



Scotland Office

An Oifis na h-Albainn

Partnerships (Prosecution) (Scotland) Act 2013

The purpose of this notice is to alert you to the change in the law relating to partnerships which operate in Scotland. Members of such partnerships (including current and prospective members), their professional advisers and representative organisations will want to be aware of this change, so they may consider how it will affect them.

The Partnerships (Prosecution) (Scotland) Act 2013 came into force on 26 April 2013, the day after it received Royal Assent. It has been enacted to respond to a loophole in the law which became apparent following a fire at the Rosepark Nursing Home in 2004. The partnership which operated the Home dissolved following the fire. Attempted prosecutions failed because the partnership no longer existed as a matter of law. Following the Scottish Law Commission's Report in December 2011, the UK Government consulted on and then introduced the Bill (which gave rise to this Act) in the UK Parliament in November 2012. In order to ensure the loophole was closed as soon as legitimately possible, the provisions have effect from the day following Royal Assent.

In brief the main provisions in the Bill are -

- A partnership which dissolves on or after the 26th April 2013 may nevertheless be prosecuted as if it had not dissolved, provided the prosecution is commenced within 5 years from dissolution;
- The prosecution of a partnership can proceed in the event of a change in membership. This provision in the Act was necessary since the law which existed prior to the coming into force of the Act was unclear. It might be that a change in membership established a new legal entity, different to the legal entity that existed before the change in membership. This could have had the same effect as the dissolution of a partnership in that it could have allowed the evasion of prosecution for an offence committed by the original partnership;
- Certain offences are framed so that culpable partners – as individuals – may be prosecuted for a partnership offence, as well as the partnership itself. The Act clarifies that dissolution or change of membership will not prevent prosecution of such a partner.

The Act enacted a limited reform of Scots law on partnerships. It does not criminalise any activity which is not currently criminal under existing law. It does not impose criminal liability on individual partners. It prevents dissolution and change of membership from being technical obstacles to prosecution of partnerships.

The Bill has cross-party support but, even so, during passage of the Bill, the law of partnerships has been debated and subject to much scrutiny. One of the tenets of the current law – which has held firm since enactment of the Partnerships Act 1890 – is that partnerships should be able to form and dissolve without undue statutory influence or regulation. That is still the case. But it is not acceptable that they could use this freedom to evade criminal proceedings – hence the Bill. As a form of business association, partnership makes sense. It is about sharing assets but also taking on the responsibilities and liabilities of a joint enterprise. Partnerships should be able to form and re-form without constraint or burdensome administrative requirements. None of that is changing.

Absent statutory controls, it is nevertheless important that individuals entering into partnership understand what the legal and financial consequences of doing so are. As partners bear unlimited and joint and several liability for the debts and obligations of the partnership, they are encouraged to take the necessary steps to inform themselves of and protect themselves against unintended consequences, such as liabilities of the partnership which may already exist. Their potential exposure to a fine is just one of the liabilities which prospective partners should assess before joining.

The Act changes the law under which dissolution of a partnership may be a technical obstacle to prosecution. Any partnerships which have relied on that element of existing law should now consider what the Act means for them.

This limited reform to partnership law in Scotland provides an opportunity for organisations who represent the interests of partnerships or who give advice to prospective or current members of partnerships to remind their members and clients of the need for such consideration.

30 APRIL 2013