

SCOTTISH LEGISLATION 1989

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Although there were only 46 Acts of Parliament passed in 1989, compared with 55 in 1988, these Acts were themselves voluminous.

They included the *Water Act (c 15)*, which provided for the privatisation of the water authorities in England and Wales and the establishment of the so-called National Rivers Authority. The abuse of the word "national" without qualification to describe creatures of Parliament, quangos and charities, when they relate to only two of the constituent territories of the state is something that would surely not be tolerated elsewhere in Europe.

The Queen's Printer's copy of this Act costs £20, but only about ten per cent of its provisions, mainly in two schedules, apply to Scotland. Schedule 22 inserts a new Part VI A in the *Water (Scotland) Act 1980 (c 45)*, to deal with the Quality of Water, which mirrors some sections in Part II of the body of the Act. Schedule 23 substitutes new provisions for Scotland in Part II of the *Control of Pollution Act 1974 (c 40)* which broadly follow some of those in Chapter II of Part III of the 1989 Act. Through skilful enumeration (eg 30A to 30E, 31, 31A to D, 32 etc) the draftsmen have been able to keep the numbers of revised sections identical with those in the original Act of 1974. These Scottish provisions will eventually slot neatly with the Statutes in Force reprint of the 1980 and the 1974 Acts respectively.

It is unfortunate that Bills and Acts are becoming prohibitively expensive for bodies such as community councils and local amenity associations. Parliament could reduce inflation for these bodies at a stroke if it could organise its procedure so that Scottish material in Bills and Acts as important as this could be sold at more modest prices, through re-structuring of what are now "GB" Bills, with Scottish provisions printed separately.

The draftsmen are still, fifteen years after the Renton Report, required to work more for the convenience of MPs, whose interest is transitory, rather than for that of the ultimate user.

The first thing the Scottish reader has to do is to go through the legislation marking, with the aid of the section dealing with "short title, commencement and extent", the territorial extent of the various provisions. Some apply to the whole of the United Kingdom, some to Great Britain, others to Scotland, and the rest (more or less) to England and Wales only.

The two Scottish schedules mentioned were brought into force on "the transfer date", when the functions of the former Anglo-Welsh water authorities were transferred to the National River authority and the new water and sewerage undertakers. The table of repeals is not divided up to indicate the territories affected, so that some readers who failed to find the appropriate paragraph in the appropriate subsection of the page-and-a-half long "short title, commencement and extent" section have at times been perplexed. Sorting it all out is a delicious exercise for the mind of a semi-retired academic, but it is

doubtful if it is the most cost-effective ("value for money", etc) way for the officials of local authorities and river purification authorities to pass their time. However, it is good that a man should both hope and quietly wait. If I may anticipate the review of the legislation for 1990, I would draw the reader's attention to the schedule of reports on the Environmental Protection Bill, which contains welcome notes to indicate what repeals of "GB" Acts do not extend to Scotland. Let us give honour to those to whom honour is due.

The *Electricity Act (c 29)* provides not only for the privatisation of the electricity supply industry, but also repeals and consolidates by re-enacting in modern form some material going back to the *Electric Lighting Act 1882 (c 56)*.

Apart from the *Prisons (Scotland) Act (c 45)* there were two other consolidation Acts, the *Extradition Act (c 33)* and the *Opticians Act (c 44)*.

Chapter Number

23. *Transport (Scotland) Act*. This Act of merely eighteen sections, including the standard form provisions, enables the Secretary of State to formulate a "disposal programme" providing for the disposal of the undertaking and eventual dissolution of the Scottish Transport Group ("the Group"), through the privatisation of the Scottish Bus Group, and the transfer of its shipping operations to the Secretary of State. These are the operations of Caledonian MacBrayne Limited and of David MacBrayne Limited.

The powers granted to him are extensive. They relate to compensation for loss of employment, comprehensive reorganisation of the Group in preparing for any disposals, and the making of modifications in the disposal programme from time to time at the request of the Group or on the Secretary of State's own initiative after consultation with the Group.

The "main objective" of the Secretary of State is laid down as being the promotion of sustained and fair competition (mercifully undefined). Employee participation is to be encouraged. This might be by way of an employee share ownership plan ("ESOPS"), which had been encouraged in the Budget of 1989.

The Group has to implement the disposal programme and complete it by the date specified in the programme. This date may be subject to modifications from time to time at the request of the Group or on the Secretary of State's own initiative after consultation with the Group. In implementing the programme the Group is given very wide discretion but it must have regard to the "main objective" and other specified considerations including employee participation.

In the course of debate, there was repetition of criticism voiced by the chairman of the CBI in Scotland of insufficient timetabling and information as to where buses are going under earlier deregulation of bus services.

This is all too true. A bus stop has been seen in Edinburgh indicating that 57 bus routes stop at it, but with nothing informing potential passengers as to whence they come or whither they go, or when. Few stops, even among those less heavily used, give this information. In contrast, in London details of routes and frequencies are usually easily ascertained. On the continent it is not unusual for bus stops, both in town and in the countryside, to indicate not only the frequency and destinations of

buses, but the precise minute when they are due. Perhaps such information will be among the fruits of the promised sustained and fair competition.

It is at first sight surprising that the government decided to abandon its general policy of privatisation by inviting Parliament to transfer the assets of Caledonian MacBrayne Limited and David MacBrayne Limited, so far as beneficially owned by the Group, to the Secretary of State. Caledonian MacBrayne, although providing vital services to the Western Isles, was not profitable, and required a subsidy of £6 million a year. So it was hardly a hot favourite for potential investors. The government hoped that the new board for the company, appointed by the Secretary of State, would move its headquarters to Oban.

There are detailed provisions for protecting pension arrangements under the new regime for the former subsidiaries of the Group. These appear to have been reasonably acceptable to employees.

The Act contains two fine examples of what is sometimes described as a "Henry VIII Clause". These are not popular with parliamentarians who are not in office, and an interesting debate on this topic took place in the House of Lords on Wednesday, 14 February 1990.

Common form provisions enable the Secretary of State, in the order providing for the dissolution of the Group, to make what appear to him to be necessary or expedient supplementary, incidental and consequential provisions. These do not usually cause much concern. But in that order he may also make amendments or repeals of any provision of the *Transport Act 1962 (c 46)*, of the *Transport Act 1968 (c 73)*, or of this Act, or of any other enactment (ie any local or private Act of Parliament, and any order, regulation or other instrument made under any Act), as appear to him necessary because of the dissolution of the Group. There is no Parliamentary control over this order.

However, the provision enabling the Secretary of State to make the order appointing the day for the transfer of the securities of the shipping companies to himself, and allowing him to make amendments or repeals of the same kind as those mentioned above, is subject to annulment in pursuance of a resolution of either House. Such a risk holds little terror for a government with a substantial majority in both Houses.

Chapter Number

39. *Self-Governing Schools etc. (Scotland) Act*. This was the major Act of the year for Scotland, potentially concerning the 96% of all children who attend public schools, but whether it will have much impact is perhaps open to question. The effect of the corresponding English legislation, the *Education Reform Act 1988 (c 40)*, appears at the time of writing to have been slight. In a penetrating article in *The Scottish Government Yearbook 1990*, "How Good is Scottish Education and How Good is the Case for Change?", Professor Andrew McPherson draws attention to the substance of Michael Forsyth's argument that he was not destroying the comprehensive system of education in Scotland, but merely providing the means for parents to do so. The legislation was permissive, and if it was not wanted it would not be used.

In the second Reading debate in the House of Lords, five of the eight peers who

spoke on both sides rightly expressed concern that a major Bill should come to that House on a Friday forenoon in late July.

Part I of the Act deals with Self-Governing Schools. The "etc" comes in Parts II and III, which deal with a variety of matters from College Councils to Technology Academies and Appraisal of Teachers.

The Secretary of State is required to maintain any school governed by a board of management constituted as a body corporate under the provisions of this Act. When a school becomes a self-governing school, the responsibilities of the education authority towards it cease.

With certain exceptions, any public school with a school board, other than a nursery school as such, is eligible for self-governing status. A school board may decide to hold a ballot of parents on whether to seek this status, or the initiative may be taken by not less than 30 parents, being not less than 10% of the parents on the electoral roll for the school board with children still actually attending the school.

If the majority of votes cast is in favour of seeking self-governing status, the school board must draw up proposals for acquiring that status for submission to the Secretary of State, to the education authority and, where relevant, to the appropriate church or denominational body. If the total number of votes cast is less than half the number of persons eligible to vote, there must be a fresh ballot.

Education authorities may spend only so much as is prescribed by the Secretary of State on propaganda to influence the outcome of the ballot. School boards may spend as much as they like, but the Secretary of State will reimburse them only to the amount that education authorities may spend (but not reclaim).

The Secretary of State must consider representations made to him and the percentage that the total votes cast in favour of self-governing status constitutes of the total number of persons eligible to vote in the ballot.

The constitution of each self-governing school will be known as a scheme of government. This will be in two parts, one (the articles of constitution) providing for the constitution of the school's board of management, and the other (the articles of management) making provision as regards the exercise of the board's function in respect of the school. Rules concerning these articles are set out in a Schedule. The scheme of government is made, and may be varied, by order of the Secretary of State. If the variation involves a change in the characteristics of a school, other than an increase in the range of provisions for pupils with special educational needs, there must be ballots, and consultations with the education authority and with the appropriate church or denominational body, where relevant.

At first the school board will act as an interim board of management, and the Secretary of State will make orders providing for the transition of a school to self-governing status. The board of management comprises parent members elected by parents of pupils attending the school from their own number (who will constitute the majority of members of the board), staff members elected by members of staff from their own number, appointed members and the head teacher. Members will normally hold office for four years. Continuity will be achieved by half of the original elected members demitting office at the end of two years.

The Act imposes a duty on boards of management to provide suitable and efficient school education, in contrast with education authorities which are required to secure that there is adequate and efficient provision of school education. They must make reports to the Secretary of State as required, and to parents annually.

Parents are given rights similar to those with children in public schools. No fees may be charged for school education, nor for books and other materials. Charges may be made in connection with education and other facilities, and the use of school premises or equipment, for purposes other than those associated with the provision of school education. Special clothes for physical exercise or other activities may be provided free or subject to charges.

There are provisions dealing with the compulsory transfer of staff to self-governing schools; somewhat mysteriously this includes "...any person who... is employed...in a post (...whether or not at the school) which involves his working solely at the school...". There are certain obvious exceptions for those leaving before incorporation, and less obviously for school meals staff. The Secretary of State may require in regulations that only teachers registered with the General Teaching Council for Scotland (with exceptions laid down by him) may be employed in self-governing schools.

Education authorities are not allowed to discriminate between pupils at public schools and those at self-governing schools in the provision of benefits or services to pupils which they have a duty or a power to provide.

The schools will be financed by three types of grant, worked out in regulations. These are capital grants, annual recurrent grants, and special purpose grants for non-recurrent items of a non-capital nature.

A board of management may take steps to discontinue a self-governing school, but its proposals are subject to acceptance by the Secretary of State, with or without modifications, or to his rejection. It seems that the machinery could be used to bring a school back into the local authority system.

Where a denominational school changes its characteristics and ceases to be denominational, or is discontinued, compensation may be payable by a board of management to the trustees who transferred the school to the education authority.

The Secretary of State may decide to cease to maintain a school; if so, he must give at least seven years' notice of his intention, unless the grounds are that the number of pupils has become too small, or that the board of management is failing substantially or persistently to comply or secure compliance with any statutory duty.

The Act contains complicated, and not entirely satisfactory, provisions dealing with the transfer of land, moveable property of any kind, endowments and obligations to boards of management, and disposals of land and moveables by education authorities, under the supervision of a commissioner for school assets. He is appointed by the Secretary of State on approving proposals that a school should acquire self-governing status. Further provisions deal with disposal of property on the winding up of a self-governing school, the possible disposal to an independent school of its land at market value and of its moveables for a fair consideration – as determined by the Secretary of State. He may give directions as

to the payment of any surplus money on winding up to an education authority or other person absolutely or in trust, but free from any pre-existing trusts.

Part II deals with the setting up of college councils, for colleges of further education (subject to such exceptions as may be prescribed in regulations by the Secretary of State). The councils were due to be appointed by the education authority by 1st April 1990, unless the Secretary of State directed otherwise. In fact, the date was postponed to 1st August 1990. These councils consist of not more than 20 members, including the principal of the college. At least half the members are selected from nominees of employers or employers' organisations, and not more than one-fifth of them may be members or employees of any local authority, other than employees of an educational establishment.

Each college council elects its own chairman, who must not be an employee of an education authority nor a student or representative of students at the college. Although councils are in principle allowed to determine their own procedure, the Secretary of State may make regulations as to duration of appointments to college councils, and rules as to the filling of vacancies, disqualification from membership, meetings and proceedings. There are extensive powers to delegate to committees, the chairman, members of staff and members of the council.

Education authorities were required to make a delegation scheme by 1st October 1990 for each college council. The schemes will delegate much of the day-to-day running (including staff appointments and dismissals) and financial control of colleges to the councils, which are the agents of their respective authorities in the exercise of their functions as regards relations with third parties. However, individual members of a college council incur no personal liability when acting in good faith. Although not allowed to borrow, councils will be able to raise funds by other means, receive gifts and invest money, but the education authorities will fix the budget, within a framework fixed by the Secretary of State, and provide the funds for current and capital expenditure. These funds may be increased or cut by an authority during any financial year.

Potential benefactors should be warned that regulations may include provisions as to the extent to which a college council may retain any income or gift received by it.

An education authority may, with reasons, suspend the delegation of functions to a college council, and, following representations by the council and a hearing, revoke the suspension. Otherwise, suspension must be reviewed every twelve months.

With the consent of the education authority and the Secretary of State, a college council may form companies for the management of a college or colleges of further education, under a scheme agreed between the authority and the company. There is express provision that such a scheme should cover the transfer of staff employed at the college, but others, who need not be located there, such as finance and personnel departments, are not so covered. There is however a catch-all provision that may be used to cover them.

Part III deals with the making of agreements between the Secretary of State and "any person" – which could mean a company – for setting up and running independent non-fee-paying secondary schools with a broad curriculum with an emphasis on science and technology to be known as technology academies. They will be financed by the government for a period of not less than seven years or for an

indefinite period terminable with not less than seven years' written notice.

There are provisions for testing of pupils in primary schools by the Scottish Examination Board. Teachers will also be put to the test, under regulations made by the Secretary of State requiring education authorities, boards of management of self-governing schools, managers of grant-aided schools and companies running colleges of further education (but not expressly persons running technology academies) to secure that the performance of teaching staff is regularly appraised in accordance with requirements and under schemes of appraisal, all as laid down in regulations made by the Secretary of State.

The whole system may be kept in a state of flux, with different schemes for different classes of teachers or for teachers in different establishments, with the making, variation and replacement of schemes according to regulations (possibly following consultation between the employer and bodies representing teaching staff). A scheme when made is submitted to the Secretary of State for approval, amendment or rejection (with eventual submission of a fresh scheme). The making of regulations themselves is subject to consultation with representatives of education authorities, teaching staffs and others whom he considers it desirable to consult.

A welcome provision is one permitting education authorities to make financial and other arrangements for enabling a child or young person to attend an establishment – not necessarily a school – outwith the United Kingdom, if it makes provision wholly or mainly for persons with pronounced, specific or complex special educational needs. Arrangements may include securing the presence of one or both parents, or someone else, in appropriate circumstances.

The existing requirement that posts above principal teacher level be advertised nationally throughout Scotland is extended to apply also to the appointment of principal teachers, except on an acting basis.

In selecting teachers, education authorities are not allowed to exclude from consideration candidates who are not employed by the appointing authority, or are not employed by “a particular employer or class of employer”, or are not currently employed as a teacher. The provision requiring three weeks' notice normally to be given to teachers of a meeting of the education committee to consider their dismissal is repealed.

The Commission for Local Authority Accounts in Scotland may be called in by the board of management of a self-governing school, a college council or the board of directors of a company formed to run a college of further education, to examine the management of their establishment, to improve their economy, efficiency and effectiveness, and to supply, or to advise on the appointment of, auditors – for a fee to cover all the expenses incurred by the Commission in such an exercise.

The still-born provisions for junior colleges are at long last repealed.

Chapter Number

45. *Prisons (Scotland) Act*. This Act continues the programme of consolidation of the Statute Law. It begins somewhat surprisingly with the statement that all powers and jurisdictions in relation to prisons and prisoners which before the commencement of the *Prisons (Scotland) Act 1877 (c 53)* were exercisable by any other authority

shall (subject to the provisions of the 1989 Act) continue to be exercisable by the Secretary of State. This is a reference to the Act which completed the setting up of a national prison system for Scotland. The law was last consolidated with the passing of the *Prisons (Scotland) Act 1952 (c 61)*. This Act, and some provisions of the *Criminal Justice (Scotland) Act 1963 (c 39)* and of the *Criminal Justice Act 1967 (c 80)*, are the main sources of the material that is consolidated.

In recognition of its role as the established Church, the Act continues to provide for the appointment, by the Secretary of State, of a minister or licentiate of the Church of Scotland as a chaplain to each prison (with no mention of a stipend). It also provides for the appointment, as ministers to a prison, of ministers of other religious denominations where the number of prisoners, in the opinion of the Secretary of State, requires it. These ministers may be paid such remuneration as he thinks reasonable, with no express mention of the usual formula prescribing the need for him to have the consent of the Treasury. Since this is a consolidating Act, which does not change the law, prisoners are still protected somewhat anachronistically from the visitations of these ministers unless they are of their flock, but Church of Scotland ministers and licentiates are subject to no such restriction.

The Act merely provides a framework for the administration of prisons. Much of the effective law in relation to prisons continues to be contained in the Prison (Scotland) Rules and the Young Offenders (Scotland) Rules. The former were expected to be amended and consolidated in 1990, and the latter soon after.

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