

# SCOTLAND ACT 1998

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## EXPLANATORY NOTES

### COMMENTARY

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

#### **SECTION 57: Community law and Convention rights**

##### **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 exercisable within devolved competence.

Section 56 provides for some exceptions to the general rule that any transferred functions should no longer be exercisable by a Minister of the Crown in or as regards Scotland. The present section provides for the further exception that UK Ministers are to retain functions for the purpose of observing and implementing Community obligations as respects devolved matters as regards Scotland.

This section is also one of a number of provisions which deal with Community obligations and with rights under the ECHR which are given effect to in UK law by the Human Rights Act 1998 (“the Convention rights”). Paragraph 7 of Part 1 of Schedule 5 provides that international relations, including those with the European Communities (and their institutions), are reserved matters but there is an exception for observing and implementing international obligations, obligations under the ECHR and under Community law. This has the effect that the responsibility of a Minister of the Crown for observing and implementing these obligations in or as regards Scotland transfers to Scottish Ministers under section 53 so far as they relate to devolved matters. The opening words of section 57(1) make it clear that this is the effect of section 53.

However, functions transferred by section 53 are only exercisable by Scottish Ministers within devolved competence. By virtue of section 54, this in effect means that they are only exercisable in the same way as if they had been conferred by an ASP. This in turn means that those functions can only be exercised by Scottish Ministers compatibly with the Convention rights and with Community law because an ASP can only confer a function to be exercised in that way - section 29(2)(d). However, this only applies in the case of functions transferred under section 53. It does not apply to functions conferred upon Scottish Ministers by other means, such as by an order under section 63. Section 57(2) is, therefore, a general across the board provision which makes it clear that a member of the Scottish Executive has no power (and would therefore be acting *ultra vires*) if he was to exercise any function incompatibly with the Convention rights or with Community law.

This means that a member of the Scottish Executive is prevented by a vires control from ever exercising any function incompatibly with the Convention rights or with Community law. Any question as to whether they may have done so (or whether any failure by them to act is incompatible) is a devolution issue in terms of paragraph 1(d) and (e) of Schedule 6.