

*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 II: the Scottish Administration

SECTION 58: Power to prevent or require action

Purpose and Effect

This section enables the Secretary of State by order to direct that any proposed action by a member of the Scottish Executive shall not be taken if he has reasonable grounds to believe it would be incompatible with any international obligations or to direct a member of the Scottish Executive to take action (including the making or introduction in the Parliament of legislation) which he has reasonable grounds to believe is required to give effect to such obligations.

It also enables the Secretary of State to revoke subordinate legislation made by, or which could be revoked by, a member of the Scottish Executive where it contains provisions which he has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security of the United Kingdom; or a provision which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters.

General

This section forms part of the set dealing with the functions of the Scottish Administration including sections 53 and 54 which make provision for the transfer to the Scottish Ministers of Ministerial functions exercisable within devolved competence and section 63 which provides for the transfer of additional functions by executive devolution.

Apart from the fact that a member of the Scottish Executive is accountable to the Parliament for the way in which he exercises his functions, the normal control upon the exercise of these functions is a *vires* control exercised by the courts. The effect of sections 53 and 54 is that the functions transferred under section 53 require to be exercised within devolved competence and of section 57(2) is that it would be *ultra vires* for a member of the Scottish Executive to act (or to fail to act) in a way which would be incompatible with any of the ECHR rights incorporated in UK law or with European Community law - see the note on section 57. Any question whether the exercise or non-exercise of a function by a member of the Scottish Executive is *ultra vires* on these grounds is a devolution issue for the purposes of Schedule 6.

However, there are certain limited circumstances where, even although it may be within their competence, the UK Government can exercise a policy control to prevent something which Scottish Ministers propose to do or require them to take some action or to revoke any subordinate legislation made by them. This section defines what those circumstances are.

This section is similar to section 35 which enables the Secretary of State, in certain circumstances, to prevent Bills from being submitted for Royal Assent.

Parliamentary Consideration

Lord Sewel explained these provisions to the House of Lords during its consideration of the Scotland Bill on 28 July 1998.

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	229
LC	28-Jul-98	1397
LC	30-Jul-98	1621
LC	30-Jul-98	1623
LR	28-Oct-98	2008
LR	28-Oct-98	2042
LR	28-Oct-98	2043

Details of Provisions

Subsection (1) provides that, where the Secretary of State has reasonable grounds to believe that action proposed to be taken by a member of the Scottish Executive would be incompatible with any international obligations, he may, by order, direct that the proposed action should not be taken.

“International obligations” are defined in section 126(10) to mean any international obligations of the UK other than obligations to observe and implement Community law or the Convention rights. It is also modified by section 106(6) in the case where the international obligation is a quantitative obligation and it is split in terms of section 106.

What is meant by “action” in this context is defined by subsection (3) which provides that it includes the making, confirming or approving subordinate legislation.

As mentioned in the general note, a member of the Scottish Executive would be acting *ultra vires* if he acted incompatibly with any of the Convention rights or with Community law. However, it was not possible to make it *ultra vires* for a member of the Scottish Executive to act in a way which would be incompatible with any other international obligation of the UK because those international obligations have not been incorporated into domestic law and, except in certain limited circumstances, they are not normally justiciable as a matter of domestic law. Accordingly, it was thought necessary to ensure that the Secretary of State had powers to prevent Scottish Ministers from acting incompatibly with any international obligation.

Subsection (2) provides that, where the Secretary of State has reasonable grounds to believe that any action which is capable of being taken by a member of the Scottish Executive is necessary in order to give effect to any international obligations, he may by order direct that the action shall be taken.

What is meant by “action” in this context is defined by subsection (3) which provides that it includes the making, confirming or approving subordinate legislation and the introducing of a Bill in the Parliament.

This is the only provision in the Act which enables the UK Government to direct a member of the Scottish Executive as to what he has to do. This is generally necessary because any Ministerial functions to implement these international obligations within devolved competence would have transferred to the Scottish Ministers under section 53 and the UK Government would not be able to exercise them. There is no equivalent

to section 57(1) in the case of these international obligations. There may also be circumstances in which the UK Government would think it necessary to direct a member of the Scottish Executive to introduce a Bill into the Parliament to implement the international obligation even although the Westminster Parliament would be able to pass the necessary legislation for this purpose (section 28(7)).

Subsection (3) defines “action” for the purposes of subsections (1) and (2) as mentioned above.

Subsection (4) empowers the Secretary of State to make an order revoking subordinate legislation made by a member of the Scottish Executive, or which would be within the competence of the Scottish Executive to revoke, if:

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

This provision is required because, if the Ministerial function to make or revoke the subordinate legislation in question has been transferred to the Scottish Ministers under section 53, a Minister of the Crown would no longer have the power to exercise that function.

These provisions are similar to the powers given to the Secretary of State by section 35 to make an order preventing a Bill from being submitted for Royal Assent and reference is made to the note upon section 35(1).

Subsection (5) requires any order under this section to state the reasons why it is being made. The order would be subject to judicial review.

Further provision about the making of the order is to be found in sections 112 to 115 and Schedule 7. In particular, under Schedule 7, orders made under this section are subject to negative resolution procedure in either House of the United Kingdom Parliament. An exception is made for an order which merely revokes an order under section 58(1), which would not be subject to any Parliamentary procedure.