

*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 V: Miscellaneous and General**

##### **SECTION 106: Power to adapt functions**

##### **Purpose and Effect**

This section confers power upon Her Majesty or a Minister of the Crown, by subordinate legislation, to make provision enabling or otherwise facilitating the transfer of a function to the Scottish Ministers (or its sharing with the Scottish Ministers or its other adaptation). Such subordinate legislation may, in particular, provide that certain functions can be exercised separately in or as regards Scotland or within devolved competence.

The section also provides that the Secretary of State's powers of intervention for international obligations under Section 58 apply to the Scottish share of an international obligation expressed in quantitative terms and not to the international obligation itself.

##### **General**

This section complements:

section 53, which makes provision for the transfer to the Scottish Ministers of functions exercisable within devolved competence; and

section 63, which enables the "executive devolution" to the Scottish Ministers of additional functions so far as they are exercisable in or as regards Scotland, or their adaptation so that they are exercisable only after consultation, or agreement, with the Scottish Ministers.

Some functions require amendment before they can transfer to the Scottish Ministers under section 53 or in an executive devolution order under section 63 so as to make them exercisable separately in or as regards Scotland or before they can transfer under section 53 by making them otherwise separately exercisable within devolved competence. This would be the case, for example, where a function is expressly or impliedly confined by its terms to a UK or GB-wide exercise. The present section enables the functions to be split, or otherwise adapted, by means of subordinate legislation at the instance of the UK Government and with the approval of Westminster so that they can be transferred to the Scottish Ministers by virtue of section 53 or 63.

The section makes particular provision for European Community or international obligations expressed in quantitative terms. Where the subordinate legislation is to be used to split such an obligation so that part of the Ministerial function of observing and implementing it can be transferred to the Scottish Ministers, the order cannot be made unless they have been consulted. The section further provides that the Secretary of State's powers of intervention under section 58 can be used to ensure that the Scottish Ministers' share of such an obligation is met.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244
LC	8-Oct-98	624
LC	8-Oct-98	626
LR	2-Nov-98	110

## **Details of Provisions**

Subsection (1) enables subordinate legislation to make provision to enable or facilitate the transfer of a function to the Scottish Ministers by virtue of section 53 or 63. Such provision may, in particular, include modifying that function.

Subsection (2) provides that such subordinate legislation may, in particular, provide that a function will be:

- (a) exercisable separately in or as regards Scotland; or
- (b) exercisable separately within devolved competence (as defined in section 54).

Subsection (3) provides that subsection (1) may also enable functions to be shared with the Scottish Ministers (thus enabling the UK Minister to continue to hold the function concurrently), or otherwise adapted (under section 63, for example, so that it can be exercised in or as regards Scotland only with the consent of the Scottish Ministers).

Subsection (4) provides that no recommendation shall be made to Her Majesty in Council to make, and no Minister of the Crown shall make, an order under this section if it modifies a function of observing or implementing an obligation mentioned in subsection (5) unless the Scottish Ministers have been consulted about the modification.

Subsection (5) provides that the obligations referred to subsection (4) are international obligations, or obligations under European Community Law, to achieve a result defined by reference to a quantity where the quantity relates to the UK or part of it.

Subsection (6) provides that references in section 58 (powers of intervention of the Secretary of State) to the international obligation are to be read as references to the requirement to achieve the Scottish Ministers' share of an obligation apportioned under subsection (4).

Subsection (7) provides that references to "Community Law" in sections 29(2)(d) (which provides that it is outwith the competence of the Scottish Parliament to legislate to make a provision which is incompatible with Community law), 57(2) (which provide 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 Community law) and paragraph 1 of Schedule 6 (which defines "devolution issues") are to be read as including references to the Scottish Ministers' share of a Community obligation which has been apportioned under sub-section (4). The effect is that where the Scottish share of a quantitative EC obligation is transferred to the Scottish Ministers, it would be regarded as a matter of Community law and can be enforced on the same basis as any other function of the Scottish Ministers of observing and implementing a Community obligation.

Further provision about the making of subordinate legislation is to be found in sections 112-115 and Schedule 7. In particular, legislation under the present section can take the form either of an order made by a UK Minister or an Order in Council. It is subject to procedures in both Houses of the Westminster Parliament. Under Schedule 7, it may be

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subject either to negative or affirmative procedure except if it contains provisions which textually amend an Act, in which case it requires affirmative resolution in both Houses.

This power has been exercised up to September 2001 in making:

The Scotland Act 1998 (Modification of Functions) Order 1999 ([S.I. 1999/1756](#));

The Scotland Act 1998 (Modification of Functions) Order 2000 ([S.I. 2000/1458](#)).