

# CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) ACT 2001

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## EXPLANATORY NOTES

### THE ACT

#### Part 6

#### Power to Make Remedial Orders

86. [Part 6](#) confers a power on the Scottish Ministers under which they are able to make orders (“remedial orders”) to remedy any actual or potential incompatibility between provisions in primary or subordinate legislation and the ECHR.

#### Remedial orders

87. [Section 12\(1\)](#) confers power on the Scottish Ministers to make remedial orders and defines the scope of that power. Further clarification of the scope of the power is contained in section 12(3). A remedial order may be made as a consequence of any Act of Parliament, Act of the Scottish Parliament, subordinate legislation made under any such Act, any provision in any such Act or subordinate legislation or any exercise or purported exercise of functions by a member of the Scottish Executive, which is or may be incompatible with any of the Convention rights. Ministers may make such provision as they consider necessary or expedient. Section 12(2) further provides that before using the power, Ministers must be satisfied that there are compelling reasons for taking the remedial order route as opposed to some other route (such as using primary legislation). Similar wording appears in section 10(2) of the Human Rights Act 1998.
88. [Section 12\(3\)\(d\)](#) enables a remedial order to modify any enactment, prerogative instrument (such as an Order in Council), other instrument or document provided these relate to the exercise or purported exercise of functions by the Scottish Ministers.
89. [Section 12\(3\)\(e\)](#) provides that a remedial order may make provision which has retrospective effect, since actions or provisions which are or may be incompatible are likely to have already taken practical effect. This mirrors the provision that is made for remedial orders under the Human Rights Act (see paragraph 1(1)(b) of schedule 2 to that Act) and the subordinate power in the Scotland Act 1998 to remedy *ultra vires* Acts or exercises of functions (see sections 107 and 114 of the Scotland Act). However, provisions which increase the punishment for, or create, criminal offences are specifically excluded from having retrospective effect. Section 12(3)(f) specifies that the remedial order may provide for the delegation of functions.
90. [Section 12\(4\)](#) restricts the scope for creating offences in a remedial order by imposing maximum penalties which may be imposed for any such criminal offences. For an offence punishable on summary conviction, the maximum penalty is restricted to 3 months’ imprisonment or a fine not exceeding level 5 on the standard scale. For more serious offences, punishable on indictment, the maximum penalty is restricted to 2 years’ imprisonment. No limit is placed on the fine that may be imposed.

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Act 2001 (asp 7) which received Royal Assent on 5 July 2001*

91. [Section 12\(5\)](#) confirms that the conferring of this power to make a remedial order does not affect any other power which the Scottish Ministers may have to remedy the ECHR incompatibility, such as any existing powers to make regulations.

**Procedure for remedial orders: general**

92. [Section 13](#) outlines the general procedure which the Scottish Ministers must follow in making a remedial order. [Section 13\(1\)](#) confirms that the order is made by statutory instrument.
93. [Section 13\(2\)](#) provides that the remedial order cannot be made until it has been laid in draft before, and approved by resolution of, the Scottish Parliament (affirmative resolution procedure).
94. [Section 13\(3\)](#) provides that, before the order is laid in draft for this purpose, the Scottish Ministers must give the Scottish Parliament and the public the opportunity to comment on a copy of the proposed draft order by:

Laying a copy of the proposed draft order and a statement of their reasons for making the order before the Parliament;

Giving appropriate public notice of the proposed order, inviting comments in writing. Such comments are to be made within a period of 60 days beginning with the earlier of the day the notice was given or the day the proposed order was laid (this may be, but need not be, the same day);

Having regard to any comments made within that period.

95. [Section 13\(4\)](#) provides that when laying the draft remedial order for approval, the Scottish Ministers must also lay a statement which summarises the comments made during the 60 day period outlined in [section 13\(3\)\(b\)](#) and which specifies any changes made to the draft order and the reasons for those changes.

**Procedure for remedial orders: urgent cases**

96. [Section 14\(1\)](#) confers power on the Scottish Ministers, for reasons of urgency, to make a remedial order forthwith without applying the procedure specified in [section 13](#).
97. The remainder of [section 14](#) specifies the procedure that the Scottish Ministers must follow having made an urgent remedial order.
98. [Section 14\(2\)](#) provides that the Scottish Ministers must, after making the order, give appropriate public notice of the contents of the order, inviting comments in writing to be made within a period of 60 days beginning with the day the order was made. Ministers must also lay the order before the Scottish Parliament with a statement of reasons for having made it.
99. [Section 14\(3\)](#) provides that the Scottish Ministers must have regard to comments made within the stipulated period. [Section 14\(4\)](#) provides that as soon as practicable after the end of the period, Ministers must lay a statement before the Scottish Parliament summarising the comments made and specifying the changes (if any) they consider should be made to the order.
100. [Section 14\(5\)](#) outlines the procedure to be followed if the Scottish Ministers consider that changes should be made to the original remedial order. Ministers must either make a second remedial order which gives effect to those changes and replaces the original remedial order and lay it before the Scottish Parliament or make an order which simply revokes the original remedial order. [Section 14\(8\)](#) provides that an order that simply revokes a remedial order will be made by statutory instrument and that instrument will be made subject to annulment in pursuance of a resolution of the Scottish Parliament (negative resolution procedure).

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101. [Section 14\(6\)](#) provides that the Scottish Parliament must, if it so chooses, within a period of 120 days from the date when the original remedial order was made, approve the original order or the second remedial order where it has replaced the original order. If the remedial order is not approved within this time, the remedial order, or as the case may be, the second remedial order, will cease to have effect. However, this will not affect anything done under either order or the power which the Scottish Ministers have to make a new remedial order.
102. [Section 14\(7\)](#) provides that section 14(6) has no effect where the Scottish Ministers simply revoke the original remedial order within the period of 120 days referred to in that subsection.
103. [Section 14\(9\)](#) ensures that any period during which the Scottish Parliament is dissolved or is in recess for more than 4 days does not count towards the 60 day period specified in section 14(2)(a) or the 120 day period specified in section 14(6).