will need to be considered. Issues include the information to be contained in the report, the period to be covered, when it is to be prepared and distributed, who is to receive a copy, whether copies should be provided before or after laying in the Parliament and publication, and how the report is to be published. In the absence of instructions, the starting point should be as in the model provisions.

There is an even split in past examples of the duty to lay the report before the Parliament being given to the body and being given to the Scottish Ministers. The model provisions offer alternative wording for both of these options.

If the body is given discretion as to the method of publication, this will be subject to any power of Ministerial direction unless otherwise provided.

There may be a need for transitional provision to deal with the first report. It is recommended that this is made in subordinate legislation if possible.

### **Drafting considerations**

In a Bill establishing a public body where the policy is to impose an annual reporting obligation on the body, an express provision should be provided.

A reporting duty provision will typically have the following elements:

- an obligation to prepare a report (typically on an annual basis following the financial year (as defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA))
- a description of the required content of the report (NB this guidance is concerned only with a generic situation where the body is reporting on its activities or the exercise of its functions)
- an obligation to publish each report
- an obligation to send a copy of the report to the Scottish Ministers or occasionally some other supervising authority
- an obligation for the report to be laid before the Parliament (either by the body or the Scottish Ministers).

Other duties relating to (for example) the provision of information should not be included in the standard reporting provision (unless they are intrinsically linked to the reports).

#### *Imposition of the duties on the body*

The obligations to prepare and publish a report should be combined unless there are particular policy reasons for separating out these duties. In addition, the subsection or sub-paragraph imposing these duties should deal with the other facets of the reporting obligations in so far as they fall on the body (i.e. laying the report before Parliament and sending a copy of the report to the monitoring body (typically the Scottish Ministers)). This approach is shown in variation 1.

A common variation is for the Scottish Ministers, rather than the body, to lay the report before Parliament. That is shown in Variation 2.



*Variation 1:*

- (1) [X body] must, as soon as practicable after the end of each financial year—
  - (a) prepare and publish a report on its activities during that year,
  - (b) send a copy of the report to the Scottish Ministers, and
  - (c) lay a copy of the report before the Scottish Parliament.

*Variation 2:*

- (1) [X body] must, as soon as practicable after the end of each financial year—
  - (a) prepare and publish a report on its activities during that year, and
  - (b) send a copy of the report to the Scottish Ministers.
- (2) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

*Form and content and method of publication*

As a default position (and in the absence of instructions to the contrary), the provision should:

- include a subsection or sub-paragraph giving the body power to determine the form and content of the report
- make no provision in relation to the manner of publication (unless there is a specific need to do so, such as ensuring that the body has discretion in spite of a Ministerial power of direction).

The provision should be worded:

'( ) It is for [X body] to determine the form and content of each report.'

*Location and section title*

It is recommended that it is kept near to any provision on annual accounts.

The provision should take a section (or paragraph) of its own and be given the title: 'annual report'.

*First reporting period*

No transitional provision relating to a short (or long) first reporting period should be included. That should be left to subordinate legislation wherever possible.

*Model provisions***1 Annual report**

- (1) The Drafting Commission must, as soon as practicable after the end of each financial year—

- (a) prepare and publish a report on its activities during that year,
  - (b) send a copy of the report to the Scottish Ministers, and
  - (c) lay a copy of the report before the Scottish Parliament.
- (2) [It is for the Commission to determine the form and content of each report.]

## **2 Annual report**

- (1) The Drafting Commission must, as soon as practicable after the end of each financial year—
- (a) prepare and publish a report on its activities during that year, and
  - (b) send a copy of the report to the Scottish Ministers.
- (2) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
- (3) [It is for the Commission to determine the form and content of each report.]

## **Accounts and audit**

### **General considerations**

The model provisions deal with the position where the body is required to keep accounts and have them audited. Consideration will have to be given to the need for any special accounting requirements.

Be aware of section 19 of the Public Finance and Accountability (Scotland) Act 2000, which enables the Scottish Ministers to require non-Ministerial office holders in the Scottish Administration to prepare accounts, and of sections 21 and 22 of that Act, which apply where an account is required by statute to be audited by the Auditor General or sent to the Auditor General for auditing. Section 19 makes provision in relation to accounts unnecessary in some circumstances. In such case, it is useful to explain that this applies in the Explanatory Notes.

Note in particular section 22(5), which requires the Scottish Ministers to lay a copy of the accounts and Auditor General's report before the Scottish Parliament and to publish them.

There may be a need for transitional arrangements for the first year, but this should be dealt with in subordinate legislation.

Note that 'financial year' is defined in schedule 1 of ILRA as a year ending with 31 March.

The SPFM provides that public bodies' accounts are to be subject to a Ministerial power of direction. Consideration will need to be given to the interaction between the general power of direction (see material on Ministerial directions and guidance, above) and a specific power in relation to accounts.

Consideration should also be given to the appointment of an accountable officer for the body. Provision can be made for an accountable officer in the Bill, or the Scottish Government's accountable officer can make the appointment, if the body is required to submit its accounts to the Auditor General for Scotland (see section 15(3) and (4) of the PFA Act 2000).

Policy teams should be reminded to speak to colleagues in finance and internal audit about the arrangements for auditing the body's accounts.

### **Drafting considerations**

In a Bill establishing a public body where it is the policy to impose accounting obligations on the body, an express provision should be included. Please note, it is not appropriate to include such provision in circumstances where section 19 of the Public Finance and Accountability (Scotland) Act 2000 will apply to the body.

Reliance should be placed on sections 21 and 22 of the 2000 Act instead of making similar provision in the Bill, unless instructed to do otherwise.

The provision should be in a section or paragraph of its own with the heading 'Accounts and Audit'.

The provision should provide for:

- the keeping of proper accounts and accounting records
- the preparation of an annual statement of accounts
- the audit of the accounts by the Auditor General for Scotland, and
- compliance with directions from the Scottish Ministers in relation to the accounts.

Except where there are specific instructions to the contrary, the provision should follow one of the examples below (selected on the basis of the policy in relation to the process for auditing the annual accounts).

'Financial year' should not be defined. Reliance can be placed on its definition in schedule 1 of the ILRA.

#### *Model provisions*

##### **1 Accounts and audit**

- (1) The Drafting Commission must—
  - (a) keep proper accounts and accounting records,

- (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Auditor General for Scotland for auditing.
- (2) The Commission must comply with any directions which the Scottish Ministers give it in relation to the matters mentioned in subsection (1)(a) and (b).

## **2 Accounts and audit**

- (1) The Drafting Commission must—
  - (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Scottish Ministers.
- (2) The Commission must comply with any directions which the Scottish Ministers give it in relation to the matters mentioned in subsection (1).
- (3) The Scottish Ministers must, as soon as reasonably practicable after receiving a copy statement of accounts from the Commission, send it to the Auditor General for Scotland for auditing.

## **Public bodies legislation**

### **General considerations**

When a new public body is established, it is common to make changes to other legislation relating to public bodies by inserting references to the new body. Of course, it is a matter of policy in each case as adding a body to such legislation has significant consequences.

The most common legislation to which changes are made are:

- the Ethical Standards in Public Life etc. (Scotland) Act 2000, schedule 3 - adding the body to the list of devolved public bodies required to produce a code of conduct
- the Scottish Public Services Ombudsman Act 2002, schedule 2 - adding to the list of authorities about whom a complaint can be made to the Scottish Public Services Ombudsman
- the Freedom of Information (Scotland) Act 2002, schedule 1 - applying the FOI regime to the body

- the Public Appointments and Public Bodies (Scotland) Act 2003, schedule 2 - adding the body to the list of bodies to which appointments are subject to the oversight of the Commissioner for Ethical Standards in Public Life.

Note that applying some regimes (e.g., FOI) to a body may make the body subject to other statutory duties.

Occasionally other legislation in relation to public bodies will also need to be amended. Examples include:

- the Public Services Reform (Scotland) Act 2010 - schedule 8 (bodies under a duty to provide information under Part 3 of that Act), schedule 19 (bodies subject to user focus scrutiny) and schedule 20 (bodies subject to a duty to co-operate in relation to scrutiny)
- the Public Records (Scotland) Act 2011 (duties in relation to records management)
- the Regulatory Reform (Scotland) Act 2014 - schedule 1 (list of "regulators" for the purpose of that Act)
- the Procurement Reform (Scotland) Act 2014 (list of bodies subject to procurement legislation)
- the Gender Representation on Public Boards (Scotland) Act 2018 – schedule 1 (list of public authorities subject to duties in relation to the "gender representation objective" under that Act).

See the public bodies unit guidance on establishing public bodies for a discussion of legislation that may need to be amended.

### **Drafting considerations**

When amending these pieces of legislation, care needs to be taken over placing and numbering the inserted reference to the body. In particular, there may be other, as yet uncommenced, insertions to be taken into account.

This sort of provision is consequential on the establishment of the body. It may be located at the end of the block of provisions establishing the body although it may also be made as part of a general set of consequential modifications.

Where to place these changes will depend on what else is being done in the Bill. No model provision is offered as the drafting will depend on where the changes are made.

If there are no other consequential modifications, then it is recommended that these changes are made in a section or paragraph at the end of the run of provisions establishing the body, and is to be headed 'application of legislation relating to public bodies'.

## Model provisions

### Notes on the model provisions

The model provisions have been agreed for use in relation to any Bill creating a public body drafted from January 2016.

Not all the provisions are appropriate in every case, in particular:

- care must be taken in offering provisions which haven't been instructed
- several of the provisions are alternative approaches.

The provisions are drafted as sections. If they are to form a schedule, adaptation to refer to paragraphs, sub-paragraphs etc is required.

Within provisions there are often alternatives or optional material to cater for different policies.

Where the instructed policy requires deviation from the model provisions, drafters should try to remain as consistent with the model provisions as possible.

### Compilation of all model provisions

#### *The Drafting Commission*

#### **1 The Drafting Commission**

- (1) The Drafting Commission (in Gaelic, Coimisean Dreachdaidh) is established.
- (2) The Commission is a body corporate.

#### **2 Exclusion of Crown status**

- (1) The Drafting Commission—
  - (a) is not a servant or agent of the Crown, and
  - (b) does not enjoy any status, immunity or privilege of the Crown.
- (2) [The Commission's members and employees are not to be regarded as civil servants.]

#### **3 Appointment of members**

- (1) The Drafting Commission is to consist of—

- (a) [a member appointed by the Scottish Ministers to chair the Commission, and]
  - (b) at least [x] but no more than [y] [other] members appointed by the Scottish Ministers.
- (2) A member is appointed for [such period [not exceeding [z] years] as the Scottish Ministers determine] [[z] years].
  - (3) The Scottish Ministers may [not] reappoint as a member of the Commission a person who is, or has been, a member.
  - (4) The Scottish Ministers may determine other terms and conditions of membership, in relation to matters not covered by this Act.
  - (5) The Scottish Ministers may by regulations amend subsection (1)[(b)] by substituting a different number for a number for the time being mentioned there.

#### **4 Appointment (where different types of member)**

- (1) The Drafting Commission is to consist of—
  - (a) a member appointed by the Scottish Ministers to chair the Commission,
  - (b) the legal members, and
  - (c) at least [x] but no more than [y] other members appointed by the Scottish Ministers.
- (2) The legal members are—
  - (a) the Lord President, and
  - (b) the Lord Justice-Clerk.
- (3) The Scottish Ministers may by regulations amend subsection (1)(c) by substituting a different number for a number for the time being mentioned there.

#### **5 Period and conditions of membership (where different types of member)**

- (1) A member of the Drafting Commission appointed under section 4(1)(a) or (c) holds office for [such period [not exceeding [z] years] as the Scottish Ministers determine] [[z] years].
- (2) The Scottish Ministers may [not] reappoint as a member of the Commission a person who is, or has been, a member.
- (3) The Scottish Ministers may determine other terms and conditions of membership, in relation to matters not covered by this Act.

## **6 Persons who may [not] be members**

- (1) The Scottish Ministers may appoint a person as a member of the Drafting Commission only if they consider that the person has [skills] [expertise] [knowledge] [experience] relevant to the functions of the Commission.
- (2) The Scottish Ministers may appoint a person as a member of the Commission only if [...].
- (3) The Scottish Ministers may not appoint a person as a member of the Commission if the person is—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.
- (4) When appointing members of the Commission, the Scottish Ministers are to have regard to the desirability of [...].
- (5) The Scottish Ministers must, when appointing members of the Commission, do so in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements.
- (6) In subsection (5), "equal opportunities" and "equal opportunity requirements" have the same meanings as in Section L2 (equal opportunities) of Part II of schedule 5 of the Scotland Act 1998.

## **7 Members' remuneration, allowances and pensions**

- (1) The Drafting Commission [may] [must] pay each member such remuneration and allowances (including expenses) as [the Scottish Ministers may determine] [it may, with the approval of the Scottish Ministers, determine].
- (2) The Drafting Commission [may] [must] pay, or make arrangements for the payment of, such pensions, allowances and gratuities to, or in respect of, any person who is or has been a member of the Commission as the Scottish Ministers may determine.
- (3) Those arrangements may include—
  - (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (4) The reference in subsection (2) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.



## **8 Early termination of membership**

- (1) A member of the Drafting Commission may resign by giving notice in writing to the Scottish Ministers.
- (2) The Scottish Ministers may, by giving notice to the member in writing, remove a member of the Commission if—
  - (a) the member [is] [becomes] insolvent,
  - (b) the member has been absent, [without reasonable excuse] [the permission of the Commission], from [3 consecutive meetings of the Commission] [meetings of the Commission for a period of longer than 6 consecutive months],
  - (c) the Scottish Ministers consider that the member is—
    - (i) unable to perform the functions of a member, or
    - (ii) unsuitable to continue as a member.
- (3) For the purposes of subsection (2)(a), a person becomes insolvent if [...].
- (4) A person's membership of the Commission ends if the person becomes—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.

## **9 Chief executive and other staff**

- (1) The Drafting Commission is to appoint, as a member of staff, a chief executive.
- (2) [The Commission is to appoint each chief executive with the approval of the Scottish Ministers.]
- (3) [The chief executive may not be a member of the Commission.]
- (4) The Commission may appoint other staff.
- (5) The chief executive and other staff are appointed on such terms and conditions as the Commission, with the approval of the Scottish Ministers, determines.

## **10 Chief executive**

- (1) The Drafting Commission is to have, as a member of staff, a chief executive.
- (2) [The chief executive may not be a member of the Commission.]
- (3) The Scottish Ministers are to appoint the first chief executive—

- (a) after consulting the Commission,
  - (b) on such terms and conditions as they determine.
- (4) The Commission is to appoint each subsequent chief executive—
- (a) with the approval of the Scottish Ministers,
  - (b) on such terms and conditions as it, with the approval of the Scottish Ministers, determines.

## **11 Other staff**

- (1) The Drafting Commission may appoint staff other than the chief executive.
- (2) Those staff are appointed on such terms and conditions as the Commission, with the approval of the Scottish Ministers, determines.

## **12 Pensions of chief executive and other staff**

- (1) The Drafting Commission may, with the approval of the Scottish Ministers, pay or make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, any person who is or has been a member of staff of the Commission.
- (2) Those arrangements may include—
  - (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (3) The reference in subsection (1) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

## **13 Committees**

- (1) The Drafting Commission may establish committees [and sub-committees].
- (2) The membership of a committee [or sub-committee] may include [(but may not consist entirely of)] persons who are not members of the Commission [(but those persons are not entitled to vote at meetings)].

## **14 Authority to perform functions**

- (1) The Drafting Commission may authorise—

- (a) any of its members,
  - (b) any committee established by it,
  - (c) [its chief executive,] or
  - (d) any [other] member of its staff,
- to perform such of its functions (and to such extent) as it may determine.
- (2) [But the Commission may not authorise another person to perform any of the following functions—
- (a) approving any [annual] budget or financial plan,
  - (b) approving annual reports or accounts,
  - (c) the function set out in section [x].]
- (3) The giving of authority under this section to perform a function does not—
- (a) affect the Commission's responsibility for the performance of the function, or
  - (b) prevent the Commission from performing the function itself.

## **15 Regulation of procedure**

The Drafting Commission may regulate its own procedure (including quorum) [and that of any committee [or sub-committee]].

## **16 Validity of things done**

The validity of anything done by the Drafting Commission [or its committees] is not affected by—

- (a) a vacancy in membership,
- (b) a defect in the appointment of a member,
- (c) [the disqualification of a person as a member after appointment].

## **17 General powers**

- (1) The Drafting Commission may do anything which appears to it—
- (a) to be necessary or expedient for the purposes of, or in connection with, the performance of its functions, or
  - (b) to be otherwise conducive to the performance of its functions.
- (2) The Commission may not however—
- (a) do [Y], or
  - (b) do [Z] without the consent of the Scottish Ministers.

**18 Funding and use of resources**

- (1) The Drafting Commission may, where it appears to it to be necessary or expedient for the purposes of, or in connection with, or to be otherwise conducive to, the performance of its functions—
  - (a) borrow money from the Scottish Ministers or, with the consent of the Scottish Ministers, from other persons,
  - (b) invest sums not immediately required for the performance of its functions,
  - (c) accept, hold and administer gifts of any kind,
  - (d) hold and maintain land or other property.
- (2) [The Commission may acquire or dispose of land only with the consent of the Scottish Ministers.]

**19 Grants to the Commission**

- (1) The Scottish Ministers may make grants to the Drafting Commission.
- (2) [In addition to any grants made under subsection (1), the Scottish Ministers may make grants to the Commission for particular purposes.]
- (3) A grant under subsection (1) [or (2)] is subject to such conditions (including conditions as to repayment) as the Scottish Ministers may determine.
- (4) [The Scottish Ministers may, from time to time after the grant is made, vary the conditions on which it was made.]

**20 Grants and loans to the Commission**

- (1) The Scottish Ministers may make grants and loans to the Drafting Commission.
- (2) A grant or loan under subsection (1) is subject to such conditions (including conditions as to repayment) as the Scottish Ministers may determine.
- (3) [The Scottish Ministers may, from time to time after the grant or loan is made, vary the conditions on which it was made.]

**21 Financial assistance**

- (1) The Scottish Ministers may provide such financial assistance to the Drafting Commission as they consider appropriate.

- (2) For the purposes of subsection (1), "financial assistance" includes grants, loans, guarantees and indemnities.
- (3) The Scottish Ministers may attach conditions (including conditions as to repayment or the payment of interest) in respect of any financial assistance provided.

## **22 Grants and loans by the Commission**

- (1) The Drafting Commission may make grants and loans to such persons as it considers appropriate for the purposes of, or in connection with, or where it appears to it to be otherwise conducive to, the performance of its functions.
- (2) A grant or loan under subsection (1) is subject to such conditions (including conditions as to repayment) as the Commission may determine.

## **23 Ministerial guidance**

- (1) The Drafting Commission must have regard to any written guidance given by the Scottish Ministers about the performance of its functions.
- (2) The Scottish Ministers must publish any such guidance (as soon as practicable after it is communicated to the Commission).

## **24 Power of Ministerial direction**

- (1) The Scottish Ministers may direct the Drafting Commission as to the performance of its functions.
- (2) But not in relation to the following—
  - (a) [...],
  - (b) [...].
- (3) A direction under subsection (1)—
  - (a) may be general or relate to a particular function or matter,
  - (b) must—
    - (i) be in writing, and
    - (ii) be published (as soon as practicable after it is communicated to the Commission).
- (4) The Scottish Ministers may revise or revoke a direction under subsection (1).
- (5) Subsection (3)(b) applies to the revision or revocation of a direction under subsection (1) as it applies to such a direction.

**25 Annual report**

- (1) The Drafting Commission must, as soon as practicable after the end of each financial year—
  - (a) prepare and publish a report on its activities during that year,
  - (b) send a copy of the report to the Scottish Ministers, and
  - (c) lay a copy of the report before the Scottish Parliament.
- (2) [It is for the Commission to determine the form and content of each report.]

**26 Annual report**

- (1) The Drafting Commission must, as soon as practicable after the end of each financial year—
  - (a) prepare and publish a report on its activities during that year, and
  - (b) send a copy of the report to the Scottish Ministers.
- (2) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
- (3) [It is for the Commission to determine the form and content of each report.]

**27 Accounts and audit**

- (1) The Drafting Commission must—
  - (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Auditor General for Scotland for auditing.
- (2) The Commission must comply with any directions which the Scottish Ministers give it in relation to the matters mentioned in subsection (1)(a) and (b).

**28 Accounts and audit**

- (1) The Drafting Commission must—
  - (a) keep proper accounts and accounting records,

- (b) prepare in respect of each financial year a statement of accounts,  
and
  - (c) send a copy of the statement to the Scottish Ministers.
- (2) The Commission must comply with any directions which the Scottish Ministers give it in relation to the matters mentioned in subsection (1).
  - (3) The Scottish Ministers must, as soon as reasonably practicable after receiving a copy statement of accounts from the Commission, send it to the Auditor General for Scotland for auditing.

## V. Public offices

### Overview

Bills establishing public offices (such as Commissioners) are rarer than those establishing public bodies.

A number of offices were established in the early days of the Scottish Parliament in order to regulate and maintain standards in public services, such as the Scottish Information Commissioner. Appointments to those offices are made by Her Majesty on the recommendation of the Scottish Parliament and those offices are sponsored by the Scottish Parliamentary Corporate Body. Changes to their governance arrangements were made in the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 in order to align them with those of the newly established Commission for Ethical Standards in Public Life.

There have been relatively few other offices established by Act of the Scottish Parliament. Those that have been are sponsored by the Scottish Ministers and have functions that are exercisable in contained policy areas. Examples include the Police Investigations and Review Commissioner, the National Convener (in relation to children's hearings), and the Convener of the School Closure Review Panels. Their governance arrangements are more varied than those of the SPCB sponsored offices.

It is perhaps more likely that future instructions to establish a public office will be concerned with an officer appointed by the Scottish Ministers to exercise functions in a particular policy area than an officer sponsored by the SPCB, and the guidance has been prepared with this sort of office in mind (while also in places mentioning the case where an office holder is appointed by Her Majesty). But in general it is important to bear in mind that there is much less uniformity in provisions establishing offices than in provisions establishing public bodies, and the guidance contained in the following sections of the Manual should be used with that in mind.

It should also be noted that this guidance is not concerned with the establishment of offices such as those of a judicial nature.

### Establishment

#### General considerations

The most common name for public offices established in Acts of the Scottish Parliament is "Commissioner" but the appropriate name will depend on the functions to be exercised by the office holder. There may be a policy preference for a particular name to be used.



There do not appear to be any examples of a public office being given a name in Gaelic. But if a Gaelic name is requested, consider whether the office is also to have a name in English and, if so, which is to be the commonly used one.

### **Drafting considerations**

If the office is to have a Gaelic name in addition to an English name, that name should be given immediately after its English name, in brackets (unless the Gaelic name is to be the commonly used one).

The provision establishing the office should be in the following terms:

'The office of [name of office] [(in Gaelic, [Gaelic name of office])] is established.'

The heading of the section establishing the office should be the name of the office.

#### *Model provision*

### **1 The Drafting Commissioner**

The office of Drafting Commissioner is established.

## **Exclusion of Crown status**

### **General considerations**

The usual style of referring to an office holder not being a servant or agent of the Crown should be departed from with caution as omitting either of these elements, or using alternative wording (e.g. 'acting on behalf of the Crown') may alter the legal effect.

It is not clear what a statement that the office holder's property is not property of, or held on behalf of, the Crown adds to a statement that the office holder does not enjoy any status, immunity or privilege of the Crown. Such provision is not thought to be needed.

In some cases, it may be desirable from a policy perspective to further provide that 'the office holder's employees are not to be regarded as civil servants'. This occasionally arises in circumstances where an existing office is being continued (with changes to its constitution), or staff are being transferred and the status of the office holder's staff may be called into question.

### **Drafting considerations**

A provision excluding Crown status from an office should specify that 'the [name of office] is not a servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown'.

If provision is to be made about the status of the office holder's staff, it should specify that "the [name of office's] employees are not to be regarded as civil servants".

The section or paragraph heading should be '**Exclusion of Crown status**'.

*Model provision*

**1 Exclusion of Crown status**

(1) The Drafting Commissioner—

(a) is not a servant or agent of the Crown, and

(b) does not enjoy any status, immunity or privilege of the Crown.

[(2) The Commissioner's employees are not to be regarded as civil servants.]

## **Appointment**

### **General considerations**

Consideration needs to be given to:

- method of appointment (including by whom),
- whether former office holders can be re-appointed,
- terms and conditions (including period), and who determines them,
- any grounds for disqualification from appointment,
- any other criteria in relation to appointment,
- remuneration and pensions,
- termination of appointment.

### *Appointment*

Consider who is to make the appointment. Office-holders are sometimes appointed by the Scottish Ministers, but not always (for example, some are appointed by Her Majesty on the nomination of the Scottish Parliament). Who makes the appointment is likely to depend on the nature of the office.

Most Acts make provision about whether or not a person can be re-appointed. It is common to provide that this is not allowed (but this is a policy decision).

Note that appointments will normally (but not always) be regulated by the Commissioner for Ethical Standards in Public Life in Scotland under the Public Appointments and Public Bodies etc. (Scotland) Act 2003. Bill teams should be reminded of this and of the Code of Practice published under section 2(1) of that Act.

If the office is to be sponsored by the SPCB, the Chief Executive of the Scottish Parliament should be made aware of the proposal to establish the office as early as possible in the process.

### *Terms and conditions*

Where the Scottish Ministers make the appointment they will usually also determine the terms and conditions on which the person is appointed. This may include fixing the period of appointment, although sometimes this is fixed in the legislation. Where the appointment is made by Her Majesty on the nomination of the Scottish Parliament, the Scottish Parliamentary Corporate Body usually determines these matters.

Where the Act sets out some of the terms and conditions of appointment it is usual to provide for other terms and conditions to be determined by the Scottish Ministers (or the SPCB).

### *Persons who may or may not be appointed*

It is not common to make provision about people who may be appointed to hold an office or to require the office-holder to have particular skills and expertise (although on at least one occasion there is a power to prescribe qualifications that must be held by the office holder). But it is common to make provision about people who may not be appointed. The grounds on which a person may not be appointed are a matter of policy, but the most common ground is holding elected office, e.g. membership of the Scottish Parliament, House of Commons etc. There may be other grounds depending on the nature of the office (e.g. a person who is or has been a police constable cannot be the Police Investigations and Review Commissioner).

Holding an office may be grounds for disqualification as an MSP or an MP (see the House of Commons (Disqualification) Act 1975, section 15 of the Scotland Act 1998, and the Scottish Parliament (Disqualification) Order 2015).

### *Remuneration and pensions*

Provision is commonly made authorising payments to be made by the Scottish Ministers (or SPCB) to office holders by way of remuneration and allowances and/or expenses, as well as enabling arrangements to be made for the payment of pensions to former office holders.

Note that the reservation of pensions in Section F3 of schedule 5 of the Scotland Act 1998 does not reserve pensions payable to the holder of an office which is a Scottish public authority with mixed or no reserved functions.

### *Early termination of appointment*

Provision is commonly made enabling an office holder to resign, for example by giving notice in writing to the Scottish Ministers (if appointed by them). In the case of office holders appointed by Her Majesty, provision is made for the officer holder to be removable by Her Majesty on the office holder's request.

It is common to enable an office holder to be removed, although the grounds for removal are not universal. In some cases they are similar to those for the removal of members of public bodies (insolvency or bankruptcy, failure to perform functions, inability to perform functions or unsuitability to continue in office).

Where the office holder is appointed by Her Majesty on the recommendation of the Parliament, the usual ground for removal is that the office holder has lost the confidence of the Parliament, or has breached the terms and conditions of appointment.

Other grounds of removal may be needed for particular circumstances (for example, conviction of a criminal offence is a ground for removal from office as the Police Investigations and Review Commissioner).

Consider whether appointment is to be automatically terminated on the occurrence of certain events, or if those events are to trigger the possibility of removal. Automatic termination is not common, except where the office holder takes up another public office (e.g., as an MSP or an MP).

## **Drafting considerations**

### *Appointment*

Provision about who makes the appointment, the period of the appointment and the determination of terms and conditions not covered in the Act should be made in one section headed "appointment".

### *Persons who may or may not be appointed*

It is helpful to deal with people who may or may not be appointed in one section or paragraph. If only providing for people who may not be appointed, this should be headed 'Persons who may not be appointed'. If provision is made about people who may be appointed (e.g., those with relevant skills or qualifications), the provision should be headed 'Persons who may be appointed'.

Where providing that a person may not be appointed if the person holds another office, the choice of offices will be a matter of policy. But the most common ones should be provided for in the following order (omitting any that are not wanted, and adding any others at an appropriate place):

- (a) member of the Scottish Parliament,
- (b) member of the House of Commons,
- (c) member of the House of Lords,
- (d) member of the European Parliament,
- (e) office-holder in the Scottish Administration,
- (f) councillor of a local authority,
- (g) civil servant,
- (h) employee of a local authority.

### *Remuneration*

It is recommended that provision is made for the payment of 'remuneration and allowances (including expenses)' as this should cover all payments which might be made, including expenses. But this may need to be adapted if the policy is to restrict the sort of payment that can be made.

### *Early termination of appointment*

Provision about the different ways in which an appointment can end early should be made in one section or paragraph headed '**early termination of appointment**'.

### *Model provisions*

#### **1 Appointment**

- (1) The Scottish Ministers are to appoint a person to hold the office of Drafting Commissioner.
- (2) [A person appointed under subsection (1) holds office for [such period [not exceeding [z] years] as the Scottish Ministers determine] [z] years.]
- (3) [A person who holds or has held the office of Drafting Commissioner may [not] be reappointed.]
- (4) The Scottish Ministers may determine other terms and conditions of appointment, in relation to matters not covered by this Act.

#### **2 Persons who may [not] be appointed**

- (1) The Scottish Ministers may appoint a person to hold the office of Drafting Commissioner only if they consider that the person has [skills] [expertise] [knowledge] [experience] relevant to the functions of the Commissioner.
- (2) The Scottish Ministers may not appoint a person to hold the office of Drafting Commissioner if the person is—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.

#### **3 Remuneration, allowances and pensions**

- (1) The Scottish Ministers [may] [must] pay the Drafting Commissioner such remuneration and allowances (including expenses) as the Scottish Ministers determine.
- (2) The Scottish Ministers [may] [must] pay, or make arrangements for the payment of, such pensions, allowances and gratuities to, or in respect of, a person who holds or has held the office of Drafting Commissioner as the Scottish Ministers may determine.

- (3) Those arrangements may include—
  - (a) making payment towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (4) The reference in subsection (2) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

#### **4 Early termination of appointment**

- (1) The Drafting Commissioner may resign by giving notice in writing to the Scottish Ministers.
- (2) The Scottish Ministers may, by giving notice in writing to the person holding the office of Drafting Commissioner, remove the person from that office if—
  - (a) the person [is] [becomes] insolvent,
  - (b) the Scottish Ministers consider that the person is—
    - (i) unable to perform the Commissioner's functions, or
    - (ii) unsuitable to continue to hold that office.
- (3) For the purposes of subsection (2)(a), a person [is] [becomes] insolvent if...
- (4) A person's appointment as Drafting Commissioner ends if the person becomes—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.

## **Temporary appointments**

### **General considerations**

It is common to make provision for the appointment of a person to act as the office holder where the office is vacant or the office holder is unable to act. An alternative approach is to allow any deputy to the office holder to act during such a period (but the appointment of deputies generally is rare).

Consider who is to make the appointment. That person will usually determine the terms and conditions of the appointment and may determine its period. Alternatively the power may just be to make an appointment for the duration of the period of the

vacancy or office holder's inability to act. Provision may also be made enabling the temporary appointee to resign or be removed.

Consider whether provision is needed about who is to pay the person's salary etc. (discussed in relation to permanent appointments in public offices: appointments).

If the Act provides for grounds of disqualification from appointment to hold the office, consider whether those should also be grounds for disqualification from appointment as a temporary appointee.

It is normal to provide for the temporary appointee to be treated as the office holder for all purposes except those of provision about the terms and conditions (including remuneration and pensions) of the office holder.

## **Drafting considerations**

It is recommended that provision about temporary appointments is made in a different section or paragraph from one dealing with permanent appointments.

### *Model provisions*

#### **1 Temporary appointments**

- (1) This section applies during any period when—
  - (a) the office of Drafting Commissioner is vacant, or
  - (b) the person holding the office is for any reason unable to perform the Commissioner's functions.
- (2) The Scottish Ministers may appoint a person to act as Commissioner during that period.
- (3) A person appointed under subsection (2)—
  - (a) is to be appointed on such terms and conditions as the Scottish Ministers determine,
  - (b) while acting as Commissioner is to be treated for all purposes, except for those of sections [x and y], as the Commissioner.

## **Staff**

### **General considerations**

Most (but not all) office holders have the ability to appoint staff.

It is common to require the approval of the Scottish Ministers (or Scottish Parliament Corporate Body if the office holder is appointed on the recommendation of the Parliament) of the terms and conditions on which staff are appointed, and occasionally the number of staff that can be appointed.

It is not common to give a power to make payments of remuneration to staff, probably because that can be implied from the power to appoint staff and determine their terms and conditions.

It is common to give a power to pay pensions to former (and sometimes current) staff. Payment of compensation for loss of office is commonly allowed. The approval of the Scottish Ministers (or SPCB) is commonly needed for these arrangements.

## **Drafting considerations**

'Staff' is considered to be a broader term than 'employee' and is to be preferred.

It is not thought necessary to say that the office holder may employ staff 'necessary for the exercise of its functions' unless as a way to limit the number of staff that may be employed.

### *Model provisions*

#### **1 Staff**

- (1) The Drafting Commissioner may appoint staff.
- (2) Those staff are appointed on such terms and conditions as the Commissioner, with the approval of the Scottish Ministers, determines.

#### **2 Staff pensions**

- (1) The Drafting Commissioner may, with the approval of the Scottish Ministers, pay or make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, any person who is or has been a member of staff of the Commissioner.
- (2) Those arrangements may include—
  - (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (3) The reference in subsection (1) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

## **Authority to perform functions**

### **General considerations**

It is common for holders of public offices to be able to authorise others to carry out their functions. Generally they can authorise any person to do so (whether a member of their staff or not).



There is a distinction between agency arrangements for the exercise of functions by another person, and delegation of functions to that person. Express or implied legislative authority is needed for delegation, but not for acting through an agent.

*Craies* (11th ed., 12.3.2) suggests that delegation denudes the person making it of the power delegated. Consideration needs to be given to whether the office holder is to retain the ability to exercise the relevant functions. If it is, express provision should be made for that.

Consideration also needs to be given to whether there are any functions which must always be exercised by the office holder, and whether the delegated power can be exercised in all circumstances or only in some.

### Drafting considerations

Where a Bill creates an office, an express provision allowing the office holder to authorise others to perform its functions should always be offered. The standard provision should be limited to authorisation of staff. As a starting point, provision along the following lines can be suggested—

'[The office holder] may authorise any person to perform such of [the office holder's] functions (and to such extent) as [the office holder] may determine.'

An exception should be added where certain functions are not to be capable of being performed by others. For example—

'[The office holder] may not authorise another person to perform any of the following functions—

- (a) approving any [annual] budget or financial plan,
- (b) approving annual reports or accounts,
- (c) the function set out in section [x].'

The provision must also clarify whether granting authority will deprive the office holder of responsibility for, or ability to perform, the function concerned. In most cases the policy will be that it should not do so, so the most common policy position would be achieved by saying—

'The giving of authority under this section to perform a function does not—

- (a) affect [the office holder's] responsibility for the performance of the function, or
- (b) prevent [the office holder] from performing the function.'

The provision should be placed alongside provision giving the office holder general powers to act in pursuance of the office holder's functions (if such provision is being made) and should be entitled '**Authority to perform functions**'.

*Model provision***1 Authority to perform functions**

- (1) The Drafting Commissioner may authorise any person to perform such of the Commissioner's functions (and to such extent) as the Commissioner may determine.
- (2) But the Commissioner may not authorise another person to perform any of the following functions—
  - (a) approving any [annual] budget or financial plan,
  - (b) approving annual reports or accounts,
  - (c) the function set out in section [x].
- (3) The giving of authority under this section to perform a function does not—
  - (a) affect the Commissioner's responsibility for the performance of the function, or
  - (b) prevent the Commissioner from performing the function.

**Validity of things done****General considerations**

Acts of the Scottish Parliament establishing public offices sometimes include a provision intended to ensure that the office holder's actings cannot be challenged on the grounds of a defect in the appointment of the office holder.

Consideration should be given to whether such a provision is necessary. It may not be needed where the office holder's decisions or actings are unlikely to be challenged anyway.

If the office holder is appointed by Her Majesty on the nomination of the Parliament, it is normal to provide that the actings are valid despite any defect in the nomination of the Parliament, rather than in the appointment.

**Drafting considerations**

A Bill establishing a public office may include an express provision providing that the validity of things done by the office holder is not affected by a defect in the office holder's appointment (a 'validity provision').

The validity provision should be in a section or (where located in a schedule) a paragraph of its own and not combined with any other provision.

The section or paragraph is to be headed '**Validity of things done**'.

The following wording is to be used—

'The validity of anything done by [the office holder] is not affected by a defect in a person's appointment as [the office holder].'

Where the Bill includes provision automatically terminating a person's appointment on the occurrence of certain events, consideration should be given to the validity of anything done by a person continuing to act as the office-holder after the appointment is terminated. The only common ground of automatic termination is taking up another public office (see the material on Public offices: Appointment).

#### *Model provision*

### **1 Validity of things done**

The validity of anything done by the Drafting Commissioner is not affected by a defect in a person's appointment as Commissioner.

## **General powers**

### **General considerations**

Acts of the Scottish Parliament establishing public offices nearly always include an express provision providing the office holder with additional powers to act in pursuance of the office holder's main functions. This often includes express power to enter into contracts and to acquire and dispose of land and property (although it is not clear why this would not fall within the general power to do things).

Consideration should be given to any need to restrict the general powers given to an office holder in a Bill (although there do not seem to be any restrictions in previous examples).

Consideration should also be given to whether the requirements of the SPFM will apply to the office. These include a requirement for prior approval for the acquisition of property and consultation before disposing of property (subject to some exceptions for specific offices which generally relate to property used in line with the office holder's core activities).

Office holders sponsored by the SPCB require the SPCB's agreement to acquiring or disposing of land, and are required to comply with directions from the SPCB about the location of the office holder's office.

If provision about the location of the office holder's office is wanted, it is recommended that it is made in a separate section or paragraph from the one dealing with general powers.

### **Drafting considerations**

In a Bill establishing a public office, an express provision providing the office holder with general powers to act in pursuance of the office holder's functions may be provided.

A provision conferring general powers should be in the following terms:

'[The office holder] may do anything which appears to it—

- (a) to be necessary or expedient for the purposes of, or in connection with, the performance of [the office holder's] functions,
- (b) to be otherwise conducive to the exercise of those functions.'

Where it is intended that this power should be restricted in certain cases (for example in relation to powers to acquire or dispose of land, give guarantees or grant securities) the provision should go on to provide for this as follows:

'[The office holder] may not however—

- (a) do [Y], or
- (b) do [Z] without the consent of the Scottish Ministers.'

The provision should be in a section or (where located in a schedule) a paragraph of its own and not combined with any other provision.

The provision is to be headed '**General powers**'.

#### *Model provision*

### **1 General powers**

- (1) The Drafting Commissioner may do anything which appears to the Commissioner—
  - (a) to be necessary or expedient for the purposes of, or in connection with, the performance of the Commissioner's functions, or
  - (b) to be otherwise conducive to the performance of those functions.
- (2) The Commissioner may not however—
  - (a) do [Y], or
  - (b) do [Z] without the consent of the Scottish Ministers.

## **Funding and use of resources**

### **General considerations**

The only provision commonly made about funding in relation to office holders is about who pays the office holder's salary, pension etc. This is discussed in the section on public offices: appointment.

Consideration should be given to what sort of funding and resources the office holder will need.

Provision is occasionally made for the payment of sums necessary for the fulfilment of the office holder's functions or the employment of staff and services, or for (e.g.)

the Scottish Ministers to provide or ensure the provision of property, staff and services.

Office holders supported by the SPCB are placed under a duty to comply with directions from the SPCB about the sharing of premises, staff, services or other resources with other public bodies or office holders.

It is rare to find other provisions about funding and the use of resources (e.g. about grants and loans) in Acts establishing offices.

## **Ministerial powers of direction and guidance**

### **General considerations**

Whether to include provision about Ministerial directions or guidance is a matter of policy.

Consideration needs to be given to any exceptions to the matters about which Ministers may issue directions or guidance, and any publication requirements.

### **Drafting considerations**

Where provision is to be made about the giving of directions or guidance to the office holder by Ministers, it should be drafted in accordance with the following model provisions.

#### *Model provisions*

#### **1 Ministerial guidance**

- (1) The Drafting Commissioner must have regard to any written guidance given by the Scottish Ministers about the performance of the Commissioner's functions.
- (2) The Scottish Ministers must publish any such guidance (as soon as practicable after it is communicated to the Commissioner).

#### **2 Power of Ministerial direction**

- (1) The Scottish Ministers may direct the Drafting Commissioner as to the performance of the Commissioner's functions.
- (2) But not in relation to the following—
  - (a) [...],
  - (b) [...].
- (3) A direction under subsection (1)—
  - (a) may be general or relate to a particular function or matter,

- (b) must—
  - (i) be in writing, and
  - (ii) be published (as soon as practicable after it is communicated to the Commissioner).
- (4) The Scottish Ministers may revise or revoke a direction under subsection (1).
- (5) Subsection (3)(b) applies to the revision or revocation of a direction under subsection (1) as it applies to such a direction.

## Reports

### General considerations

Acts of the Scottish Parliament establishing public offices commonly include express provision imposing an annual reporting duty.

What reporting requirements (if any) an office holder is to be subject to is a matter of policy. This section is concerned with a duty to make annual reports.

There may be a separate requirement to give information to Ministers, or a separate power to make other reports.

The detail of the reporting requirement will need to be considered. Issues include the information to be contained in the report, the period to be covered, when it is to be prepared and distributed, who is to receive a copy, whether copies should be provided before or after laying in the Parliament and publication, and how the report is to be published. In the absence of instructions, the starting point should be as in the model provisions.

Consider whether any duty to lay the report before the Parliament is to be given to the office holder, or to the Scottish Ministers. The model provisions offer alternative wording for both of these options.

If the office holder is given discretion as to the method of publication, this will be subject to any power of Ministerial direction unless otherwise provided.

There may be a need for transitional provision to deal with the first report. It is recommended that this is made in subordinate legislation if possible.

### Drafting considerations

In a Bill establishing a public office, where the policy is to impose an annual reporting obligation on the office holder, an express provision should be provided.

A reporting duty provision will typically have the following elements:

- an obligation to prepare a report (typically on an annual basis following the financial year (as defined in schedule 1 of ILRA))
- a description of the required content of the report (NB this policy is concerned only with a generic situation where the office holder is reporting on its activities or the exercise of its functions)
- an obligation to publish each report
- an obligation to send a copy of the report to the Scottish Ministers or occasionally some other supervising authority
- an obligation for the report to be laid before the Parliament (either by the office holder or the Scottish Ministers)

Other duties relating to (for example) the provision of information should not be included in the standard reporting provision (unless they are intrinsically linked to the reports).

*Imposition of the duties on the office holder*

The obligations to prepare and publish a report should be combined unless there are particular policy reasons for separating out these duties. In addition, the subsection or subparagraph imposing these duties should deal with the other facets of the reporting obligations in so far as they fall on the office holder (i.e. laying the report before Parliament and sending a copy of the report to the monitoring body (typically the Scottish Ministers)). This approach is shown in variation 1.

A variation is for the Scottish Ministers, rather than the office holder to lay the report before Parliament and that is shown in Variation 2.

*Variation 1:*

- (1) [The office holder] must, as soon as practicable after the end of each financial year-
  - (a) prepare and publish a report on [the office holder's] activities during that year,
  - (b) send a copy of the report to the Scottish Ministers, and
  - (c) lay a copy of the report before the Scottish Parliament.

*Variation 2:*

- (1) [The office holder] must, as soon as practicable after the end of each financial year-
  - (a) prepare and publish a report on [the office holder's] activities during that year, and
  - (b) send a copy of the report to the Scottish Ministers.

- (2) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.

*Form and content and method of publication*

As a default position (and in the absence of instructions to the contrary), the provision should:

- include a subsection or subparagraph giving the office holder power to determine the form and content of the report,
- make no provision in relation to the manner of publication (unless there is a specific need to do so, such as ensuring that the office holder has discretion in spite of a Ministerial power of direction).

The provision should be worded:

- ( ) It is for [the office holder] to determine the form and content of each report.'

*Location and section title*

It is recommended that it is kept near to any provision on annual accounts.

The provision should take a section (or paragraph) of its own and be given the title: '**Annual report**'.

*First reporting period*

No transitional provision relating to a short (or long) first reporting period should be included. That should be left to subordinate legislation wherever possible.

*Model provision*

**1 Annual report**

- (1) The Drafting Commissioner must, as soon as practicable after the end of each financial year—
- (a) prepare and publish a report on the Commissioner's activities during that year,
  - (b) send a copy of the report to the Scottish Ministers, and
  - (c) lay a copy of the report before the Scottish Parliament.
- (2) [It is for the Commissioner to determine the form and content of each report.]

**2 Annual report**

- (1) The Drafting Commissioner must, as soon as practicable after the end of each financial year—



- (a) prepare and publish a report on the Commissioner's activities during that year, and
  - (b) send a copy of the report to the Scottish Ministers.
- (2) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
- (3) [It is for the Commissioner to determine the form and content of each report.]

## Accounts

### General considerations

The model provisions deal with the position where the office holder is required to keep accounts and have them audited. Consideration will have to be given to the need for any special accounting requirements.

Be aware of section 19 of the Public Finance and Accountability (Scotland) Act 2000, which enables the Scottish Ministers to require non-Ministerial office holders in the Scottish Administration to prepare accounts, and of sections 21 and 22 of that Act, which apply where an account is required by statute to be audited by the Auditor General, or sent to the Auditor General for auditing.

Section 19 makes provision in relation to accounts unnecessary in some circumstances.

Note in particular section 22(5) which requires the Scottish Ministers to lay a copy of the account and Auditor General's report before the Scottish Parliament and to publish them.

There may be a need for transitional arrangements for the first year, but this should be dealt with in subordinate legislation.

Note that 'financial year' is defined in schedule 1 of ILRA as a year ending with 31 March.

Consider whether the accounts should be subject to a Ministerial power of direction. If they should, consideration will need to be given to the interaction between the general power of direction (see Ministerial directions and guidance) and the specific power in relation to accounts.

Section 15 of the Public Finance and Accountability (Scotland) Act 2000 makes default provision about the appointment of accountable officers for offices whose accounts are to be audited by the Auditor General. Acts establishing offices which are sponsored by the Scottish Parliamentary Corporate Body (such as the Scottish Information Commissioner) include provision requiring the SPCB to designate the office holder or a member of the office holder's staff as accountable officer (displacing section 15).

## Drafting considerations

In a Bill establishing a public office where it is the policy to impose accounting obligations on the office holder, an express provision should be provided. Please note, it is not appropriate to include such provision in circumstances where section 19 of the Public Finance and Accountability (Scotland) Act 2000 will apply to the office holder (i.e. office-holders in the Scottish Administration).

Reliance should be placed on sections 21 and 22 of the 2000 Act instead of making similar provision in the Bill unless instructed to do otherwise.

The provision should be in a section or paragraph of its own with the heading '**Accounts and Audit**'.

The provision should provide for:

- the keeping of proper accounts and accounting records,
- the preparation of an annual statement of accounts,
- the audit of the accounts by the Auditor General for Scotland, and
- compliance with directions from the Scottish Ministers in relation to the accounts.

Except where there are specific instructions to the contrary, the provision should follow one of the examples below (selected on the basis of the policy in relation to the process for auditing the annual accounts).

'Financial year' should not be defined. Reliance can be placed on its definition in schedule 1 of ILRA.

### *Model provisions*

#### **1 Accounts and audit**

- (1) The Drafting Commissioner must—
  - (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Auditor General for Scotland for auditing.
- (2) The Commissioner must comply with any directions which the Scottish Ministers give the Commissioner in relation to the matters mentioned in subsection (1)(a) and (b).

#### **2 Accounts and audit**

- (1) The Drafting Commissioner must—

- (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts,  
and
  - (c) send a copy of the statement to the Scottish Ministers.
- (2) The Commissioner must comply with any directions which the Scottish Ministers give the Commissioner in relation to the matters mentioned in subsection (1).
  - (3) The Scottish Ministers must, as soon as reasonably practicable after receiving a copy statement of accounts from the Commissioner, send it to the Auditor General for Scotland for auditing.

## Public bodies legislation

### General considerations

When a new public office is established, it is common to make changes to other legislation relating to public bodies and office holders by inserting references to the new office. Of course, it is a matter of policy in each case as adding an office to such legislation has significant consequences.

The most common legislation to which changes are made are:

- the Scottish Public Services Ombudsman Act 2002, schedule 2 - adding to the list of authorities about whom a complaint can be made to the Scottish Public Services Ombudsman
- the Freedom of Information (Scotland) Act 2002, schedule 1 - applying the FOI regime to the office holder
- the Public Appointments and Public Bodies (Scotland) Act 2003, schedule 2 - adding the office to the list of offices and bodies to which appointments are subject to the oversight of the Commissioner for Ethical Standards in Public Life

Occasionally other legislation in relation to public bodies and offices will also need to be amended. Examples include:

- the Public Services Reform (Scotland) Act 2010 - schedule 8 (bodies and office holders under a duty to provide information under Part 3 of that Act), schedule 19 (bodies and office holders subject to user focus scrutiny) and schedule 20 (bodies and office holders subject to a duty to co-operate in relation to scrutiny)
- the Public Records (Scotland) Act 2011 (duties in relation to records management)

- the Regulatory Reform (Scotland) Act 2014 - schedule 1 (list of "regulators" for the purpose of that Act)
- the Procurement Reform (Scotland) Act 2014 (list of bodies and office holders subject to procurement legislation).

### **Drafting considerations**

When amending these pieces of legislation, care needs to be taken over placing and numbering the inserted reference to the office holder. In particular, there may be other, as yet uncommenced, insertions to be taken into account.

This sort of provision is consequential on the establishment of the office. It may be located at the end of the block of provisions establishing the office although it may be made as part of a general set of consequential modifications.

Where to place these changes will depend on what else is being done in the Bill. No model provision is offered as the drafting will depend on where the changes are made.

If there are no other consequential modifications then it is recommended that these changes are made in a section or paragraph at the end of the run of provisions establishing the office, and is headed '**Application of legislation relating to office holders**'.

### **Model provisions**

#### **1 The Drafting Commissioner**

The office of Drafting Commissioner is established.

#### **2 Exclusion of Crown status**

- (1) The Drafting Commissioner—
  - (a) is not a servant or agent of the Crown, and
  - (b) does not enjoy any status, immunity or privilege of the Crown.
- (2) [The Commissioner's employees are not to be regarded as civil servants.]

#### **3 Appointment**

- (1) The Scottish Ministers are to appoint a person to hold the office of Drafting Commissioner.
- (2) [A person appointed under subsection (1) holds office for [such period [not exceeding [z] years] as the Scottish Ministers determine] [[z] years].]

- (3) [A person who holds or has held the office of Drafting Commissioner may [not] be reappointed.]
- (4) The Scottish Ministers may determine other terms and conditions of appointment, in relation to matters not covered by this Act.

#### **4 Persons who may [not] be appointed**

- (1) The Scottish Ministers may appoint a person to hold the office of Drafting Commissioner only if they consider that the person has [skills] [expertise] [knowledge] [experience] relevant to the functions of the Commissioner.
- (2) The Scottish Ministers may not appoint a person to hold the office of Drafting Commissioner if the person is—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.

#### **5 Remuneration, allowances and pensions**

- (1) The Scottish Ministers [may] [must] pay the Drafting Commissioner such remuneration and allowances (including expenses) as the Scottish Ministers determine.
- (2) The Scottish Ministers [may] [must] pay, or make arrangements for the payment of, such pensions, allowances and gratuities to, or in respect of, a person who holds or has held the office of Drafting Commissioner as the Scottish Ministers may determine.
- (3) Those arrangements may include—
  - (a) making payment towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (4) The reference in subsection (2) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

#### **6 Early termination of appointment**

- (1) The Drafting Commissioner may resign by giving notice in writing to the Scottish Ministers.
- (2) The Scottish Ministers may, by giving notice in writing to the person holding the office of Drafting Commissioner, remove the person from office if—

- (a) the person [is] [becomes] insolvent,
- (b) the Scottish Ministers consider that the person is—
  - (i) unable to perform the Commissioner's functions, or
  - (ii) unsuitable to continue to hold that office.
- (3) For the purposes of subsection (2)(a), a person [is] [becomes] insolvent if...
- (4) A person's appointment as Drafting Commissioner ends if the person becomes—
  - (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a councillor of a local authority.

## **7 Temporary appointments**

- (1) This section applies during any period when—
  - (a) the office of Drafting Commissioner is vacant, or
  - (b) the person holding the office is for any reason unable to perform the Commissioner's functions.
- (2) The Scottish Ministers may appoint a person to act as Commissioner during that period.
- (3) A person appointed under subsection (2)—
  - (a) is to be appointed on such terms and conditions as the Scottish Ministers determine,
  - (b) while acting as Commissioner is to be treated for all purposes, except for those of sections [x and y], as the Commissioner.

## **8 Staff**

- (1) The Drafting Commissioner may appoint staff.
- (2) Those staff are appointed on such terms and conditions as the Commissioner, with the approval of the Scottish Ministers, determines.

## **9 Staff pensions**

- (1) The Drafting Commissioner may, with the approval of the Scottish Ministers, pay or make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, any person who is or has been a member of staff of the Commissioner.
- (2) Those arrangements may include—

- (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (3) The reference in subsection (1) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

## **10 Authority to perform functions**

- (1) The Drafting Commissioner may authorise any person to perform such of the Commissioner's functions [and to such extent] as the Commissioner may determine.
- (2) But the Commissioner may not authorise another person to perform any of the following functions—
- (a) approving any [annual] budget or financial plan,
  - (b) approving annual reports or accounts,
  - (c) the functions set out in section [x].
- (3) The giving of authority under this section to perform a function does not—
- (a) affect the Commissioner's responsibility for the performance of the function, or
  - (b) prevent the Commissioner from performing the function.

## **11 Validity of things done**

The validity of anything done by the Drafting Commissioner is not affected by a defect in a person's appointment as Commissioner.

## **12 General powers**

- (1) The Drafting Commissioner may do anything which appears to the Commissioner—
- (a) to be necessary or expedient for the purposes of, or in connection with, the performance of the Commissioner's functions, or
  - (b) to be otherwise conducive to the performance of those functions.
- (2) The Commissioner may not however—
- (a) do [Y], or
  - (b) do [Z] without the consent of the Scottish Ministers.

**13 Ministerial guidance**

- (1) The Drafting Commissioner must have regard to any written guidance given by the Scottish Ministers about the performance of the Commissioner's functions.
- (2) The Scottish Ministers must publish any such guidance (as soon as practicable after it is communicated to the Commissioner).

**14 Power of Ministerial direction**

- (1) The Scottish Ministers may direct the Drafting Commissioner as to the performance of the Commissioner's functions.
- (2) But not in relation to the following—
  - (a) ...
  - (b) ...
- (3) A direction under subsection (1)—
  - (a) may be general or relate to a particular function or matter,
  - (b) must—
    - (i) be in writing, and
    - (ii) be published (as soon as practicable after it is communicated to the Commissioner).
- (4) The Scottish Ministers may revise or revoke a direction under subsection (1).
- (5) Subsection (3)(b) applies to the revision or revocation of a direction under subsection (1) as it applies to such a direction.

**15 Annual report**

- (1) The Drafting Commissioner must, as soon as practicable after the end of each financial year—
  - (a) prepare and publish a report on the Commissioner's activities during that year,
  - (b) send a copy of the report to the Scottish Ministers, and
  - (c) lay a copy of the report before the Scottish Parliament.
- (2) [It is for the Commissioner to determine the form and content of each report.]



**16 Annual report**

- (1) The Drafting Commissioner must, as soon as practicable after the end of each financial year—
  - (a) prepare and publish a report on the Commissioner's activities during that year, and
  - (b) send a copy of the report to the Scottish Ministers.
- (2) The Scottish Ministers must lay a copy of the report before the Scottish Parliament.
- (3) [It is for the Commissioner to determine the form and content of each report.]

**17 Accounts and audit**

- (1) The Drafting Commissioner must—
  - (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Auditor General for Scotland for auditing.
- (2) The Commissioner must comply with any directions which the Scottish Ministers give the Commissioner in relation to the matters mentioned in subsection (1)(a) and (b).

**18 Accounts and audit**

- (1) The Drafting Commissioner must—
  - (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Scottish Ministers.
- (2) The Commissioner must comply with any directions which the Scottish Ministers give the Commissioner in relation to the matters mentioned in subsection (1).
- (3) The Scottish Ministers must, as soon as reasonably practicable after receiving a copy statement of accounts from the Commissioner, send it to the Auditor General for Scotland for auditing.

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### Glossary

ASP/asp - Act of the Scottish Parliament

ILRA - Interpretation and Legislative Reform (Scotland) Act 2010

PCO - Parliamentary Counsel Office

SI - Statutory Instrument

SPFM – Scottish Public Finance Manual

SSI - Scottish Statutory Instrument



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