

SCOTLAND ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS (AND SCHEDULES)

Part 2: Ministers and Their Powers

Section 12: The Scottish Government

48. *Subsection (1)* renames the Scottish Executive as the Scottish Government. This empowers the Scottish administration to use the term Scottish Government in formal, legal documents, following the increasing use of that term by the current Scottish administration and others in the public domain.
49. *Subsection (2)* amends the 1998 Act to reflect this renaming.

Section 13: Exercise of power to make Order disqualifying persons from membership of the Parliament

50. *Subsection (2)* amends section 112 of the 1998 Act with the effect of giving the Scottish Ministers responsibility for taking forward Orders in Council under section 15(1) or (2) of the 1998 Act to specify descriptions of office-holders who are disqualified from being a member of the Scottish Parliament. These Orders are currently made by statutory instrument (being a reserved matter); the responsibility for preparing them therefore falls to Scotland Office Ministers. *Subsection (2)* applies section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 to the function of making an Order in Council under section 15(1) or (2), so that these Orders will now be Scottish statutory instruments rather than statutory instruments. This means that – although they remain a reserved matter – these Orders will be subject to the affirmative procedure in the Scottish Parliament before being recommended to Her Majesty for making. It follows that the responsibility for preparing them will fall to the Scottish Ministers.
51. *Subsections (3) to (5)* amend other provisions of the 1998 Act in consequence of this. *Subsection (3)* modifies the function of the Queen’s Printer for Scotland in section 92 so that the Queen’s Printer may exercise functions in relation to the Orders (eg, printing them as part of the series of Scottish statutory instruments) by regarding those functions as being exercisable within devolved competence. *Subsection (4)* amends the scope of section 104 Orders to apply to Orders made under section 15. *Subsection (5)* makes a consequential amendment to paragraph 11 of Schedule 4 to the 1998 Act.

Section 14: Time limit for human rights actions against Scottish Ministers etc

52. This section inserts a time limit for actions against the Scottish Ministers under the 1998 Act where it is claimed that they have acted incompatibly with Convention rights.
53. In the *Somerville* case in 2007, the House of Lords held, in relation to breaches of Convention rights by Scottish Ministers under the 1998 Act, that actions for such breaches were not subject to the same statutory time limit of twelve months as the Human Rights Act. As a result, there was no time limit on when proceedings could be brought against Scottish Ministers.

54. In response to this, the Scotland Act 1998 (Modification of Schedule 4) Order 2009 (S.I. 2009/1380) was made. This enabled the Scottish Parliament to pass the [Convention Rights Proceedings \(Amendment\) \(Scotland\) Act 2009 \(asp 11\)](#), giving a time limit to proceedings brought against Scottish Ministers. But this was appropriate only as a temporary solution. *Subsection (6)* makes essentially the same amendment as was made by the 2009 Act of the Scottish Parliament. Accordingly, the 2009 Order is revoked and the Act of the Scottish Parliament is repealed (see *subsections (2) to (4)*).

Section 15: Power to vary retrospective decisions about non-legislative acts

55. Section 102 of the 1998 Act confers power on a court or tribunal to remove or limit the retrospective effect of its decision, or suspend the effect of its decision, where it has decided that:
- An Act of the Scottish Parliament or any provision of such an Act is not within the legislative competence of the Scottish Parliament; or
 - A member of the Scottish Government does not have the power to make, confirm or approve any subordinate legislation that they have purported to make, confirm or approve.
56. This section provides that this power also extends to any other purported exercise of a function by a member of the Scottish Government where a court or tribunal has determined that such exercise is outside devolved competence. So, for example, a court or tribunal will have the powers specified in section 102 if it determines that the exercise of any function by a member of the Scottish Government was outside devolved competence by virtue of being incompatible with Convention rights or Community law.

Section 16: BBC Trust member for Scotland

57. This section inserts new section 90A into the 1998 Act, requiring a Minister of the Crown to obtain the agreement of the Scottish Ministers before making a recommendation for the appointment to the BBC Trust of the ordinary member who will hold the Scottish post. This process is governed by the Royal Charter for the continuance of the British Broadcasting Corporation, which requires that one of the ordinary members of the Trust be designated as the Trust member for Scotland.
58. Appointments to the BBC Trust and the designation of members are made by Her Majesty by Order in Council, in accordance with articles 13 and 14 of the Charter. The Secretary of State for Culture, Olympics, Media and Sport makes the recommendation of who should be appointed by Order in Council to the BBC Trust, including the ordinary member who holds the Scottish post.

Section 17: Exercise of functions relating to Seirbheis nam Meadhanan Gàidhlig

59. Sections 183 and 183A of the Broadcasting Act 1990 (“the 1990 Act”), as amended by sections 208 and 209 of the Communications Act 2003, make provision in relation to Seirbheis nam Meadhanan Gàidhlig or the Gaelic Media Service. The operating name of the body is MG Alba.
60. *Subsection (2)* substitutes section 183(1) of the 1990 Act with the effect that Scottish Ministers, rather than the Secretary of State, must, for each financial year, pay to OFCOM such amount as they may determine to be appropriate for the purposes of paying into the Gaelic Broadcasting Fund. OFCOM are the independent regulator and competition authority for the UK communications industries.
61. *Subsection (5)* amends section 183A(4) of the 1990 Act to require OFCOM to seek the approval of the Scottish Ministers as well as the Secretary of State before making appointments of members of the Gaelic Media Service and for the appointment of a member as the chairman of the Service.

62. *Subsection (6)* amends section 183A(6)(b) of the 1990 Act so that any guidance issued by the Secretary of State to OFCOM in relation to the appointment of members must have the agreement of the Scottish Ministers.
63. The remaining subsections of the section make consequential provision in relation to the transfer of funding of MG Alba to Scottish Ministers following the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

Section 18: Crown Estate Commissioner with special responsibility for Scotland

64. *Subsection (2)* of this section amends paragraph 1 of Schedule 1 to the Crown Estate Act 1961 so as to require that one of the Crown Estate Commissioners be appointed as the Crown Estate Commissioner with special responsibility for Scotland. Commissioners are appointed by Her Majesty by warrant under the Royal Sign Manual. *Subsection (3)* inserts a new paragraph 1(4A) into Schedule 1 which requires the Chancellor of the Exchequer to make any recommendation to Her Majesty as to whom to appoint as the Crown Estate Commissioner with special responsibility for Scotland, and to consult the Scottish Ministers before making that recommendation.

Section 19: Misuse of drugs

65. This section amends provisions of the Misuse of Drugs Act 1971 ('MDA') which relate to the circumstances in which a doctor may prescribe controlled drugs to a person who is addicted to certain drugs. Under section 10(2)(i) of the MDA, the Secretary of State may make regulations to prohibit a doctor from administering, supplying or authorising the administration or supply of certain controlled drugs to a person addicted to controlled drugs, except under and in accordance with a licence issued in pursuance of the regulations. This is known as an 'addicts licence'. The current regulations made under this section are the Misuse of Drugs (Supply to Addicts) Regulations 1997 (S.I. 1997/1001).
66. *Subsection (2)* amends section 10(2)(i) of the MDA. The effect is to give Scottish Ministers the powers to issue addicts licences to doctors acting in Scotland. By virtue of the amendments to section 30 of the MDA in *subsection (6)*, the Scottish Ministers may set terms and conditions in addicts licences and modify or revoke existing licences. The power to make the regulations will continue to be exercisable by the Secretary of State. It is anticipated that the existing Regulations will be amended separately to reflect the change being made by this section.
67. Section 13(1) of the MDA allows the Secretary of State to give a direction to any doctor who has contravened certain provisions of the MDA relating to drug addicts. A direction under section 13(1) prohibits the doctor from prescribing, administering or supplying or authorising the administration or supply of such controlled drugs as may be specified. *Subsection (3)* further amends the MDA so that the power of direction in section 13(1) is exercisable by the Scottish Ministers rather than the Secretary of State where the contravention in question relates to activities which require an addicts licence and took place in Scotland.
68. Section 14 of the MDA gives the Secretary of State the power to refer cases about directions under section 13 to a tribunal or advisory body constituted under Schedule 3 to the MDA. *Subsections (4) and (5)* provide that those powers are exercisable by the Scottish Ministers where the direction in question is one which would be made, by virtue of *subsection (3)*, by the Scottish Ministers. *Subsection (7)* makes a consequential amendment about the procedure for making tribunal rules.

Section 20: Power to prescribe drink-driving limits

69. This section amends sections 8(3) and 11(2) of the Road Traffic Act 1988 ('RTA') to give Scottish Ministers powers to make regulations in relation to the prescribed alcohol limit which applies when driving in Scotland. The RTA includes two offences which

apply where the driver of a motor vehicle has consumed so much alcohol that he exceeds the prescribed limit. These are: the offence of causing death by careless driving when under the influence of drink (section 3A(1)(b)) and the offence of driving or being in charge of a motor vehicle with an alcohol concentration above the prescribed limit (section 5(1)).

70. Under the RTA, Scottish Ministers currently have no powers in relation to the prescribed alcohol limit for driving in Scotland. The amendment to section 11(2) of the RTA and the new subsection (2ZA) provided for by *subsections (5) to (7)* will enable Scottish Ministers to change the prescribed alcohol limit for drivers on Scottish roads.
71. Section 8(2) of the RTA provides a right for certain drivers who have given an evidential sample in breath to substitute for it a sample of blood or urine. This right applies to drivers whose evidential breath sample is not more than the amount specified. Section 8(3) of the RTA allows that amount to be varied, so that a link can be maintained with the prescribed limit under section 11(2). The amendment to section 8(3) and the new subsection (4), provided for by *subsections (2) to (4)*, will give Scottish Ministers the power to vary that amount in relation to drivers suspected of having committed a relevant offence in Scotland.

Section 21: Speed limits

72. This section amends the Road Traffic Regulation Act 1984 ('RTRA') to give the Scottish Ministers the power to determine the level of the Scottish national speed limit and the power to make regulations to specify traffic signs to indicate that limit.
73. Scottish Ministers already have power to make regulations under section 17(2) and (5) of the RTRA, but only with respect to any particular special road (see the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750)).
74. In addition, Scottish Ministers have powers under section 88(1)(a) and (4) of the RTRA to make or continue an Order but only in relation to any road specified in the Order (see the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 (S.I. 2000/1563)). For the remaining functions in those subsections, the Secretary of State is required to consult Scottish Ministers (by virtue of S.I. 1999/1750).
75. *Subsections (2) to (5) and (12) to (18)* amend sections 17 and 88 of the RTRA to give Scottish Ministers powers to set the speed limits on Scottish roads, without the need to consult the Secretary of State.
76. *Subsections (9) to (11)* amend section 86 of the RTRA to give Scottish Ministers the power to vary, by regulations, the provisions of Schedule 6 of RTRA which sets out speed limits for particular classes of vehicles.
77. Additionally, *subsection (7)* inserts new subsection (2A) into section 64 of RTRA to enable the Scottish Ministers to make regulations to specify signs for a Scottish national speed limit. New subsection (2B) requires that Scottish Ministers have the agreement of the Secretary of State to make these regulations. The "Scottish national speed limit" is then defined in new subsection (2C).

Section 22: Speed limits: supplementary

78. *Subsections (1) to (3)* of this section make amendments to the subordinate legislation made under section 63 of the 1998 Act in consequence of the transfer of functions related to speed limits provided for in section 21.
79. *Subsections (4) to (7)* of the section make transitional provision in relation to the transfer of functions provided for in section 21.