



Retrospective legislation

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This Note explains what retrospective legislation is and provides some examples, in the context of the *Mental Health (Approval Functions) Act 2012* and the *Job-Seekers (Back to Work Schemes) Act 2013*.

Standard Note 5256 *Fast-track legislation* examines the reasons for urgent legislation and new procedures which apply in the Lords when the Government wants to bring forward an expedited bill. A Parliamentary Information List (**Standard Note** 4974) provides a list of expedited bills since 1979.

Contents

1	What is retrospective legislation?	2
2	Examples of retrospective legislation	2
3	<i>Mental Health (Approval Functions) Act 2012</i>	3
4	<i>Job-Seekers (Back to Work Schemes) Act 2013</i>	4

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1 What is retrospective legislation?

Retrospective legislation is generally defined as legislation which 'takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'.¹

According to the *Oxford Dictionary of Law*, retrospective (or retroactive) legislation is:

Legislation that operates on matters taking place before its enactment, e.g. by penalizing conduct that was lawful when it occurred. There is a presumption that statutes are not intended to have retroactive effect unless they merely change legal procedure.²

Under its entry for 'retrospective' *Stroud's Judicial Dictionary of Words and Phrases* outlines the principle:

... 'nova constitutio futuris formam imponere debet, non præteritis', that is unless there be clear words to the contrary statutes 'do not apply to a past, but to a future, state or circumstance'.³

The previous Government's position on introducing retrospective legislation was set out by Harriet Harman, the Solicitor General, in answer to a question from Jonathan Sayeed:

Mr. Sayeed: To ask the Parliamentary Secretary, Lord Chancellor's Department if he will make a statement on the Government's policy on the introduction of retrospective legislation.

The Solicitor-General: I have been asked to reply. The Government's policy before introducing a legislative provision having retrospective effect is to balance the conflicting public interests and to consider whether the general public interest in the law not being changed retrospectively may be outweighed by any competing public interest. In making this assessment the Government will have regard to relevant international standards including those of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was incorporated into United Kingdom law by the Human Rights Act 1998.⁴

2 Examples of retrospective legislation

However, there are examples of legislation which has been applied retrospectively, for example to validate activities which have no statutory basis, or to correct practices which have been found to be illegal. Examples include:

- *Statutory Instruments (Production and Sale) Act 1996* which amended the *Statutory Instruments Act 1946* to validate retrospectively and authorise prospectively the printing of statutory instruments by contractors working for HMSO.
- *Caravans (Standard Community Charge and Rating) Act 1991* which amongst other provisions excluded caravans from the definition of 'domestic subjects' in the *Abolition of*

¹ *Craies on Legislation*, 9th edition, p432 n136

² Elizabeth A Martin (ed), *Oxford Dictionary of Law* fourth edition, 1997, p406

³ Daniel Greenberg and Alexandra Millbrook, *Stroud's Judicial Dictionary of Words and Phrases* sixth edition, 2000, Vol 3, p2315

⁴ HC Deb 6 March 2002, Vol 381 c409-10W

Domestic Rates Etc (Scotland) Act 1987 and deemed the amendment to have had effect since 1 April 1990.

- Amendments were made at a late stage in the passage of the *Compensation Act 2006* effectively to reverse the effect of a House of Lords decision on mesothelioma cases.
- The *Scotland Act 2012* provided that the regulation of activities in Antarctica should be treated as having been reserved to the UK Government from the beginning of devolution, even though it had not been reserved in the *Scotland Act 1998*. This had been an oversight, and had deprived the Secretary of State of a legal basis for any permits s/he had issued for scientific missions.
- The *Wireless Telegraphy (Validation of Charges) Act 1954* provided a statutory basis for the wireless licence fees which the Postmaster-General had been collecting for around 50 years, after it was found that the presumed legal basis was defective.⁵

A rare example of legislation to create retrospective criminal liability was the *War Crimes Act 1991*, which allowed proceedings for murder, manslaughter or culpable homicide to be brought against anyone, regardless of nationality at the time, who had committed a war crime in Germany, or territory it occupied, during the Second World War. This was subject to their being a British citizen or resident from 1990 onwards.

A recent example of retrospection was the *Police (Detention and Bail) Act 2011*. On 30 June 2011, policing minister Nick Herbert announced the Government's intention to introduce emergency legislation to reverse the High Court's decision on the calculation of the detention clock under the *Police and Criminal Evidence Act 1984*, saying that the matter was too urgent to wait for the full Supreme Court appeal to be heard. The Bill was published and had its first reading on 5 July 2011. All of its remaining Commons stages took place on 7 July 2011.⁶

Retrospective legislation also occurs in tax law. Standard Note 6361 *Retrospective taxation : section 58 of the Finance Act 2008* and Standard Note 4369 *Tax legislation; Retrospective taxation: earlier debates* provide background.

3 *Mental Health (Approval Functions) Act 2012*

On 29 October 2012 Jeremy Hunt, Secretary of State for Health, made a statement to the Commons. He said:

It has become apparent that there are some irregularities around the way in which doctors have been approved for the purpose of assessing patients for detention under the Act. For assessments and decisions under certain sections of the Act, including detention decisions under sections 2 and 3, three professionals are required to be involved—two doctors and an approved mental health professional. The latter will usually be a social worker.

In 2002, when strategic health authorities came into being, the then Secretary of State properly and lawfully delegated his function of approving doctors under the Act to them. However, it came to light last week that in four out of the 10 SHAs—North East, Yorkshire and Humber, West Midlands and East Midlands—between 2002 and the present day the authorisation of doctors' approval appears to have been further delegated to NHS mental health trusts.

⁵ HC Deb 10 December 1954, cc1253ff-

⁶ Library Research Paper 11/56 *Police (Detention and Bail) Bill 2010-12*

I was made aware of the issue and kept up to date with the actions being taken last week. Our latest best estimate is that approximately 2,000 doctors were not properly approved, and that they have participated in the detention of between 4,000 and 5,000 current patients within institutions in both the NHS and independent sectors. Rampton high-secure hospital is in one of the affected areas, and some patients at Ashworth high-secure hospital are also included....

Although we believe there are good arguments that past detentions under the Mental Health Act were and are lawful, it is important that doctors, other mental health professionals and, most importantly, patients and their families have absolute confidence in the decisions made. That is why, in relation to past detentions, we have decided that the irregularity should be corrected by retrospective legislation. Although we are aware of the problem in only the four areas going back to 2002, the proposed legislation will apply in principle to the approval of all doctors under the Mental Health Act since its introduction in 1983. The proposed legislation will retrospectively validate the approval of clinicians by those organisations to which responsibility was delegated, up to the point when all the relevant doctors were fully re-approved and their status put beyond doubt. The legislation will not deprive people of their normal rights to seek redress if they have been detained for any reason other than the narrow issue of the delegation of authority by the strategic health authorities, nor will it affect any future detentions or legitimise any similar failures in future. We are proposing to introduce the draft legislation to this House and, through best endeavours, looking for it to complete its passage through all the appropriate stages in this House and the other place as soon as is practicable.⁷

Following business questions on 29 October 2012, the Bill received all its Commons stages on 30 October and Lords stages on 31 October. [Standard Note 5256](#) *Fast-track legislation* examines the reasons for urgent legislation and new procedures which apply in the Lords when the Government wants to bring forward an expedited bill. A Parliamentary Information List ([Standard Note](#)) [4974](#) provides a list of expedited bills since 1979. [Appendix 5](#) of the Lords Constitution Committee report on expedited legislation in 2008-09 lists all expedited bills since 1979 with a brief summary of the justification given.⁸

4 *Job-Seekers (Back to Work Schemes) Act 2013*

Full details are contained in Library Standard Note 6587 [Job-Seekers \(Back to Work\) Schemes Bill 2012-13](#). This Act had an expedited passage through Parliament, with all Commons stages taken on 19 March and Lords stages taken on 21 and 25 March 2013.

In *Reilly and Wilson v Secretary of State for Work and Pensions*, the Court of Appeal ruled on 12 February 2013 that 2011 Regulations underpinning some of the Government's back to work schemes – including its flagship Work Programme – were unlawful and must be quashed. Media attention focused on the issue of whether schemes breached Article 4 of the European Convention on Human Rights (forced labour), but the Court found against the DWP on the grounds that the regulations failed to provide sufficient information about the various back to work schemes, and that letters sent to claimants mandated to take part in the schemes gave insufficient information on their obligations and on the situations where sanctions would be applied.

The Act covers cases where claimants were sanctioned for a failure to comply with a requirement under the 2011 Regulations, or where there was a failure but a decision to

⁷ [HC Deb 29 October 2012](#) c32-34

⁸ [Fast Track Legislation](#): Constitutional Implications HL Paper 116 2008-09

impose a sanction has not yet been made. Once enacted, it was not possible to challenge a decision to impose a sanction solely on the grounds that the 2011 Regulations were invalid, or that notices to claimants were inadequate, notwithstanding the Court of Appeal judgment.

On 21 March the [House of Lords Constitution Committee](#) published its report on the Bill.⁹ The Committee was “unable to agree with the Government’s assessment that it was necessary for the Bill to be fast-tracked” and stated that it was incumbent upon the Government to explain why it had made this choice and rejected other options. It also concluded that, in scrutinising the Bill, the House of Lords would want to consider “whether retrospectively confirming penalties on individuals who, according to judicial decision, have not transgressed any lawful rule is constitutionally appropriate in terms of the rule of law.”

At Second Reading in the Lords, the Opposition tabled an amendment deploring “the Government’s incompetence” which led the tabling of a Bill with retrospective effect, and the need to introduce fast-track legislation in spite of the Constitution Committee’s concerns, and seeking various assurances about appeal rights and the terms of reference for the independent review. The amendment was defeated by 140 votes to 106. However, in the course of the debate a number of powerful speeches were given critical of the Government, notably from the crossbencher Lord Pannick who concluded that there was “no justification whatever” for fast-tracking, and that the Bill “offends against a basic constitutional principle that people should be penalised only for contravening what was at the time of their act or omission a valid legal requirement.”¹⁰

⁹ HL 155 2012-13

¹⁰ [HL Deb 21 March 2013 c740-3](#)