

*These notes refer to the Scotland Act 1998 (c.46)  
which received Royal Assent on 19th November 1998*

# SCOTLAND ACT 1998

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part II: the Scottish Administration**

##### SECTION 54: Devolved competence

#### **Purpose and Effect**

This section defines what is meant by a function being exercised within or outside devolved competence for the purposes of the Act. This is of particular relevance to determining what functions are transferred to the Scottish Ministers by virtue of section 53. In general, a function is exercisable within devolved competence if it could be conferred by an Act of the Scottish Parliament. The intention is to align the executive competence of the Scottish Ministers closely with the legislative competence of the Parliament.

#### **General**

This section forms part of the set dealing with the establishment of the Scottish Administration and its functions. Section 53 makes provision for the transfer to the Scottish Ministers of Ministerial functions “so far as they are exercisable within devolved competence”.

Sections 117-119 modify pre-commencement enactments in connection with the exercise of a function by a member of the Scottish Executive within devolved competence.

The expression “within devolved competence” is also used in other contexts. Section 118(4) refers to the exercise of a function within devolved competence to make, confirm or approve subordinate legislation conferred by a pre-commencement enactment upon a person other than a member of the Scottish Executive etc so as to apply, for example, to a function conferred upon Her Majesty to make an Order in Council where that is exercisable within devolved competence.

The question whether a function is exercisable within devolved competence is made a devolution issue by paragraph 1(f) of Schedule 6.

#### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244
LC	21-Jul-98	818
LR	28-Oct-98	2038

## **Details of Provisions**

Subsection (1) provides that references in the Act to the exercise of a function being within or outside devolved competence should be read in accordance with this section. However, as with the definition of the legislative competence of the Parliament in section 29, it is defined negatively by defining what is meant by exercising a function outside devolved competence.

Subsection (2) indicates that it would be outside devolved competence to make a certain provision in subordinate legislation or to confirm or approve subordinate legislation containing such provision. The provision in question is one which it would be outside the legislative competence of the Parliament (which is defined by section 29) to include in an Act of the Scottish Parliament. This means that any Ministerial function to make, confirm or approve subordinate legislation in a pre-commencement enactment only transfers to the Scottish Ministers under section 53 to the extent that any provision made under it could be included in an ASP.

Section 118(1) and (2) modify the procedure contained in any pre-commencement enactment in relation to the exercise by Scottish Ministers within devolved competence of any function to make, confirm or approve subordinate legislation.

Subsection (3) applies to functions other than those relating to making, confirming or approving subordinate legislation. It provides that it is outside devolved competence to exercise such functions (or to exercise them in any way) if a provision of an Act of the Scottish Parliament conferring those functions (or conferring them so as to be exercisable in that way) would be outside the Parliament's legislative competence. This means in effect that any such Ministerial function in a pre-commencement enactment only transfers to the Scottish Ministers under section 53 to the extent that it would be within the legislative competence of the Parliament to confer it by an ASP. The Parliament can only confer a function which is exercisable within its legislative competence, for example a function which is exercisable in or as regards Scotland or compatible with Community law or any Convention rights.