

Scotland Bill

DRAFT CLAUSES FOR CONSULTATION

1 **The Lord Advocate: Convention rights and Community law**

- (1) The 1998 Act is amended as follows.
- (2) In section 57(3) (Community law and Convention rights: excepted acts of the Lord Advocate) omit the words after paragraph (b).
- (3) After section 98 insert—

“98A The Lord Advocate and Convention rights etc: criminal appeals

- (1) This section applies to an act or failure to act of the Lord Advocate—
 - (a) in prosecuting any offence, or
 - (b) in the capacity of head of the system of criminal prosecution in Scotland.
- (2) In this section “compatibility” means the compatibility of such an act or failure to act with any of the Convention rights or with Community law.
- (3) For the purpose of determining any question relating to compatibility, an appeal shall lie to the Supreme Court against a determination by a court of two or more judges of the High Court of Justiciary.
- (4) An appeal under this section lies from any court only with the permission of that court or, failing such permission, with permission of the Supreme Court.
- (5) Where the High Court’s determination was on an appeal under section 106 of the Criminal Procedure (Scotland) Act 1995 (appeal from solemn proceedings), subsections (3) to (3D) of that section apply in accordance with subsections (7) and (8) below.
- (6) Where the High Court’s determination was on an appeal under subsection (2) of section 175 of that Act (appeal from summary proceedings), subsections (5) to (5D) of that section apply in accordance with subsection (7) and (8) below.
- (7) Those subsections (appeal to be on grounds of miscarriage of justice) apply to the Supreme Court in relation to an appeal under this section as they apply to the High Court in relation to any appeal.
- (8) But an alleged miscarriage of justice may not be brought under review of the Supreme Court by virtue of subsection (7) except for the purpose of determining a question relating to compatibility.
- (9) In relation to an appeal under this section, the Supreme Court has all the powers of the court below and may (in consequence of determining a question relating to compatibility)—

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- (a) affirm, set aside or vary any order or judgment made or given by that court;
 - (b) remit any issue for determination by that court;
 - (c) order a new trial or hearing.”
 - (4) In paragraph 1 of Schedule 6 (devolution issues), after sub-paragraph (f) insert—

“But a question whether an act or failure to act is, or would be, incompatible with any of the Convention rights or with Community law is not a devolution issue if it is an act or failure to act of the Lord Advocate in prosecuting any offence or in the capacity of head of the systems of criminal prosecution and investigation of deaths in Scotland.”
 - (5) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
 - (6) In sections 112(6), 121(5)(a), 121A(5), 122(5) and 177(8), for “paragraph 13(a) of Schedule 6 to the Scotland Act 1998” substitute “section 98A of the Scotland Act 1998 or paragraph 13(a) of Schedule 6 to that Act”.
 - (7) In section 122(4)—
 - (a) for “and paragraph 13(a) of Schedule 6 to the Scotland Act 1998” substitute “, section 98A of the Scotland Act 1998 and paragraph 13(a) of Schedule 6 to that Act”;
 - (b) after “appeal under” insert “section 98A of that Act or”.
 - (8) In section 288A—
 - (a) in subsection (1) omit “in pursuance of paragraph 6 of Schedule 6 to the Scotland Act 1998 (devolution issues)”;
 - (b) for subsection (2) substitute—
 - “(2) Where the Advocate General for Scotland was a party in pursuance of paragraph 6 of Schedule 6 to the Scotland Act 1998 (devolution issues), the Advocate General may refer to the High Court for their opinion any devolution issue which has arisen in the proceedings.
 - (2A) Whether or not subsection (2) applies, the Advocate General for Scotland may refer to the High Court for their opinion any question which has arisen in the proceedings as to whether an act or failure to act of the Lord Advocate in prosecuting in the proceedings or in the capacity of head of the system of criminal prosecution in Scotland was incompatible with any of the Convention rights or with Community law.
 - (2B) If a reference is made under subsection (2) or (2A) the Clerk of Justiciary shall send to the person acquitted or convicted and to any solicitor who acted for that person at the trial a copy of the reference and intimation of the date fixed by the Court for a hearing.”;
 - (c) in subsection (6) after “(2)” insert “or (2A)”.
 - (9) In section 288B(1)—
 - (a) for “paragraph 13(a) of Schedule 6 to the Scotland Act 1998” substitute “section 98A of the Scotland Act 1998 or paragraph 13(a) of Schedule 6 to that Act”;

(b) omit “of a devolution issue”.

2 **Power to vary retrospective decisions about non-legislative acts**

In section 102 of the 1998 Act (powers of courts or tribunals to vary retrospective decisions), in subsection (1) at the end add “, or

(c) any other purported exercise of a function by a member of the Scottish Government was outside devolved competence.”