

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

COMMENTARY

SECTION 35: Power to intervene in certain cases

Purpose and Effect

This section enables the Secretary of State, to intervene, by order, to prohibit the Presiding Officer from submitting a Bill for Royal Assent in certain limited circumstances. It also specifies when the order can be made and what it must contain.

General

This section is one of a number dealing with the legislative competence of the Parliament.

The limits upon the legislative competence of the Scottish Parliament are set out in sections 28-30, together with the list of reserved matters in Schedule 5 and the entrenched enactments and rules of law in Schedule 4. Any provision in an Act of the Scottish Parliament which falls outside those limits is *ultra vires* and void, subject to any order made by the courts under section 102. There are various provisions providing for a Bill to be scrutinised before it is enacted to ensure that it is *intra vires*, both before its introduction (section 31) and by the Judicial Committee after it has been passed but before it is submitted for Royal Assent (sections 32- 34). After the Bill has been enacted, any question as to whether the Act or some provision in it is outside the legislative competence of the Parliament is a devolution issue and attracts the special procedures in Schedule 6

However, there are certain limited circumstances where the UK Government can exercise a policy control or veto over what legislation is enacted by the Scottish Parliament, even although it is within its competence. This section defines what those circumstances are. There is a related power in section 58(4) enabling the Secretary of State, in similar circumstances, to revoke subordinate legislation made by a member of the Scottish Executive.

Parliamentary Consideration

Ministers explained these provisions in the House of Lords during the passage of the Scotland Bill on 28 July 1998 and 28 October 1998.

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	262
LC	28-Jul-98	1391
LC	28-Jul-98	1397
LR	28-Oct-98	2006
LR	28-Oct-98	2008

<i>Stage</i>	<i>Date</i>	<i>Column</i>
L3	9-Nov-98	535

Details of Provisions

Subsection (1) provides that the Secretary of State may make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent if the Bill contains provisions:

- (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security; or
- (b) which make modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

Subsection (1)(a) enables the Secretary of State to prevent a Bill from being enacted where he has reasonable grounds to believe that it would be incompatible with the UK's international obligations.

“International obligations” are defined in section 126(10) as meaning “any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights”.

In relation to EC law rights or rights under the European Convention on Human Rights (“Convention rights”), there is a *vires* control in the Act: section 29(2)(d) provides that any provision in an ASP which is incompatible with Community law or any of the Convention rights is outside the legislative competence of the Scottish Parliament.

However, other international obligations cannot be protected by such a *vires* control because, except in certain limited circumstances, they are not normally justiciable as a matter of domestic law. Accordingly, it is necessary to ensure that they can be protected by the Secretary of State by the use of the power in this section (see also section 58 in relation to the actions of the Scottish Executive).

Subsection (1)(a) also enables the Secretary of State to prevent a Bill from being enacted where he has reasonable grounds to believe that it would be incompatible with the interests of defence or national security. These are reserved matters by virtue of paragraph 9 of Part I, and Section B8 of Part II, of Schedule 5 and therefore provisions in an ASP cannot relate to them (see section 29(2)(b)). Nevertheless, an ASP could have a significant effect upon such reserved matters (see the note on section 29). In view of the national importance of defence and national security, it was thought appropriate that they should be given this special protection.

Subsection (1)(b) enables the Secretary of State to prevent a Bill from being enacted which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

Provisions in an ASP cannot relate to reserved matters (section 29(2)(b)) and they, generally, cannot modify “the law on reserved matters” by virtue of section 29(2)(c) and paragraph 2 of Schedule 4. Nevertheless, they could have a significant effect upon reserved matters (see the note on section 29).

Subsection (2) requires the order to identify the Bill and the provisions concerned, and state the reasons why it is being made.

Further provisions about the making of the order are to be found in sections 112 to 115 and Schedule 7. The Order is subject to “Type I” procedure i.e. it is subject to annulment in pursuance of a resolution of either House of Parliament.

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Subsection (3) gives the Secretary of State four weeks from the Scottish Parliament passing the Bill, or approving it following reconsideration, or after a reference under section 33 being decided or otherwise disposed of by the Judicial Committee, in which to make the Order.

Subsection (4) prevents the Secretary of State from making an order if he has previously notified the Presiding Officer that he does not intend to do so, unless the Parliament has meanwhile approved the Bill following reconsideration.

Subsection (5) provides that an order ceases to have effect if the Scottish Parliament approves the Bill following reconsideration (section 36(5) and under Standing Orders Rule 9.9). (See also the note on section 36(4)). If the Parliament approves the Bill, then, under subsection (3), the Secretary of State has a further 4-week period in which to make a further order if he is still not content.