

*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 40: Proceedings by or against the Parliament etc.

#### **Purpose and Effect**

This section makes provision as to how legal proceedings are brought by or against the Parliament or its officers and staff but prevents any coercive order being granted against the Parliament, whether directly or indirectly.

#### **General**

Apart from the protection from defamation in section 41, there is no general provision which seeks to exclude judicial proceedings being brought against the Parliament or any MSP in respect of anything said or done in the Parliament. There is nothing similar to the privilege conferred upon the Westminster Parliament by Article 9 of the Bill of Rights Act 1688 which confers upon “proceedings in Parliament” protection from being “impeached or questioned” in any “court or place out of Parliament”.

Against this background, this section makes provision as to how legal proceedings may be taken by or brought against the Parliament. Instead of protecting the Parliament or its proceedings by preventing such judicial proceedings from being brought, this section restricts the remedies which may be granted directly or indirectly against the Parliament. It prevents coercive orders being granted by the Parliament which would require it to do something or prevent it from doing something on the grounds that this could interfere unduly with the proceedings of the Parliament. Instead, it will be open to the courts to make a declarator and it would then be for the Parliament to decide how it should react.

Similar protection is also provided for MSPs, the Presiding Officer and his deputies, the SPCB and staff of the Parliament if the effect of making an order would be to give relief against the Parliament. This is intended to prevent the protection for the Parliament being circumvented by taking action instead against individual members or office-holders. This follows the same approach as is taken in civil proceedings against the Crown in section 21 of the [Crown Proceedings Act 1947 \(c.44\)](#).

It is possible for the Parliament to modify sections 40-43 and to make its own provision about such protections - see paragraph 4(2) of Schedule 4.

#### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
L3	9-Nov-98	538

#### **Details of Provisions**

Subsection (1) provides that the Scottish Parliamentary Corporate Body (the Parliamentary corporation) is the body which represents the Scottish Parliament in all

legal proceedings by or against the Parliament. As the Parliament is an unincorporated association consisting of all its members, it was thought that it would be more practical and convenient if legal proceedings were brought by or against the SPCB on behalf of the Parliament. The SPCB is in many respects the legal persona of the Parliament and, in any event, the property rights and liabilities of the Parliament, which are likely to give rise to most of the legal proceedings against the Parliament, are treated as those of the SPCB - see section 21(5).

Subsection (2) provides that any legal proceedings by or against the Presiding Officer or a deputy or any member of staff of the Parliament should be brought by or against the SPCB on his behalf. Provision is made for this in case proceedings are brought by or against the Presiding Officer or a member of the Parliament's staff, such as the Clerk, in his official capacity. It is not thought that it would apply where, for example, a member of the staff may be bringing an action in a personal capacity against the SPCB arising out of his contract for employment with the SPCB.

Subsection (3) provides for the remedies a court may take against the Parliament. A court will not be able to make an order for suspension, interdict, reduction or specific performance or other like order (including an interim order) but may make a declarator. This is similar to what is provided in section 21(1)(a), as read with section 47, of the Crown Proceedings Act 1947 except that it refers expressly to suspensions and to other like orders. Subsection (5) makes it clear that references to an order include an interim order.

Subsection (4) extends the protection given to the Parliament by similarly restricting the remedies which may be granted in legal proceedings against an MSP, the Presiding Officer and his deputies, the SPCB and staff of the Parliament if the effect of making such an order would be to give relief against the Parliament. This is intended to prevent the protection for the Parliament being circumvented by taking action instead against individual members or office-holders. This is similar to what is provided in section 21(2) of the Crown Proceedings Act 1947.

The effect of this subsection was considered by the Court of Session in *Whaley v Lord Watson of Invergowrie* 2000 SLT 475 where it was held that it did not prevent an interdict being granted against a MSP from introducing a Bill on the grounds that he would thereby be breaching some provision of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 (S.I. 1999/1350). As the Lord President stated at page 482:

“...the subsection does not bar a remedy against a member simply because it may have some consequential effects on the working of the Parliament: the bar applies only where the interdict against the member would have the effect of granting relief, i.e. a legal remedy, against the Parliament.

Subsection (5) makes it clear that references to an order include an interim order.