

SCOTTISH LEGISLATION 1995

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INTRODUCTION

There were nine 'Scotland only' Acts passed by Parliament in 1995, out of a total of 87, but two of them were 'paving' statutes, which were repealed in subsequent legislation. The emphasis on substantive criminal law and on criminal procedure is to be welcomed, in bringing these aspects of the law into more manageable format.

The **Control of Pollution Act 1974 (c 40)**, which was much amended in its application to Scotland by the **Water Act 1989 (c 15)**, is further amended (by the **Environment Act 1995 (c 25)**) in order to bring the Scottish provisions with regard to pollution of inland waters into harmony with those applying to England and Wales. This Act also replaces many provisions of the near-centenarian **Public Health (Scotland) Act 1897 (c 38)** relating to statutory nuisances by adapting Part III of the **Environmental Protection Act 1990 (c 43)** so as to extend them to Scotland.

The 1995 Act sets up new autonomous agencies for either side of the Border, the Environment Agency for England and Wales (but naturally with no 'national label!'), and the Scottish Environment Protection Agency, known from the moment of conception, and now by statute, as SEPA. SEPA's powers are marginally wider than those of the EA, inasmuch as it takes over the powers of the Secretary of State to require the creation of smoke control areas, and of local authorities as enforcing authorities in relation to the release of substances into the air.

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CHAPTER NUMBER 6: CIVIL EVIDENCE (FAMILY MEDIATION) (SCOTLAND) ACT 1995

This Act makes provision that information as to what has occurred during family mediation may not be admitted as evidence in civil proceedings.

CHAPTER NUMBER 7: REQUIREMENTS OF WRITING (SCOTLAND) ACT

Although this is essentially an Act that affects legal practitioners, and especially conveyancers, it has considerable significance for people in business and also for the charitably disposed who have been accustomed to sign covenants without benefit of witnesses, by having resort to the well-known formula, 'adopted as holograph', above their signature. Although it is a relatively brief statute, consisting of 15 sections and 5 schedules, it has already given birth to two valuable commentaries published by W Green and by Butterworth at a cost of £16 (paperback) and £30 (hardback) respectively.

Certainly, the Act will remove from the scene a number of cases that have for long confused rather than enlightened the law student, by removing some rules as to proof of contracts (whose technicalities were tempered by the ingenuity and realism or humanity of the judges). It will deprive examiners of the opportunity to set some ingenious problem questions.

Apart from the abolition of the privilege of holograph documents and of those adopted as holograph, perhaps the most significant change for the ordinary member of the public is the reduction of the requirement to have the signatures of two witnesses, to that of one witness, to render a document 'self-proving'. An interesting concession (except in the case of self-proving documents) is that one may sign by a mark, initial or nickname if that is one's usual practice.

Of course, most contracts do not require to be in writing, but it remains essential to most transactions relating to land, such as the creation, variation or extinction of an interest in land, including rights of occupancy or use (or their restriction) - but not a tenancy. Generally speaking, where writing is required, as with the missives exchanged when buying and selling houses, only a bare signature is needed. However, it has been suggested that missives should be witnessed, thus rendering them self-proving. This would help to distinguish them from other communings between the parties.

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In the case of corporate bodies, to be self-proving, documents may be executed by a director, secretary or other authorised person, and signed by one witness, or, alternatively, by two directors, one director and the secretary, or two authorised persons. This brings Scots law conveniently into line with that of England.

Wills, in order to be self-proving, must, in addition to the signature of the witness on the last page, also be signed by the testator on every page, as before. The need for this is obvious. The Act uses the word 'sheet', but it would be prudent to sign each page.

There is a relaxation of the former rule that, when a document is to be executed notarially (when the grantor is blind or cannot write), the person executing the deed must read the whole document over to the grantor. This is not now required if the grantor indicates that he does not wish it to be read; it might be imprudent for the grantor to do so in the case of a will.

In addition to notarial execution by a notary or justice of the peace, this may now be done by an advocate or a sheriff clerk. The Act does not include parish ministers in the list, which may be a sign of these non-discriminatory ecumenical times, but may be regretted by some who distrust other professionals. Some people might have been more comfortable if the notarial execution of wills in particular could be trusted to the same range of clergy as those who are thought fit to tie the marriage knot.

Although the new rules may take a little time to get used to, a writer in the **Journal of the Law Society of Scotland** has expressed the view that, compared with some other innovations in the past two decades, this Act should not present many problems, and we may hope that it gets rid of others satisfactorily.

The Act is silent concerning the making of contracts by fax. Business practice is clearly developing faster than the law in this respect.

CHAPTER NUMBER 14: LAND REGISTERS (SCOTLAND) ACT 1995

This Act makes it a condition of acceptance of writs for recording in the Register of Sasines, and of applications for registration in the Land Register of Scotland (depending on which register is relevant to the area), that the

appropriate statutory fees have been duly paid. You get nothing 'on tick' from the government!

CHAPTER NUMBER 36: CHILDREN (SCOTLAND) ACT 1995

This is a major Act, extending to over 100 sections. It is the fruit of a series of reports, starting with Lord Clyde's **Report of the Inquiry into the Removal of Children From Orkney in February 1991** (House of Commons Papers 1992-93, No 191) and including the White Paper, **Scotland's Children: Proposals for Child Care Policy and Law** (1993, Cm 2286). The Bill was much amended in the course of its passage through Parliament.

Part I deals with Parents, Children and Guardians. It introduces new terminology. Parental rights (which are expressly listed, and supersede any analogous rights enjoyed by a parent at common law) become the correlative of parental responsibility. Custody and access become 'residence' and 'contact'.

While all mothers have full parental responsibilities, fathers enjoy these of right only if married to the mother. This includes cases where the marriage is voidable or was a 'putative' marriage: that is void but believed in good faith to be valid. There are provisions for circumstances where an unmarried father may, by means of an agreement registered in the Books of Council and Session, acquire parental rights and responsibilities.

Persons with de facto care and control must safeguard a child's health, development and welfare, and may consent to its surgical, medical or dental treatment. All exercise of parental responsibility must have regard to any views expressed by a child in reaching any major decision.

There are detailed rules as to guardianship, the administration of a child's property, and orders by the Court of Session or sheriff court relating to these matters.

Part II is the major part of the Act, dealing with the promotion of children's welfare by local authorities and children's hearings, and re-enacting and amending legislation going back to the **Social Work (Scotland) Act 1968 (c 49)**.

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Part III amends the **Adoption (Scotland) Act 1978 (c 28)**. The 'paramount consideration' is the need to safeguard and promote the welfare of the child throughout its life. It now suffices that an application for an adoption order be made before a person's 18th birthday for the proceedings to continue. Courts and adoption agencies must have regard so far as practicable to the child's expressed views (if any), its religious persuasion, racial origin and cultural and linguistic background. Adoption agencies must consider if satisfactory arrangements as alternatives to adoption may be made. A child's step-parent is now enabled to adopt the step-child without the child's natural parent also having to go through the absurd procedure of adopting his or her own child. One may sum up many of these provisions as statutory common sense.

Part IV contains miscellaneous provisions, including a section that enables children under the age of 16 who are successful in procreation also to register the births of their own children. This closes a lacuna in the **Age of Legal Capacity (Scotland) Act 1991 (c 50)**, which ignored the precocity of the human species, but of which the common law was fully aware.

CRIMINAL LEGISLATION

Criminal lawyers can hardly complain about any lack of legislative attention during the course of 1995, when five criminal statutes entered the statute book. One of these disappeared almost immediately, to appear in another form, one was a measure to provide for the mechanics of legislative change, and two were consolidation acts. Yet the overall picture has been one of a flurry of legislation, even in a year in which important aspects of the criminal justice system came under the scrutiny of the Sutherland Committee and the courts themselves handed down a number of landmark appellate decisions.

This spate of activity comprises: the **Criminal Justice (Scotland) Act 1995 (c.20)**, the **Criminal Law (Consolidation) Act 1995 (c.39)**, the **Criminal Procedure (Consequential Provisions) (Scotland) Act (c.40)**, the **Criminal Procedure (Scotland) Act 1995 (c.46)**, and the **Proceeds of Crime (Scotland) Act 1995 (c.43)**. The **Criminal Justice (Scotland) Act** was repealed by the **Criminal Procedure (Consequential Provisions) Act**, to appear in the new, consolidating legislation on criminal procedure, the **Criminal Procedure (Scotland) Act**. The **Proceeds of Crime (Scotland) Act** is largely based on existing legislation (the **Criminal Justice (Scotland) Act 1987** and the **Criminal Justice (Scotland) Act 1995**), and the **Criminal**

Law (Consolidation) (Scotland) Act similarly consolidates the law from a number of disparate legislative sources. The **Proceeds of Crime (Scotland) Act** is concerned with the tracking and confiscation of criminal profits, and with the forfeiture of the means of committing crime. The **Criminal Law (Consolidation) Act** brings into one legislative instrument a number of crimes, including sexual offences, legislation on serious and complex fraud, money laundering offences, and offensive weapon provisions.

Setting aside consolidation matters, the main activity of Parliament in this sphere has been to reform criminal procedure. The **Criminal Procedure (Scotland) Act** brings together the reforms passed in the **Criminal Justice (Scotland) Act** and existing criminal procedure provisions (to which a considerable number of amendments were made in the schedule to the **Criminal Justice (Scotland) Act 1995**) to create a new and significant piece of legislation to govern the day-to-day workings of the criminal courts. The reforms introduced by the 1995 legislation are numerous. The way in which trials are conducted has itself been changed, with the introduction of devices intended to make the parties agree on disputed facts at an early stage and to monitor this progress of efforts to reach this agreement. Then, in relation to evidence, the legislation implements the recommendations of the Scottish Law Commission on hearsay, allowing such evidence to be admitted in those circumstances when it is effectively the best evidence available. This will be where a potential witness is dead or cannot, for some other reason, give evidence. Also on the subject of evidence, an important change is made in relation to the right of silence. This has been a controversial matter, with opinion being divided on whether it should be permissible for the prosecution to make adverse comment on the failure of an accused person to give evidence at his trial. Until this reform, a person charged with a crime could remain silent throughout proceedings and the prosecution would not be able to invite the jury to take an adverse inference from this. In spite of major questioning as to whether any change was necessary (including some fairly pointed comment from the Scottish Law Commission), this is now changed, and such an inference might be made. It should be noted, though, that this does not mean that the accused is obliged to say anything; he is not, but if he declines to give an explanation of himself once he is in court he may find that the jury concludes that he has something to hide.

Important changes have been introduced in relation to criminal appeals. The extent to which the High Court is over-burdened with business is well-known. One solution would be to appoint more judges, but this is obviously an expensive route to follow and is therefore not politically attractive. The

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measure which the Government has favoured is the introduction of a screening system which will require leave to appeal to be obtained from a single judge of the High Court, who will decide, on the basis of the submissions made to him, whether there are grounds for an appeal. This should have the effect of excluding those attempts at appeal which are clearly without any reasonable foundation and which are abandoned before a hearing. Of course, taking the matter to a single judge is a form of review anyway, even if the judge has no power to upset the earlier decision. Certainly, there will be those who will approve of this method of preventing the time of the Court of Criminal Appeal from being spent on a high volume of relatively minor matters which should not be using the time of such a court.

The **Criminal Procedure (Scotland) Act** also contains a long-overdue and extremely welcome reform of the means by which mentally disordered offenders are dealt with by the courts. The criminal law provides two courses of action for the insane offender. The first of these is the plea-in-bar of trial, which raises the issue of whether an accused person is mentally fit to stand trial. Under the old law, if a person appearing before the court was found, on grounds of mental infirmity, to be incapable of understanding proceedings or instructing counsel, then the court had power to stop the trial and arrange for the hospital detention of the accused. There was no enquiry as to whether the accused actually committed the crime with which he was charged, and the thus the possibility existed of people being deprived of their liberty and consigned to a secure hospital without any trial of the facts. This issue has now been addressed, and provision is made for an examination of the facts to ascertain whether the accused actually did what he was alleged to have done. The second course of action open to a mentally disordered accused is to raise a defence of insanity. This defence is very rarely used today and the test which has to be satisfied in Scots law (the 'complete alienation of reason') is, apart from its opacity, fairly difficult to satisfy. Success in raising it, moreover, might have unattractive consequences, as the courts were then obliged to consign the accused to a secure hospital, subject to a restriction order. Under the new provisions introduced in this Act, the courts are given a wide discretion as to how to deal with such persons, and, in addition to having the option of sending the accused to hospital, may impose a supervision or treatment order, arrange for the accused to be placed under guardianship, or, indeed, make no order at all. This last course of action would be appropriate where the accused has fully recovered and where there is no prospect of a recurrence of the problem. Murder, however, is different, and the legislation requires that a hospital order be made and that a restriction

order be imposed. There are sound public protection reasons for such a limitation in the case of murder, but most people will welcome the liberalisation that has been achieved in relation to other, less serious offences.

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