

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

COMMENTARY

Part V: Miscellaneous and General

SECTION 102: Powers of courts or tribunals to vary retrospective decisions

Purpose and Effect

This section provides for a court or tribunal to remove, or limit any retrospective effect, or suspend any such effect, of a decision by it that an Act of the Scottish Parliament or a provision of it is *ultra vires* or that a member of the Scottish Executive did not have the power to make subordinate legislation that he has purported to make.

It also provides that one of the criteria the court or tribunal must take into account when determining whether to use this power is the extent to which third parties would otherwise be adversely affected. The section also provides that if a court or tribunal is considering using this power it must in certain circumstances intimate that fact to the Lord Advocate and the appropriate law officer who may then become a party to the proceedings so far as they relate to the possible exercise of the power.

General

The courts may find that an ASP, or a provision in an ASP, is outside the legislative competence of the Parliament. Such an ASP or provision would be “not law” as is stated in section 29(1). In other words, the effect of that decision would be that such an ASP or provision would be void *ab initio* i.e. it would never have had legal effect from the date of its enactment or commencement.

Similarly, the courts may find that some subordinate legislation made by Scottish Ministers is *ultra vires* because, for example, the power to make the legislation did not transfer to Scottish Ministers under section 53 because it was not exercised within devolved competence (section 54) or simply because the power was exercised beyond the limits of the delegated power. Again, the effect of that decision would be that such subordinate legislation would be void *ab initio*.

Such decisions could cause difficulty particularly if they are made some years after the ASP or the subordinate legislation has purported to come into force. It is doubtful whether the courts have the power, at common law, to vary the retrospective effect of their decisions, such as to provide that the decision should only have effect from the date of the decision or from some date other than the date when the defective provision purported to come into force.

This section confers such a power. Such a power is thought to be necessary since the court or tribunal will, in this situation, be declaring invalid legislation (whether primary or secondary) that had, until that point, been considered to be perfectly valid. This power affords the courts and tribunals the power to protect those who had been acting on that basis. A court may, for example, limit any retrospective effect which its decision may have by providing that it should only take effect from the date of its decision or

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from some other time. It would also allow the court to preserve the legal effects of anything already done in reliance on the erroneous provision.

This section also empowers the court to suspend the effect of its decision for any period to allow the defect to be corrected. This would be appropriate where, for example, it was likely that the defect would be corrected by an ASP or by a remedial order under section 12 of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001 \(asp 7\)](#) or by the UK Government in a Westminster Act or an order under section 30(2) or 107 of the Scotland Act.

In framing this section, account was taken of the similar provision in Article 172(1) of the Constitution of South Africa 1996.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	783
LC	8-Oct-98	588
LC	8-Oct-98	595
LC	8-Oct-98	598
LC	8-Oct-98	606
Stage	Date	Column
LC	8-Oct-98	608
LC	8-Oct-98	611

Details of Provisions

Subsection (1) defines the circumstances in which the section will apply. It will apply where a court or tribunal decides that an Act of the Scottish Parliament or any provision in such an Act is not within the legislative competence of the Parliament or that a member of the Scottish Executive has purported to make, confirm or approve subordinate legislation when he had no power to do that.

The power itself is defined in subsection (2). If the court or tribunal makes such a decision, it may make an order to remove or limit any retrospective effect of that decision. It may also suspend the effect of the decision for any length of time and on any conditions to allow the defect in the Act or the subordinate legislation to be corrected.

Subsection (3) requires the court or tribunal, in deciding whether to make such an order, to have regard (amongst other things) to the extent to which third parties (i.e. those not a party to the proceedings in which the decision is made) would be adversely affected if the power were not exercised. The court or tribunal may however also take into account other relevant criteria as it sees fit.

Subsection (4) provides that if a court or tribunal is considering using the power conferred by this section it must intimate that to the Lord Advocate and the appropriate law officer (where the decision relates to a devolution issue) if that person is not already a party to the proceedings. This ensures that, where a Law Officer has already been given intimation that the proceedings raise a devolution issue but he has chosen not to become a party to those proceedings, the Law Officer will be given intimation of the fact that the court intends to make an order under section 102 as it relates to a devolution issue. "Appropriate law officer" is defined in subsection (7). Rules of court which provide for the giving of notice are [S.I. 1999/1345](#) (Rule of Court 25A.12), [S.I. 1999/1346](#) (Rule 40.12) and [S.I. 1999/1347](#) (Rules 8.9).

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Subsection (5) provides that when a person is given intimation in terms of subsection (4) he may participate in the proceedings so far as they relate to the making of the order.

Subsection (6) provides that paragraphs 36 and 37 of Schedule 6 apply, with necessary modifications, for the purposes of subsections (4) and (5) as they apply for the purposes of that Schedule. This, in effect, enables the courts, in deciding any question of costs or expenses, to take into account the fact that the Lord Advocate has taken part in the proceedings in consequence of this section; and makes clear that general powers to regulate the procedures before any court or tribunal include power to make provisions for the purposes of subsections (4) and (5).

Subsection (7) is a technical provision that defines “intimation” in this section as including notice. It also provides that the “appropriate law officer” is to be the Advocate General in relation to proceedings in Scotland, the Attorney General in relation to proceedings in England and Wales or the Attorney General for Northern Ireland in relation to proceedings in Northern Ireland.