

*These notes refer to the Partnerships (Prosecution) (Scotland) Bill [HL]
as brought from the House of Lords on 27 February 2013 [Bill 143]*

PARTNERSHIPS (PROSECUTION) (SCOTLAND) BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Partnerships (Prosecution) (Scotland) Bill [HL] as brought from the House of Lords on 27 February 2013. They have been provided by the Scotland Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND SUMMARY

3. The Bill gives effect, subject to minor modifications, to recommendations contained in the Scottish Law Commission's *Report on Criminal Liability of Partnerships* (Scot Law Com No 224, Cm 8238 (2011)). The impetus for the Scottish Law Commission's project was the decision of the High Court of Justiciary in *Balmer v HM Advocate* ([2008] HCJAC 44, 2008 SLT 799), in which it was held that since the juristic personality of a partnership was extinguished by dissolution, it was not competent to prosecute a partnership which had been dissolved. In that case, the result was that no criminal proceedings could competently be brought in relation to the death of 14 residents of a care home managed by the partnership prior to dissolution.

Background to the criminal liability of partnerships

4. In Scotland, a partnership is a legal entity distinct from the partners of whom it is composed (Partnership Act 1890, section 4(2)). It may sue and be sued in the firm name. It may commit offences, and be prosecuted, as a legal entity. Where a partnership commits an offence, the appropriate target of prosecution will be the partnership as a legal entity. Where it is convicted, the conviction will be of the partnership as a separate legal entity and not of the partners as individuals.
5. In addition to Scottish partnerships i.e. partnerships that have separate legal personality under section 4(2) of the Partnership Act 1890, partnerships that do not have separate legal personality (such as English or Welsh partnerships) may sometimes have to be prosecuted in their own right, depending on the terms of the enactment creating the offence. Section 77 of the Health Act 2006, for example, requires proceedings for any offence under that Act alleged to have been committed by a partnership to be brought in the name of the partnership and not in that of any of the partners.
6. A fine imposed upon a partnership in Scotland is enforceable as if it were an extract registered decree (i.e. a court judgment) for payment of a debt.¹ As such, it is enforceable against the assets of the partnership, and also against the assets of any of the partners.² As the fine is treated as a debt judgment, the partners' personal liability is not criminal, but rather a civil liability to meet a debt owed by the firm.
7. Although the general law is that fines may be enforced, in the same way as civil debts, against the assets of the partners, there are a number of offence-creating provisions which provide for payment to be made from the partnership assets. The implication of this may be that fines in relation to such offences are enforceable only against the partnership assets and not against the assets of the partners.³
8. In addition to the criminal liability of the partnership itself, the existing law also contains a number of bases upon which partners may be held criminally liable as individuals. A significant example is section 36 of the Health and Safety at Work etc. Act 1974. That Act places obligations upon employers, the breach of which may amount to an offence. At first sight, these offences may only be committed by an employer. But section 36 of the 1974 Act imposes criminal liability on an individual where it can be

¹ Criminal Procedure (Scotland) Act 1995, ss 70(6) and 143(2).

² Partnership Act 1890, ss 4(2) and 9. In relation to a Scottish partnership, the liability is joint and several, with each partner having a right of relief against the firm and his or her fellow partners.

³ See Scottish Law Commission, *Discussion Paper on Criminal Liability of Partnerships*, DP No 150 (2011), paragraphs 3.7-3.16.

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shown that an offence under that Act was committed owing to the act or omission of that person. It explicitly provides that it is not necessary, in order for that person to be prosecuted, for proceedings to have been taken against the employer. A number of other enactments provide for the individual criminal liability of partners where the partnership commits an offence with their consent or connivance, or as a result of their neglect.⁴ Additionally, an individual may be held art and part guilty of an offence, either at common law or under statute,⁵ or guilty of the offence of aiding, abetting, counselling or procuring the commission of a statutory offence.⁶

The effect of dissolution or change of membership

9. Following *Balmer v HM Advocate*,⁷ it is settled that the legal personality of a Scottish partnership ends immediately upon its dissolution. Consequently, dissolution bars prosecution of a Scottish partnership which has been dissolved. It is not certain whether the legal personality of a partnership survives changes in the membership of the partnership.⁸ It is accordingly possible, following the logic of *Balmer v HM Advocate*, that the resignation of a partner, or the assumption of a new partner, would render it incompetent to prosecute offences committed by the partnership prior to the change of membership.
10. A partnership which has ceased to exist as a legal entity cannot, as a matter of logic, be the holder of assets. To the extent that the offence-creating enactment restricts payment of a fine imposed upon a partnership to the partnership assets, it would be impossible to enforce a fine in relation to that offence against a dissolved partnership, there being no partnership assets against which it might be enforced.
11. There is no reason in principle why the dissolution of a partnership, or a change in its membership, should prevent the prosecution of individual partners in circumstances where the law presently provides for such individual criminal liability.⁹ This is probably competent under the present law. But there is an absence of direct authority on this point.

⁴ For instance, s 37 of the 1974 Act.

⁵ Criminal Procedure (Scotland) Act 1995, s 293(1). "Art and part" in Scots law is broadly equivalent to aiding and abetting in England and Wales.

⁶ Criminal Procedure (Scotland) Act 1995, s 293(2).

⁷ [2008] HCJAC 44, 2008 SLT 799.

⁸ The Law Commission and Scottish Law Commission *Joint Report on Partnership Law* (Law Com No 283; Scot Law Com No 192 (2003)), paragraph 8.7.

⁹ That is, on any of the bases mentioned in paragraph 8 above.

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Summary of Bill provisions

12. The Bill provides that it will be competent to prosecute a dissolved partnership, notwithstanding its dissolution, provided that proceedings are commenced within 5 years of the date of dissolution. Where a fine is imposed upon a dissolved partnership, it may generally be enforced in the same manner as if the partnership had not been dissolved. The sole exception is that, where an enactment limits payment of a fine to the partnership assets, this restriction will not apply to a fine imposed upon a dissolved partnership in relation to an offence committed after the Bill has come into force.
13. The Bill also gives effect to the Scottish Law Commission's recommendation that it should remain competent to prosecute a partnership in respect of an offence allegedly committed prior to a change in membership, notwithstanding that change in membership.
14. Finally, the Bill provides, for the avoidance of doubt, that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a partnership is not affected by the dissolution of that partnership or a change in its membership.

TERRITORIAL EXTENT AND APPLICATION

15. The Bill extends to Scotland only, with the exception of consequential amendments which have the same territorial extent as the enactments to which they relate.
16. The Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

COMMENTARY ON CLAUSES

Clause 1: Prosecution of dissolved partnership

17. Clause 1 provides for the prosecution of dissolved partnerships, addressing the issue identified by the High Court of Justiciary in *Balmer v HM Advocate*.¹⁰

¹⁰ [2008] H CJAC 44, 2008 SLT 799.

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18. Subsections (1) and (2) permit a dissolved partnership to be prosecuted, or (where proceedings have already been commenced) to continue to be prosecuted, for an offence allegedly committed by the partnership prior to dissolution. These provisions apply only to prosecution for an offence which a partnership is, by virtue of an enactment or rule of law, capable of committing separately from its partners (see clause 7(a)). The declaration in subsection (2) that the partnership may be prosecuted as if it had not been dissolved represents a limited exception to the general rule that the legal personality of a partnership is extinguished by its dissolution.
19. Subsection (3) requires prosecutions by virtue of subsection (2) to be brought within 5 years of the date of dissolution. The period of 5 years matches the period of negative prescription applying to the majority of civil liabilities to which a partnership might be subject.¹¹ Subsection (5) makes it clear that this time limit is without prejudice to the six-month time limit for the prosecution of summary-only offences which is imposed by section 136 of the Criminal Procedure (Scotland) Act 1995.
20. Subsection (6) makes provision for the enforcement of any fine which might be imposed upon a partnership following its conviction by virtue of subsection (2). The existing law is that a fine imposed upon a partnership is enforced as if it were an extract registered decree for payment of a debt.¹² As such they may be enforced against the assets of the individual partners as well as against the partnership assets.¹³ Subsection (6) applies the same rules to the liability of partners of a dissolved partnership convicted by virtue of subsection (2) as would have applied had the partnership not been dissolved.

Clause 2: Dissolution of partnership: proceedings against former partner or other person

21. Clause 2 provides that the competency of criminal proceedings against an individual in relation to an offence allegedly committed by a partnership is not affected by the dissolution of that partnership. The Scottish Law Commission expressed the view that such a prosecution would be likely to be competent under the present law, but recommended that provision be made for the avoidance of doubt.¹⁴

¹¹ Prescription and Limitation (Scotland) Act 1973, s 6.

¹² Criminal Procedure (Scotland) Act 1995, ss 70(6) (solemn proceedings) and 143(2) (summary proceedings).

¹³ Partnership Act 1890, ss 4(2) and 9.

¹⁴ Scottish Law Commission, *Report on Criminal Liability of Partnerships* (Scot Law Com No 224 (2011)), paragraph 4.3.

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22. Subsection (1) provides for the prosecution (or, where proceedings have already commenced, the continuing prosecution) of a person who could have been prosecuted, by virtue of an enactment or rule of law, for the offence allegedly committed by a now-dissolved partnership. The subsection applies only where the law presently provides for an individual to be prosecuted for an offence committed by the partnership. This may be by virtue of an enactment such as section 36 of the Health and Safety at Work etc. Act 1974; on the basis of consent and connivance (as in section 37 of that Act); or art and part liability either at common law or in terms of section 293 of the Criminal Procedure (Scotland) Act 1995. The aim of subsection (1) is to make it clear that the dissolution of a partnership will not prevent the prosecution of a culpable individual where individual criminal liability arises under the existing law. It does not extend individual criminal liability to any person who would not have been subject to prosecution under the existing law.
23. Subsection (2) provides that a prosecution may be brought against an individual whether or not the partnership has been, or is being, tried for the offence, but may not be brought against an individual where the partnership has been tried and acquitted (whether before or after its dissolution).
24. Where an individual is liable to prosecution for an offence committed by a partnership, it will be necessary to prove, as a question of fact in the proceedings against the individual, that the partnership committed the offence. Subsection (3) provides, for the avoidance of doubt, that the evidence led in the prosecution of an individual may include evidence as to the commission of the offence by the partnership.

Clause 3: Payment of fine where dissolved partnership convicted

25. Clause 3 disapplies any provision requiring a fine levied upon a partnership to be paid only from the partnership assets in cases where a fine is levied upon a partnership which has been dissolved.¹⁵ This provision is required to give full effect to clause 1, since without it there would be cases in which a prosecution was competent by virtue of that clause, but where no fine could be imposed owing to the absence of partnership assets. In modifying the law relating to the enforcement of fines in the case of a dissolved partnership, it represents an exception to the general rule in clause 1(6) that any enactment or rule of law relating to the liability of partners on the conviction of a partnership applies as if the partnership had not been dissolved. The clause applies only to cases in which the offence was committed, and proceedings commenced, after its coming into force (see clause 8(4)).

¹⁵ Ibid, paragraphs 3.2-3.7. For an example of such a provision, see s 77 of the Health Act 2006.

Clause 4: Prosecution of partnership after change in membership

26. Clause 4 provides that a partnership may be prosecuted for an offence allegedly committed by the partnership prior to a change in membership. The clause applies only in relation to offences that a partnership is, by virtue of an enactment or rule of law, capable of committing separately from its partners (see clause 7(a)).
27. While it is clear that a Scottish partnership, upon the resignation of a partner or the assumption of a new partner, continues to be a legal person distinct from the partners of whom it is composed,¹⁶ it is not certain whether the partnership is the same legal person before and after the change.¹⁷ If a change in membership terminates the legal personality of the "old" partnership and brings into being a "new" partnership entity, then it may not be competent to prosecute the "new" partnership for offences committed prior to the change in membership (by analogy with the case of dissolution discussed by the High Court in *Balmer v HM Advocate*). Clause 4 addresses this uncertainty in the existing law.
28. Subsection (1) provides that clauses 4 and 5 apply where there is a change of membership of the partnership, the partnership continues to carry on business after the change, and an offence is alleged to have been committed by the partnership before the change.
29. Subsections (2) and (3) provide that the continuing partnership may be prosecuted notwithstanding a change in membership, and that any rule whereby a change in membership constitutes a new partnership shall not apply for the purposes of this clause and clause 5.
30. Subsection (4) defines what is meant by a change in the membership of a partnership for the purposes of clauses 4 and 5. The definition must be read together with subsection (1)(b), which provides that clauses 4 and 5 apply only where the partnership continues to carry on business after the change. In cases where the change in membership results automatically in dissolution,¹⁸ the partnership cannot continue to carry on business after the change: subsection (1)(b) will not be satisfied, and any prosecution of the partnership will be by virtue of clause 1 rather than clause 4.

¹⁶ Partnership Act 1890, s 4(2).

¹⁷ The Law Commission and Scottish Law Commission, *Joint Report on Partnership Law* (Law Com No 283; Scot Law Com No 192 (2003)), paragraph 8.7.

¹⁸ For instance, by the operation of section 33 (dissolution by bankruptcy, death or charge) of the Partnership Act 1890.

Clause 5: Change in membership of partnership: proceedings against partner or other person

31. Clause 5 applies where the alleged commission of an offence has been followed by a change in the membership of a partnership. Otherwise, it is of equivalent effect to clause 2.

Clause 6: Consequential amendments

32. Clause 6 makes amendments to the Partnership Act 1890 and the Criminal Procedure (Scotland) Act 1995 which are consequential upon the substantive provisions of the Bill. It also confers upon the Secretary of State a power to make further consequential amendments by order made by statutory instrument and specifies the procedure required for the making of such an order.
33. Subsections (1) and (2) amend section 38 of the Partnership Act 1890 (continuing authority of partners for the purposes of winding up etc) to insert a reference to prosecution by virtue of clause 1 of this Bill. This ensures that partners of the dissolved partnership can continue to bind the partnership in relation to the conduct of the proceedings.
34. Subsections (3) to (5) amend sections 70(2) and 141(2) of the Criminal Procedure (Scotland) Act 1995 to permit service of the indictment or complaint in relation to a prosecution by virtue of clause 1 to be made at the home or business address of any of the partners.
35. Subsection (6) gives the Secretary of State the power, by order made by statutory instrument, to make such further amendments or repeals of any enactment as appear to him to be necessary in consequence of the Bill. Any amendment made under this power will have the same territorial extent as the enactment to which it relates (clause 8(6)). An order made under subsection (6) which amends primary legislation may only be made if a draft of the order has been laid before, and approved by a resolution of, each House of Parliament (subsection (7)).

Clause 7: Interpretation

36. Paragraph (a) of clause 7 provides that references to an offence committed by a partnership are to an offence that a partnership is capable of committing separately from its partners, whether because the partnership enjoys separate legal personality generally (under section 4(2) of the Partnership Act 1890) or because the offence-creating enactment requires criminal proceedings to be brought in the name of the partnership only and not in that of any of the partners. Paragraph (b) defines "enactment" as including an enactment contained in subordinate legislation or in an Act of

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the Scottish Parliament or in an instrument made under such an Act (that is, in a Scottish Statutory Instrument).¹⁹

Clause 8: Short title, commencement and extent

37. Subsection (2) provides for the Bill to come into force on the day after the day upon which it is passed.
38. Subsection (3) provides for the Bill to apply where the partnership is dissolved or there is a change in membership of the partnership on or after the day on which it comes into force. It will not apply in relation to a dissolution or, as the case may be, a change of membership, which takes place prior to the day on which the Bill comes into force.
39. Subsection (4) provides that the Bill (other than clause 3) will apply irrespective of when the offence mentioned in section 1(1)(b) or 4(1)(c) is alleged to have been committed. This means that it can apply to offences committed before the Bill becomes law as well as to offences committed after the Bill becomes law. Subsection (4) also provides that the Bill (other than clause 3) will apply to proceedings which are ongoing on the day the Bill comes into force. The subsection does not apply to clause 3, which will apply only in relation to offences committed after the Bill has come into force.
40. Subsection (5) provides that the Bill extends only to Scotland. This is subject to the qualification, in subsection (6) that the amendment made in clause 6(2) (amending section 38 of the Partnership Act 1890), and any amendment made in an order under clause 6(6), shall have the same extent as the enactment (or the relevant part of the enactment) to which it relates.

FINANCIAL EFFECTS AND PUBLIC SECTOR MANPOWER

41. The Bill potentially reduces the costs of the Crown Office and Procurator Fiscal Service in unsuccessful attempts to prosecute dissolved partnerships. No other effects on public expenditure have been found. The Bill is not expected to have any effect on public service manpower.

¹⁹ Cf the definition of "enactment" in Schedule 1 to the Interpretation Act 1978, which would otherwise have the effect of excluding enactments contained in, or in instruments made under, an Act of the Scottish Parliament.

IMPACT ASSESSMENT

42. An impact assessment has been prepared. The only cost which was identified to partnerships was familiarisation with the new law in the first year only. There was no ascertainable cost to public bodies, and an expected saving in wasted prosecution expenses (the Bill having clearly established a competent basis upon which dissolved partnerships might be prosecuted). Non-monetised benefits included the likelihood that more effective enforcement of existing offences would reduce offending, potentially including the avoidance of injury and loss of life. The Bill is not expected to have any direct carbon assessment or other environmental impacts. The impact assessment is available from the Scotland Office, Dover House, Whitehall, London, SW1A 2AU.

EQUALITY IMPACT ASSESSMENT

43. The analysis of impacts did not identify any differential impact on individuals or groups in relation to their having any of the protected characteristics of the Equality Act 2010.

SMALL FIRMS AND MICRO-BUSINESSES

44. A majority of partnerships are small or micro-businesses. The Bill will apply to them. But the measures in the Bill do not impose a new burden, but rather aim to ensure that partnerships and partners will not escape prosecution for offences. A waiver from the moratorium in respect of regulation that would apply to micro-businesses has been granted by the Reducing Regulation Committee.

EUROPEAN CONVENTION ON HUMAN RIGHTS

45. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in each House of Parliament to make a statement before second reading about the compatibility of the provisions of the Bill with the European Convention on Human Rights (as defined by section 1 of that Act). The Parliamentary Under Secretary of State for Scotland has made the following statement:

"In my view, the provisions of the Partnerships (Prosecution) (Scotland) Bill are compatible with the Convention rights."

46. The Bill implements recommendations contained in the Scottish Law Commission's *Report on Criminal Liability of Partnerships*. The Scottish

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Law Commission expressed the view that its proposals did not raise any issue of compatibility with Convention rights.²⁰ Having considered each clause in turn the Minister does not believe that the Bill is incompatible within any of the Convention rights.

47. The substantive provisions of the Bill (clauses 1 to 5) have the effect of preventing the dissolution of a partnership, or a change in the membership of a partnership, from barring the prosecution in Scotland of the partnership, or of an individual partner, for an offence committed before the dissolution or change in membership. They do not criminalise anything which was not previously criminal; nor do they extend criminal liability to any person who is not liable under existing law. The Minister is therefore satisfied that these provisions do not adversely affect any person's right to a fair trial in terms of Article 6 of the European Convention on Human Rights ("the Convention").
48. Clause 1 permits fines to be enforced against the assets of partners in the same way as they would have been had the partnership not been dissolved. In the Minister's opinion, any interference that this might involve with the right to peaceful enjoyment of possessions in terms of Article 1 of the First Protocol to the Convention is justified in terms of that Article, as a lawful and proportionate measure aimed at the legitimate aim of securing compliance with the criminal law.
49. Clauses 1, 2, 4 and 5 apply in any case in which the dissolution (or, as the case may be, the change of membership) takes place after the Bill has come into force, regardless of when the alleged offence was committed or whether proceedings have commenced. Although they apply in relation to offences which have already been committed, the provisions are not retrospective, since their effect is to modify the effect of a dissolution or change of membership taking place after they have come into force. In particular, it may be noted that they do not alter the penalty to which any person may be subject from that which would have applied at the time that the offence was committed. The Minister is accordingly satisfied that the application of these provisions to offences committed prior to the Bill's coming into force, and to proceedings which are ongoing at that date, does not offend against the prohibition in Article 7 of the Convention of retrospective changes to criminal offences and penalties.²¹

²⁰ Scottish Law Commission, *Report on Criminal Liability of Partnerships* (Scot Law Com No 224 (2011), paragraph 1.10.

²¹ Cf the opinion of the European Court of Human Rights in *Coëme and Others v Belgium*, Application nos. 32492/96, 32548/96, 33209/96 and 33210/96 (2000), §148.

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50. Clause 3, which applies only in relation to offences committed after the Bill has come into force, removes a limitation which may apply to the enforcement of fines in respect of certain statutory offences (as explained in the note to that clause). This is necessary to permit enforcement of fines against partnerships which have been dissolved, and strikes a fair balance between the interests of the partners and the need to secure effective enforcement of criminal penalties. In the Minister's view, these provisions are compatible with Articles 6 and 7 of the Convention and with Article 1 of the First Protocol to the Convention.

COMMENCEMENT

51. Other than clause 8, which will come into force on the date the Bill is passed, the provisions of the Bill will come into force on the day after the day upon which it is passed.

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