Written evidence submitted by the Law Society of Scotland (DSB 12)

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee ('the committee'). The committee is comprised of senior and specialist lawyers (both in-house and private practice)

The committee welcomes the opportunity to consider and respond to the call for written evidence on the Constitutional implications of draft Scotland clauses and has the following comments to make.

This submission focusses on Part 1 – Constitutional Arrangements contained in the Draft Scotland clauses 2015 in the appendix to "Scotland in the United Kingdom: an enduring settlement" (CM8990).

Clause 1 and the sovereignty of the UK Parliament

The Smith Commission reported on 27 November 2014. The five political parties which participated in the Smith Commission Agreement process agreed that new powers should be devolved to the Scottish Parliament and to Scottish Ministers.

Pillar 1 of the Agreement relates to providing a "durable but responsive constitutional settlement for the governance of Scotland". Paragraph 21 of the report concerns the permanence of the Scottish Parliament and provides that "UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions".

Clause 1(1) inserts a new subsection (1A) into Section 1 of the Scotland Act 1998. It states that "A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements". Similar phraseology is used for the purposes of amending Section 44 of the Scotland Act 1998 which makes provision for the Scottish Government. That Section, which was amended by the Scotland Act 2012 will now have a new sub-section 1 which declares that "there shall be a Scottish Government and that a Scottish Government is recognised as a permanent part of the United Kingdom's constitutional arrangements…"

The phrasing in the draft clause does not literally implement the terms of Paragraph 21 of the Smith Report. The use of the phrase "recognised as permanent" has a different nuance from a statement that "the Scottish Parliament and Scottish Government are permanent institutions". The difference in wording between the Smith Report and the draft clause is significant. The draft clause could be said to acknowledge or declare a matter of fact rather than provide a statement in law. There are a number of observations to be made about how this draft legislation fits with the current theory of the sovereignty to the UK Parliament.

The classic theory of UK Parliamentary sovereignty is stated in AV Dicey's "Introduction to the Study of the Law of the Constitution" which has been subject to academic study and judicial interpretation over the years. Parliament can, in theory, make law on any subject which it pleases and there are no fundamental laws which restrict its power. Parliament cannot fetter itself for the future and cannot bind its own successor Parliaments. The "continuing" theory of Parliamentary supremacy means that Parliament possesses as Dicey stated "under the English constitution, the right to make or unmake any law whatever. Furthermore, no person or body according to Dicey has the right to override or set aside the legislation of Parliament.

This theory presents drafting problems for any statement of the permanence of the Scottish Parliament or the Scottish Government. It is clearly in an effort to meet the intentions of the Smith Commission but also to work within the confines of the theory of the sovereignty of Parliament that the draft clauses have been framed in the way they have. As statements of law, they lack normative quality and would need amendment prior to introduction in order to confer normative status. However, even an amendment to Draft Clause 1 would not, of itself achieve "permanence". This is because a Parliament cannot, according to the orthodox theory bind a future or successor Parliament. Accordingly, the conclusion must be that Clause 1 is designed to be, in fact, declaratory of political intention rather than an attempt to re-write the existing theory of the sovereignty of Parliament.

Permanence as a concept

Some attempts have been made to create permanent institutions by statutory arrangements:-

1. In the Treaty of Union, Article XIX, it is stated that "the Court of Session… do, after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted … and that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland".

2. The Northern Ireland Act 1998 provides in Section 1:-

   "(1) it is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

   (2) but if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a United Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland).

These are two examples of how Parliament has sought to make law which, in strict theory does not comply with the theory of Parliamentary sovereignty, while at the same time sets out political and legal objectives.

The Draft Clauses are not designed to reformulate British constitutional theory; therefore Clause 1 will need amendment in order to align it more closely to the views of the Smith Commission. At the same time we need to acknowledge the theory of the sovereignty of Parliament and the limitations that theory puts on achieving, in legal terms the intentions of the Smith Commission.

There are a number of cases, such as *Ellon Street Estates v The Minister of Health [1934]* 1 KB 590 and *Thorburn v Sunderland City Council [2002] EWHC 195 (Admin)* which adhere to the classic position but recently, in decisions such as *Jackson v The Attorney General [2005] UKHL 56* and *AXA General Insurance Limited and Others v The Lord Advocate and Others [2011] UKSC 46*, there was some discussion about the nature of the principle of the sovereignty of the United Kingdom Parliament. In the AXA case, Lord Hope at Paragraph 50 stated "the question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances, is still under discussion". That discussion, however, cannot take place in the context of dealing with these clauses and would require a more searching investigation along the lines of the committee's inquiry into "*A New Magna Carta*". We ought to acknowledge that the world is different since Dicey wrote his text and recently issues have been raised about whether Parliament can be relied upon to control an abuse of its legislative authority by the Executive. It has been observed that Parliamentary sovereignty and the rule of law are "not entirely in harmony" with each other. These clauses however are not the place to decide where the proper balance should lie.

These clauses will nonetheless require some amendment. This might be by an absolute statement attempting to limit Parliament's authority to legislate on the matter or by including a conditional qualification on the legislative authority as in the case of the Northern Ireland Act 1998.

Other declaratory statements in the law, such as the Statute of Westminster 1931 the Canada Act 1982 and the Hong Kong Act 1985 are all geared to permanently relinquishing Parliamentary sovereignty for the future over former colonies or dominions. As such they are not strictly precedents but they do demonstrate that sometimes Parliament can pass what appears to be legislation which contradicts the established constitutional theory.

Similarly, EU law and the doctrine of supremacy of EU law clearly modify the orthodox theory. *Factortame Ltd v Secretary of State for Transport (No.2) [1991] 1 AC 603.*

Clause 2 – The Sewel Convention

The Sewel Convention was declared in the House of Lords during the passage of the Scotland Bill 1998 on 21 July 1998, during a debate on an amendment by Lord Mackay of Drumadoon concerning Clause 27(7) – now Section 28(7). New Clause 28(8) seeks to recognise that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

In one sense, this does place the Sewel Convention on a statutory footing as required by Paragraph 22 of the Smith Report. It essentially quotes Lord Sewel at Column 791 where he stated that "we would expect a Convention to be established that Westminster would not normally legislate, with regard to devolved matters in Scotland, without the consent of the Scottish Parliament". As a Convention, the Sewel Convention has worked relatively well. Since the establishment of the Scottish Parliament, there appear to have been no significant problems with the operation of the Convention. It applies when UK legislation makes provision specifically designed for a devolved purpose. The Convention has been agreed in Memoranda of Understanding and by the House of Commons Procedure Committee and its practical usage is explained in Devolution Guidance Note Number 10 (DGN10). DGN10 does not apply to incidental or consequential provisions in relation to a reserved matter. It does apply to draft bills and private members' bills. It will also apparently continue to apply to any statutory formulation of the Convention.

It is significant that DGN10 also requires the consent of the Scottish Parliament in respect of provisions of a Bill before the UK Parliament which would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers (see DGN 10 at paragraphs 4(iii) and 9).

The Convention at present has no legal effect in limiting the power of the UK Parliament but a breach of the Convention would have considerable political impact. It would not only be unconstitutional to disregard the Convention but that action could also have significant political and constitutional consequences. A similar Convention applying to the Southern Rhodesian Legislative Assembly was referred to in the case of Madzimbamuto v Lardner-Burke PC [1969] 1 AC 723 where a breach would have been considered unconstitutional.

Is a breach of the Convention, even formulated in a new Scotland Bill, justiciable? Lord Sewel indicated in Column 791 that he expected that differences of opinion would be negotiated between the Parliaments or Governments rather than being argued in court. So, in theory, it might be litigated upon but would a court strike down UK legislation affecting a devolved area where the consent of the Scottish Parliament had not been given? Under the terms of Section 28(7) the answer to that question is probably not. However, purposive interpretation and declarations of incompatibility under the Human Rights Act 1998 as well as an enhanced sense of constitutionalism under devolution legislation indicate that when the courts consider UK legislation to be seriously flawed Parliament has considered itself bound to alter that legislation. It may therefore be the case that the courts will be called upon to adjudicate in the event of a statutory formulation of the Sewel Convention being breached. The outcome of such a case is a matter for the court concerned.

Clause 3 – 9

The Sub-Committee has no comment to make.

February 2015