

SCOTLAND ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS (AND SCHEDULES)

Part 1: the Parliament and Its Powers

Section 1: Administration of elections

9. This section transfers certain of the executive functions in section 12 of the Scotland Act relating to the conduct and administration of Scottish Parliament elections, which are currently exercisable by the Secretary of State, to the Scottish Ministers. These powers have most recently been exercised in the Scottish Parliament (Elections etc.) Order 2010 (S.I. 2010 No. 2999 (S. 9)), which was made on 16 December 2010.
10. *Subsection (2)* amends section 12(1)(a) and (b) to give the Scottish Ministers power to make provisions on the conduct of the Scottish Parliament elections, the questioning of such elections and the consequences of irregularities. The Scottish Ministers are required to consult the Secretary of State before exercising these powers (see *subsection (7)*). The powers of the Scottish Ministers do not extend to those provisions (in particular, in relation to the franchise) which the Secretary of State may make under new section 12A. Section 12(1)(c) is omitted, as the Secretary of State will retain the power to make provisions on the return of Scottish Parliament members other than at an election (see section 12A(1)(d), inserted by *subsection (9)*).
11. *Subsection (3)* amends section 12(2) which clarifies the scope of the order-making powers of the Scottish Ministers to make provisions under section 12(1)(a). Section 12(2)(d) allows Scottish Ministers to combine polls of the Scottish Parliament with other devolved elections where the polls are held on the same day. The powers to combine polls of the Scottish Parliament with UK Parliament or European parliamentary elections are dealt with in section 2 and are retained by the Secretary of State. The provisions in section 12(2)(b), (e) and (f), which are omitted by this section, are also retained by the Secretary of State (see sections 12A(1)(b) and (c) and 12A(2)(a) inserted by *subsection (9)*).
12. *Section 12(4)(a)*, which is not amended by this section, enables the Scottish Ministers to apply established statutory procedures for elections to Scottish Parliament elections, subject to any necessary alterations. Section 12(4)(b) and (c) are replaced by new section 12A(4).
13. *Subsection (6)* enables the Scottish Ministers to make orders as regards the designation of regional returning officers.
14. *Subsection (9)* introduces new section 12A, which sets out the powers to make provisions about elections that continue to be exercisable by the Secretary of State.
15. Section 12A(1) provides that the Secretary of State may make provision about the registration of electors. By virtue of section 12A(2), this includes disregarding the alterations in a register of electors and other provisions about the content of a register

or the effect of registration, but does not include provision about supply or dealing with the register, which may be made by the Scottish Ministers under section 12(2)(a).

16. The Secretary of State may also make provision for modifying the application of section 7(1) of the 1998 Act where a constituency poll is abandoned or notice of it countermanded (equivalent of the current section 12(2)(e)), for modifying section 8(7) to ensure the allocation of the correct number of seats for the region (equivalent of the current section 12(2)(f)), and as to the return of members otherwise than at an election (equivalent of the current section 12(1)(c)).
17. Under section 12A(3), modifications may be made to section 10(4) and (5) of the 1998 Act (which relate to the procedure for replacing regional MSPs who stood on a regional party list). This is the equivalent of current section 12(3).
18. Sections 12A(4)(a) and (b) confer on the Secretary of State the powers about the application and modification of electoral law which are currently provided under sections 12(4)(a) and (c) of the 1998 Act.
19. Section 12A(5) provides that the Secretary of State must consult the Scottish Ministers before making regulations under this section.

Section 2: Combination of polls at Scottish Parliamentary and other reserved elections

20. This section amends section 15 of the Representation of the People Act 1985 so as to require that, where Scottish Parliamentary general elections and UK or European Parliamentary general elections are held on the same day, they are to be taken together. Under section 15(5), the Secretary of State is given the power to make such provision as he thinks fit in connection with the combination of polls. This might include making modifications to the rules which would otherwise apply to the conduct of those elections to ensure that the two polls being taken together are subject to consistent rules. As a result of the amendment made by section 2, this power extends to a combination of polls which includes a Scottish Parliamentary general election. *Subsection (3)* amends section 15(3) so that the elections which returning officers have discretion to combine under section 15(2) include Scottish Parliamentary elections. This would allow, for example, the combination of the poll for a Scottish Parliamentary by election with the poll at a general election to the House of Commons.
21. *Subsection (4)* inserts new subsection (3ZA) into section 15; this provides that the discretion of returning officers under subsection (2) does not extend to determining that a Scottish Parliamentary election and a local government election in Scotland are to be taken together.
22. *Subsection (5)* inserts new subsection (5C) to section 15, requiring the Secretary of State to consult Scottish Ministers before making combination rules under subsection (5) where one of the elections is a Scottish Parliamentary election or a local government election in Scotland.

Section 3: Supplementary and transitional provision about elections

23. *Subsection (1)* inserts section 113(1A) of the 1998 Act so that that section also applies to Scottish Ministers' new powers to make subordinate legislation about the administration of Scottish Parliament elections under section 12 of the 1998 Act (provided for by section 1 of the Act). Section 113 makes supplementary provision about the scope of subordinate legislation powers in the 1998 Act.
24. *Subsections (3) and (4)* make procedural provision in relation to the subordinate legislation powers which are conferred on the Scottish Ministers and Secretary of State under section 1. An order made by the Scottish Ministers under section 12 of the 1998 Act is subject to the affirmative procedure set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010. This means that it may not be made unless

it has been laid in draft before, and approved by, the Scottish Parliament. Regulations made by the Secretary of State under new section 12A may not be made unless a draft of the regulations has been laid before, and approved by, both Houses of the Westminster Parliament. This is consistent with the procedure which applies to orders made by the Secretary of State under the current section 12 of the 1998 Act.

25. *Subsection (5)* amends section 7(2)(g) of the Political Parties, Elections and Referendums Act 2000 ('PPERA') so that Scottish Ministers and the Secretary of State are both required to consult the Electoral Commission before exercising the powers to make subordinate legislation in sections 12 and 12A of the 1998 Act which are conferred by section 1.
26. *Subsection (6)* amends section 8(2) of PPERA so that Scottish Ministers may only exercise their powers under section 12(2)(c) in relation to the limitation of election expenses on the recommendation of the Electoral Commission. This constraint is subject to an exception in relation to provision which is made purely to take account of inflation.
27. *Subsections (7) to (12)* make transitional and savings provisions in connection with the transfer of powers in section 12 from the Secretary of State to the Scottish Ministers.

Section 4: Presiding Officer and deputies

28. This section amends section 19 of the 1998 Act to allow the Parliament, at any time, to elect one or more deputies in addition to the two deputies who have to be appointed by virtue of section 19(1). This will allow the Parliament to elect additional deputies if and when it is appropriate, for example, if a deputy or the Presiding Officer is ill. These additional deputies may hold office for a shorter period than deputies appointed under section 19(1) (see *subsection (4)*).
29. This section also relaxes the existing requirement in section 19(1) on the Parliament to appoint a Presiding Officer and two deputies at its first meeting. Instead, it requires that the Parliament must appoint these officers before it conducts any other proceedings (other than its members taking the oath of allegiance) and, in any event, within 14 days of the election.
30. This section also amends Schedule 3 to the 1998 Act to require the standing orders to make provision to ensure that all the available officers (that is, those of the Presiding Officer and the deputies who are at any time able to act) do not all represent the same political party.

Section 5: Scottish Parliamentary Corporate Body

31. This section amends section 21(2)(b) of the 1998 Act to allow for a minimum of four members of the Scottish Parliament (MSP) to be appointed as members of the Scottish Parliamentary Corporate Body (SPCB). Currently, the number of MSP members of the SPCB is fixed at four. Any increase in the number of SPCB members will be implemented by a change to the standing orders of the Scottish Parliament.

Section 6: Bills: statements as to legislative competence

32. This section amends section 31(1) of the 1998 Act so as to require anyone in charge of a Bill, not just Ministers, to make a statement on or before introduction of the Bill, that the Bill is within the Parliament's legislative competence. The new requirement will apply to backbench MSPs introducing Members Bills, committee convenors introducing Committee Bills and private individuals and organisations introducing Private Bills.

Section 7: Members' Interests

33. This section amends section 39 of the 1998 Act to give greater flexibility to the Scottish Parliament when making provision for a members' interests regime.

*These notes refer to the Scotland Act 2012 (c.11)
which received Royal Assent on 1st May 2012*

34. **Section 39** imposes a statutory duty upon the Scottish Parliament to make provision by or under an Act of the Scottish Parliament about members' interests. Provision is currently made in the **Interests of Members of the Scottish Parliament Act 2006 (asp 12)**.
35. **Subsection (2)** substitutes new subsections for subsections (5) to (7) of section 39.
36. New subsection (4A) confers on the Scottish Parliament the power to create exceptions to the requirements or prohibitions imposed by the provisions made in pursuance of section 39(2) to (4). For example, this would enable the Scottish Parliament to make provision, if an excuse for non-compliance is considered to be reasonable by the Parliament, that there may be a finding that there has not been a failure to comply or a contravention.
37. New subsection (5) allows the Scottish Parliament to make provision to impose on a member such sanctions as it considers appropriate if a member fails to comply with or contravenes any provision made in pursuance of subsections (2) to (5). It continues to be able to make provision to exclude members from the proceedings of the Parliament in similar circumstances.
38. New subsection (5A) allows provision made under subsection (5) to include provision that a sanction is not to be imposed in certain specified circumstances. For example, this would enable the Scottish Parliament to make provision, if it considers it appropriate to do so, for a defence of reasonable excuse where there is a failure to comply or a contravention of the requirements stated under section 39(2) to (5).
39. **Section 39(6)** currently provides that any Member of Parliament who contravenes provision made in pursuance of subsections (2) to (4) is guilty of an offence. New subsection (6) replaces this with a power for the Parliament to make provision in this regard. The penalty for the offence remains the same (see new subsection (7)).

Section 8: Constituencies, regions and regional members

40. This section repeals sections 1(2) and (3) and Schedule 2 of the Scottish Parliament (Constituencies) Act 2004 ('the 2004 Act') as these transitional provisions are no longer required.
41. **Subsection (2)** introduces Schedule 1 which contains amendments reproducing the effect of modifications contained in Schedule 2 to the 2004 Act and makes some other minor amendments to Schedule 1 to the 1998 Act.

Section 9: Continued effect of provisions ceasing to be within legislative competence

42. This section amends section 30 of the 1998 Act to provide that where there is an alteration to the matters which are reserved matters or to Schedule 4 of that Act, the effect of which is that a provision of an Act of the Scottish Parliament ceases to be within legislative competence, the provision does not for that reason cease to have effect, unless an enactment provides otherwise.

Section 10: Air weapons

43. This section amends Section B4 of Part 2 of Schedule 5 to the 1998 Act to create an exception to that reservation. Section B4 reserves the subject matter of Firearms Acts 1968 to 1997.
44. The amendment gives legislative competence to the Scottish Parliament in relation to the regulation of air weapons within the meaning of section 1(3)(b) of the Firearms Act 1968.

45. The Secretary of State retains the power under section 53 of the Firearms Act 1968 and section 1(4) of the Firearms (Amendment) Act 1988 to make rules and orders relating to specially dangerous weapons.

Section 11: Antarctica

46. This section re-reserves the regulation of activities in Antarctica. The effect of this section is that it will no longer be within the legislative competence of the Scottish Parliament to pass Acts which relate to the regulation of activities in Antarctica. The Scottish Parliament has never in fact exercised this competence.
47. *Subsection (2)* provides that the amendment to Schedule 5 takes effect retrospectively, so that it is regarded as having effect from the date that Schedule 5 came into force. The effect of this provision is that executive functions in relation to the regulation of activities in Antarctica are regarded as never having transferred to the Scottish Ministers under section 53 of the 1998 Act (where they would otherwise have been exercisable within devolved competence) and always having been exercisable by Ministers of the Crown.

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.

*These notes refer to the Scotland Act 2012 (c.11)
which received Royal Assent on 1st May 2012*

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.

Part 3: Finance

Section 23: Taxation: introductory

80. This section provides the structure within which the Scottish Parliament may legislate on tax. The Act is providing for the Scottish Parliament to set a rate of income tax for Scottish taxpayers; it is devolving stamp duty land tax and landfill tax to Scotland and it is making provision for new devolved taxes.
81. Section 28 of the 1998 Act gives the Scottish Parliament the power to make laws, to be known as Acts of the Scottish Parliament, within the limits set out in the 1998 Act. Sections 29 and 30 of, and Schedule 5 to, that Act specify that tax policy is outside the Scottish Parliament's legislative competence, although an exception is made for local taxes (e.g. council tax and business rates).
82. *Subsection (1)* introduces the amendments made by the section to the 1998 Act.
83. *Subsection (2)* inserts Chapter 1 (new sections 80A and 80B) of the new Part 4A, the remaining Chapters of which deal with income tax and each of the devolved taxes.
84. Section 80A(1)(a) of the new Part 4A introduces Chapter 2, which provides that the Scottish Parliament may set a rate of income tax to be paid by Scottish taxpayers.
85. Section 80A(1)(b) introduces Chapters 3 and 4, which provide that the Scottish Parliament may legislate in respect of the devolved taxes (that is, taxes on land transactions and disposals of waste to landfill).
86. Section 80A(2) provides that the Part may impose restrictions on that power to legislate in relation to devolved taxes.
87. Section 80A(3) provides that a devolved tax introduced by the Scottish Parliament may not be imposed where to do so would be incompatible with the UK's international obligations.
88. Section 80A(4) defines a "devolved tax" as meaning a tax specified in the new Part 4A as a devolved tax.
89. Section 80B(1) provides that Part 4A may be amended by Order in Council to provide for additional devolved taxes or to modify the provisions in relation to devolved taxes.
90. Section 80B(2) provides that an Order in Council under this section may modify any enactment, prerogative instrument or any other instrument or document in connection with other provisions made by the Order. Section 80B mirrors the power in section 30 of the 1998 Act to make changes to Schedules 4 and 5 to the Act.
91. *Subsection (3)* of the section amends section 93 (agency arrangements) of the 1998 Act to provide that the collection and management of a devolved tax is a specified function of Scottish Ministers. This will enable the Scottish Ministers to contract out the collection and management of devolved taxes, should they wish to do.
92. *Subsection (4)* includes "devolved tax" in section 127 (index of defined expressions) of the 1998 Act.
93. *Subsection (5)* provides that devolved taxes, including their collection and management, are excepted from the reserved tax matters, bringing these taxes within the Scottish Parliament's power to legislate.
94. *Subsection (6)* specifies the legislative procedure to be used in making any Orders in Council under section 80B, by inserting section 80B into Schedule 7 (procedure for subordinate legislation) to the 1998 Act. The Order will be subject to the Type A

procedure; an Order must be laid in draft before, and approved by a resolution of, both Houses of Parliament and the Scottish Parliament.

Section 24: Amendments relating to the Commissioners for Revenue and Customs

95. This section amends existing legislation to enable Her Majesty's Revenue and Customs (HMRC) to disclose information to Scottish Ministers regarding devolved taxes; to make such information confidential and subject to onward disclosure controls; and to ensure that such devolved taxes are neither a function nor an "assigned matter" of HMRC.
96. HMRC has a statutory duty of confidentiality which sets out the circumstances in which lawful disclosure of information held by HMRC can be made. Disclosure may only occur in a limited number of specific circumstances. Devolution of some areas of taxation to the Scottish Government means that amendments are needed to the Commissioners for Revenue and Customs Act 2005 to provide HMRC with the ability to disclose information regarding devolved taxes. Further amendments are required to ensure that devolved taxes do not become a statutory function of HMRC but remain instead a matter for the Scottish Government.
97. This section sets out amendments to the Commissioners for Revenue and Customs Act 2005 and the Customs and Excise Management Act 1979 to provide for the role of HMRC in relation to devolved taxes.
98. *Subsections (2) and (3)* amend HMRC's statutory duty of confidentiality at section 18 of the Commissioners for Revenue and Customs Act 2005 so that HMRC may disclose revenue and customs information to Scottish Ministers in connection with devolved taxes.
99. *Subsection (4)* introduces an onward disclosure control forbidding further disclosure of such information without the consent of the Commissioners.
100. *Subsection (5)* makes it a criminal offence for the Scottish Ministers or any other person to unlawfully disclose information in breach of the control added by *subsection (4)*.
101. *Subsection (6) and (7)* provide that the Commissioners and officers of HMRC shall not have functions or "assigned matters" conferred on them in relation to the devolved taxes. This ensures that the Scottish Government remain wholly responsible for devolved taxes.

Section 25: Scottish rate of income tax

102. This section deals with the Scottish rate of income tax.
103. *Subsection (2)* provides that Part 4 of the 1998 Act is to be repealed. Part 4 provides that the Scottish Parliament may fix the basic rate of income tax for Scottish taxpayers – this is commonly referred to as the "Scottish variable rate". *Subsection (4)* provides that HM Treasury may, by order, appoint a tax year as the last year for which Part 4 is to have effect.
104. *Subsection (3)* inserts a new Chapter 2, consisting of sections 80C to 80H, into Part 4A of the 1998 Act. *Subsection (5)* provides that HM Treasury may appoint a tax year as the first tax year for which a Scottish rate resolution set under the new provisions is to have effect.
105. New section 80C confers on the Scottish Parliament a power to set a Scottish rate of income tax, for Scottish taxpayers.
106. Section 80C(1) provides that this power is exercisable by resolution.

*These notes refer to the Scotland Act 2012 (c.11)
which received Royal Assent on 1st May 2012*

107. Section 80C(2) provides a signpost to the reader that the rate is to be calculated under section 6(2B) of the Income Tax Act (ITA) 2007. Section 6(2B) is inserted by section 26 of this Act.
108. Sections 80C(3) to (6) provide that a Scottish rate resolution applies for only one tax year. The resolution applies for the whole of that year and may specify only one rate, which must be a whole or a half number. The resolution must specify the tax year to which it applies. It must be made before the start of that tax year, but no more than 12 months before the start of that year. Standing orders must provide that only a member of the Scottish Government may move a motion for a Scottish rate resolution.
109. Section 80C(7) provides that if a Scottish rate resolution is cancelled before the start of the tax year for which it is to apply the Income Tax Acts have effect for that year as if the resolution had never been passed. The Interpretation Act 1978 defines the Income Tax Acts as meaning all enactments relating to income tax. If a resolution is cancelled it may be replaced by another Scottish rate resolution provided that that replacement resolution is passed before the start of the tax year for which it is to apply.
110. Section 80D defines a “Scottish taxpayer” for the purposes of Part 4A of the 1998 Act.
111. Section 80D(1) states that a Scottish taxpayer is an individual (and not, for example, a company or a trust) who is resident in the UK for income tax purposes and who also meets condition A, B or C.
112. Section 80D(2) sets out condition A and provides that an individual will meet condition A if they have a close connection with Scotland.
113. Section 80D(3) sets out condition B and provides that an individual will meet condition B if they do not have a close connection with any part of the UK other than Scotland and if they spend more days of that year in Scotland than in any other part of the UK.
114. Section 80D(4) sets out condition C. An individual will meet condition C if, for a whole or part of a year, that individual is a member of Parliament for a constituency in Scotland, a member of the European Parliament for Scotland or a member of the Scottish Parliament.
115. New section 80E defines what is meant by a close connection with Scotland or any part of the UK for the purposes of sections 80D(2) and 80D(3)(a).
116. Section 80E(2) applies where an individual has only one place of residence in the UK in which they live for at least part of the year. It provides that such an individual will have a close connection with the part of the UK in which that place of residence is located. If that place is in Scotland the individual will be a Scottish taxpayer. If that place is in another part of the UK, the individual will not be a Scottish taxpayer (unless they meet condition C).
117. Section 80E(3) applies where an individual has 2 or more places of residence in the UK. It provides that such an individual will have a close connection with the part of the UK in which their main place of residence is located, provided they live in that residence for at least part of the year and provided the times when their main place of residence is in that place comprise in aggregate at least as much of the year as the times when their main place of residence is in any one other part of the UK. If the times when their main place of residence is in Scotland comprise in aggregate at least as much of the year as the times when their main place of residence is in any one other part of the UK the individual will be a Scottish taxpayer.
118. Section 80E(4) provides that, for the purposes of applying the definition of a Scottish taxpayer, a ‘place’ includes a sailing vessel and other means of transport.
119. Section 80F provides the means of determining the number of days in which an individual spends in Scotland or in another part of the UK.

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120. Section 80F(1) provides that an individual spends more days in Scotland than in any other part of the UK if (and only if) the number of days in the year in which they are in Scotland at the end of the day equals or exceeds the number of days in the year in which they are in any other part of the UK at the end of the day.
121. Section 80F(2) provides an exception from the rule in section 80F(1) where an individual arrives in the UK as a passenger and, on the next day, departs from the UK without engaging in activities which are to a substantial extent unrelated to their passage through the UK
122. Section 80G provides supplemental powers to modify enactments.
123. Section 80G(1) provides that a Treasury Order may exclude the effect of the tax-varying power in relation to any enactment, or provide that its effect is to be modified in relation to any enactment. Several tax reliefs are calculated by reference to gross income before deduction of income tax. The introduction of a Scottish rate raises a number of questions about the rate which should be used in the calculation of reliefs and of income from which tax is deducted at source. The Government wishes to discuss this with relevant stakeholders before coming to a final view on the treatment of such reliefs and, where appropriate, to deal with such matters by secondary legislation once those discussions have taken place.
124. Section 80G(2) gives HM Treasury a power to make an order modifying any enactment as they consider necessary or expedient in consequence of or in connection with the fact that the Scottish Parliament has the power to set a Scottish rate (under section 80C), in the making of any resolution, or the exercise of the order making power in subsection (1). A number of detailed technical consequential amendments are likely to be required to tax legislation as a result of the introduction of the new Scottish rate. It would not be appropriate to set such details out in primary legislation, particularly as the expected date on which the Scottish rate is set for the first time will not be for several years.
125. Section 80G(3) provides that an order made under subsection (2) may, in particular, postpone temporarily the effect of a resolution in relation to the operation of PAYE. A fundamental part of the PAYE system is the use of tax tables by employers to calculate how much is to be deducted from their employees. If for any reason the Scottish Parliament either did not pass a resolution until shortly before the start of the tax year, or replaced one resolution with another shortly before the start of the tax year, there may be practical difficulties for HMRC, payroll providers and others in making the necessary changes required to properly operate the PAYE system before the start of the tax year. Similar problems may arise if the UK Government were not to make a decision in relation to the main rates of income tax, or to any relevant allowances, until shortly before the start of the tax year. Where such a problem arises in relation to the main rates of income tax the relevant Finance Act will normally contain a provision to deal with the impact on the PAYE system (see, for example, sections 2(3) and 4(3) of the Finance Act 2008). The power provided by section 80G(3) will allow similar provision to be made in relation to the Scottish rate.
126. Section 80G(4) provides that an order under section 80G may, to the extent that HM Treasury consider it to be appropriate, take effect retrospectively from the beginning of the year of assessment in which it is made. It is not uncommon for a Finance Act to receive Royal Assent after the start of the tax year to which it applies and for provisions made under such an Act to be given retrospective effect from the start of that tax year. This power would allow HM Treasury to make any necessary consequential amendments required as a result of such a provision.
127. New section 80H provides that the Scottish Ministers may reimburse any Minister of the Crown or any government department for administrative expenses incurred by virtue of the new Chapter 2 at any time after the Act receives Royal Assent. This would include both the implementation and running costs of the new Scottish rate.

Section 26: Income tax for Scottish taxpayers

128. This section makes amendments relating to income tax for Scottish taxpayers.
129. *Subsection (1)* of the section introduces various amendments to ITA 2007.
130. *Subsection (2)* of the section inserts new sections 6(2A) to (2C) into ITA 2007.
131. Section 6(2) of ITA 2007 provides that the basic rate, higher rate and additional rate for a tax year (i.e. a year for which income tax is charged) are the rates determined as such by the UK Parliament for that year. Section 6(2A) provides that section 6(2) does not apply to the non-savings income of a Scottish taxpayer.
132. Section 6(2B) provides that, for the non-savings income of a Scottish taxpayer, the basic rate, higher rate and additional rate are found by:
 - Taking the rates determined under section 6(2);
 - Deducting 10 percentage points; and
 - Adding the Scottish rate (if any) set by the Scottish Parliament for that year.
133. Section 6(2C) is a signpost to the provisions of the 1998 Act, inserted by this Act, about the meaning of “Scottish taxpayer” and the setting of the Scottish rate.
134. *Subsections (3) and (4)* amend sections 10 and 16 of ITA 2007. Section 10 of ITA 2007 sets out how much of an individual’s income is subject to tax at the basic, higher and additional rates. Section 10 is subject to section 13 of ITA 2007 which deals with dividend income (as defined by section 19 of ITA 2007). Dividend income is charged at the dividend ordinary, dividend upper and dividend additional rates rather than at the main rates of income tax. The dividend income of Scottish taxpayers will continue to be charged at these rates.
135. Special rules also apply in relation to savings income (as defined by section 18 of ITA 2007). Broadly speaking savings income is charged at the starting rate for savings (rather than the basic rate) on so much of an individual’s income up to the starting rate limit for savings as is savings income (see section 12 of ITA 2007) and at the basic, higher or additional rate as appropriate thereafter.
136. Section 16 of ITA 2007 sets out the rules for determining the extent to which a person’s income consists of savings income or dividend income and for determining the highest part of the person’s total income.
137. *Subsections (3) and (4)* make consequential amendments to sections 10 and 16 to reflect the fact that the Scottish rate does not apply to savings income.
138. *Subsection (5)* amends section 809H of ITA 2007. Chapter A1 of Part 14 of ITA 2007 provides for an alternative basis of charge for individuals who are not domiciled in the United Kingdom or not ordinarily resident in the United Kingdom. Such an individual, if resident for income tax purposes in the United Kingdom, may make a claim for the remittance basis to apply. Under the remittance basis, income and gains only come within the charge to UK income tax and UK capital gains tax when they are brought into the United Kingdom. However, an individual who has been resident in the United Kingdom for at least seven of the previous nine tax years, and who wishes to be taxed on the remittance basis, is subject under section 809H(2) of ITA 2007 to a minimum charge to income tax and capital gains tax of £30,000. For the purposes of calculating income tax charged under section 809H(2), *subsection (5)* of this section disapplies new sections 6(2A) to (2C) of ITA 2007.
139. *Subsection (6)* amends section 989 of ITA 2007. Section 989 contains a number of definitions which apply for the purposes of income tax legislation. The definitions of basic rate, higher rate, and additional rate are defined as the rate of income tax in pursuance of section 6(2) ITA 2007. Section 6(2) only refers to the income tax

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calculated at the UK level. *Subsection (6)* adds a reference to section 6(2B) to extend the definition to the rates applicable to Scottish taxpayers.

140. *Subsection (7)* amends the Provisional Collection of Taxes Act 1968. That Act gives temporary statutory effect to resolutions passed by the House of Commons relating to the rate of various taxes, including income tax. This allows HMRC to collect the tax until such time as the Finance Bill containing the relevant tax provisions receives Royal Assent and becomes law or until such time as the resolutions cease to have effect. *Subsection (7)* amends the Act so as to include a reference to the rates as calculated in relation to Scottish taxpayers by reference to new sections 6(2A) to (2C) of ITA 2007.
141. *Subsection (8)* of this section is the commencement provision. The amendments will take effect from the beginning of the tax year appointed by order by HM Treasury under the power given by section 25(5).

Section 27: Definition of Scottish taxpayer for Scottish variable rate

142. This section ensures that the definition of a Scottish taxpayer for the Scottish rate of income tax will also be applied to the Scottish variable rate (SVR).
143. *Subsection (1)* replaces the definition of a Scottish taxpayer used for SVR set out in section 75 Scotland Act 1998 with the definition proposed for the Scottish rate of income tax. The definition of a Scottish taxpayer for the Scottish rate of income tax is inserted as new section 80D of the 1998 Act by section 25(3) of this Act.
144. *Subsection (2)* ensures that when the Scottish rate of income tax replaces SVR this section will cease to have effect at the end of the last tax year for which SVR applies. Sections 25(2) and (4) of this Act provide for the repeal of the provisions on SVR.

Section 28: Scottish tax on transactions involving interests in land

145. This section is one of a series which together provide the mechanism for bringing to an end the collection and management of stamp duty land tax (“SDLT”) in Scotland and allowing the Scottish Parliament to bring in its own land transaction tax.
- Section 23 indicates that the Scottish Parliament has the power (conferred by section 28 of the 1998 Act) to legislate for their own devolved taxes.
 - Section 29 disapplies the United Kingdom SDLT by excluding land transactions in Scotland from the SDLT charge, from a date to be appointed by HM Treasury.
 - Section 28 defines the scope of this devolved tax, broadly a transaction tax applying to acquisitions of interests in land in Scotland.
 - Schedule 4 contains further amendments relating to the disapplication of SDLT to Scotland and provides for the supply of information about land transactions in Scotland to HMRC.
146. SDLT is a transaction tax which applies to acquisitions of a chargeable interest in land. The definition of “chargeable interest” at section 48 of the Finance Act 2003 includes an estate, interest, right or power in or over land in the United Kingdom.
147. The tax is to be fully devolved by excluding acquisitions of interests in land in Scotland from the charge to SDLT and granting a power to the Scottish Parliament to tax those acquisitions. The devolved tax will apply regardless of the residence of any party to the transaction.
148. **Section 28** introduces Chapter 3 (sections 80I and 80J) of new Part 4A of the 1998 Act (as inserted by Section 23) which provides for the devolved Scottish tax.
149. New section 80I provides for the devolved Scottish tax. Subsection (1) provides that a tax charged on certain acquisitions relating to land in Scotland is a devolved tax.

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Subsection (2) makes clear that such a tax may apply regardless of whether or not the transaction is effected by means of a formal document or the residence of the parties to the transaction.

150. New section 80J provides that certain transactions and statutory bodies are not subject to the devolved tax. Subsection (1) excludes transactions to the extent that they relate to land below mean low water mark. Subsection (2) excludes Ministers of the UK and devolved governments and corporate bodies associated with legislative assemblies in the UK.
151. *Subsection (2)* ensures that the devolved tax cannot apply to a land transaction to which SDLT applies and thereby links commencement of the tax to the disapplication of SDLT in Scotland under section 29.

Section 29: Disapplication of UK stamp duty land tax

152. SDLT is a transaction tax which applies to acquisitions of a chargeable interest in land. The definition of “chargeable interest” at section 48 of the Finance Act 2003 includes an estate, interest, right or power in or over land in the United Kingdom.
153. This section provides for SDLT to be disapplied by reference to the “effective date” of a land transaction for SDLT purposes. This is normally the date on which the purchase contract is completed but may be earlier if the transaction is “substantially performed” (that is, if the consideration for the transaction is paid or the property is occupied) before this date.
154. *Subsection (1)* introduces the amendments to the SDLT provisions in Part 4 of the Finance Act 2003.
155. *Subsection (2)* amends the definition of “chargeable interests” in Section 48 by limiting it to interests in land in England and Wales or Northern Ireland.
156. *Subsection (3)* introduces Schedule 3. Part 1 of Schedule 3 contains further amendments relating to the disapplication of SDLT in Scotland and Part 2 provides for the supply of information about land transactions in Scotland to HMRC, as this information will no longer be available to HMRC from land transaction returns.
157. *Subsection (4)* applies the amendments introduced by the section to land transactions with an effective date on or after a date appointed by HM Treasury.
158. *Subsection (5)* makes transitional provisions to ensure that SDLT continues to apply to transactions where a contract is entered into on or before the date on which the Act receives the Royal Assent.
159. *Subsection (6)* disapplies the transitional rules in *subsection (5)* where certain events in relation to the transaction occur after Royal Assent.

Section 30: Scottish tax on disposals to landfill

160. This section is one of a series which, together, provides the mechanism for bringing to an end the collection and management of landfill tax in Scotland and allowing the Scottish Parliament to bring in its own tax on disposals of waste to landfill.
161. This section sets out the scope of the Scottish Parliament’s power to introduce a Scottish landfill tax.
162. Currently landfill tax is charged on the disposal of waste to landfill in the UK. The UK Government has decided to fully devolve landfill tax to Scotland. Section 31 disapplies the existing landfill tax in Scotland.
163. Together with section 23 of this Act and section 28 of the 1998 Act, this section provides the Scottish Parliament with the power to introduce a Scottish landfill tax.

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164. *Subsection (1)* introduces Chapter 4 (section 80K) of new Part 4A of the 1998 Act.
165. In new section 80K:
- *Subsection (1)* provides that a tax charged on disposals to landfill made in Scotland is a devolved tax for the purposes of this part.
 - *Subsection (2)* provides a definition of a disposal to landfill for the purposes of this part.
166. *Subsection (2)* refers to section 31(4) and provides that tax cannot be charged on disposals made prior to a date to be specified by a Treasury Order.

Section 31: Disapplication of UK landfill tax

167. *Subsection (1)* introduces the amendments to the existing landfill tax provisions in Part 3 of the Finance Act 1996.
168. *Subsection (2)* limits the existing landfill tax to disposals made in England, Wales or Northern Ireland.
169. *Subsection (3)* introduces Schedule 4, which makes amendments consequential upon the disapplication of landfill tax in Scotland.
170. *Subsection (4)* provides for the date of these changes to be set out by a Treasury Order.

Section 32: Borrowing by the Scottish Ministers

171. This section amends sections 66 and 67 of the 1998 Act to revise the circumstances under which the Scottish Ministers may borrow to set out the main controls and limits on such borrowing.
172. This section enables the Scottish Ministers to borrow - subject to HM Treasury's controls and limits - for the following purposes:
- a) to meet a 'temporary excess of sums paid out of the Scottish Consolidated Fund (SCF) over the sums paid into the fund' – this means that the Scottish Government can borrow to manage excessive in-year volatility of receipts, where actual income differs greatly from the forecast receipts for that month;
 - b) to provide a working balance to the SCF, i.e. enough balance to ensure cash-flow;
 - c) to meet the differences between forecast and outturn receipts for devolved taxes or from income tax charged by virtue of a Scottish rate resolution; and
 - d) to fund capital expenditure.
173. The Scottish Ministers will be able to run up to £2.7bn of outstanding debt, of which up to £500m of debt can be from current borrowing and £2.2bn of debt from capital borrowing.
174. Scottish Ministers will be able to borrow from the Secretary of State for the purposes (a) to (c) above and from wider sources in addition to the Secretary of State for capital borrowing (purpose (d) above).
175. *Subsection (1)* introduces the amendments to the 1998 Act.
176. *Subsection (2)* introduces the amendments to the existing borrowing provisions in section 66 of the 1998 Act.
177. *Subsection (3)* replaces subsection (1) in section 66. It:

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- re-enacts sections 66(1)(a) and (b) of the 1998 Act which enable Scottish Ministers to borrow temporarily from the Secretary of State to provide a working balance to the SCF and to manage excessive in-year volatility of receipts; and
 - extends the Scottish Ministers' borrowing powers to include borrowing across years to fund deviations between forecast and outturn receipts of the devolved taxes.
178. New subsection (1A) enables the Scottish Ministers to borrow to fund capital expenditure, subject to HM Treasury's approval. The borrowing must be in the form of a loan either from the National Loan Fund (through the Secretary of State) or from another lender, such as a commercial bank. The section does not allow Scottish Ministers to issue Scottish gilts or bonds as the section requires borrowing to be by way of a loan.
179. New subsection (1B) defines capital expenditure. The definition of capital expenditure is drawn from the rules (provided by HM Treasury to the Scottish Government) governing the preparation of the accounts under section 70 of the 1998 Act.
180. *Subsection (4)* is a consequential amendment to take account of the fact that not all borrowing need be from the Secretary of State.
181. *Subsection (5)* inserts a new subsection (5) into section 66 which enables the Secretary of State, by order and with the consent of HM Treasury, to change the manner in which the Scottish Ministers can borrow money for capital purposes, for example, to permit borrowing by the issue of bonds. Orders under this new subsection are subject to the approval of the House of Commons through the draft affirmative procedure (this is provided for by *subsection (12)*).
182. *Subsection (6)* introduces the amendments to the existing borrowing provisions in section 67 of the 1998 Act.
183. *Subsection (7)* specifies that the £500m limit applied to the aggregate outstanding of principal sums borrowed under the existing section 66(1) - which appears on the face of the 1998 Act - now applies to the borrowing powers listed in new section 66(1), i.e. current borrowing.
184. *Subsections (8) to (9)* amend section 67(3) of the 1998 Act and allow the Secretary of State, by order and with the consent of HM Treasury, to revise the £500m limit on the Scottish Ministers' current borrowing either upwards or downwards, although never below the initial £500m. These provisions enable the Secretary of State to increase the amount from time to time, for example, to keep pace with inflation or to meet exceptional circumstances. Orders under this section are subject to the approval of the House of Commons through the draft affirmative procedure.
185. *Subsection (10)* inserts a new section 67A into the 1998 Act which includes further provisions on capital borrowing.
186. New section 67A(1) provides that the aggregate outstanding of principal sums borrowed under new section 66(1A) - borrowing to fund capital expenditure - must not exceed £2.2 billion. This provision, together with that in section 67, means that the total aggregate outstanding of principal (both current and capital) cannot exceed £2.7 billion.
187. New sections 67A(2) and (3) allow the Secretary of State, by order and with the consent of HM Treasury, to revise the £2.2 billion limit either upwards or downwards, but never below the initial £2.2 billion. Orders under this section are subject to the approval of the House of Commons through the draft affirmative procedure (this is provided for by *subsection (12)*).
188. Section 67A(4), (5) and (6) contain further rules on Scottish Ministers' borrowing to fund capital spending. In particular:

- a) Subsection (4) provides that lenders are not bound to make enquiries into the power to borrow (such as checking whether the Scottish Government has breached its borrowing limits or is acting without HM Treasury approval). In the absence of such a provision, lenders could fear that doubtful vires could render loans unenforceable and could see the Scottish Government as a risky borrower.
- b) Subsection (5) states that Scottish Ministers are prohibited from mortgaging or charging any property as security for money which they have borrowed.
- c) Subsection (6) provides that any security given in the breach of subsection (5) is unenforceable.

Section 33: Reports on the implementation and operation of this Part

189. *Subsections (1) and (3)* require the Secretary of State to publish a report on the implementation and operation of Part 3 of the Act (that is, the provisions relating to finance) within a period of one year beginning with the day on which the Act is passed and thereafter an annual report until 2020 or, if later, until a year after the tax and borrowing powers are fully transferred to the Scottish Parliament (see *subsection (4)*). Copies of such reports must be laid before both Houses of Parliament and sent to Scottish Ministers, who must lay the reports before the Scottish Parliament.
190. *Subsections (2) and (3)* require Scottish Ministers to make and lay reports of the same kind before the Scottish Parliament on an annual basis and to provide a copy of each report to the Secretary of State to lay before both Houses of Parliament.
191. *Subsection (5)* sets out the areas that each report must include. These are: an update on all aspects of progress towards the commencement of provisions in Part 3 of the Act since the previous report, detail of any steps towards commencement which the maker of the report proposes should be taken, an assessment of the operation of the provisions which have been commenced, an assessment of the operation of powers to devolve taxes to the Scottish Parliament or changes to the powers of the Scottish Ministers to borrow, or of any other changes to the finance provisions in this Act, the effect of transferring tax powers on the Scottish block grant and any other matters concerning sources of revenue for the Scottish Administration which the maker of the report considers should be brought to the attention of the UK or Scottish Parliaments.

Part 4: Miscellaneous

Section 34: Convention rights and EU law: role of the Advocate General in relation to criminal proceedings

192. This section amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). *Subsection (3)* inserts a new section 288ZA into the 1995 Act, subsections (2) and (3) of which contain a definition of a “compatibility issue” as a question raised in criminal proceedings as to:
 - (a) whether a public authority has acted in way that is unlawful under section 6(1) of the Human Rights Act 1998 or incompatible with European Union law;
 - (b) whether an Act of the Scottish Parliament, or a provision of such an Act, is incompatible with the European Convention on Human Rights or with EU law.
193. The new section inserted by *subsection (3)* also gives the Advocate General for Scotland a right to take part in criminal proceedings so far as they relate to a compatibility issue. *Subsection (7)* amends section 288A of the 1995 Act to allow the Advocate General for Scotland, in certain circumstances, to refer a compatibility issue to the High Court for their opinion following the conclusion of trial proceedings.

Section 35: References of compatibility issues to the High Court or Supreme Court

194. *Section 35* inserts a new section 288ZB into the 1995 Act providing powers for compatibility issues to be referred to the High Court and to the Supreme Court in certain circumstances. A lower court may refer a compatibility issue to the High Court, constituted as an appeal court. The Lord Advocate and the Advocate General for Scotland may require a lower court to refer a compatibility issue to the High Court, constituted as an appeal court. Where the Lord Advocate or Advocate General for Scotland make such a referral, the High Court may determine the issue itself or refer the issue to the Supreme Court.
195. If the High Court, acting as an appeal court, is considering a compatibility issue, other than on a reference, then the High Court could refer the compatibility issue to the Supreme Court. In these circumstances the Lord Advocate or Advocate General for Scotland could require the High Court to refer the compatibility issue to the Supreme Court.

Section 36: Convention rights and EU law: criminal appeals to the Supreme Court

196. *Subsection (2)* amends section 57(3) of the 1998 Act so that acts or failures to act by the Lord Advocate in prosecuting any offence, or as head of the system of criminal prosecutions in Scotland, are not rendered *ultra vires* by virtue of section 57(2) of the 1998 Act.
197. *Subsection (3)* amends section 102 of the 1998 Act so that the Supreme Court may only determine the compatibility issue. The power to remove or limit any retrospective effect of that decision, or to suspend its effect, is to be exercised by the High Court.
198. *Subsection (4)* amends the definition of a “devolution issue” in paragraph 1 of Schedule 6 to the 1998 Act so that a matter which is a compatibility issue cannot also be a devolution issue.
199. *Subsections (5) and (6)* amend the 1995 Act to provide a right to appeal a compatibility issue from the High Court, constituted as an appeal court, to the Supreme Court. Such an appeal can only be made with the permission of the High Court or the Supreme Court (although such permission is not needed if the compatibility issue was referred to the High Court by the lower court at the request of the Lord Advocate or Advocate General for Scotland). An application for permission to appeal has to be made to the High Court within 28 days of the determination of the appeal or such longer period as the Court considers equitable. If the High Court refuses permission, an application to the Supreme Court has to be made within 28 days of the date of the High Court’s refusal of permission. Again the time limit can be extended if the Court considers this equitable.
200. *Subsections (5) and (6)* also provide that the new appeal right to the Supreme Court can only apply to the determination of a compatibility issue. The Supreme Court may reformulate the compatibility issue but it can only do this for the purpose of determining the compatibility issue. The powers of the Supreme Court can only be exercised to determine the compatibility issue and once the Court has done this it must remit the proceedings to the High Court.

Section 37: Time limits for appeals on devolution issues in criminal proceedings

201. This section amends Schedule 6 to the 1998 Act to provide time limits for appeals to the Supreme Court in relation to devolution issues arising in criminal proceedings. An application has to be made to the High Court for permission to appeal within 28 days of determination of the appeal or such longer period as the Court considers equitable. If the High Court refuses permission, an application to the Supreme Court has to be made within 28 days of the date on the High Court’s refusal of permission. Again the time limit can be extended if the Court considers this equitable. The time limits are the same

as those that apply in relation to compatibility issue appeals to the Supreme Court in criminal proceedings by virtue of section 36.

Section 38: Review and power to amend sections 34 to 37

202. This section requires the Secretary of State to arrange a review of the provision made by sections 34 to 37. The review has to take place within 3 years of the new appeal right for compatibility issues coming into force, but could take place earlier if the Secretary of State considers this to be appropriate.
203. *Subsection (4)* gives the Secretary of State power to make an order amending the provision made by sections 34 to 37 and to make further provision about these matters. The first order made after the conclusion of the review will have to take account of the review. An order made by the Secretary of State would be subject to the affirmative resolution procedure.

Section 39: Maximum penalties which may be specified in subordinate legislation

204. Section 113(10) of the 1998 Act specifies the maximum penalties that may be applied to criminal offences created in subordinate legislation made under powers conferred by the 1998 Act (for example, orders made under section 104 of the 1998 Act, which may make provision in consequence of any provision made by or under an Act of the Scottish Parliament).
205. Currently section 113(10) restricts the penalties which can be imposed for new criminal offences created in subordinate legislation under the 1998 Act to a maximum of three months imprisonment or a fine not exceeding level 5 on the standard scale on summary conviction and a maximum of two years imprisonment on conviction on indictment.
206. *Subsection (2)* substitutes section 113(10) with new subsections (9A), (9B) and (10).
207. New subsection (9B) changes the maximum penalties which may be applied to offences created in relation to Scotland to reflect summary justice reforms made by the Scottish Parliament in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. New subsection (10) provides that the maximum penalties which may be applied to offences created in relation to England and Wales and Northern Ireland remain the same as currently provided for by the 1998 Act, other than a change to the maximum fine which may be applied to offences which are triable either way (where correct terminology of the “statutory maximum” now applies – subsection (9B) makes a similar change in relation to Scotland for either way offences).
208. *Subsection (3)* provides a power for Her Majesty, by Order in Council, to amend subsection (9B) or (10) so as to change any period of imprisonment or amount of fine specified there. *Subsection (4)* amends Schedule 7 to the 1998 Act to provide that Type A procedure is applied to such Orders. Paragraph 2 of Schedule 7 defines Type A procedure as meaning that no recommendation to make the legislation is to be made to Her Majesty in Council unless a draft of the Order has been subject to the affirmative procedure in both Houses of Parliament and also the Scottish Parliament.

Section 42: Power to make consequential, transitional and saving provision

209. This section confers powers on the Secretary of State or the Treasury to make consequential or transitional provision by order.
210. *Subsection (1)* of this section gives the Secretary of State the power, by order, to make provision consequential on Parts 1 and 2 and the other provisions in Part 4 of the Act.
211. *Subsection (2)* gives the Secretary of State the power, by order, to make transitional or saving provision in connection with the coming into force of those provisions of the Act.

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212. *Subsection (3)* gives the Treasury the power, by order, to make provision consequential on section 29 or 31 and transitional or saving provision in connection with the coming into force of any provision of Part 3.
213. *Subsection (4)* provides that provision under the section may amend, repeal or revoke an enactment passed or made before the Act was passed.
214. *Subsection (5)* defines ‘enactment’ for the purposes of this section.
215. *Subsection (6)* provides that where a statutory instrument made under this section containing an order under subsection (1) or (2) amends or repeals primary legislation then it is subject to draft affirmative procedure in both Houses (otherwise *subsection (7)* provides for negative procedure to apply).
216. *Subsection (8)* provides that any instrument made by the Treasury under subsection (3) which amends or repeals any provision of an Act is subject to draft affirmative procedure in the House of Commons (otherwise *subsection (9)* provides for negative procedure in the Commons to apply).

Section 44: Commencement

217. *Subsection (1)* of this section provides for certain provisions to come into force on the day the Act is passed.
218. *Subsection (2)* provides for certain other provisions to come into force 2 months after the Act is passed, including most of the provisions of Part 3 (finance). But this is subject to *subsection (3)*, which provides for certain sections dealing with finance to have effect according to their own provisions. In relation to the provisions for income tax, this is because they need to take effect *in relation to a particular tax year*, rather than from a particular date. The provisions in sections 25(1) to (6) and section 26(8) enable the Treasury to specify the relevant tax year in each case. In relation to SDLT and landfill tax, the Treasury needs to have discretion to disapply those taxes, so as to synchronise with the coming into force of the two devolved taxes in Scotland. The provisions in sections 29(4) (SDLT) and 31(4) (landfill tax) give the Treasury this discretion.
219. *Subsection (4)* provides that section 25(7) and Schedule 2 and section 32 of the Act come into force on such day as the Treasury may, by order made by statutory instrument, appoint.
220. *Subsection (5)* provides that the other provisions of the Act not dealt with in subsections (1) to (4) of the section come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint.
221. *Subsection (6)* provides that the Secretary of State or the Treasury may appoint different days for different purposes.