

*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 44: The Scottish Executive

#### **Purpose and Effect**

This section provides for the establishment of the Scottish Executive. In particular it provides for:

the composition of the Scottish Executive; and

the members of the Scottish Executive to be referred to collectively as the Scottish Ministers.

It also provides that a person may not hold Ministerial office in the UK Government and also be a member of the Scottish Executive.

#### **General**

Section 44 is the first section of Part II providing for the establishment of the Scottish Administration. The Scottish Administration (as defined in section 126(6)) comprises the First Minister and other members of the Scottish Executive, junior Scottish Ministers, holders of certain offices such as the Keeper of the Registers of Scotland, and the staff of the Scottish Administration.

Section 44 provides for the creation of the Scottish Executive. Sections 45 and 46 provide for the appointment of the First Minister. Section 47 provides for the appointment of Ministers, section 48 provides for the appointment of the Scottish Law Officers, and section 49 provides for the appointment of junior Scottish Ministers.

#### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	160
CC	29-Jan-98	530
LC	14-Jul-98	230
LC	28-Jul-98	1450
LC	28-Jul-98	1458
LC	28-Jul-98	1464
LC	28-Jul-98	1470
LR	28-Oct-98	2026

<i>Stage</i>	<i>Date</i>	<i>Column</i>
L3	9-Nov-98	539

### **Details of Provisions**

Subsection (1) establishes the Scottish Executive and provides that its members are to be the First Minister, such Ministers as the First Minister may appoint under section 47, the Lord Advocate and the Solicitor General for Scotland.

Junior Scottish Ministers are not members of the Scottish Executive nor are the staff included in it. However, in practice, the name of the Scottish Executive is used to describe not only its statutory members but the whole organisation, including those members, junior Scottish Ministers and the staff.

Subsection (2) provides that the members of the Scottish Executive should be referred to collectively as the Scottish Ministers.

Subsection (3) provides that a person who holds a Ministerial office (which as defined means a Ministerial office in the UK Government) may not be appointed a member of the Scottish Executive and, if a member of the Scottish Executive is appointed to a Ministerial office, he has to cease to hold office as a member of the Scottish Executive. The effect is that a person cannot be a Minister in both the UK Government and in the Scottish Executive at the same time.

Subsection (4) provides that references in subsection (3) to:

- (a) members of the Scottish Executive are to include junior Scottish Ministers; and
- (b) “Ministerial office” is to have the same meaning as in section 2 of the House of Commons Disqualification Act 1975. Section 2 of that Act defines “ministerial office” by reference to the offices specified in Schedule 2 to the Act and refers to a ministerial office in the UK Government.

### ***SECTION 45: The First Minister***

#### **Purpose and Effect**

This section provides for the appointment of the First Minister by Her Majesty. It makes provision for his term of office, for his resignation, and for his functions to be undertaken by a member of the Scottish Parliament if the office of the First Minister is vacant or if he is unable to act.

The section also provides that the First Minister shall be Keeper of the Scottish Seal.

#### **General**

Section 45 is the second of a group of sections about the Scottish Administration.

Section 44 provides for the Scottish Executive. Section 45 and 46 provide for the appointment of the First Minister. Section 47 provides for the appointment of Ministers and section 49 provides for the appointment of junior Scottish Ministers.

#### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	185
LC	28-Jul-98	1474

### **Details of Provisions**

Subsection (1) provides for the First Minister to be appointed by Her Majesty from among members of the Scottish Parliament. It further provides that he shall hold office at Her Majesty's pleasure. In terms of section 46, it is for the Parliament to nominate one of its members for appointment as First Minister and for the Presiding Officer to recommend to Her Majesty the appointment of that nominated person.

Subsection (2) provides that the First Minister may tender his resignation at any time. It also requires the First Minister to resign if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

Subsection (3) provides that the First Minister shall cease to hold office on the appointment of his successor.

Subsections (4) and (5) provide that, if the office of the First Minister is vacant, or if he is for any reason unable to act, his functions will be exercisable by a member of the Scottish Parliament, designated by the Presiding Officer. If the Parliament has been dissolved, the Presiding Officer may designate a person who ceased to be a member by virtue of the dissolution. The Standing Orders of the Parliament require the Presiding Officer to notify the Parliament of the name of any person whom he has designated.

Subsection (6) provides that a member designated under subsection (4) shall be capable of exercising the functions of the First Minister even if the Parliament is subsequently dissolved.

Subsection (7) provides that the First Minister shall be Keeper of the Scottish Seal. "The Scottish Seal" is defined in section 2(6) as being "Her Majesty's Seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal of Scotland". The First Minister became the Keeper on 6 May 1999 when this subsection was commenced. Previously, the Secretary of State for Scotland was the Keeper of this Seal in terms of section 8 of the Secretary of State for Scotland Act 1885.

SECTION 46: Choice of the First Minister

### **Purpose and Effect**

Section 45 provides for the First Minister to be appointed by Her Majesty. This section makes provision about the way in which a person is chosen for such appointment. It provides for the Parliament to nominate one of its members for appointment as First Minister and for the Presiding Officer to recommend to Her Majesty the appointment of the person nominated by the Parliament.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	185
LC	28-Jul-98	1474

### **Details of Provisions**

Subsection (1) requires the Parliament, within the period allowed in subsection (3), to nominate one of its members for appointment as First Minister if one of the events mentioned in subsection (2) occurs. The Standing Orders of the Parliament set out the procedure and system of voting for the nomination of a person as First Minister.

The period allowed for nomination is normally 28 days after the occurrence of the event in question. If the Parliament fails to make a nomination within that period, then the Presiding Officer is required by section 3(1)(b) to propose a day for the holding of an extraordinary general election.

Subsection (2) specifies four events which trigger the procedure for the nomination of the First Minister, namely:

- (a) the holding of a poll at a general election;
- (b) the First Minister tendering his resignation to Her Majesty;
- (c) the office of First Minister becoming vacant (other than in consequence of his resignation;  
or
- (d) the First Minister ceasing to be a member of the Parliament, other than on a dissolution (e.g. by resigning his seat under section 14).

Subsection (3) provides that the period within which the Parliament must nominate a First Minister is 28 days from the date of the relevant event.

However, that period may be extended under subsection (3)(a) if another of the specified events occurs within that period of 28 days, in which case the period is extended so that it ends 28 days after the occurrence of the second event.

Subsection (3)(b) provides that the 28 day period shall end if the Parliament resolves to dissolve itself under section 3(1)(a) in which case an extraordinary general election requires to be held and a new 28 day period begins to run from the day of the holding of the poll. The period also ends when Her Majesty appoints a First Minister. This prevents the Parliament from seeking to change its nomination after the person has been appointed.

Subsection (4) requires the Presiding Officer to recommend to Her Majesty the appointment of any member of the Scottish Parliament nominated for First Minister under this section.

#### SECTION 47: Ministers

### **Purpose and Effect**

This section provides for the appointment of Ministers by the First Minister from among members of the Parliament. Appointments require the approval of the Parliament and Her Majesty. The section also makes provision about the tenure of office of such Ministers.

### **Background**

This section forms part of a group of sections about the Scottish Administration. Section 44 provides for the Scottish Executive whose members are known as Scottish Ministers. Scottish Ministers include Ministers appointed under this section as well as the First Minister (see sections 45 and 46) and the Scottish Law Officers (see section 48).

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	160
CC	10-Feb-98	185
LC	28-Jul-98	1477

### **Details of Provisions**

Subsection (1) provides that the First Minister may, with the approval of Her Majesty, appoint Ministers from among the members of the Scottish Parliament. These Ministers must, therefore, be MSPs.

Subsection (2) provides that the First Minister shall not seek Her Majesty's approval for any appointment under this section without obtaining the Parliament's agreement. The Standing Orders of the Parliament make provision for the agreement of the Parliament to be sought, by motion, to the appointment of either an individual MSP to be a Minister or for a slate of 2 or more MSPs to be Ministers. A slate may be amended by the Parliament to delete the name of a particular member or members.

Subsection (3) makes provision about the tenure of office of a Minister appointed under this section. It provides that he shall hold office at Her Majesty's pleasure, may be removed from office by the First Minister, may resign at any time and must do so if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament. Subsection (3) further provides that a Minister shall cease to hold office immediately on resigning and shall cease to hold office if he ceases to be a member of Parliament other than by virtue of a dissolution (e.g. by resigning from his seat).

There is no requirement in the Act for the Parliament to be notified when a Minister ceases to hold office except where he resigns. Provision for this is made in the Standing Orders of the Parliament.

SECTION 48: The Scottish Law Officers

### **Purpose and Effect**

This section makes provision about the Law Officers to the Scottish Executive. In particular, it makes provision about the appointment of the Lord Advocate and the Solicitor General for Scotland and their removal from office; about the independence of the Lord Advocate in his capacity as the head of the systems of criminal prosecution and investigation of deaths in Scotland; and about the removal of references to the Lord Advocate and Solicitor General from the House of Commons Disqualification Act 1975 and the Ministerial and other Salaries Act 1975 consequential on them ceasing to be Ministers of the Crown.

### **General**

Prior to devolution, the Lord Advocate and Solicitor General for Scotland were Ministers in the UK Government. Apart from his Law Officer function of advising the Government on matters of Scots law and representing it in civil proceedings, the prime responsibility of the Lord Advocate was for the prosecution of crimes and for the investigation of deaths in Scotland. As a Departmental Minister in charge of part of the Scottish Courts Administration, he was also responsible for the policy on certain matters concerned with the administration of justice, such as civil jurisdiction and procedure, evidence, diligence etc. The Solicitor General acted as his deputy under section 2(1) of the Law Officers Act 1944.

As none of these matters are reserved, the White Paper on Scotland's Parliament stated that it was "appropriate that the Law Officers of the Scottish Executive should be the Lord Advocate and the Solicitor General for Scotland" (para. 4.8). It was therefore necessary to provide for their transfer into the Scottish Executive. This is effected by section 44 providing that the Lord Advocate and the Solicitor General are members of the Scottish Executive and that they, together with the First Minister and the Ministers appointed under section 47, are to be known collectively as the Scottish Ministers. It is also effected by this section making provision as to how they are to be appointed within the Scottish Executive and by ensuring that amendments are made consequential upon them ceasing to be Ministers of the Crown in the UK Government.

The Scottish Law Officers ceased to be members of the UK Government and became members of the Scottish Executive on 20 May 1999 by virtue of Article 2(2) of and Schedule 4 to the Scotland Act 1998 (Commencement) Order 1998 ([S.I. 1998/3216](#)). Although there was no change in the persons who were Lord Advocate

and the Solicitor General, it was still necessary for them to be appointed in terms of section 48.

When he became a member of the Scottish Executive on 20 May 1999, the Lord Advocate carried with him his existing functions as head of the systems of prosecution and investigation of deaths in Scotland. These are part of his “retained functions” under section 52(6).

Amendments were also made to the Crown Suits (Scotland) Act 1856 by Schedule 8 paragraph 2 to enable civil proceedings, which are being brought by or against any part of the Scottish Administration (e.g. the Scottish Ministers), to be brought by or against the Lord Advocate on its behalf.

However the functions of the Lord Advocate connected with the administration of justice were transferred to the Secretary of State just before the Lord Advocate ceased to be a member of the UK Government - see the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 (S.I. 1999/678) and a written answer to a Parliamentary Question given by the Prime Minister on 22 March 1999 (H.C. *Deb* vol. 328 col. 9w). These functions were then transferred on 1 July 1999 to the Scottish Ministers either under section 53 or in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750) made under section 63 of the Act.

Certain of the functions of the Lord Advocate in relation to reserved matters were transferred to the Advocate General for Scotland, who was appointed under section 87 to provide legal advice to the UK Government on matters of Scots law under the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999 (S.I. 1999/679).

Subsection (5) of the present section is one of a number of provisions which safeguard the independence of the Lord Advocate and the Solicitor General in exercising their prosecution functions. Section 29 provides that it would be outside the competence of the Parliament to legislate to remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. Section 27 deals with the participation of the Law Officers in the proceedings of the Parliament and includes provision for either of them to decline to provide documents or to answer questions about particular criminal cases if he considers that doing so might prejudice the proceedings in that case or would otherwise be contrary to the public interest.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	28-Jul-98	1458
LC	28-Jul-98	1483
LR	28-Oct-98	2028
LR	28-Oct-98	2029

### **Details of Provisions**

Subsection (1) provides that the First Minister is responsible for recommending to Her Majesty the appointment of a person as Lord Advocate or Solicitor General for Scotland and for recommending the removal of either but prohibits him from doing so without the agreement of the Scottish Parliament.

The Standing Orders of the Parliament make provision for the agreement of the Parliament to be sought, by motion, to the recommendation to be made by the First Minister about the appointment of the Scottish Law Officers and the motion may relate

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to either or both of the Scottish Law Officers. Where it relates to both, the motion may be amended by the Parliament to delete the name of one of them.

There is no requirement that the Lord Advocate or the Solicitor General has to be a member of the Parliament. Where they are not, there are special provisions regarding their participation in the proceedings of the Parliament under section 27 and the Standing Orders.

Unlike the case of the other members of the Scottish Executive, the Scottish Law Officers can only be removed from office by Her Majesty and after the agreement of the Parliament. This adds to their security of tenure.

Subsection (2) provides that the Lord Advocate and the Solicitor General may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

The Standing Orders of the Parliament require the Presiding Officer to notify the resignation to the Parliament.

Subsection (3) provides that where the Lord Advocate has resigned in consequence of a vote of no confidence, he shall be deemed to continue in office until the warrant of appointment for his successor is granted, but only for the purpose of exercising his retained functions. Retained functions are defined in section 52(6) and refers in particular to his functions as head of the systems of criminal prosecution and investigation of deaths in Scotland. This provision is required to ensure that there is continuity in criminal proceedings.

Subsection (4) provides that subsection (3) is without prejudice to section 287 of the Criminal Procedure (Scotland) Act 1995 providing for the demission of office by Lord Advocate. Section 287 provides for indictments raised by a Lord Advocate to remain effective even although he has demitted office and for indictments to run in the name of the Solicitor General for Scotland if the office of Lord Advocate is vacant. Section 287(5) provides that, where both the Lord Advocate and Solicitor General demit office on the same day (as would happen in the event of a vote of no confidence - see subsection (2) above), the Lord Advocate is deemed to continue in office for the purposes of the 1995 Act until the appointment of his successor.

Subsection (5) protects the independence of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland by providing that any decision made by him in that capacity is to continue to be taken by him independently of any other person. This is intended to ensure that the traditional independence of the Lord Advocate in taking those decisions when he was a member of the UK Government continues now that he is a member of the Scottish Executive.

The provisions in subsection (6) are necessary to disengage the offices of Lord Advocate and Solicitor General for Scotland from the UK Government. This subsection removes them from the list of Ministerial offices in Schedule 2 to the House of Commons Disqualification Act 1975. Section 2 of that Act limits the number of holders of Ministerial offices who are entitled to sit in the House of Commons at any one time. Subsection (6) also removes the two offices from Part III of Schedule 1 to the Ministerial and other Salaries Act 1975. That Part lists the Law Officers to the UK Government and specifies their salaries. See also the Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999 (S.I. 1999/901), which includes transitional provisions relating to these amendments.

SECTION 49: Junior Scottish Ministers

### **Purpose and Effect**

This section provides for the appointment of junior Scottish Ministers by the First Minister from among members of the Parliament. Junior Scottish Ministers (JSMs) assist the Scottish Ministers in the exercise of their functions. Appointments require the

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approval of Her Majesty following the agreement of the Parliament. The section also makes provision about the tenure of office of junior Scottish Ministers.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	185
CC	10-Feb-98	186
CR	19-May-98	754
LC	28-Jul-98	1477

### **Details of Provisions**

Subsections (1) and (2) provide that the First Minister may, with the approval of Her Majesty, appoint junior Scottish Ministers from among members of the Scottish Parliament to assist the Scottish Ministers in the exercise of their functions.

This terminology is intended to reflect the *Carltona* doctrine, by which civil servants are able to act for Ministers, so that junior Scottish Ministers are able to act for the Scottish Ministers. This is also reflected in the fact that, in practice, those appointed as junior Scottish Ministers are known as “deputy Minister”.

Subsection (3) provides that the First Minister shall not seek Her Majesty’s approval for any appointment under this section without obtaining the Parliament’s agreement. The Standing Orders of the Parliament make provision for the agreement of the Parliament to be sought, by motion, to the appointment of either an individual MSP to be a JSM or for a slate of 2 or more MSPs to be JSMs. A slate may be amended by the Parliament to delete the name of a particular member or members.

Subsection (4) provides that a junior Scottish Minister so appointed shall hold office at Her Majesty’s pleasure, may be removed from office by the First Minister, may resign at any time and must do so if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament. Subsection (4) further provides that a junior Scottish Minister shall cease to hold office immediately on resigning, and shall cease to hold office on ceasing to be a member of the Parliament other than on a dissolution.

SECTION 50: Validity of acts of Scottish Ministers etc.

### **Purpose and Effect**

This section ensures that the validity of acts of members of the Scottish Executive or junior Scottish Ministers are not affected by any defect in the way in which the Parliament has either nominated or agreed to their appointment.

### **General**

This section ensures that the validity of the acts of Ministers cannot be questioned because of any defect in any parliamentary proceedings which have to be followed with regard to their appointment. Similar protection is given to the Presiding Officer and deputies (section 19), members of the Scottish Parliamentary Corporate Body (Schedule 2), and the Auditor General for Scotland (section 69).

### **Details of Provisions**

Section 50 provides that the validity of any act of a member of the Scottish Executive or junior Scottish Minister is not affected by any defect in his nomination by the Parliament or in the Parliament’s agreement to his appointment. It would not, therefore, be possible



to challenge the acts of a Minister on the basis, for example, that his or her nomination or appointment was not made in accordance with the Scotland Act or Standing Orders.  
SECTION 51: The Civil Service

### **Purpose and Effect**

This section makes provision as respects the staff of the Scottish Administration. In particular it provides that:

the Scottish Ministers may appoint persons to be members of the staff of the Scottish Administration;

the staff of, and the holders of any non-ministerial office in, the Scottish Administration are members of the Home Civil Service and, accordingly, their appointment is subject to the provisions of the Civil Service Order in Council; and

responsibility for the management of such staff will ultimately remain with the Minister for the Civil Service (i.e. the Prime Minister) but provision is made enabling responsibility for the day to day management of such staff to be delegated to the Scottish Ministers in the same way as happens for government departments in the UK Government.

### **General**

Prior to devolution, the Secretary of State for Scotland had various different statutory powers to appoint staff in the Scottish Office, the courts and prisons and in the Department of the Registers of Scotland and the Scottish Record Office etc. The Lord Advocate appointed staff in his Department, in the Crown Office and in the Procurator Fiscal service. As the functions carried out by those departments and bodies were devolved, they became in effect part of the Scottish Administration. The Scottish Administration is defined in section 126(6)-(8) to include not only Ministers but also the holders of those non-ministerial offices (such as the Keeper of the Registers of Scotland etc.) and the staff of the Scottish Administration.

The existing powers of the Secretary of State and the Lord Advocate to appoint such staff were, so far as possible, replaced by section 51(1) which confers upon the Scottish Ministers the power to appoint staff of the Scottish Administration.

Section 51(2) makes it clear that the staff of the Scottish Administration and the holder of any non-ministerial office in the Scottish Administration are members of the Home Civil Service and section 51(3) ensures that the power to appoint such persons is subject to the Civil Service Order in Council.

Although the Scottish Ministers have therefore the power to appoint persons to be civil servants, the Civil Service itself is a reserved matter by virtue of paragraph 8 of Part I of Schedule 5. There is an exception from that reservation for various statutory provisions relating to the appointment of sheriff clerks, procurators fiscal etc. and officers of the High Court of Justiciary and the Court of Session.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	754
LC	28-Jul-98	1458
LR	28-Oct-98	2037

## **Details of Provisions**

Subsection (1) gives the Scottish Ministers the power to appoint persons to be members of the staff of the Scottish Administration. The staff of the Scottish Administration include the staff of the Lord Advocate, such as in the Crown Office or in the Procurator Fiscal service. It also includes the staff of the various non-ministerial offices who are part of the Scottish Administration, such as the Keeper of the Registers of Scotland.

Subsection (2) provides for service as the holder of any office in the Scottish Administration which is not a ministerial office or a member of the staff of the Scottish Administration to be service in the Home Civil Service. This ensures that all these persons are civil servants in the Home Civil Service and there is no separate civil service created as in the case of Northern Ireland.

Offices in the Scottish Administration which are not ministerial offices are defined by section 126(8) and include the Registrar General of Births, Deaths and Marriages for Scotland, the Keeper of the Registers of Scotland and the Keeper of the Records of Scotland. It also includes the offices specified in the Scottish Administration (Offices) Order 1999 (S.I. 1999/1127).

Subsection (3) makes the power of the Scottish Ministers to appoint staff under subsection (1) and other statutory powers to appoint such persons (e.g. that of the Registrar General of Births, Deaths and Marriages for Scotland) subject to any provisions made in relation to the Home Civil Service by or under any Order in Council.

This provision ensures, in particular, that, subject to any delegation permitted under subsection (4), the standards of entry to the Home Civil Service and the management of the service, including the terms and conditions of service, are similar throughout the UK.

The first part of subsection (4) makes it clear that any civil service management function shall be exercisable by the Minister for the Civil Service (i.e. the Prime Minister) in relation to the staff of the Scottish Administration as it is exercisable in relation to other members of the Home Civil Service.

The second part of subsection (4) makes it clear that the power which the Minister for the Civil Service has under section 1 of the Civil Service (Management Functions) Act 1992 to delegate any civil service management function also applies to any civil service management function in relation to the staff of the Scottish Administration.

Subsection (5) provides that salary and allowances payable to or in respect of the persons mentioned in subsection (2) shall be payable out of the Scottish Consolidated Fund. This includes the contributions to any pension scheme.

Subsection (6) provides that section 1(2) and (3) of the Superannuation Act 1972 shall have effect as if references to a Minister of the Crown (other than the Minister for the Civil Service) included the Scottish Ministers. This allows functions relating to civil service pensions to be delegated to the Scottish Ministers.

Subsection (7) requires the Scottish Ministers to make payments to the Minister for the Civil Service of such amounts as he may determine in respect of the pensions etc. payable to persons who are or have been in service as mentioned in subsection (2) and in respect of any expenses to be incurred in administering those pensions etc.

Subsection (8) provides that any amounts required for payments by virtue of subsection (7) shall be charged on the Scottish Consolidated Fund.

Subsection (9) provides definitions of the terms “civil service management function” and “the Home Civil Service”.

SECTION 52: Exercise of functions

## **Purpose and Effect**

Section 52 provides for statutory functions to be conferred on “the Scottish Ministers”. It also provides that statutory functions of the Scottish Ministers, the First Minister and the Lord Advocate shall be exercisable on behalf of Her Majesty. It provides for functions conferred on the Scottish Ministers to be exercisable by any of them and for acts or omissions by or in relation to any of them to be treated as acts or omissions of or in relation to each of them, except for the Lord Advocate’s retained functions and functions conferred on the First Minister alone.

## **General**

This section forms part of a group of sections concerned with Ministerial functions. The section ensures that the Scottish Executive have collective responsibility for any function exercisable by any member of the Executive, other than the specific functions conferred on the First Minister or Lord Advocate.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	160
CC	10-Feb-98	205
CR	12-May-98	244
LC	28-Jul-98	1450
LR	28-Oct-98	2037
L3	9-Nov-98	541

## **Details of Provisions**

Subsection (1) provides that statutory functions may be conferred on the Scottish Ministers by that name.

Subsection (2) provides that statutory functions of the Scottish Ministers and statutory functions conferred on the First Minister or the Lord Advocate in their singular capacities, shall be exercisable on behalf of Her Majesty.

Subsection (3) provides that statutory functions conferred on the Scottish Ministers shall be exercisable by any member of the Scottish Executive. This ensures that functions conferred on the Scottish Ministers collectively may legally be exercisable by any one of them. In practice, it is for the First Minister to determine administratively which Minister is to exercise any particular statutory function by allocating the Ministerial portfolios. This provision only applies to statutory functions conferred upon the Scottish Ministers and not specifically upon the First Minister or the Lord Advocate.

Subsection (4) provides that any act or omission of, or in relation to, any member of the Scottish Executive be treated as an act or omission of, or in relation to, each of them. Similarly any property acquired or liability incurred by any member of the Scottish Executive shall be treated as if it were acquired or incurred by each of them. “Property” is defined in section 126(1) as including rights and interests of any description. This ensures that there is collective legal responsibility among the members of the Scottish Executive and, in particular, joint and several liability for any acts or omissions of any one of them. This is qualified by subsection (5).

Subsection (5) provides that subsection (4) does not apply to in relation to the exercise of functions conferred on the First Minister alone or the Lord Advocate’s retained

functions. This exception means that the First Minister and the Lord Advocate are solely legally responsible for how they exercise, or fail to exercise, their respective functions.

The “retained functions” of the Lord Advocate are defined in subsection (6). Functions conferred upon the Lord Advocate may, however, be exercised by the Solicitor General for Scotland under section 2(1) of the Law Officers Act 1944.

Subsection (6) defines the Lord Advocate’s “retained functions” as meaning: (a) any functions exercisable by the Lord Advocate immediately before he ceases to be a Minister of the Crown; and (b) other statutory functions conferred on him alone after he ceases to be a Minister of the Crown.

On (a), reference is made to the note on section 48 for a description of what happened to the functions of the Lord Advocate before he ceased to be a Minister of the Crown on 20 May 1999. The effect was that the only functions which were exercisable by the Lord Advocate immediately before he ceased to be a Minister of the Crown were those relating to his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland. It was those functions which he retained when he became a member of the Scottish Executive on that date.

However (b) makes it clear that the concept of “retained functions” also includes any future statutory functions which are conferred upon the Lord Advocate alone after 20 May 1999 in a Westminster Act or an Act of the Scottish Parliament or in subordinate legislation. It would be appropriate for functions to be conferred upon him alone where they related to his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Subsection (7) provides that, in this section, “statutory functions” means functions conferred by virtue of any enactment.

SECTION 53: General transfer of functions

### **Purpose and Effect**

This section makes provision for the transfer to the Scottish Ministers of Ministerial functions in so far as they are exercisable within devolved competence, as defined in section 54. The effect of the section is that Ministerial functions under pre-existing legislation, prerogative and other executive functions exercisable by a Minister of the Crown on behalf of Her Majesty and other functions conferred on a Minister of the Crown by a prerogative instrument, will transfer to the Scottish Ministers, so far as they are exercisable in or as regards Scotland, except so far as they are exercisable in relation to matters outside the legislative competence of the Scottish Parliament.

### **General**

This section and section 54 forms part of the set dealing with the functions of the Scottish Executive. Section 52 provides for statutory functions conferred on the Scottish Ministers to be exercisable by any one of them.

This section is a key element in the structure of the Act. It provides for the automatic transfer of Ministerial functions to the Scottish Ministers. It describes the types of functions to be transferred and transfers them “so far as they are exercisable within devolved competence” (which is defined in section 54).

The functions to be transferred require to be exercisable “in or as regards Scotland” because this is implicit in the concept of “devolved competence” (see note on section 54). 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 53), as being, or as not being, functions which are exercisable in or as regards Scotland - see the note on section 30.

The functions to be transferred also require to be separately exercisable within devolved competence. Section 106 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. The Order may in particular provide for any function which is not separately exercisable in or as regards Scotland or otherwise within devolved competence to be so exercisable - see the note on section 106.

If the function to be transferred requires to be exercised with the agreement of or after consultation with a Minister of the Crown, section 55 provides that this requirement does not apply to the exercise by the Scottish Ministers of functions transferred to them.

To the extent that a function is transferred from a Minister of the Crown to the Scottish Ministers, it ceases to be exercisable by the Minister of the Crown. However sections 56 and 57(1) provide for certain exceptions to this.

Sections 117 to 123 make general modifications to existing pre-commencement enactments in relation to the exercise by the Scottish Ministers of functions transferred to them.

Reference is also made to the Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999 (S.I. 1999/901), which includes transitional and savings provisions relating to the transfer of functions under section 53.

Section 63 provides for the transfer of additional functions to the Scottish Ministers. This enables certain functions to be transferred to the Scottish Ministers which would not transfer under section 53 because they are not within “devolved competence”. Section 108 enables functions, to be transferred from the Scottish Ministers to UK Ministers. Both powers require the agreement of both the UK and Scottish Parliaments.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244
LR	28-Oct-98	2038
L3	9-Nov-98	541

### **Details of Provisions**

Subsection (1) provides that the functions mentioned in subsection (2) shall, so far as they are exercisable within devolved competence, be exercisable by the Scottish Ministers instead of by a Minister of the Crown.

This subsection has the effect of automatically transferring the functions from a Minister of the Crown to the Scottish Ministers but only “so far as they are exercisable within devolved competence”. To the extent that the function is exercisable outside devolved competence, then it is not transferred and remains with the Minister of the Crown. What devolved competence means is defined in section 54.

However, a function can only transfer if it is separately exercisable within devolved competence and section 106 may be used to facilitate its transfer by making it separately exercisable.

Sections 56 and 57(1) make provision for certain functions to continue to be exercisable by a Minister of the Crown as well as by the Scottish Ministers.

Subsection (2) defines the functions which may be transferred as being:

- (a) those prerogative and other executive functions exercisable by Ministers on behalf of Her Majesty;

- (b) other functions conferred on a Minister of the Crown by a prerogative instrument; and
- (c) functions conferred on a Minister of the Crown by any “pre-commencement enactment”; but not the retained functions of the Lord Advocate as defined in section 52(6).

The “prerogative and other executive functions exercisable by Ministers on behalf of Her Majesty” would include any non-statutory functions which are exercisable by a Minister of the Crown. These functions are not confined to functions which were possessed by a Minister of the Crown when section 53 was commenced on 1 July 1999. They would include functions acquired thereafter by a Minister of the Crown so far as they are exercisable within devolved competence, such as the function of implementing any new EC or international obligation relating to a devolved matter.

The “functions conferred on a Minister of the Crown by a prerogative instrument” are also not time limited and would therefore include any function conferred upon a Minister of the Crown by a Royal Charter made under the prerogative after 1 July 1999. “Prerogative instrument” is defined in section 126(1).

The statutory functions which are transferred are limited to functions conferred on a Minister of the Crown by any “pre-commencement enactment” which is defined in subsection (3). However a Westminster enactment which is passed after devolution may contain a provision which deems it or certain provisions in it to be a pre-commencement enactment. This would then enable functions conferred by that enactment upon a Minister of the Crown to transfer to Scottish Ministers under section 53 “so far as they are exercisable within devolved competence”.

Subsection (3) defines a “pre-commencement enactment” for the purposes of the Act as:

- (a) an Act passed before or in the same session in which the Scotland Act was passed and any other enactment made before the passing of this Act;
- (b) subordinate legislation made under such an Act or other enactment before the commencement of section 53 on 1 July 1999; and
- (c) subordinate legislation made under section 106 (power to adapt functions) to the extent that the subordinate legislation states that it is to be treated as a pre-commencement enactment. This is to ensure that functions which are modified under section 106 after 1 July 1999 in order to facilitate transfer can be transferred under section 53.

Subsection (4) draws attention to the fact that this section and section 54 are modified by Part III of Schedule 4. That modifies the general effect of the devolved competence test for certain enactments and other aspects of the law which that Schedule protects from modification by the Scottish Parliament. Paragraph 12 of the Schedule has the effect that, in general, Ministerial functions conferred by such enactments which are protected from modification are not transferred. However, paragraph 13 provides for some exceptions to that in relation to, for example, the European Communities Act 1972 and the Human Rights Act 1998, so that certain Ministerial functions under those Acts are transferred to the Scottish Ministers.

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.

**SECTION 55: Functions exercisable with agreement**

**Purpose and Effect**

This section provides that any existing requirements for a function to be exercised by a Minister of the Crown only with the agreement of, or after consultation with, another Minister of the Crown should cease to have effect in relation to the exercise of any function transferred to a member of the Scottish Executive by virtue of section 53. An exception is made for the designation of enterprise zones where a requirement for Treasury consent is maintained because of the tax privileges conferred by such status.

**General**

This section forms part of the set dealing with the conferral of functions upon members of the Scottish Executive. Section 53 makes provision for the transfer of Ministerial functions exercisable within devolved competence. Some of those functions can only be exercised with the consent of, or after consultation with, another Minister of the Crown, such as the Treasury.

There are two reasons for dispensing with these requirements when the functions are exercised by the Scottish Ministers. Firstly, it would in general be inappropriate for these controls to continue to apply when the Scottish Ministers are exercising those functions. Secondly, in many cases, the function of being consulted, or of giving agreement, would have itself transferred to the Scottish Ministers and it would be confusing to require Scottish Ministers to consult or agree with themselves.

This section therefore dispenses with these requirements. An exception is made for functions under the Local Government, Planning and Land Act 1980 of designating enterprise zones. This reflects the need for continuing Treasury oversight of the tax privileges conferred by the grant of enterprise zone status.

**Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	205
LC	28-Jul-98	1491
LR	28-Oct-98	2039

**Details of Provisions**

Subsection (1) provides that any statutory provision, or any provision not contained in an enactment, requiring a Ministerial function to be exercised only with the agreement of, or after consultation with, another Minister of the Crown should cease to have effect when the function is exercised by a member of the Scottish Executive by virtue of section 53. Section 126(1) defines “Minister of the Crown” as including the Treasury. “Agreement” is intended to include also requirements of consent, concurrence or approval.

Subsection (2) defines “statutory provision” for the purposes of subsection (1) as any provision of any pre-commencement enactment (as defined by section 53(3)) other than paragraph 5 or paragraph 15 of Schedule 32 to the Local Government, Planning and Land Act 1980. Paragraph 5 of Schedule 32 to the 1980 Act confers a power upon the Secretary of State, with the consent of the Treasury, to make an order designating an enterprise zone. Paragraph 15 confers a power to modify such an order, again with the



consent of the Treasury. This ensures that the consent requirement is not removed by subsection (1).

Paragraph 1(2)(d) of Schedule 4 lists the provisions requiring the consent of the Treasury amongst the enactments protected from modification by the Scottish Parliament. By virtue of Part III of Schedule 4, the function of giving consent in each case will not transfer to the Scottish Ministers.

#### SECTION 56: Shared powers

### **Purpose and Effect**

This section provides for certain exceptions to the general rule that functions which are transferred to the Scottish Ministers by virtue of section 53 will cease to be exercisable by Ministers of the Crown in or as regards Scotland. This enables the UK Government, for example, to provide financial assistance to industry in Scotland. The section also enables the Scottish Ministers and a Minister of the Crown to exercise jointly non-statutory powers in order to establish, maintain or abolish bodies, offices and office-holders.

### **General**

This section forms part of the set dealing with the functions of members of the Scottish Executive. Section 53 makes provision for the transfer of functions of a Minister of the Crown so far as they are exercisable within devolved competence so that they will be exercisable by the Scottish Ministers instead of by a Minister of the Crown.

The present section provides for some exceptions to this general rule where it makes sense for the function to continue to be exercisable within devolved competence by a Minister of the Crown as well as by Scottish Ministers. Section 57(1) provides for a further exception in respect of functions exercisable for the purposes set out in section 2(2) of the European Communities Act 1972. These functions are called “shared” or “concurrent” functions - see section 63(1). They are not exercisable jointly but they are exercisable separately by a Minister of the Crown and by the Scottish Ministers.

Where functions remain exercisable by a Minister of the Crown by virtue of this section, paragraph 6 of Schedule 4 prevents an Act of the Scottish Parliament from modifying (or conferring power to modify) any enactment so far as the enactment relates to powers exercisable by a Minister of the Crown by virtue of this section. This does not, however, prevent the Scottish Parliament from repealing or amending the enactment so far as it relates to powers exercisable by the Scottish Ministers while leaving the powers exercisable by UK Ministers untouched.

Certain other functions which are executively devolved to the Scottish Ministers by an order under section 63 are similarly made exercisable by UK Ministers as well as by the Scottish Ministers.

The section also provides for certain non-statutory functions to be exercised jointly by a Minister of the Crown and the Scottish Ministers.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	205
CR	12-May-98	244
<b>Stage</b>	<b>Date</b>	<b>Column</b>
LR	28-Oct-98	2039

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

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	28-Oct-98	2040

### **Details of Provisions**

Subsection (1) provides that, despite the transfer by virtue of section 53 of any function under certain specified enactments, the function will be exercisable by a Minister of the Crown as well as by the Scottish Ministers.

The specified enactments are:

- (a) *Section 17(1) of the Ministry of Transport Act 1919*. That section empowers the Minister to make advances out of moneys provided by Parliament to any authority, company or person, either as grants or as loans, for the construction, improvement or maintenance of railways, light railways, tramways, harbours, docks, piers, canals, or inland navigations, or for the promotion and improvement of transport services by land or by water.
- (b) *Any Order in Council under section 1 of the United Nations Act 1946*. Such Orders in Council are made to give effect to UN Security Council resolutions. This enables pre-existing regimes for licensing exports etc in pursuance of UN sanctions to continue to operate on a UK-wide basis. By virtue of paragraph 6 of Schedule 8, Orders in Council under the 1946 Act can continue to be made with UK-wide effect but, if an Order includes any provision which would be within the legislative competence of the Scottish Parliament, it requires to be laid before the Scottish Parliament as well as before the Westminster Parliament.
- (c) *Section 9 of the Industrial Organisation and Development Act 1947*. That section empowers certain UK Ministers, by order, to impose levies on industry for the purposes of funding bodies concerned with scientific research, promotion of export trade, or the improvement of design.
- (d) *Section 5 of the Science and Technology Act 1965*. That section empowers the Secretary of State to fund scientific research, the dissemination of its results and related matters.
- (e) *Section 1 of the Mineral Exploration and Investment Grants Act 1972*. That section empowers the Secretary of State to contribute towards expenditure on exploration for mineral deposits in Great Britain or in UK territorial waters or continental shelf.
- (f) *Sections 10 to 12 of the Industry Act 1972*. These sections empower the Secretary of State to guarantee loans for the construction of ships and offshore installations and to pay grants in respect of the interest on such loans.
- (g) *Sections 2, 11(3) and 12(4) of the Employment and Training Act 1973*. These sections provide powers to make arrangements for employment and training and to make certain payments in relation to employment and training.
- (h) *Sections 7 to 9 and 11 to 13 of the Industrial Development Act 1982*. Sections 7 to 9, 11 and 12 empower the Secretary of State to provide financial assistance to industry, to provide advice to businesses, and to promote careers in industry. Section 13 empowers Ministers to make grants or loans towards the cost of improving basic services with a view to contributing to the development of industry.
- (i) *Sections 39 and 40 of the Road Traffic Act 1988*. These sections empower the Secretary of State to provide for promoting road safety by disseminating information or advice relating to the use of roads, and to contribute towards the costs of measures for promoting road safety.

Subsection (2) enables subordinate legislation to provide for any other function which is transferred by virtue of section 53 to be exercisable (so far as the subordinate legislation provides) by a Minister of the Crown as well as by the Scottish Ministers. This

power has been exercised in the Scotland Act 1998 (Concurrent Functions) Order 1999 (S.I. 1999/1592).

Subsection (3) provides that the power in subsection (2) may not be exercised so that subordinate legislation made under it comes into force at any time after the function in question has been transferred. That date was 1 July 1999 for the initial suite of functions transferred to the Scottish Ministers. However, the power may also be used if, at some time in the future, further functions are transferred to the Scottish Ministers, such as in consequence of extending the legislative competence of the Scottish Parliament and therefore also the concept of devolved competence.

Subsection (4) provides that any power referred to in section 53(2)(a) (those of Her Majesty's prerogative and other executive functions which are exercisable on Her behalf by a Minister of the Crown) to establish, maintain, or abolish a body, office, or office-holder having functions which include both:

(a) functions which are exercisable in or as regards Scotland and do not relate to reserved matters; and

(b) other functions,

shall, despite section 53, be exercisable jointly by the Minister of the Crown and the Scottish Ministers. This enables the Scottish Ministers and the UK Government to establish jointly, for example, an advisory committee to advise both administrations about a matter of common interest (e.g. some environmental matter) or a company or trust to operate on a cross-border basis.

Subsection (5) provides a definition of "office-holder" for the purposes of subsection (4).

SECTION 57: Community law and Convention rights

### **Purpose and Effect**

This section:

(a) makes it clear that section 53 has the effect of transferring to Scottish Ministers any functions of Ministers of the Crown of observing and implementing Community law in relation to devolved matters in or as respects Scotland; but

(b) provides that, notwithstanding such transfer, Ministers of the Crown shall continue to be able to exercise those functions as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972; and

(c) provides that members of the Scottish Executive have no power to make subordinate legislation, or to do any other act, if the subordinate legislation or act is incompatible with Community law or with rights under the European Convention of Human Rights (ECHR) which are given effect to in UK law.

(d) ensures that the Lord Advocate is able to enjoy the protection afforded by section 6(2) of the Human Rights Act 1998 in prosecuting offences or in his capacity as the head of the systems of criminal prosecution and investigation of deaths.

### **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.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	30-Jul-98	1623
LR	28-Oct-98	2040

### **Details of Provisions**

Subsection (1) provides that, despite the transfer to the Scottish Ministers of functions in relation to observing and implementing Community law by virtue of section 53, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972. Section 2(2) enables Ministers to make regulations to implement any Community obligation, or for the purpose of dealing with matters arising out of any such obligation. Community law is defined in section 126(9).

The intention is that it should continue to be possible for a Minister of the Crown to exercise functions, such as to make regulations under section 2(2) of the 1972 Act or some other statutory provision, for the purpose of implementing an EC obligation as respects a devolved matter. There may be circumstances where it is convenient and sensible for European Community obligations to be implemented through a single set of regulations having effect across the whole of the UK, rather than having separate regulations for Scotland. This will be a matter for agreement between the Scottish Executive and UK Ministers.

Subsection (2) provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law. Convention rights are defined in section 126(1) as having the same meaning as in the Human Rights Act 1998 and mean the rights which are given effect to throughout the UK by that Act.

The effect of this provision is to impose a *vires* control upon Scottish Ministers so that they would be acting *ultra vires* if they acted incompatibly with any of the Convention rights or with Community law.

The reference in this context to Community law is modified by section 106(6) in the case of an obligation under Community law which is a quantitative obligation and it is split in terms of section 106.

This provision applied to the Lord Advocate as soon as he became a member of the Scottish Executive on 20 May 1999 (see note on section 48) and to the Scottish Ministers as from 1 July 1999. There have been a number of cases raising the question of whether the Lord Advocate is acting incompatibly with Convention rights in bringing or continuing some prosecution, such as *Starrs v Ruxton 2000 JC 80* (temporary sheriffs).

Subsection (3) provides that subsection (2) does not apply to an act of the Lord Advocate in prosecuting any offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland which, because of subsection (2) of section 6 of the Human Rights Act 1998 is not unlawful under subsection (1) of that section.

Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority, which includes the Lord Advocate, to act in a way which is incompatible with a Convention right. Section 6(2) provides that section 6(1) does not apply if (a) as a result of provisions in primary legislation, the public authority could not have acted differently or (b) the public authority was acting to give effect to or enforce provisions made under primary legislation. This is intended to protect a public authority where a Westminster Act required it to breach a Convention right.

SECTION 58: Power to prevent or require action

### **Purpose and Effect**

This section enables the Secretary of State by order to direct that any proposed action by a member of the Scottish Executive shall not be taken if he has reasonable grounds to believe it would be incompatible with any international obligations or to direct a member of the Scottish Executive to take action (including the making or introduction in the Parliament of legislation) which he has reasonable grounds to believe is required to give effect to such obligations.

It also enables the Secretary of State to revoke subordinate legislation made by, or which could be revoked by, a member of the Scottish Executive where it contains provisions which he has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security of the United Kingdom; or a provision which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters.

### **General**

This section forms part of the set dealing with the functions of the Scottish Administration including sections 53 and 54 which make provision for the transfer to the Scottish Ministers of Ministerial functions exercisable within devolved competence and section 63 which provides for the transfer of additional functions by executive devolution.

Apart from the fact that a member of the Scottish Executive is accountable to the Parliament for the way in which he exercises his functions, the normal control upon the exercise of these functions is a *vires* control exercised by the courts. The effect of sections 53 and 54 is that the functions transferred under section 53 require to be exercised within devolved competence and of section 57(2) is that it would be *ultra vires* for a member of the Scottish Executive to act (or to fail to act) in a way which would be incompatible with any of the ECHR rights incorporated in UK law or with European Community law - see the note on section 57. Any question whether the exercise or non-exercise of a function by a member of the Scottish Executive is *ultra vires* on these grounds is a devolution issue for the purposes of Schedule 6.

However, there are certain limited circumstances where, even although it may be within their competence, the UK Government can exercise a policy control to prevent something which Scottish Ministers propose to do or require them to take some action or to revoke any subordinate legislation made by them. This section defines what those circumstances are.

This section is similar to section 35 which enables the Secretary of State, in certain circumstances, to prevent Bills from being submitted for Royal Assent.

### **Parliamentary Consideration**

Lord Sewel explained these provisions to the House of Lords during its consideration of the Scotland Bill on 28 July 1998.

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	229
LC	28-Jul-98	1397
LC	30-Jul-98	1621
LC	30-Jul-98	1623
LR	28-Oct-98	2008
LR	28-Oct-98	2042
LR	28-Oct-98	2043

### **Details of Provisions**

Subsection (1) provides that, where the Secretary of State has reasonable grounds to believe that action proposed to be taken by a member of the Scottish Executive would be incompatible with any international obligations, he may, by order, direct that the proposed action should not be taken.

“International obligations” are defined in section 126(10) to mean any international obligations of the UK other than obligations to observe and implement Community law or the Convention rights. It is also modified by section 106(6) in the case where the international obligation is a quantitative obligation and it is split in terms of section 106.

What is meant by “action” in this context is defined by subsection (3) which provides that it includes the making, confirming or approving subordinate legislation.

As mentioned in the general note, a member of the Scottish Executive would be acting *ultra vires* if he acted incompatibly with any of the Convention rights or with Community law. However, it was not possible to make it *ultra vires* for a member of the Scottish Executive to act in a way which would be incompatible with any other international obligation of the UK because those international obligations have not been incorporated into domestic law and, except in certain limited circumstances, they are not normally justiciable as a matter of domestic law. Accordingly, it was thought necessary to

ensure that the Secretary of State had powers to prevent Scottish Ministers from acting incompatibly with any international obligation.

Subsection (2) provides that, where the Secretary of State has reasonable grounds to believe that any action which is capable of being taken by a member of the Scottish Executive is necessary in order to give effect to any international obligations, he may by order direct that the action shall be taken.

What is meant by “action” in this context is defined by subsection (3) which provides that it includes the making, confirming or approving subordinate legislation and the introducing of a Bill in the Parliament.

This is the only provision in the Act which enables the UK Government to direct a member of the Scottish Executive as to what he has to do. This is generally necessary because any Ministerial functions to implement these international obligations within devolved competence would have transferred to the Scottish Ministers under section 53 and the UK Government would not be able to exercise them. There is no equivalent to section 57(1) in the case of these international obligations. There may also be circumstances in which the UK Government would think it necessary to direct a member of the Scottish Executive to introduce a Bill into the Parliament to implement the international obligation even although the Westminster Parliament would be able to pass the necessary legislation for this purpose (section 28(7)).

Subsection (3) defines “action” for the purposes of subsections (1) and (2) as mentioned above.

Subsection (4) empowers the Secretary of State to make an order revoking subordinate legislation made by a member of the Scottish Executive, or which would be within the competence of the Scottish Executive to revoke, if:

- (a) it contains provisions which he has reasonable grounds to believe to be incompatible with any international obligations or the interests of defence or national security; or
- (b) it contains a provision which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters.

This provision is required because, if the Ministerial function to make or revoke the subordinate legislation in question has been transferred to the Scottish Ministers under section 53, a Minister of the Crown would no longer have the power to exercise that function.

These provisions are similar to the powers given to the Secretary of State by section 35 to make an order preventing a Bill from being submitted for Royal Assent and reference is made to the note upon section 35(1).

Subsection (5) requires any order under this section to state the reasons why it is being made. The order would be subject to judicial review.

Further provision about the making of the order is to be found in sections 112 to 115 and Schedule 7. In particular, under Schedule 7, orders made under this section are subject to negative resolution procedure in either House of the United Kingdom Parliament. An exception is made for an order which merely revokes an order under section 58(1), which would not be subject to any Parliamentary procedure.

**SECTION 59: Property and liabilities of the Scottish Ministers**

### **Purpose and Effect**

This section makes general provision relating to the property and liabilities of the Scottish Ministers, namely provision as to how property may be held by them, how there is perpetual succession to their property and liabilities, and how documents may be validly executed by them.

## **General**

This is the first of a series of four sections dealing with the property and liabilities of the Scottish Ministers, including the First Minister and the Lord Advocate.

This section makes general provision regarding the property and liabilities of Scottish Ministers. Section 61 makes similar provision in relation to the property and liabilities of the Lord Advocate and the First Minister.

Sections 60 and 62 make provision for the transfer to Scottish Ministers and the Lord Advocate respectively of property and liabilities belonging to the UK Government.

Property is defined in section 126(1) to include rights and interests of any description. This will therefore include rights under a contract or in any Memorandum and Articles of Association.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	30-Jul-98	1640

## **Details of Provisions**

Subsection (1) provides for property to be held by the Scottish Ministers in that name without the need for any further designation. This makes it clear, for example, that the title to any heritable property belonging to the Scottish Ministers may be taken in the name of the Scottish Ministers.

Subsection (2) provides that property acquired by or transferred to the Scottish Ministers shall belong to those who are the Scottish Ministers for the time being. The same applies to the liabilities of the Scottish Ministers. This ensures that there is perpetual succession to such the property and liabilities: they remain vested in the Scottish Ministers, even although there may be changes in who the Scottish Ministers are or even if there is an entirely new Scottish Executive appointed.

Subsection (3) provides that, in relation to the property and liabilities of the Scottish Ministers, references to them in titles recorded in the Register of Sasines or registered in the Land Register of Scotland and in any other document (e.g. a contract) are to be read as meaning the Scottish Ministers for the time being in accordance with subsection (2). This provision is necessary to support the provision in subsection (2) about perpetual succession.

Subsection (4) provides that documents are validly executed by the Scottish Ministers if they are executed by any member of the Scottish Executive. The [Requirements of Writing \(Scotland\) Act 1995 \(c.7\)](#), as amended by paragraph 31 of Schedule 8 to the Scotland Act, makes provision as to how documents are signed by a member of the Scottish Executive.

SECTION 60: Transfers to the Scottish Ministers

## **Purpose and Effect**

This section confers power, by way of subordinate legislation, to transfer to the Scottish Ministers property and liabilities of the UK Government in connection with any transfer or functions to the Scottish Ministers or to provide them with rights or interests in such property where the property is not being transferred.



## **General**

This is the second in a series of four sections dealing with the property and liabilities of the Scottish Executive, including the First Minister and the Lord Advocate. See the general note to section 59.

Further provision about the making of subordinate legislation under this section is to be found in sections 112 to 115 and Schedule 7. In general, the powers may be exercised by Her Majesty by Order in Council or by a Minister of the Crown by order and, in either case, if the instrument is made without a draft having been approved by each House of the Westminster Parliament, it is subject to annulment in pursuance of a resolution of either House of that Parliament.

This power was exercised in making the Transfer of Property (Scottish Ministers) Order 1999 ([S.I. 1999/1104](#)).

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244
LC	14-Jul-98	240
LC	30-Jul-98	1647

## **Details of Provisions**

Subsection (1) confers power, by subordinate legislation, to provide (a) for the transfer to the Scottish Ministers of any property belonging to a Minister of the Crown or government department or (b) for the Scottish Ministers to have rights or interests in relation to any such property (whether in connection with its transfer or otherwise). This power has to be read subject to subsection (3) which limits its scope.

Subsection (2) confers power, by subordinate legislation, to provide for the transfer to the Scottish Ministers of any liabilities to which a Minister of the Crown or government department is subject. This power has also to be read subject to subsection (3) which limits its scope.

Subsection (3) limits the scope of the order which may be made under this section by providing that it can only be made “in connection with” any transfer or sharing of functions of a Minister of the Crown by virtue of section 53, 63 or 89 or in any other circumstances in which the person making the legislation considers it appropriate to do so for the purposes of this Act.

Section 53 provides for the automatic transfer of Ministerial functions to the Scottish Ministers so far as they are exercisable within devolved competence; section 63 provides for the transfer of specific Ministerial functions to the Scottish Ministers relating to reserved matters etc and section 89 provides for an Order in Council to be made in connection with the functions relating to a cross border public authority.

Under the Transfer of Property (Scottish Ministers) Order 1999 ([S.I. 1999/1104](#)), general provision is made for the transfer of rights and interests in land and corporeal moveable property (other than excepted property) used wholly or mainly for or in connection with a transferred function i.e. a function which is transferred to the Scottish Ministers by virtue of sections 53, 63 or 89. Special provision is made for special cases.  
**SECTION 61: Property and liabilities of the Lord Advocate and the First Minister**

## **Purpose and Effect**

This section makes general provision relating to the property and liabilities of the Lord Advocate and of the First Minister.

## **General**

This is the third of a series of four sections dealing with the property and liabilities of the Scottish Executive, including the First Minister and the Lord Advocate. See the general note to section 59.

## **Details of Provisions**

Subsection (1) provides for property to be held by the Lord Advocate in that name without the need for any further designation.

Subsection (2) provides that property acquired by or transferred to the Lord Advocate shall belong to the Lord Advocate for the time being. The same applies to the liabilities of the Lord Advocate. This ensures that there is perpetual succession to such property and liabilities, which remains vested in the Lord Advocate for the time being despite the appointment of any successor.

Subsection (3) provides that, in relation to the property and liabilities of the Lord Advocate, references to the office in titles recorded in the Register of Sasines or registered in the Land Register of Scotland and in any other document (e.g. a contract) and any other documents are to be read as meaning the Lord Advocate for the time being in accordance with subsection (2).

Subsection (4) provides that any rights and liabilities acquired or incurred by the First Minister shall belong to the First Minister for the time being. It is envisaged by section 52 that statutory functions may be conferred on the First Minister alone and therefore it will be possible that he will acquire rights or incur liabilities in relation to such functions.

SECTION 62: Transfers to the Lord Advocate

## **Purpose and Effect**

This section confers power, by way of subordinate legislation, to transfer to the Lord Advocate property and liabilities of the UK Government in connection with any transfer of functions to him or to provide him with rights or interests in such property where the property is not being transferred.

## **General**

This is one of a series of sections dealing with the property and interests of the Scottish Executive, including the First Minister and the Lord Advocate. See the general note to section 59.

Further provision about the making of subordinate legislation under this section is to be found in sections 112 to 115 and Schedule 7. In general, the powers may be exercised by Her Majesty by Order in Council or by a Minister of the Crown by order and, in either case, the instrument is subject to annulment in pursuance of a resolution of either House of the Westminster Parliament.

This power was exercised in making the Transfer of Property (Lord Advocate) Order 1999 ([S.I. 1999/1105](#)).

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	205
LC	14-Jul-98	240
LC	30-Jul-98	1647

### **Details of Provisions**

Subsection (1) confers power, by subordinate legislation, to provide (a) for the transfer to the Lord Advocate of any property belonging to a Minister of the Crown or government department or (b) for the Lord Advocate to have rights or interests in relation to any such property (whether in connection with its transfer or otherwise). This power has to be read subject to subsection (3) which limits its scope.

Subsection (2) confers power, by subordinate legislation, to provide for the transfer to the Lord Advocate of any liabilities to which a Minister of the Crown or government department is subject. This power has also to be read subject to subsection (3) which limits its scope.

Subsection (3) limits the scope of the order which may be made under this section by providing that it can only be made “in connection with” the Lord Advocate becoming a member of the Scottish Executive or having any retained functions or in any other circumstances in which the person making the legislation considers it appropriate to do so for the purposes of this Act. Retained functions are defined in section 52(6).

SECTION 63: Power to transfer functions

### **Purpose and Effect**

This section enables Her Majesty, by Order in Council, to provide for the transfer to the Scottish Ministers of functions of a Minister of the Crown which are exercisable in or as regards Scotland, even although they relate to reserved matters. It also enables such functions to be shared with the Scottish Ministers or to be exercised by a Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers.

### **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”.

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.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	160
CC	10-Feb-98	205
CR	12-May-98	244
LC	28-Jul-98	1450
LC	30-Jul-98	1649
LC	30-Jul-98	1650

### **Details of Provisions**

Subsection (1) enables Her Majesty, by Order in Council, to provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable:

- (a) by the Scottish Ministers instead of by the Minister of the Crown;
- (b) by the Scottish Ministers concurrently with the Minister of the Crown; or
- (c) by the Minister of the Crown only with the agreement or, or after consultation with, the Scottish Ministers.

“Functions” include any executive powers or duties, such as the power to grant licences or to pay grants and the duty to maintain registers, and the power to make subordinate legislation.

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

Where a function is exercisable “concurrently” with the UK Minister this means that both the Scottish Ministers and the UK Minister may exercise that function independently of each other.

Subsection (2) provides that, where an Order transfers a function to the Scottish Ministers or provides that it should be exercisable by them concurrently with the Minister of the Crown (under (a) or (b) above), then any existing requirement that the function can only be exercised with the agreement of, or after consultation with, another Minister of the Crown shall no longer apply to the exercise of the function by the Scottish Ministers, unless the Order expressly provides that it should continue to apply. A requirement to consult a person other than a Minister of the Crown will continue to apply.

This is similar to the effect of section 55 in relation to functions transferred under section 53.

Subsection (3) provides that, where an Order transfers a function to the Scottish Ministers or provides that it should be exercisable by them concurrently with the Minister of the Crown (under (a) or (b) above), then the Order can impose a requirement for the function to be exercisable by the Scottish Ministers only with the agreement of, or after consultation with, a Minister of the Crown or other person.