



University  
of Glasgow

Chalmers, J., and Leverick, F. (2013) Scotland: twice as much criminal law as England? *Edinburgh Law Review*, 17 (3). pp. 376-381. ISSN 1364-9809

Copyright © 2013 Edinburgh Law Review Trust and the Contributors

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

The content must not be changed in any way or reproduced in any format or medium without the formal permission of the copyright holder(s)

When referring to this work, full bibliographic details must be given

<http://eprints.gla.ac.uk/85358/>

Deposited on: 06 September 2013

Enlighten – Research publications by members of the University of Glasgow  
<http://eprints.gla.ac.uk>

government's – thus recognising the government's interest as the instigator of the 2003 Act.<sup>50</sup> The UKSC's approach is also sensitive to its supra-jurisdictional role: didactic provision of authoritative answers on the interpretation of the ECHR and then remitting the entirety of the next stage to the Scottish institutions, is consistent with the approach of supra-jurisdictional courts. So section 72(10) is not law – and never has been – but the effects of that finding are postponed to another day.

Daniel J Carr  
University of Edinburgh

EdinLR Vol 17 pp 376-381

## Scotland: Twice as Much Criminal Law as England?

Concern has been expressed in recent times over the proliferation of criminal offences.<sup>1</sup> Claims that the UK Government had created over 3,000 offences in a ten year period<sup>2</sup> led to the introduction in England and Wales of a system whereby any civil servant wishing to create a criminal offence needs to obtain “gateway clearance” from the Secretary of State for Justice before doing so.<sup>3</sup> No such mechanism exists in Scotland, where the issue has received rather less attention.<sup>4</sup> Yet the Scottish Parliament has created criminal offences at a far greater rate than its English counterpart. In this note we demonstrate that, over the course of a twelve month period between 2010 to 2011, twice as many criminal offences applying to Scotland were created compared to those applying to England. We analyse this difference and demonstrate that over that period Holyrood showed a far greater propensity to create criminal offences than Westminster, with 165 offences being created by Holyrood for Scotland alone over that period as against a mere 10 created by Westminster for England or England and Wales alone.

50 Cf the approach above, however.

1 See e.g. A Ashworth and L Zedner, “Defending the criminal law: reflections on the changing character of crime, procedure and sanctions” (2008) 2 *Criminal Law and Philosophy* 21 at 22, 32; C Pantazis, “The problem with criminalisation” (2008) 74 *Criminal Justice Matters* 10; A Crawford, “Governing through anti-social behaviour: regulatory challenges to criminal justice” (2009) 49 *BJ Crim* 810 at 826.

2 See N Morris, “Blair’s ‘frenzied law making’: a new offence for every day spent in office”, *The Independent*, 16 August 2006. In fact, the true figure is almost certainly much higher than this, with 1395 offences created in the first year of the New Labour government alone. See J Chalmers and F Leverick, “Tracking the creation of criminal offences” [2013] *Crim LR* 543.

3 Ministry of Justice, *Criminal Offences Gateway Guidance* (2011), available via [www.justice.gov.uk/legislation/criminal-offences-gateway](http://www.justice.gov.uk/legislation/criminal-offences-gateway).

4 Although see P R Ferguson, “Criminal law and criminal justice: an exercise in adhocery”, in E E Sutherland et al (eds), *Law Making and the Scottish Parliament: The Early Years* (2011) 208 at 216.

## A. THE STUDY

It is surprisingly difficult to find information about the number and characteristics of criminal offences “on the books” in the UK. Criminal law teaching and scholarship tends to focus on “core crimes”, such as offences against the person or the general offences of dishonesty,<sup>5</sup> but these account for only a tiny part of the criminal law. Various attempts have been made to quantify the number of criminal offences in existence in the UK, but these have tended to be limited in some way and have often been by-products of analysis rather than its central focus.<sup>6</sup>

It was against this background that we embarked on a project intended to rectify this lacuna. The aim of the project was not to identify every single criminal offence on the books in the UK: this would have been a monumental undertaking far beyond the resources we had at our disposal. Rather it was (a) to establish a methodology for recording the number and characteristics of criminal offences created during a particular period and (b) to carry out this exercise for two time periods each of one year.<sup>7</sup> The time periods selected were the first year of the Coalition government (that is, all offences created from 6 May 2010 to 5 May 2011) and the first year of the New Labour government (from 2 May 1997 to 1 May 1998).<sup>8</sup> For each period, we reviewed all Acts of Parliament, Acts of the Scottish Parliament, statutory instruments and Scottish statutory instruments to identify offence creating provisions. The inclusion of secondary legislation in this exercise was important. Attempts to estimate the number of criminal offences often ignore such instruments, but far more offences are created via secondary legislation than via primary legislation.<sup>9</sup>

Identifying an offence creating provision is, however, only the first stage in any exercise aiming to record the number of criminal offences because a single statutory provision can – and often does – create multiple offences.<sup>10</sup> Our next task was, therefore, to examine each offence creating provision with a view to determining whether it created a single offence or multiple offences (and in the latter case how many separate offences it created). For the most part, this was a reasonably straightforward – if time consuming – exercise. In other instances, it was far more

5 W Stuntz, “The pathological politics of criminal law” (2001) 100 *Michigan LR* 505 at 512.

6 See Chalmers and Leverick (n 2) at 544-545.

7 We are grateful to the University of Edinburgh School of Law (where James Chalmers worked during the initial stages of this research) for providing funding through its Strategic Investment Fund which allowed us to employ Peter Lewin as a research assistant, and we are in turn grateful to Peter for his hard work.

8 We treated the government’s first year in office as having begun the day after the relevant General Election, and treated an offence as having been created on the day on which the relevant statute received Royal Assent or the statutory instrument was made.

9 Our research found that 99 per cent of offences created in 1997-98 and 86 per cent of offences created in 2010-11 were contained in secondary legislation. See Chalmers and Leverick (n 2) at 550.

10 See, for example, regulation 91(a) of *The Feeding Stuffs (Establishments and Intermediaries) Regulations 1998*, a single statutory provision which prohibits 48 distinct acts or omissions, targeted at varying audiences and often attracting different maximum penalties.

**Table 1.** Offences created 1997-98 and 2010-11

<b>Geographical extent</b>	<b>1997-1998</b>	<b>2010-2011</b>
UK	1022	409
Britain	213	4
England	None	212
England and Wales	None	9
Wales	None	314
Scotland	3	810
Northern Ireland	52	2
Isle of Man	53	None
Channel Islands	52	None
Total	1395	1760

problematic.<sup>11</sup> It also proved surprisingly difficult sometimes to identify the nature of the prohibited conduct, as legislative drafting techniques can be astonishingly complex, rendering the results all but inaccessible except to those possessing dogged persistence and not a small modicum of legal knowledge.<sup>12</sup>

Finally, once individual offences had been identified, we recorded for each offence its salient characteristics, including its maximum penalty; its geographical extent; its subject matter; any special capacity associated with it; and whether or not *mens rea* was required.

## **B. CRIMINAL OFFENCES AND THEIR GEOGRAPHICAL APPLICATION**

We have presented elsewhere a more comprehensive report of the results of our research.<sup>13</sup> Here we wish to focus on just one aspect of the study: some interesting differences that have emerged between Scotland and England and Wales in terms of the number of offences created during the two time periods in question. Table 1 displays the number of offences created in each of these periods, both in total and according to their geographical application.

As table 1 shows, the bare figures are astonishing – 1395 criminal offences were created in 1997-98 and 1760 in 2010-11. But the geographical differences are also interesting.

In 1997-98, there was very little difference between patterns of offence creation in Scotland, England and Wales. The vast majority of criminal offences in the sample extended either to “Great Britain” or to “the UK” and thus applied to all three

11 In J Chalmers and F Leverick, “Quantifying criminalisation”, in R A Duff et al (eds), *Criminalization: The Aims and Limits of the Criminal Law* (forthcoming) we discuss in detail the methodological issues that we faced and the solutions we adopted.

12 An issue we discuss in Chalmers and Leverick (n 2). See also J R Spencer, “The drafting of criminal legislation: need it be so impenetrable?” (2008) 67 CLJ 585; P R Ferguson, “The drafting of offence provisions by the Scottish Parliament” (2011) 32 Stat LR 161.

13 See Chalmers and Leverick (n 2). See also Chalmers and Leverick (n 11).

jurisdictions. In 2010-11, however, the picture was very different. The number of offences applying only to England was 212 (or, if those applying to “England and Wales” are included, 221), whereas the number applying specifically to Scotland was 810. If the 413 criminal offences applying to the UK/Britain are added to these figures, this means that almost twice as many offences were created in 2010-11 that applied to Scotland (a total of 1223) compared to England (a total of 634).

The fact that it was more common in 2010-11 for offences to be created applying only to one or more of the constituent parts of the UK is not, in itself, terribly surprising. In 1997-98, the modern Scottish Parliament did not exist and thus whenever a need arose to pass criminal legislation covering the whole of the UK – to implement a European Directive requiring criminal measures, for example – this would have been done by the way of a single legislative instrument. With the advent of the Scottish Parliament (and the Welsh Assembly and the Northern Ireland Assembly), European legislation that lies within the legislative competence of these law making institutions is frequently implemented separately for England, Wales, Northern Ireland and Scotland.<sup>14</sup>

What is surprising is the fact that in 2010-11 so many more offences were created by the Scottish Parliament compared to its Westminster counterpart (when the latter was legislating specifically for England or for England and Wales).

### C. ACCOUNTING FOR THE DIFFERENCE

The difference is a stark one. Although the “headline figures” indicate that twice as many offences were created in Scotland as in England and Wales over 2010-11, if we are to understand the difference we must strip out all those offences which applied to the whole of the UK or to Britain. As we note above, in 2010-11 there were 810 offences created which applied to Scotland alone, compared to 221 which applied to England or England and Wales alone.

Beyond this, we should disregard the relatively small number of offences created at a “limited local level”:<sup>15</sup> byelaws, transport and Work Act orders and harbour orders. We should also disregard offences created in order to implement European legislation – there is a significant difference over this period, but that seems largely to be due to coincidences of time (because European obligations might have been implemented within the time period we analysed for one part of the UK but not another)<sup>16</sup> or the use of consolidation instruments.<sup>17</sup> Over time, the extent of criminalisation based on European obligations should be very similar throughout the UK.

14 See e.g. the Beef and Veal Labelling Regulations 2010, SI 2010/983; the Beef and Veal Labelling (Scotland) Regulations 2010, SSI 2010/402; the Beef and Veal Labelling (Wales) Regulations 2010, SI 2011/991 (W 145); and the Beef and Veal Labelling (Northern Ireland) Regulations 2010 (SI 2010/155).

15 20 such offences were created in England over 2010-11 and five in Scotland.

16 See e.g. the Beef and Pig Carcase Classification (Scotland) Regulations 2010, SSI 2010/330 (which fell within our sample period) and the corresponding English legislation, the Beef and Pig Carcase Classification (England) Regulations 2010, SI 2010/1090 (which did not).

17 See e.g. the Water Environment (Controlled Activities) (Scotland) Regulations 2011, SSI 2011/209.

All this only serves to make the difference more remarkable. It leaves 224 offences created in Scotland over 2010-11, as compared to only ten in England. The English offences comprised nine under the Health Protection (Local Authority Powers) Regulations 2010<sup>18</sup> and one under the Health Protection (Notification) Regulations 2010.<sup>19</sup> The 224 Scottish offences were found in one Act of the UK Parliament (creating two offences),<sup>20</sup> one statutory instrument (creating 57 offences)<sup>21</sup> fifteen Acts of the Scottish Parliament (creating 149 offences)<sup>22</sup> and six Scottish statutory instruments (creating 16 offences).<sup>23</sup>

We might disregard the 59 offences created for Scotland by UK legislation as telling us nothing about Holyrood's propensity to create criminal offences. Nevertheless, that leaves 165 offences created by Holyrood for Scotland as compared to ten created by Westminster for England.<sup>24</sup> Why this remarkable difference?

At this stage in our work, any answer must be somewhat speculative. One obvious possibility is that, because our analysis is framed around the date of a UK General Election, we have examined a period in which Westminster was able to pass less legislation than Holyrood. That seems correct: over the year, 14 Acts of Parliament received Royal Assent, compared to 25 Acts of the Scottish Parliament.<sup>25</sup>

However, this is only a partial explanation, and it highlights one remarkable fact. None of those 14 Acts of Parliament passed by Westminster created criminal offences. By contrast, Holyrood appears to have great difficulty regulating without criminalising: 15 of the 25 Scottish Acts created criminal offences.<sup>26</sup> This is a common pattern – legislation which is not on its face “criminal”<sup>27</sup> will include a regulatory scheme backed up by criminal penalties, such as failing to register transfers of land or changes of landlord under the Crofting Reform (Scotland) Act 2010 or failing to comply with notices issued under the Historic Environment (Amendment) (Scotland) Act 2011.

It may often be legitimate to use the criminal law in this way, and at this stage we pass no comment on the manner in which the Scottish Parliament has done so.

18 SI 2010/657.

19 SI 2010/659.

20 The Parliamentary Voting System and Constituencies Act 2011 part 1 of sch 4, which applies certain provisions of the Representation of the People Act 1983 “with modifications” to the Alternative Vote referendum.

21 The Scottish Parliament (Elections etc.) Order 2010, SI 2010/2999. This replaced an existing order and so is unlikely to have created many – if any – new criminal offences, although we have not analysed this directly.

22 In 2010: asp 9, 13, 14, 16, 17. In 2011: asp 1, 2, 3, 6, 8, 9, 11, 13, 14, 15.

23 SSI 2011/182, SSI 2011/183, SSI 2011/184, SSI 2011/185, SSI 2011/210 and SSI 2011/215.

24 Including offences created by the relevant governments by way of statutory instruments rather than by Parliament itself.

25 Excluding one Private Act.

26 And two of those that did not were criminal procedure legislation: the Double Jeopardy (Scotland) Act 2011 and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

27 The Acts over this period which one might expect, on the basis of their short titles, to create offences were the Criminal Justice and Licensing (Scotland) Act 2010 (29 offences); the Domestic Abuse (Scotland) Act 2011 (one offence); the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (one offence); and possibly the Control of Dogs (Scotland) Act 2010 (one offence).

The contrast with English legislation may suggest that the gateway procedure there has been effective in its aims and that civil servants have sought to use the criminal law as a tool of last resort in regulation, although the contrast may be due also to differences in legislative subject matter. In this short note, however, we hope we have demonstrated that Holyrood's propensity to create criminal offences is a cause for concern.

*James Chalmers and Fiona Leverick*  
*University of Glasgow*

EdinLR Vol 17 pp 381-387

## The Admissibility of Previous False Allegations of Sexual Assault: *CJM (No 2) v HM Advocate*

### A. BACKGROUND

*CJM* is an interesting, if inconclusive, High Court decision by a bench of five judges.<sup>1</sup> Given its “very fact sensitive”<sup>2</sup> nature, it is essential to rehearse the salient details. In 2011 the appellant was convicted of four charges relating to the sexual abuse of three female children during the 1990s but the appeal was primarily concerned with the testimony of only one of those victims, CD. The allegations were first made to the police in 2008 by the other two victims, who were sisters, and CD then “reluctantly” made a statement to the police in 2009 about the abuse perpetrated upon her by the appellant between 1994 and 1998 when she was aged between 6 and 10.<sup>3</sup> The defence lodged a pre-trial application under section 275 of the Criminal Procedure (Scotland) Act 1995<sup>4</sup> seeking permission to put to her that two and a half years before making the current allegation, at which time she was 17, she had made a false claim to the police of sexual assault by a third party. The defence argued that this was relevant because it went to the credibility of CD's complaint of historic sexual abuse.<sup>5</sup>

The allegedly false allegation related to an incident when CD and her friend turned up at a house in the country, apparently distressed, claiming that they had accepted a lift from a male who had driven them to some woods and asked them to perform sexual acts for payment. The house's occupant drove them home and phoned the police the following day to check on their welfare. No complaint had been received but the police traced and interviewed the two girls. CD repeated their earlier account but her friend stated that they had willingly accompanied the man, to whom

1 *CJM (No 2) v HM Advocate* [2013] HCJAC 22.

2 *CJM v HM Advocate* [2012] HCJAC 83 at para 22.

3 *CJM (No 2)* at para 3.

4 Section 274 of the Criminal Procedure (Scotland) Act 1995 prohibits complainers in sexual offence trials from being questioned about their sexual history or bad character (the “rape shield”), but s 275 sets out an exception based on a three-stage test. See P Duff, “The Scottish ‘rape shield’: as good as it gets?” (2011) 15 EdinLR 218.

5 *CJM (No 2)* at para 6.