

*These notes refer to the Scotland Act 1998 (c.46)  
which received Royal Assent on 19th November 1998*

# **SCOTLAND ACT 1998**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

SECTION 29: Legislative competence

#### **Purpose and Effect**

This section limits the competence of the Scottish Parliament to make laws. It provides that an Act of the Scottish Parliament (ASP) will not be law so far as any provision of it is outside the legislative competence of the Parliament. It then defines that what is meant by a provision of an ASP being outside the legislative competence of the Parliament is if it would form part of the law of a country other than Scotland or confer or remove functions exercisable otherwise than in or as regards Scotland, relates to reserved matters, is in breach of the restrictions in Schedule 4, is incompatible with any of “the Convention rights” (i.e. the rights under the European Convention on Human Rights which are defined and given effect in the Human Rights Act 1998) or with European Community law, or would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. The section also makes provision to ensure that the Scottish Parliament can legislate about Scots private law and Scots criminal law, provided it does so to make the law apply consistently to reserved and devolved matters.

#### **General**

This section is part of a set dealing with legislation of the Scottish Parliament. Section 28 provides for the Parliament to be able to make laws known as Acts of the Scottish Parliament (ASPs). Section 30 introduces the list of reserved matters (which are set out in Schedule 5) and provides for the modification of Schedules 4 and 5 by subordinate legislation. Sections 31 to 33 and 36 make provision for the scrutiny of Bills and ASPs to establish whether their provisions are within the powers of the Parliament and for the necessary procedural arrangements for this. Section 35 provides for the Secretary of State to have the power to intervene to prevent submission of a Bill for Royal Assent in certain limited circumstances. Sections 98, 101 to 103 and Schedule 6 make provision in relation to the judicial determination of questions about the legislative competence of the Scottish Parliament. Scots private law and Scots criminal law are defined in section 126(4) and (5). Schedule 4 sets out restrictions on modification of a number of enactments and rules of law. Schedule 5 defines reserved matters.

This section is also one of a number dealing with the relations between the Parliament and the Scottish Executive, the UK Government and the European Union. Although relations with the EU are reserved to the UK Government, the Parliament and the Executive will be responsible for observing and implementing Community law in relation to devolved matters (see also Schedule 5 and section 126).

Responsibility for secondary legislation and any other executive functions are devolved by virtue of section 53 in so far as the functions do not relate to reserved matters or the retained functions of the Lord Advocate. Section 63 allows for subordinate legislation to specify additional functions to be exercised by the Scottish Ministers. See also

section 57 in relation to Community law and Convention rights and section 58 in relation to the Secretary of State's power to prevent or require action to be taken.

### **Parliamentary Consideration**

The interrelationships between section 29 and Schedules 4 and 5 were explained by Lord Sewel on 21 July 1998 (H.L. *Deb.* vol. 592 cols. 818-822) during consideration of the Scotland Bill by the House of Lords.

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	254
CC	29-Jan-98	601
LC	21-Jul-98	816
LC	21-Jul-98	818
LC	21-Jul-98	829
LR	28-Oct-98	1952
LR	28-Oct-98	2037

### **Details of Provisions**

Subsection (1) provides that an Act of the Scottish Parliament is not law so far as any provision in it is outside the legislative competence of the Scottish Parliament.

If a provision of an ASP is held to be outside the legislative competence of the Parliament, section 29(1) does not render the whole Act invalid. It only provides that the Act is "not law so far as" that invalid provision is concerned.

A provision, which is outside the legislative competence of the Parliament, is "not law" and will never have been law. It is *ultra vires* the Parliament's competence and therefore void *ab initio*. This could have quite drastic effects, particularly if this invalidity is only found to be the case by the courts after the ASP has been in operation for some years. Accordingly, section 102 empowers a court, where it decides that an ASP or some provision in it is not within the legislative competence of the Parliament, to make an order removing or limiting the retrospective effect of its decision or suspending its effect for a period to allow the defect to be corrected.

Subsection (2) provides that a provision is outside the legislative competence of the Parliament if any of the five paragraphs apply.

*Paragraph (a)* mentions two circumstances. It provides that a provision is outside that competence if it would form part of the law of any country or territory other than Scotland. "Scotland" is defined by section 126(1) to include the internal waters and territorial seas adjacent to Scotland. This provision would, therefore, prevent the Scottish Parliament from legislating as a matter of English law but it does not prevent a provision in an ASP from having extra-territorial effect provided it does so only as a matter of Scots law. If it is necessary, in consequence of an ASP for some provision to be made in the law in the rest of the UK, for example, some cross border provision, section 104 enables the Secretary of State to make such provision by subordinate legislation.

*Paragraph (a)* also provides that a provision is outside that competence if it confers or removes functions exercisable otherwise than in or as regards Scotland. There is no definition of what is meant by a function exercisable "as regards Scotland" but it is clear that there has to be some connection or nexus with Scotland. There are other references in the Act to functions being exercisable "in or as regards Scotland" - see sections 63, 88(6), 90(1) and in the definition of Scottish public authority in section 126(1). It

is also implicit in the concept of “devolved competence” (see section 54) so that, for example, it is only functions of a Minister of the Crown which are exercisable in or as regards Scotland which are transferred to the Scottish Ministers under section 53. The question whether a function is exercisable in or as regards Scotland is specifically made a devolution issue by paragraph 1(f) of Schedule 6. Section 30(3) enables Her Majesty, by Order in Council, to specify functions which are to be treated, for such purposes of the Act as may be specified (including for the purposes of legislative competence) as being or as not being exercisable “in or as regards Scotland”.

*Paragraph (b)* provides that a provision is outside the legislative competence of the Parliament if it relates to reserved matters. Reserved matters are defined in Schedule 5.

What is meant by a provision “relating to” a reserved matter is dealt with in section 29(3).

*Paragraph (c)* provides that a provision is outside the legislative competence of the Parliament if it is in breach of the restrictions in Schedule 4. Schedule 4 imposes various restrictions preventing the Scottish Parliament from modifying various enactments or rules of law, such as the law on reserved matters. Accordingly, even if the provision does not relate to reserved matters, it may still be outside its competence if it does so by modifying the law on reserved matters contrary to that Schedule. The notes on Schedule 4 give further detail in this regard.

*Paragraph (d)* provides that a provision is outside the legislative competence of the Parliament if it would be incompatible with any of the Convention rights or with Community law.

The effect of this provision is to make it *ultra vires* for a provision of an ASP to be incompatible with any of the Convention rights or with Community law.

The expression “Convention rights” is defined in section 126(1) as having the same meaning as in the Human Rights Act 1998. That Act came into force on 2 October 2000 but, until that time, section 129(2) provided that section 29(2)(d) should have effect as it would have after that date.

The expression “Community law” is defined in section 126(9) in similar terms as in the European Communities Act 1972. It is also modified by section 106(6) in the case of an obligation under Community law which is a quantitative obligation and it is split in terms of section 106.

*Paragraph (e)* provides that a provision is outside the legislative competence of the Parliament if it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. This is one of the provisions in the Act which are intended to safeguard the position of the Lord Advocate. It does not prevent the Scottish Parliament from amending or even completely altering those systems from what they are at present.

Subsection (3) provides that, for the purposes of this section, the question of whether a provision of an Act of the Scottish Parliament “relates to” a reserved matter is to be determined, subject to sub-section (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

When this amendment was made at Committee Stage in the House of Lords on 21 July 1998 (H.L. *Deb* vol. 592 col. 818 *et seq*), Lord Sewel indicated that it was necessary to ensure that the Scottish Parliament could legislate about devolved matters, such as planning or pollution, even although they might affect reserved matters, such as coal mining. He explained that it had been intended to rely upon the “respectation doctrine” which the courts had developed in determining whether a provision was “in respect of” some matter in cases arising from the Commonwealth and the Government of Ireland Act 1920. The classic statement of the respectation doctrine was by Lord Atkin in the Northern Irish case of *Gallagher v Lynn* 1937 AC 863 at 870:

“It is well established that you are to look at the “true nature and character of the legislation”... the “pith and substance of the legislation”. If, on the view of the statute as a whole, you find the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorised field.

However, in order to avoid any doubt as to whether the courts would apply that doctrine, it was reflected in statutory form as the purpose test in section 29(3). The courts are therefore required by statute to determine whether a provision “relates to” a reserved matter by reference to “the purpose of the provision”. In determining its purpose, the courts are to have regard, amongst other things, to its effect in all the circumstances. It may be that it is thought that a provision might have two or more purposes but section 29(3) does not say that the courts are to determine what is the dominant purpose. It requires the courts to determine what is “the” purpose of the provision or, in other words, what the provision is about, what is its “true nature”, its “pith and substance”.

How are the courts to do this? In determining the purpose of a provision, the courts are required to have regard to “its effect in all the circumstances”. A provision might be said to have many effects and among them might well be the fact that it “affects” reserved matters. The courts would be required to have regard to that in determining what is “its effect in all the circumstances”. The courts are also required to have regard to other things. These may include the legislative context, what is stated in the Parliament to be the purpose of the provision and what may be said to be its legislative intention.

Once the courts have determined that the purpose does not relate to reserved matters, the fact that it may affect them, even significantly, is irrelevant. This is similar to the effect of the respectation doctrine. The fact that there can be a provision which does not relate to reserved matters but which nevertheless affects them is implied by subsection (4).

Subsection (4) qualifies subsection (3) by making special provision as to whether a provision in an ASP relates to reserved matters where it modifies Scots private law or Scots criminal law as it applies to reserved matters. It provides that, even although such a provision would not otherwise relate to reserved matters (that is, by the application of the purpose test in subsection (3)), it is nevertheless to be treated as relating to reserved matters unless “the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise”.

Scots private law and Scots criminal law are defined in section 126(4) and (5). Scots private law is defined as including not only the various familiar areas of the civil law of Scotland but also judicial review of administrative action.

The application of the purpose test may well result in a provision in an ASP amending Scots private law and Scots criminal law being regarded as not “relating” to reserved matters even although it might substantially affect them. Subsection (4), however, deems such a provision to relate to reserved matters (and therefore to be invalid) unless it can be said that “the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise” i.e. to both reserved and devolved matters.