

*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 63: Power to transfer functions**

###### **General**

Section 53 provides for the automatic transfer to Scottish Ministers of any functions of a Minister of the Crown “so far as they are exercisable within devolved competence” as defined in section 54. Most of the functions exercisable by Scottish Ministers will have transferred to them by this route.

However, there were certain functions which were exercisable by the Secretary of State for Scotland through the Scottish Office prior to devolution and which it was intended should be exercisable by the Scottish Ministers but which would not transfer to them under section 53 because they did not relate to devolved matters. This section was therefore intended to provide for the transfer of those functions and any other functions conferred upon a Minister of the Crown which it is proposed should be treated in the same way.

These functions could not, of course, be transferred automatically as in the case of section 53. It was therefore necessary to provide in this section for an order making power to identify the particular functions which were to be transferred. The section does not, however, limit the functions to be transferred to those which relate to reserved matters.

The only limitation placed upon the function to be transferred was that it had to be exercisable by a Minister of the Crown “in or as regards Scotland” and, by necessary implication, it had to be separately exercisable in or as regards Scotland. Where there is uncertainty about this, section 30(3) empowers an Order in Council to be made which would provide that specified functions are to be treated, for such purposes of this Act as may be specified (including section 63), as being, or as not being, functions which are exercisable in or as regards Scotland for further details, see the note on section 30.

Section 106 also enables provision to be made by Order in Council modifying a function exercisable by a Minister of the Crown “for the purpose of enabling or otherwise facilitating” its transfer under section 53 or 63. The Order may in particular provide for any function which is not separately exercisable in or as regards Scotland to be so exercisable - see the note on section 106.

This section also enables Scottish Ministers to share or to participate in the making of certain functions in various ways which are detailed in the subsections.

As the effect of this section was to enable Scottish Ministers to exercise functions in relation to matters which were outside the competence of the Scottish Parliament to legislate about, it is commonly referred to as “executive devolution”.

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Further provision about the making of the Order in Council is to be found in sections 112 to 115 and Schedule 7. It is subject to Type A procedure which means that it is subject to draft affirmative procedure in both the Westminster Parliament and the Scottish Parliament. This ensures that functions are not transferred to be exercised by Scottish Ministers without their consent and without the knowledge and consent of the Scottish Parliament. Even although the Scottish Parliament may not have any legislative competence over the transferred function, nevertheless Scottish Ministers are accountable to the Parliament for their exercise.