

20 October 2014

Lord Smith of Kelvin
The Smith Commission,
7th Floor, 144 Morrison Street,
Edinburgh
EH3 8EX



Dear Lord Smith,

Introduction

The Scottish Law Commission would like to draw to the attention of the Smith Commission the provisions of the Scotland Act 1998 reserving business associations (sections C1 and C2 of Schedule 5.) We suggest that these provisions merit a review in order to remove certain anomalies in the boundary between reserved and devolved matters. We think that the removal of such anomalies will help strengthen the constitutional settlement in the United Kingdom by enabling the Scottish Parliament to deal with matters affecting primarily Scots law and people living and working in Scotland, and for which the UK Parliament has insufficient time at its disposal. The present reservation is justified by "single market" considerations but we venture to suggest that it may be wider in scope than is merited by that justification.

The following observations give our reasons for this suggestion

Not-for-profit associations

The general position of not-for-profit associations under the present devolution settlement is anomalous. You will be aware that the definition of "business association" in Section C1 includes not-for-profit organisations. Thus almost any type of organisation would appear to be a "business association". Section C1 also says, however, that the law relating to "charities" is devolved. Thus the Scottish Parliament can legislate about substantial not-for-profit organisations if they are charities. So, for example, it was within the competence of the Scottish Parliament to provide in the Charities and Trustee Investment (Scotland) Act 2005 for the creation of a new corporate entity, the Scottish Charitable Incorporated Association (SCIO). If a not-for-profit organisation is not a charity, however, the corresponding legislation is a reserved matter.

One of our recent projects was on the Law of Unincorporated Associations (available at <http://www.scotlawcom.gov.uk/publications/reports/2000-2009/>). A chess club would be an example of such an association; a local charity providing day centre facilities for elderly people would be another. Law reform relating to the former, not being a charity, is not within the competence of the Scottish Parliament, whereas the latter is. The draft Bill appended to our final Report relates to not-for-profit associations which are not charities as well as to charities, so the Bill cannot be passed by the Scottish Parliament. The Bill would make it possible for non-charities to enjoy the benefit of a form of corporate status (Scottish Association with Legal Personality [SALP]) akin to that already available to charities (i.e. SCIOs). But so far it has not proved possible to make time available at Westminster to consider such a Bill. There was a consultation in 2012 the response to which showed wide support for taking forward the broad principles of our proposals. The UK Government indicated a commitment to taking the matter forward in a Bill in due course, noting that "The intention is to proceed with this work, as time allows, with the aim of bringing forward a Bill for a future session of the UK Parliament". Unfortunately no Parliamentary time has been available since 2012 for the further development of our



draft Bill to meet the issues raised by the consultation, although this Commission stands ready on its side to commit the resources that may be required of it.

We fully understand that unincorporated associations in Scotland are unlikely to be a priority for the civil service in London and the UK Parliament, which have many other important matters requiring attention. But implementation of reforms to the law of non-profit associations in Scotland will have beneficial effects for important areas of Scottish civil as well as economic life. It seems to us that there is no distinction to be drawn in principle between not-for-profit associations which are charities and those which are not, and that it would therefore remove an anomaly for legislation relating to the creation, operation, regulation and dissolution of the latter to be brought within the competence of the Scottish Parliament. We do not think that there would be any disadvantages in the suggested change from a United Kingdom perspective, either in economic terms or in any weakening of the Union in an area where the laws of Scotland and England & Wales are already distinct from each other.

For-profit associations

Associations formed with a view to profit, such as partnerships and companies, raise different considerations from not-for-profit associations, and are more obviously related to "single market" issues across the United Kingdom. Nevertheless, we think that this is another area where the current devolution settlement has given rise to a problem.

In 2002 there was a joint report by the English and Scottish Law Commissions (available at <http://www.scotlawcom.gov.uk/downloads/rep192.pdf>) recommending new legislation to replace the Partnership Act 1890. This proposal attracted support in Scotland, where it was regarded as a necessary updating of out-dated legislation; moreover, it has become clear in recent years that the 1890 Act contains anomalies and omissions that require to be dealt with by legislation.

In England, however, there has been some opposition to the joint report, and as a result the Department of Business Innovation & Skills has not taken the Report forward to legislation. Consequently Scottish partnership law has not been modernised, even though such modernisation has professional and commercial support in Scotland. This may be regarded as anomalous.

In relation to limited companies, we note that under the Northern Ireland Act 1998 the Northern Ireland Assembly is entrusted with legislative competence in respect of both for-profit and not-for-profit associations. Thus both partnerships and companies fall within devolved competence in Northern Ireland, as indeed they did under previous devolution regimes from the 1920s on. We are not aware that this has given rise to any practical problems or "single market" issues for the rest of the United Kingdom.

Our main point here is, however, that modernisation of the law of partnership would be a useful development in Scotland, with important implications in particular for small businesses and so for the economy as a whole. Further devolution in this area could thus be beneficial on several fronts.

Yours sincerely,

LORD PENTLAND
Chairman