EXECUTIVE NOTE

THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 4) ORDER 2009

SI 2009/1380 (S.8)

The above instrument is proposed to be made under **section 30(2)** of the **Scotland Act 1998 (c.46)**. Section 30(2) Orders provide a mechanism whereby Schedule 4 or Schedule 5 to the Act can be modified by an Order in Council. By virtue of section 115(1) and paragraphs 1 and 2 to Schedule 7 to the Scotland Act, this Order is subject to affirmative resolution procedure in both Houses of the UK Parliament and in the Scottish Parliament.

Policy Objectives

The purpose of this Order is to amend Schedule 4 to the Scotland Act 1998 to enable the Scottish Parliament to create a time limit for certain proceedings brought under the Scotland Act alleging that the Scottish Ministers or a member of the Scottish Executive have or has acted in breach of Convention Rights consistent with the one that already exists in relation to such claims brought under the Human Rights Act 1998. It would do so by providing that paragraph 4 of Schedule 4 to the Scotland Act 1998, which specifies the Scotland Act itself as an enactment which cannot be modified by an Act of the Scottish Parliament, shall not prevent the Scottish Parliament from passing an Act to establish such a time limit.

Current situation

Under section 6(1) of the Human Rights Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention Right. The Convention Rights are those rights and freedoms drawn from the European Convention on Human Rights set out in Schedule 1 to the Act. If a person claims that a public authority has acted, or proposes to act, in a way which is made unlawful by section 6(1), they may bring proceedings against the public authority under the Human Rights Act in the appropriate court or tribunal (section 7(1)(a)). They are only permitted to do so if they are, or would be, a victim of the unlawful act. A "public authority" includes the members of the Scottish Executive.

Additionally, section 57(2) of the Scotland Act provides that members of the Scottish Executive do not have the power to act in a manner that is incompatible with Convention Rights. This means that where it is alleged that members of the Scottish Executive have acted incompatibly with Convention rights, a claim can be brought against them under the Human Rights Act or under the Scotland Act, on the latter basis that in so doing they have acted outwith their powers under the devolution settlement.

Section 100 of the Scotland Act however provides that proceedings of this sort under the Scotland Act cannot be brought by a person unless they would fall within the class entitled to bring proceedings under the Human Rights Act. It also limits any damages by reference to the Human Rights Act.

Under section 7(5) of the Human Rights Act, proceedings brought under section 7(1)(a) must generally be brought within one year from the date of the alleged breach, unless a stricter time limit applies to the proceedings in question. A court or tribunal may permit proceedings

beyond this time limit if it considers it equitable having regard to all the circumstances. The Scotland Act, however, makes no such provision, therefore those bringing their claim under the Scotland Act will, notwithstanding the claim is identical in all other respects, have longer in which to do so, and only be subject to general prescription and limitation principles as a matter of Scots law. [1]

Effect of Instrument

This Order will provide the Scottish Parliament with the power to pass legislation to ensure that a similar time limit is included within the Scotland Act to ensure consistency with the Human Rights Act, so that Convention-based claims brought against the Scottish Ministers, which may be based on the same facts and unlawful act, are subject to the same time limit whether pursued under either Act.

Time limitations in relation to claims brought in civil courts in Scotland are a devolved area of law. However, paragraph 4 of Schedule 4 to the Scotland Act provides that an Act of the Scottish Parliament may not modify, or confer power by subordinate legislation to modify, the Scotland Act itself. There are certain exceptions to this rule, and paragraph 4(2) of Schedule 4 lists sections of the Scotland Act which may be modified by the Scottish Parliament.

This Order inserts a new paragraph 4A into Schedule 4 to enable the Scottish Parliament to legislate in relation to time limits for claims brought under the Scotland Act alleging breach of Convention Rights by the Scottish Ministers or members of the Scottish Executive. It provides that any legislation enacted by the Scottish Parliament must provide for a period for proceedings to be brought within one year beginning with the date on which the act complained of took place or such longer period as a court may consider equitable. This is similar in effect to section 7(1)(a) and (5) of the Human Rights Act 1998. That limitation period may be without prejudice to any shorter period applicable to the relevant procedure and will not apply to claims about the making of legislation.

The UK Government has agreed to this proposed course of action, and to laying the draft instrument before both Houses of Parliament at Westminster for approval as required by section 115 of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act. The intention is that the UK Government will subsequently seek the agreement of the UK Parliament to a comprehensive solution for all three Devolved Administrations via primary legislation, so putting all the Devolved Administrations on a consistent footing.

Consultation

The instrument has been prepared in consultation with the United Kingdom Ministry of Justice and the Scotland Office. There has not been any public consultation by the Scottish Government on the instrument; but the Scottish and UK Governments have made known publicly their intention to make the instrument and this was the subject of a statement to the Scottish Parliament by the Cabinet Secretary for Justice on 11 March 2009, which was

[1] This is the effect of the decision of the House of Lords in the case of *Somerville v Scottish Ministers [2007] UKHL 44.*

accompanied by publication of drafts of the instrument and of the Bill proposed to be introduced before the Scottish Parliament once the instrument has been made.

Financial Effects

The instrument will have no direct financial effect on business, local government or the Scottish Government. However, it is understood that the amendment to the Scotland Act that the instrument would empower the Scottish Parliament to make would enable up to £50m of provision that has been made in the Scottish Prison Service's accounts to cover the cost of compensation claims brought under section 100 of the Scotland Act to be redirected by the Scottish Government for spending on other purposes.

Scottish Government
1 April 2009