

*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 81: Remuneration of members of the Parliament and Executive**

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

This section requires the Parliament to make provision for the payment of salaries to members of the Parliament and members of the Scottish Executive, including junior Scottish Ministers. The amount of any salary is a matter for the Parliament to determine. Under this section the Parliament can also, if it so decides, make provision for the payment of allowances and pensions, gratuities and allowances to MSPs and members of the Scottish Executive. In respect of pensions the Parliament can provide for contributions or payments towards such pensions or for the establishment and administration, whether by the Scottish Parliamentary Corporate Body or otherwise of, a pension scheme or schemes.

##### **Background**

This section is one of a series on remuneration. Section 82 deals with limits on salaries of MSPs who are also Members of the UK Parliament or the European Parliament and section 83 requires information as to salaries, allowances, pensions and gratuities paid under this section to be published each year and ensures that a person cannot receive a salary as an MSP or a member of the Scottish Executive unless he has taken the appropriate oath under section 84.

##### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	23-Feb-98	127
CR	12-May-98	230
CR	19-May-98	765
LC	6-Oct-98	337
LC	6-Oct-98	339
LC	6-Oct-98	342
LC	6-Oct-98	343

##### **Details of Provisions**

Subsection (1) places a duty on the Parliament to provide for the payment of salaries to Members of the Parliament and the members of the Scottish Executive including the junior Scottish Ministers.

Subsection (2) allows the Parliament to provide for the payment of allowances to members of the Parliament and members of the Scottish Executive including the junior Scottish Ministers. It is for the Parliament to determine what allowances if any are payable but it could provide, for example, for allowances for the provision of secretarial services etc.

Subsection (3) allows the Parliament to provide for the payment of pensions, gratuities or allowances to or in respect of any person who has ceased to be a member of the Parliament or a member of the Scottish Executive. It is for the Parliament to determine what provision is to be made but it could for example, include provision for payment of a gratuity similar to the resettlement grant paid at Westminster when an MP fails to be re-elected. The subsection also allows the Parliament to provide for a pension etc. to be payable to or in respect of any person who has ceased to hold an appointment in the Parliament or Scottish Executive but who continues to be a member of the Parliament or the Scottish Executive. There is, however, nothing to prevent an MSP contributing to a pension scheme under private arrangements.

Under subsection (4) the provision made by the Parliament under subsection (3) may include in particular provision for contributions or payments towards the provision of pensions, gratuities and allowances. The Parliament may also make arrangements for the establishment and administration of one or more pension schemes. It can do this through the Scottish Parliamentary Corporate Body (SPCB) or by such other means as the Parliament decides.

Subsection (5) provides that “provision” includes provision by an Act of the Scottish Parliament or by a resolution of the Parliament conferring functions on the SPCB. All references in this section to a member of the Scottish Executive include a junior Scottish Minister.

SECTION 82: Limits on salaries of members of the Parliament

### **Purpose and Effect**

This section requires the Scottish Parliament to abate the salary of any member of the Scottish Parliament who also receives a salary as a Member of Parliament or a Member of the European Parliament. The amount by which the salary is abated is a matter for the Parliament.

### **General**

This section is one of a series on remuneration. Section 81 deals with salaries, allowances, gratuities and pensions of MSPs and members of the Scottish Executive and section 83 requires details of salaries, allowances, pensions and gratuities paid under section 81 to be published each year and ensures that a person receiving a salary as an MSP or a member of the Scottish Executive must first have taken the appropriate oath under section 84.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	23-Feb-98	127
LC	6-Oct-98	348
LR	28-Oct-98	2063
LR	28-Oct-98	2065

### **Details of Provisions**

Subsection (1) places a duty on the Parliament to ensure that the amount of salary payable to a member of the Scottish Parliament under section 81 is reduced if any salary is payable to him as a member of either House of Parliament or as a member of the European Parliament.

Subsection (2) places a duty on the Parliament to ensure that the salary is reduced to a particular proportion of what it would otherwise be or to a particular amount; or by the amount of any salary payable to the member of the Scottish Parliament as a member of Parliament or the European Parliament or by a particular proportion of that amount or by some other particular amount.

SECTION 83: Remuneration: supplementary

### **Purpose and Effect**

This section makes further provision as to the remuneration of members of the Scottish Parliament and members of the Scottish Executive. In particular, it provides for information concerning salaries, allowances, pensions or gratuities paid to them to be published each year. This section also requires members of the Scottish Parliament and members of the Scottish Executive to have taken the appropriate oath before receiving payment of salaries or allowances. This section also allows certain persons to continue to receive remuneration as an MSP after a dissolution of the Parliament in certain specified circumstances.

### **General**

This section is one of a series on remuneration. Section 81 deals with salaries, allowances and pensions etc. of MSPs and members of the Scottish Executive and section 82 deals with limits on the salaries of MSPs who are also Members of Parliament or Members of the European Parliament.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	6-Oct-98	339
LC	6-Oct-98	348

### **Details of Provisions**

Subsection (1) places a duty on the Parliament to publish information relating to salaries, allowances, pensions or gratuities paid each financial year. There is no restriction as to the vehicle used by the Parliament to make this information available. This covers the remuneration of members of the Parliament and members of the Scottish Executive.

Subsection (2) provides that no payment of salary or allowances shall be made to a member of the Scottish Parliament or a member of the Scottish Executive who has not taken the appropriate oath, as required by section 84.

Subsection (3) provides that a member's entitlement to a salary or allowance is not affected for the period prior to him taking the oath provided he does duly take the oath. Therefore, if a member delays in taking the oath, he will still be entitled to receive payment in respect of the period after he was elected and before he took the oath but not until he has taken the oath. This should be read in conjunction with section 84(3) which provides that if the oath is not taken within 2 months from the date of being returned as an MSP the seat will become vacant, although that section also provides that the Parliament could extend that period.

Subsection (4) provides for a person who was a member of the Scottish Parliament prior to a dissolution of the Parliament to continue to receive remuneration under section 81 in one of 2 circumstances. These are firstly if he continues to hold office as a member of the Scottish Parliamentary Corporate Body or as Presiding Officer or deputy Presiding Officer, in which case he is treated as an MSP until he ceases to hold office; and secondly, if he is nominated as a candidate at the subsequent election, he is treated as an MSP for the purposes of section 81 until the end of the day of that election.

Subsection (5) allows for different provisions to be made under sections 81 or 82 for different cases. This allows the Parliament to provide for different salaries to be paid to different descriptions of MSPs or members of the Scottish Executive according to any office or position which they may hold in the Parliament or the Scottish Executive. For example it allows the Parliament to make provision for the MSP who holds the office of Presiding Officer to be paid a higher salary.

#### SECTION 84: Oaths

### **Purpose and Effect**

This section requires all members of the Parliament to take the oath of allegiance provided by the Promissory Oaths Act 1868 or to make the corresponding affirmation. If they do not do so within 2 months of the day they are returned, or such longer period as the Parliament may allow, then they shall cease to be a member and their seat will become vacant. It also requires the members of the Scottish Executive to take the official oath under the 1868 Act and to take the oath of allegiance, unless they have already taken it as a member of the Parliament.

### **General**

This section affects all members of the Scottish Parliament and members of the Scottish Executive (including junior Scottish Ministers). It parallels the arrangements in the UK Parliament. Significantly no payment of salary or allowances may be made under section 81 (Remuneration of members, etc.) to a member or Minister until the oath is taken. Nor may they participate in the proceedings of the Parliament until they have done so.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	29-Jan-98	572
CC	4-Mar-98	1079
CC	4-Mar-98	1095
CR	12-May-98	241
LC	6-Oct-98	348

### **Details of Provisions**

Subsection (1) requires all members of the Parliament to take the oath of allegiance each time they are returned irrespective of the fact that they may have taken it when they were previously returned as a member or on another occasion (e.g. on being returned as a member of the House of Commons). Under section 5 of the Oaths Act 1978 a member may make an affirmation instead of swearing the oath.

Subsection (2) requires members to take the oath at a meeting of the Parliament and prohibits them from taking part in any other proceedings (including proceedings in committees and sub-committees - see section 126) until they have done so.

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Subsection (3) provides that, if a member has not taken the oath within two months after the date of being returned, he will cease to be a member of the Parliament and his seat will become vacant. The Parliament may extend the two month period, but can only do so before the 2 month period expires.

Subsection (4) requires the First Minister and the other Scottish Ministers including the Lord Advocate and the Solicitor General to take the official oath and the oath of allegiance on appointment. They may make a corresponding affirmation under the Oaths Act 1978. The official oath, as set out in section 3 of the Promissory Oaths Act 1868, is as follows:

I do swear that I will well and truly serve Her Majesty Queen Elizabeth in the Office of . . . . . so help me God.

This is the same oath as is sworn by Ministers in the UK Government.

Subsection (5) provides for members appointed as junior Scottish Ministers to take the oath of allegiance on appointment.

Subsection (6) dispenses with the need for the Scottish Ministers including the Lord Advocate, the Solicitor General and junior Scottish Ministers to take the oath of allegiance when appointed as members of the Executive if they have already taken it as elected members of the Parliament under subsection (1). The Lord Advocate and Solicitor General must take the oath of allegiance if they are not members of the Parliament.

Subsection (7) provides that the oath of allegiance referred to in the section is that provided by the Promissory Oaths Act 1868. This is the same as that used in the UK Parliament namely:

I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law. So help me God.

Procedures for the taking of the oath of allegiance in the Parliament are contained in the Standing Orders of the Parliament.

See also the provisions in section 287(6) of the Criminal Procedure (Scotland) Act 1995 (as amended by [S.I. 1999/1042](#)) in relation to the taking of the oath of office by the Lord Advocate and Solicitor General.

SECTION 85: Exemption from jury service

### **Purpose and Effect**

This section provides for members of the Parliament and the Scottish Executive to be exempt from jury service in Scotland and England and Wales.

### **General**

This section parallels arrangements which apply to members of the UK Parliament and UK Ministers to ensure that the performance of their public duties is not impaired by the need to serve on a jury.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	6-Oct-98	348

## **Details of Provisions**

Subsection (1) provides for members of the Parliament, members of the Scottish Executive and junior Scottish Ministers to be excused jury service as of right in England and Wales.

Subsection (2) provides for those listed above to be excused jury service as of right in Scotland.

Exemption from jury service in Northern Ireland has been provided for by making equivalent amendments to the Juries (Northern Ireland) Order 1996 ([S.I. 1996/1141](#)) in paragraph 23 of Schedule 1 to the Scotland Act 1998 (Consequential Modifications) (No. 1) Order 1999 ([S.I. 1999/1042](#)). Paragraphs 7, 9 and 23 also provide exemption from jury service for the Auditor General for Scotland.

While all those listed above are entitled as of right to be excused jury service they could serve if they so wished.

SECTION 86: Scottish representation at Westminster

## **Purpose and Effect**

This section removes the provision in the rules for the redistribution of seats by the Boundary Commission which requires a minimum number of Scottish seats in the House of Commons. This will take effect at the next general review by the Boundary Commission for Scotland and will require that Commission then to adopt an electoral quota for Scotland in line with that for England at the time of that review. This will reduce the number of MPs for Scottish constituencies at Westminster. The section also prohibits the Commission from combining the Orkney Islands or the Shetland Islands in a constituency which includes another part of Scotland.

## **General**

The Parliamentary Constituencies Act 1986 provides that the constituencies of the UK Parliament into which each part of the United Kingdom is to be divided should be arrived at by means of a review undertaken by the Boundary Commission for that part of the United Kingdom. The 1986 Act provides for Boundary Commissions for England, Scotland, Wales and Northern Ireland and sets out the rules that the Commissions must follow when conducting a review of Parliamentary constituencies.

These functions of the Boundary Commission are due to be transferred to the Electoral Commission established under section 1 of the [Political Parties, Elections and Referendums Act 2000 \(c. 41\)](#) by virtue of section 16 and the amendments made by Schedule 3 to that Act. The function of carrying out reviews of the seats in Scotland will be carried out by the Boundary Committee for Scotland established by the Electoral Commission under section 14 of that Act. A date has not yet been appointed as to when these provisions of the 2000 Act will be brought into force. These notes therefore describe the position as it exists at present under section 86, as originally enacted.

Rule 1(1) of those rules provides that the number of constituencies in Great Britain shall not be substantially greater or less than 613. Sub-paragraphs (2) to (4) provide minimum numbers of constituencies for Scotland, Wales and Northern Ireland respectively. A maximum is also provided for Northern Ireland only. In particular, sub-paragraph (2) provides that the number of constituencies in Scotland shall not be less than 71. Since 1983 there have been 72 Scottish seats.

Rule 5 stipulates that, subject to certain other rules, the electorate of each constituency shall be as near the electoral quota as is practicable. The other rules the Commission may take into account include any special geographical considerations, in particular size, shape and accessibility. These considerations are also taken account of by the other Boundary Commissions.

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Rule 8 of the 1986 Act defines electoral quota as “a number obtained by dividing the electorate for that part of the United Kingdom by the number of constituencies in it existing on the enumeration date”. The rules also provide that the “enumeration date” is the date on which the notice informing the Secretary of State of an intended report is published (in Scotland in the Edinburgh Gazette).

Section 3 of the 1986 Act provides that the Commission is required to submit a report to the Secretary of State showing the constituencies into which it recommends Scotland should be divided, not less than 8 or more than 12 years from the date of the submission of its last report. The Commission submitted its last report in December 1994. Its next mandatory report, therefore, is due to be submitted between December 2002 and December 2006.

The result of applying the current rules has been that the average number of electors per constituency in Scotland is lower than that for the rest of the United Kingdom. In 1997 Scotland had an average of 55,339 electors per constituency; Wales 55,563; Northern Ireland 66,122; and England 69,578. The average electorate per constituency in the United Kingdom as a whole was 67,077. The effect of this section will be to reduce the number of MPs at Westminster from Scottish constituencies and to bring Scotland’s average electorate substantially into line with that for England.

The White Paper set out the intention that the constituencies of the Scottish Parliament would be the same as those for elections to Westminster except in the case of Orkney and Shetland. Orkney and Shetland form one Westminster constituency but would be 2 constituencies, matching the local government areas, for the Scottish Parliament. Any changes made to the Westminster constituencies would subsequently be reflected in the constituencies for the Scottish Parliament. In order to maintain Orkney Islands and Shetland Islands as separate constituencies for elections to the Scottish Parliament, it is necessary to prevent the Boundary Commission from combining either of those local government areas with any other local government area in Scotland to create a constituency.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	160
CC	4-Mar-98	1079
LC	6-Oct-98	352
LC	6-Oct-98	360
LR	28-Oct-98	2065
LR	28-Oct-98	2068
L3	9-Nov-98	548
L3	9-Nov-98	557
L3	9-Nov-98	562
L3	9-Nov-98	569

### **Details of Provisions**

Subsection (1) introduces the amendments made by the section to the Parliamentary Constituencies Act 1986.

Subsection (2) removes the requirement in the rules for a minimum number of Scottish constituencies.

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Subsection (3) provides a new rule 3A to the effect that when undertaking a review of Westminster constituencies, the Parliamentary Boundary Commission for Scotland cannot, in any constituency containing the Orkney islands or Shetland Islands, include the whole or any other part of a local government area other than those 2 areas.

Subsection (4) provides that, for the Scottish Commission's next mandatory review only, the electoral quota to be used is the electoral quota for England on the enumeration date for the Scottish review. After the Commission's next mandatory review it would revert to using the Scottish quota as defined in rule 5.

Subsection (5) makes provision consequential on subsection (3), in particular making it clear that the Commission have to comply with the new rule 3A inserted by that subsection.

SECTION 87: The Advocate General for Scotland

### **Purpose and Effect**

This section makes such provision as is necessary for the establishment of the new Ministerial post of the Advocate General for Scotland, the Scottish Law Officer to the UK Government.

### **General**

The Scottish Law Officers to the UK Government prior to devolution were the Lord Advocate and the Solicitor General for Scotland. However, these offices became part of the Scottish Executive. Section 44 provides for the Lord Advocate and Solicitor General to be members of the Scottish Executive and section 48(6) has the effect of providing that their offices ceased to be part of the UK Government. This took place on 20th May 1999. Section 48 makes provision for their appointment and for the disengagement of their posts from the UK Government.

The Law Officer functions of the Lord Advocate which he had immediately before that date and which related to reserved matters were transferred to the Advocate General. In the case of statutory functions this was done by the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999 ([S.I. 1999/679](#)).

There are other references to the functions of the Advocate General in sections 32 and 33 (submission of Bills for Royal Assent and scrutiny of Bills by the Judicial Committee of the Privy Council); Schedule 6 (devolution issues); and the amendments to the Crown Suits (Scotland) Act 1857 and the Crown Proceedings Act 1947 made by Schedule 8.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	6-Oct-98	378

### **Details of Provisions**

Subsection (1) inserts a reference to the Advocate General for Scotland in the list of Ministerial offices in Schedule 2 of the House of Commons Disqualification Act 1975. Section 2 of that Act limits the number of holders of the offices listed who are entitled to sit in the House of Commons at any one time. Subsection (1) also inserts the same reference in Part III of Schedule 1 to the Ministerial and other Salaries Act 1975, which lists the Law Officers to the UK Government and specifies their salaries. (Similar references to the Lord Advocate and Solicitor General for Scotland were removed by section 48(6)).

Subsection (2) provides that a vacancy in the office should not affect the validity of anything done in relation to it. This will ensure that, for example, legal proceedings are not disrupted if the post falls vacant.

Subsection (3) provides for another Minister of the Crown, to be determined by the Prime Minister in writing, to exercise the functions of the Advocate General if his office is vacant or he is unable to act.

SECTION 88: Cross-border public authorities: initial status

### **Purpose and Effect**

This section:

- (a) makes provision for public authorities which, in addition to other functions, have functions exercisable in or as regards Scotland which do not relate to reserved matters to be designated by Order in Council as “cross-border public authorities”;
- (b) disapplies the provisions in certain other sections in relation to authorities so specified;
- (c) requires a Minister of the Crown to consult the Scottish Ministers before he exercises certain functions in relation to such an authority; and
- (d) requires any report relating to such an authority which must be laid before the Westminster Parliament also to be laid before the Scottish Parliament.

### **General**

This is one of a number of sections which make provision for public authorities which have remits which fall partly within the legislative competence of the Scottish Parliament. This includes bodies dealing only with devolved subjects, but which operate both in Scotland and England, and Scotland-only bodies which operate in both reserved and devolved areas. Specific provision is made for these authorities because of the effect of section 53. That section transfers Ministerial functions which are exercisable within devolved competence to the Scottish Ministers and removes them to that extent from UK Government Ministers. In the case of functions exercisable in relation to public authorities - such as functions of appointment, funding or direction - the result could have been an unworkable distribution of functions between the two administrations.

The present section enables such authorities to be designated by Order in Council as cross-border public authorities. This then disapplies sections 53 and 118-121 from functions which are specifically exercisable in relation to such authorities. (Sections 118-121 translate subordinate legislation procedure and requirements for funding, auditing and reporting to the equivalents for the Scottish Parliament). Thus all Ministerial functions specifically exercisable in relation to such bodies are left with a Minister of the Crown.

However, the section also requires the Minister to consult the Scottish Ministers before exercising specific functions of appointment or removal or functions whose exercise might affect Scotland other than wholly in relation to reserved matters. It also imposes a requirement for any report relating to a cross-border public authority, which is required by a pre-commencement enactment (as defined in section 53) or a prerogative instrument to be laid at Westminster, to be laid also in the Scottish Parliament.

The consultation and reporting requirements under section 88 can be regarded as the “default” position for cross-border public authorities. That position can be modified under section 89 to provide, for example, that certain appointment or direction-making powers should be exercisable by the Scottish Ministers. This allows arrangements for accountability and control to be tailor-made for particular authorities.

Other related provisions are:

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- (a) section 90, which makes provision where the Scottish Parliament legislates to remove the devolved functions of a cross-border public authority and which provides a power for its property and liabilities to be transferred in that circumstance, and
- (b) section 56(4), which permits the Scottish Ministers and a Minister of the Crown to exercise non-statutory powers jointly to establish, maintain, or abolish a body, office, or office-holder with cross-border responsibilities.

**Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	197
CR	12-May-98	244
LC	6-Oct-98	383
LC	6-Oct-98	384
LC	6-Oct-98	386
LC	6-Oct-98	387
LC	6-Oct-98	388

**Details of Provisions**

Subsection (1) disappplies the following sections in relation to functions which are specifically exercisable in relation to a cross-border public authority:

- (a) section 53, which transfers Ministerial functions exercisable within devolved competence to the Scottish Ministers;
- (b) section 118, which modifies the effect of pre-commencement enactments with respect to functions relating to subordinate legislation;
- (c) section 119, which alters the effect of certain references in pre-commencement enactments to the Consolidated Fund or money provided by Parliament;
- (d) section 120, which alters the effect of provisions in pre-commencement enactments relating to accounts and audit; and
- (e) section 121, which requires reports, which are required by a pre-commencement enactment to be laid before the Westminster Parliament, to be laid before the Scottish Parliament instead of, or in addition to, Westminster.

Section 118 is also disappplied in relation to any function of a cross-border public authority.

Subsection (2) provides that the Scottish Ministers are to be consulted by a Minister of the Crown before he exercises any specific function relating to a cross-border public authority which either relates to appointments or the exercise of which might affect Scotland otherwise than wholly in relation to reserved matters.

Subsection (3) requires reports (defined in subsection (7)) relating to cross-border public authorities which are required by a pre-commencement enactment to be laid before the Westminster Parliament to be laid before the Scottish Parliament.

Subsection (4) provides that the provisions of subsections (1) to (3) are subject to any provision made by any Order in Council under section 89, for example to transfer certain functions to the Scottish Ministers.

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Subsection (5) defines a “cross-border public authority” for the purposes of the Act as any body, government department, office or office-holder specified in an Order in Council made under this section. Further provision about the making of this Order in Council is to be found in sections 112 to 115 and Schedule 7.

Subsection (6) provides that an Order may only specify such a body, government department, office or office-holder which, at the time when the Order is made, has, in addition to other functions, functions exercisable in or as regards Scotland which do not relate to reserved matters.

This power was exercised in making the Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999 (S.I. 1999/1319) which specifies some 65 authorities.

Subsection (7) defines “report” (as mentioned in subsection (3)) as including accounts and any statement and “office-holder” as including employee or other post-holder.  
SECTION 89: Power to adapt etc. cross-border public authorities

### **Purpose and Effect**

This section enables an Order in Council to make such provision in relation to a cross-border public authority (as defined under section 88) as is considered necessary or expedient in consequence of the Act. It allows arrangements to be tailor-made for allocating accountability and control between the UK Government and the Scottish Executive, and between the UK and Scottish Parliaments.

### **General**

This is the second of the set of three sections dealing with “cross-border public authorities”. Section 88 provides for such cross-border public authorities to be designated by Order in Council, and for certain requirements to apply unless and until alternative provision is made under the present section, including a requirement on Ministers of the Crown to consult the Scottish Ministers before exercising certain statutory functions in relation to them and for reports to be laid before the Scottish Parliament as well as Westminster. Section 90 enables the transfer by Order in Council of property and liabilities of such an authority where an Act of the Scottish Parliament has provided for any of its functions to be no longer exercisable in or as regards Scotland.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1135
CR	12-May-98	197
LC	6-Oct-98	388
LR	28-Oct-98	2071
LR	28-Oct-98	2072

### **Details of Provisions**

Subsection (1) confers a power for Her Majesty, by Order in Council, to make such provision in relation to a cross-border public authority as She considers necessary or expedient in consequence of the Act.

Subsection (2) provides that the Order in Council under subsection (1) can, in particular, provide for:

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modifying any function of a cross-border public authority or of a Minister of the Crown in relation to such an authority. This can be used, for example, to provide for an authority's functions to be separately exercisable in or as regards Scotland, so that it can be separately accountable to the Scottish Ministers and the Parliament;

conferring any function on a cross-border public authority or on a Minister of the Crown or the Scottish Ministers in relation to such an authority;

modifying the constitution of such an authority;

modifying the application of:

section 88(1), which disapplies sections 53 (transfer of functions) and 118 to 121(subordinate instruments; Consolidated Fund; Accounts & Audit; Laying of Reports) in relation to functions specifically exercisable in relation to a cross-border public authority, and disapplies section 118 in relation to any function of a cross-border public authority;

section 88(2), which requires consultation with the Scottish Ministers before the exercise of certain functions;

section 88(3), which provides for the laying of reports relating to a cross-border public authority before the Scottish Parliament; and

section 56(4), which allows a Minister of the Crown and the Scottish Ministers to exercise certain non-statutory powers jointly to establish, maintain or abolish bodies, offices and office-holders;

functions to be transferred from a Minister of the Crown to the Scottish Ministers, or by the one concurrently with the other, or by both jointly, or by either with the agreement of or after consultation with the other. This can be used, for example, to provide that appointment or decision-making powers are transferred to the Scottish Ministers;

apportioning assets or liabilities;

imposing or enabling the imposition of, new limits or restrictions (for example on the size of grants payable by a body); and

alteration of financial arrangements, by providing for sums to be charged on or payable out of, or paid into, the Scottish Consolidated Fund and requiring payments to a Minister of the Crown or into the Consolidated Fund or the National Loans Fund.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7. In particular, an Order in Council under section 89 is subject to procedure in both the Scottish and United Kingdom Parliaments. It is subject to negative procedure unless it contains provisions which amend the text of an Act, in which case it is subject to affirmative procedure.

Subsection (3) requires the cross-border public authority concerned to be consulted before a recommendation is made to Her Majesty in Council to make an Order under this section.

This power has been exercised up to September 2001 as follows:

The Scotland Act 1998 (Cross-Border Public Authorities)(Adaptation of Functions etc.) Order 1999 ([S.I. 1999/1747](#));

The Scotland Act 1998 (Cross-Border Public Authorities)(Forestry Commissioners) Order 2000 ([S.I. 2000/746](#));

The Scotland Act 1998 (Cross-Border Public Authorities)(Adaptation of Functions etc.) Order 2000 ([S.I. 2000/1102](#));

*These notes refer to the Scotland Act 1998 (c.46)  
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The Scotland Act 1998 (Cross-Border Public Authorities)(British Wool Marketing Board) Order 2000 (S.I. 2000/1113);

The Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No.2) Order 2000 (S.I. 2000/3251).

## SECTION 90: Power to transfer property of cross-border public authorities

### **Purpose and Effect**

This section enables an Order in Council to provide for the transfer of property and liabilities of a cross-border public authority where an Act of the Scottish Parliament has provided for any of its functions to be no longer exercisable in or as regards Scotland.

### **General**

This is the third of three sections dealing with cross-border public authorities. Section 88 provides for such authorities to be designated by Order in Council. Section 89 enables arrangements for accountability and control to be tailor-made for particular cross-border authorities. The present section makes provision for the circumstance when the Scottish Parliament legislates to remove the devolved Scottish functions of a cross-border public authority. This is most likely to occur because of decision to set up a separate, Scottish, authority. It may be appropriate for some of the property or liabilities to be transferred. This section enables this to be done. Section 116(2)(c) makes clear that such an order can make provision about the tax treatment of such transfers.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	197
CC	4-Mar-98	1135

### **Details of Provisions**

Subsection (1) defines the circumstances when the section is applicable. These are when an Act of the Scottish Parliament has provided for any of the functions of a cross-border public authority (an authority specified by an Order in Council made under section 88) to be no longer exercisable in or as regards Scotland.

Subsection (2) provides that an Order in Council can transfer any property (defined in section 126(1) as including rights and interests of any description) to which the section applies and can provide that any person will have rights and interests in relation to such property.

Subsection (3) defines the property to which the section applies - essentially that belonging to a cross-border public authority which appears to be used in relation to the functions which are no longer to be exercisable in or as regards Scotland (or which, when last used in connection with the exercise of any function, was used in relation to the functions no longer to be exercisable in or as regards Scotland).

Subsection (4) provides that an Order in Council can also transfer liabilities of a cross-border public authority which appear to have been incurred for or in connection with the exercise of functions which are no longer to be exercisable in or as regards Scotland.

Subsection (5) requires the cross-border public authority concerned to be consulted before a recommendation is made to Her Majesty in Council to make an Order under this section.

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

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7. In particular, an Order under section 90 is subject to negative procedure in both the Scottish and United Kingdom Parliaments, unless it contains provisions which amend the text of an Act, in which case it is subject to affirmative procedure in both Parliaments.

Similar provision to section 90 is also made in section 33 of the [Food Standards Act 1999 \(c.28\)](#) in relation to the Food Standards Agency and in section 70 (2) of the [Care Standards Act 2000 \(c.14\)](#) in relation to the Central Council for Education and Training in Social Work.

SECTION 91: Maladministration

### **Purpose and Effect**

This section imposes a duty on the Scottish Parliament to provide for the investigation of certain complaints of maladministration in connection with action taken by or on behalf of members of the Scottish Administration. In making such provision, the Parliament is required to take account of the Parliamentary Commissioner Act 1967. It also provides that the Parliament may make provision for the investigation of complaints in respect of office-holders in the Scottish Administration, the Scottish Parliamentary Corporate Body, Scottish public authorities and action taken by cross-border public authorities in connection with devolved matters.

### **General**

This section imposes a duty on the Parliament to provide for the investigation of certain complaints of maladministration, and provides that the Parliament may make further provision. Prior to the Parliament making its own provision, the office of Scottish Parliamentary Commissioner for Administration was created to investigate complaints made against members of the Scottish Administration, Scottish public authorities, cross-border public authorities (in connection with devolved matters), and the Scottish Parliamentary Corporate Body under the Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Order 1999 ([S.I. 1999/1351](#)), as amended by [S.I. 1999/1595](#).

As a consequence, devolved public authorities were removed from the jurisdiction of the Parliamentary Commissioner for Administration by amendments made to the Parliamentary Commissioner Act 1967 by [S.I. 1999/1820](#).

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1140
CR	19-May-98	774
LC	6-Oct-98	397
LR	2-Nov-98	11
L3	9-Nov-98	586

### **Details of Provisions**

Subsection (1) requires the Parliament to make provision for the investigation of “relevant” complaints made to members about any action taken by or on behalf of a member of the Scottish Executive in the exercise of functions conferred on the Scottish Ministers, or by or on behalf of any other office-holder in the Scottish Administration.

Subsection (2) defines what is a “relevant complaint”. The Parliament’s duty extends to providing for the investigation of those kinds of complaints which could be investigated under the Parliamentary Commissioner Act 1967. This, for example, specifically excludes complaints relating to the commencement or conduct of civil or criminal proceedings before any court of law in the United Kingdom.

Subsection (3) provides that the Parliament may make provision for the investigation of complaints in respect of:

- (a) any action taken by or on behalf of an office-holder in the Scottish Administration;
- (b) any action taken by or on behalf of the Parliamentary corporation;
- (c) any action taken by or on behalf of a Scottish public authority with mixed functions or no reserved functions; and
- (d) any action concerning Scotland and not relating to reserved matters which is taken by or on behalf of a cross-border public authority.

Subsection (4) read together with subsection (6) requires the Parliament, in making provision under subsection (1), to have regard among other things to the provisions of the Parliamentary Commissioner Act 1967 as it has effect on the commencement of this section.

Subsection (5) provides that certain sections of the Act related to the transfer of functions to the Scottish Ministers will not apply to functions conferred by or under the Parliamentary Commissioner Act 1967. The relevant sections are:

53	General transfer of functions;
117	Ministers of the Crown;
118	Subordinate legislation;
119	Consolidated Fund, etc.;
121	Requirements to lay reports etc. before Parliament.

Subsection (6) defines “action” in this context as including failure to act, and defines “provision” in this context as provision by an Act of the Scottish Parliament.

**SECTION 92: Queen’s Printer for Scotland**

**Purpose and Effect**

This section provides for the establishment of an office of Queen’s Printer for Scotland (QPS). The QPS will be responsible for exercising the functions of the Queen’s Printer in relation to Acts of the Scottish Parliament and subordinate legislation and any other statutory functions conferred on the QPS. The QPS also has the function of exercising all rights and privileges of Her Majesty in respect of copyright in Acts of the Scottish Parliament, devolved subordinate legislation and other “Scottish works” including works made by the Scottish Administration and existing works made in the exercise of functions which will be exercisable by the Scottish Administration. The QPS is part of the Scottish Administration..

**Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	2-Nov-98	11

## **Details of Provisions**

Subsection (1) provides for the establishment of an office of Queen's Printer for Scotland (QPS). The QPS is responsible for exercising the functions of the Queen's Printer in relation to Acts of the Scottish Parliament and subordinate legislation and any other statutory functions conferred on the QPS

The intention is to ensure that the Scottish Parliament and the Scottish Administration have an appropriate degree of policy control over the arrangements for publication and printing of Acts of the Scottish Parliament and material produced by the Scottish Administration.

The Queen's Printer of Acts of Parliament is, by virtue of the Letters Patent by which she is appointed, responsible for exercising all of Her Majesty's rights and privileges in respect of copyright. The Office of Queen's Printer of Acts of Parliament is held by a civil servant in the UK Government, appointed on recommendation by the head of the Home Civil Service and effectively subject to policy directions given by the UK government. It was considered inappropriate for the question as to how "Scottish works" may be published to be subject to the control of the Queen's Printer acting in accordance with policy arrangements laid down by the UK Government with expenditure being met from the Consolidated Fund and income being accountable to that Fund.

The functions of the QPS, as set out in subsection (3), are to be responsible for exercising printing functions in relation to ASPs and devolved subordinate legislation and to exercise all rights and privileges of Her Majesty in respect of copyright in "Scottish works" such as Acts of the Scottish Parliament, subordinate legislation and any other works copyright in which belongs to Her Majesty where Her Majesty has acquired that copyright for the purposes of or in connection with the functions of any part of the Scottish Administration.

Subsection (5) provides that the QPS is to be the same person who holds office as the Queen's Printer. The Queen's Printer also holds the office of Government Printer for Northern Ireland. This will ensure a degree of consistency and coherence in the approach taken to the publication of statute law in the UK and the administration of the rules of Crown copyright.

As a Scottish public authority and part of the Scottish Administration, the Parliament will have competence in relation to the funding and receipts of the QPS and so any expenditure in connection with the QPS functions could be met out of the Scottish Consolidated Fund (SCF) and any receipts paid into the SCF. The Scottish Parliament is able to legislate to confer functions on QPS in addition to those conferred by the Act and could provide for the Scottish Ministers to give directions in connection with the exercise of those functions. This enables the Parliament to make provision as to the numbering and citation of Acts of the Scottish Parliament. The Parliament will also be able to summon the QPS.

Further functions in connection with the printing of Acts of the Scottish Parliament and the numbering and printing etc. of Scottish Statutory Instruments are conferred on the Queen's Printer for Scotland by the Scotland Act 1998 (Transitory and Transitional Provisions)(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/1379) and the Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999 (S.I. 1999/1096).

SECTION 93: Agency arrangements

## **Purpose and Effect**

This section enables a UK Minister and the Scottish Ministers to make arrangements to exercise functions on behalf of each other, on the basis that Ministerial responsibility for the exercise of a function is not affected by such an arrangement. The function

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

concerned must be specified in an Order in Council, subject to procedure in both the United Kingdom and Scottish Parliaments, and cannot include any function of making, confirming or approving subordinate legislation.

### **General**

From time to time, it may make sense for Ministers of one administration, often in practice through their officials, to exercise the functions of Ministers of the other. This section enables that to happen. For example, it permits a department of the UK Government to administer a scheme of licensing on behalf of the Scottish Ministers.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	6-Oct-98	398
LC	6-Oct-98	398

### **Details of Provisions**

Subsection (1) provides that arrangements may be made between the Scottish Ministers and a Minister of the Crown for the agent to exercise certain functions on behalf of the principal.

Subsection (2) provides that such an arrangement does not affect a person's responsibility for the exercise of his functions.

Subsection (3) provides that the functions concerned are those specified in an Order in Council made under this sub-section, and do not include functions of making, confirming or approving subordinate legislation. It also provides that "Minister of the Crown" includes government department, and that the section applies to the Lord Advocate as it applies to the Scottish Ministers.

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

The Scotland Act 1998 (Agency Arrangements)(Specification) Order 1999 ([S.I. 1999/1512](#));

The Scotland Act 1998 (Agency Arrangements)(Specification) (No. 2) Order 1999 ([S.I. 1999/3320](#));

The Scotland Act 1998 (Agency Arrangements)(Specification) Order 2000 ([S.I. 2000/745](#));

The Scotland Act 1998 (Agency Arrangements) (Specification) (No.2) Order 2000 ([S.I. 2000/3250](#)).

SECTION 94: Private legislation

### **Purpose and Effect**

The purpose of this section is to modify pre-commencement enactments, which require any provisional order to be subject to an Act of Parliament or any special procedure order to special parliamentary procedure, where the power to make, confirm or approve that order is exercisable by the Scottish Ministers by virtue of section 53. These are special kinds of private legislation. The modifications require such orders to be confirmed by an Act of the Scottish Parliament or, as the case may be, to be subject to special procedures in the Scottish Parliament rather than the UK Parliament.

### **General**

This section should be read with:

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

- (a) section 36(3) which provides that the standing orders may, in relation to different types of Bill (including Private bills), modify the provisions made by the standing orders in pursuance of section 36(1) as to the stages of Bill procedure. Private Bill procedure is now provided for in of the Standing Orders of the Parliament;
- (b) section 53 which deals with the general transfer of functions to the Scottish Ministers and which defines “pre-commencement enactment”;
- (c) section 118 in relation to the exercise by a member of the Scottish Executive of a function to make, confirm or approve subordinate legislation;
- (d) Schedule 4, paragraph 1(2)(b) which provides that an Act of the Scottish Parliament cannot modify (or confer power to modify) the Private Legislation Procedure (Scotland) Act 1936; and
- (e) Schedule 8, paragraph 5, which amends the Private Legislation Procedure (Scotland) Act 1936, so that it does not apply where the conferral of the parliamentary powers sought is wholly within the legislative competence of the Scottish Parliament. Further amendments to the Private Legislation Procedure (Scotland) General Orders 1946 were made by paragraph 135 of Schedule 2 to [S.I. 1999/1820](#).

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	21-Jul-98	818

### **Details of Provisions**

Subsection (1) specifies the provisions to which the modifications in subsection (2) apply. These are provisional orders (which require to be confirmed by Act of Parliament) and special procedure orders (within the meaning of the Statutory Orders (Special Procedure) Act 1945 and which require to be subject to special parliamentary procedure) under any pre#commencement enactment where the power to make, confirm or approve such an order is exercisable by the Scottish Ministers by virtue of section 53.

Subsection (2) makes modifications to ensure that such provisional orders become subject to confirmation by an Act of the Scottish Parliament rather than an Act of the UK Parliament and for such special procedure orders to be subject to such special procedure as may be provided for by the Scottish Parliament rather than the special parliamentary procedure provided by the UK Parliament in the 1945 Act.

Transitional arrangements for special procedure orders were provided by the Scotland Act 1998 (Orders subject to Special Parliamentary Procedure) Order 1999 ([S.I. 1999/1593](#)) prior to the Scottish Parliament making its own provisions.

SECTION 95: Appointment and removal of judges

### **Purpose and Effect**

This section sets out the roles of the Prime Minister and the First Minister in the appointment and removal of members of the Scottish Judiciary. It provides that the Prime Minister will continue to exercise the role of recommending the appointment by Her Majesty of the Lord President of the Court of Session and the Lord Justice Clerk but on the basis of nominations from the First Minister following consultation with the Lord President and the Lord Justice Clerk. Other judges of the Court of Session, sheriffs and sheriffs principal are appointed by Her Majesty on the recommendation of the First Minister, after consultation with the Lord President.

This section also sets out a statutory framework for the removal of judges. It provides that a judge of the Court of Session and the Chairman of the Scottish Land Court

may be removed from office only by Her Majesty on the recommendation of the First Minister. The First Minister may make such a recommendation only if a tribunal constituted for these purposes resolves that a judge is unfit for office by reason of inability, neglect of duty or misbehaviour and if the Parliament resolves, on a motion made by the First Minister, that a recommendation should be made.

### **General**

This section is one of a number of provisions which implement the White Paper proposals in relation to the judiciary and provide safeguards for their independence. Section 23(7) exempts judges from the Scottish Parliament's power to call witnesses or require the production of documents. Under Section L1 of Schedule 5 the determination of senior judicial salaries and pensions are reserved matters. This will allow pay awards to continue to be based on recommendations of the Senior Salaries Review Body.

The provisions in the present section for the removal of a judge of the Court of Session rectified the anomaly that, unlike in the rest of the UK, there were no powers to remove such a judge from office. Powers already exist for the removal from office of sheriffs principal and sheriffs (section 12 of the Sheriff Courts (Scotland) Act 1971) and the relevant functions in the 1971 Act transferred to the Scottish Ministers and Scottish Parliament. The arrangements for the removal of judges are based on the model already used for sheriffs.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	4-Mar-98	1150
CC	4-Mar-98	1151
CR	19-May-98	775
LC	6-Oct-98	398
LC	6-Oct-98	399
LC	6-Oct-98	400
LC	6-Oct-98	409
LC	6-Oct-98	415
LC	6-Oct-98	416
LR	2-Nov-98	17
<b>Stage</b>	<b>Date</b>	<b>Column</b>
LR	2-Nov-98	41
L3	9-Nov-98	586
L3	9-Nov-98	590
LCCLA	17-Nov-98	1176

### **Details of Provisions**

Subsection (1) provides that it will continue to be for the Prime Minister to recommend to Her Majesty the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk.

Subsection (2) provides that the candidates for these two senior judicial posts put forward by the Prime Minister require to have been nominated by the First Minister.

Subsection (3) provides that, before making such a nomination, the First Minister shall consult the Lord President and the Lord Justice Clerk (unless, in either case, the office is vacant).

Subsection (4) provides that it is for the First Minister, after consulting the Lord President, to recommend candidates to Her Majesty for appointment as judges of the Court of Session (other than the Lord President or the Lord Justice Clerk) or as sheriffs or sheriffs principal.

Subsection (5) provides that the First Minister shall comply with any requirement imposed by virtue of any enactment in relation to a nomination for the appointment of a person as Lord President or Lord Justice Clerk, or a recommendation for the appointment of a person as a judge of the Court of Session, sheriff principal or sheriff. This will allow the Parliament to impose further requirements on the First Minister in relation to nominations and recommendations.

Subsection (6) provides that a judge of the Court of Session and the Chairman of the Scottish Land Court can only be removed from office by Her Majesty on the recommendation of the First Minister. Paragraph 29 of Schedule 8 amends the Scottish Land Court Act 1993 in connection with the appointment of members of the Scottish Land Court.

Subsection (7) requires that the First Minister shall make a recommendation for the removal of such a judge if (and only if) the Parliament, on a motion made by the First Minister passes a resolution that the judge should be removed. The Standing Orders of the Parliament make further provision in this regard.

Subsection (8) requires provision to be made for a tribunal constituted by the First Minister to investigate and report on whether a judge of the Court of Session or the Chairman of the Scottish Land Court is unfit for office by reason of inability, neglect of duty or misbehaviour and the report to be laid before the Parliament. This provision is to be made by or under an Act of the Scottish Parliament.

Subsection (9) requires the provision made for the tribunal to include provision for the constitution of the tribunal by the First Minister when requested by the Lord President as well as in such other circumstances as the First Minister thinks fit. It also provides that the tribunal should be chaired by a member of the Judicial Committee of the Privy Council (limited to the same composition of the Committee as provided for in section 103(2) in relation to devolution cases). Provision may be made for a judge to be suspended from office.

Subsection (10) provides the circumstances in which the First Minister can make a motion recommending the removal of a judge. Such a motion can only be made if the First Minister has received a written report from the tribunal concluding that the judge is unfit for office by reason of inability, neglect of duty or misbehaviour. If the motion concerns the Lord President or the Lord Justice Clerk, the First Minister must consult the Prime Minister. The subsection also provides that the First Minister should comply with any other requirement imposed by virtue of any enactment (including an Act of the Scottish Parliament).

Subsection (11) defines provision for the purposes of section 95 as meaning a provision by or under an Act of the Scottish Parliament. It defines tribunal for the purposes of this section as a tribunal of at least three persons.

Until the Parliament made its own provision for a tribunal, transitional arrangements were put in place by the Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999 (S.I. 1999/1017).

SECTION 96: Provision of information to the Treasury

### **Purpose and Effect**

The purpose of this section is to enable the Treasury to obtain such information from the Scottish Ministers as it may reasonably require. If the information is not within the possession or control of the Scottish Ministers, they are required to take all reasonable steps to comply with the requirement.

### **Details of Provisions**

Subsection (1) provides that the Treasury may require the Scottish Ministers to provide such information, within such period and in such a form and manner, as the Treasury may reasonably specify. This is necessary so as to enable the Treasury to obtain such information as it may require to, for example, monitor expenditure or compile other macroeconomic information on a UK basis.

Subsection (2) provides that if the information is not in their possession or under their control, the duty of the Scottish Ministers under subsection (1) is to take all reasonable steps to comply with the requirement.

SECTION 97: Assistance for opposition parties

### **Purpose and Effect**

This section confers a power on Her Majesty, by Order in Council, to make provision for the Scottish Parliamentary Corporate Body to make payments, out of the Scottish Consolidated Fund, to any opposition registered political party represented in the Scottish Parliament to assist their MSPs in performing their parliamentary duties.

The power is intended to make provision similar to that made in the House of Commons for the payment of “Short Money”. Short money is generally applied to the opposition parties to obtain research and support facilities for Opposition Front Bench spokesmen, assistance in the Opposition Whips Office and other staff for the Leader of the Opposition. It is intended to counterbalance the facilities available to the Government through the Civil Service.

The power conferred by this section was exercised in making the Scottish Parliament (Assistance for Registered Political Parties) Order 1999 (S.I. 1999/1745).

Paragraph 6 of Part 1 of Schedule 5 reserves the registration and funding of political parties. However, that paragraph was modified by the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749) so that “making payments to any political party for the purpose of assisting members of the Parliament who are connected with the party to perform their Parliamentary duties” is excepted from the reservation. That order also provided that section 97 is not to be among the provisions of the Scotland Act which is protected by paragraph 4 of Schedule 4 from modification by the Scottish Parliament.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	2-Nov-98	72

### **Details of Provisions**

Subsection (1) provides that Her Majesty may by Order in Council provide for the Scottish Parliamentary Corporate Body to make payments to registered political parties to assist their MSPs in performing their parliamentary duties. These payments would be made out of the Scottish Consolidated Fund.

Subsections (2) and (3) restrict the power of the SPCB to make payments in pursuance of an order under subsection (1). Under subsection (2) payment is restricted to those

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

parties who do not have one or more of its members as a member of the Scottish Executive or junior Scottish Ministers. However subsection (3) provides that the Order in Council under subsection (1) may provide for the fact that an MSP is a member of the Scottish Executive or a junior Scottish Minister to be disregarded in any circumstances which may be specified in the Order.

Subsection (4) provides the Order may determine the circumstances in which a member of the Parliament and a party are regarded as connected for the purposes of this section. This is intended to deal with situations such as where a member ceases to be associated with a party but remains a member of the Parliament.

SECTION 98: Devolution issues

### **Purpose and Effect**

This section gives effect to Schedule 6 to the Act, which defines devolution issues and makes provision for the special procedures to apply where they arise in legal proceedings.

### **General**

This section forms part of the set of provisions which deal with the power of the Judicial Committee of the Privy Council and the other courts in Scotland, England and Wales and Northern Ireland to deal with disputes about the *vires* (or legal competence) of Acts of the Scottish Parliament; secondary legislation made under its auspices; and actions of members of the Scottish Executive.

Section 102 provides for a court or tribunal to limit the retrospective effect, or suspend the effect, of a finding of *ultra vires*. Section 103 provides for the membership of the Judicial Committee in devolution cases and for the conferring of certain powers on the Judicial Committee in relation to such proceedings.

### **Details of Provisions**

Section 98 simply introduces Schedule 6. See the separate note on Schedule 6 for further information.

SECTION 99: Rights and liabilities of the Crown in different capacities

### **Purpose and Effect**

Section 99 provides for legal relations to arise between the Crown in right of Her Majesty's Government in the UK and the Crown in right of the Scottish Administration. It provides that rights and liabilities may arise between the Crown in such different capacities by virtue of a contract, by operation of law or by virtue of an enactment and that property and liabilities can be transferred between them as if they were subjects. It also provides that the Crown can sue each other in such different capacities in respect of such property and liabilities or in respect of the exercise of, or failure to exercise, any function exercisable by an office holder of the Crown in one of those capacities. This will enable the Scottish Ministers, in appropriate cases, to sue a Minister in the UK Government (or vice versa) in contract or in delict or to seek judicial review of the exercise, or failure to exercise, of some function by that Minister.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	2-Nov-98	74

## **General**

Section 99 ensures that the two manifestations of the Crown, as the UK Government and as the Scottish Administration, are placed in the same relationship to each other as they would be if they were not the Crown but two subjects. Legal relationships can be created between them and they are able to enforce any rights or obligations created. Without this provision, the doctrine of Crown indivisibility would have meant that it would not be possible to create legally enforceable obligations, as the two would have been regarded as parts of the same body.

The Crown Suits (Scotland) Act 1857, as amended by paragraph 2 of Schedule 8, provides for the Lord Advocate to represent the Scottish Administration (or any part of it) and for the Advocate General for Scotland to represent the UK Government in Scottish legal proceedings. Amendments are also made to the Crown Proceedings Act 1947 by paragraph 7 of Schedule 8 to differentiate between Crown proceedings where the proceedings are by or against any part of the Scottish Administration and where they are by or against the UK Government.

## **Details of Provisions**

Subsection (1) provides that rights and liabilities may arise between the Crown in right of Her Majesty's Government in the UK and the Crown in right of the Scottish Administration by virtue of a contract, by operation of law, or by virtue of enactment as they may arise between subjects.

Subsection (2) provides that property and liabilities may be transferred between the Crown in such different capacities as between subjects and that they may create, vary or extinguish any property or liability as subjects may.

Subsection (3) provides that judicial proceedings in respect of property or liabilities of the Crown or the exercise of functions of office-holders of the Crown may be instituted by the Crown in either capacity and the Crown in the other capacity may be a party to the proceedings. In appropriate cases, the Advocate General, as representing the Secretary of State, could for example institute proceedings in contract or delict against the Lord Advocate, as representing Scottish Ministers or seek judicial review of some decision taken by Scottish Ministers, such as to appoint staff in breach of the provisions referred to in section 51(3).

Subsection (4) provides that section 99 applies to a unilateral obligation as it applies to a contract. This is because, under Scots law, legal obligations can arise, in certain cases, as a result of a promise or undertaking.

Subsection (5) defines an "office-holder" in relation to the Crown in right of Her Majesty's Government in the United Kingdom as any Minister of the Crown or other office-holder under the Crown in that capacity and, in relation to the Crown in right of the Scottish Administration, as any office-holder in the Scottish Administration. It defines "subject" as a person not acting on behalf of the Crown.

SECTION 100: Human rights

## **Purpose and Effect**

The purpose of this section is to ensure that, so far as possible, there is compatibility between the Scotland Act and the Human Rights Act 1998 with regard to who would have title and interest to bring proceedings on the ground that an act of a member of the Scottish Executive is incompatible with the Convention rights and the amount of damages which may be awarded if such an act is incompatible.

## **General**

The Scotland Act has various devices which ensure that a member of the Scottish Executive would be acting *ultra vires* if he made any subordinate legislation or did any

other act which is incompatible with any of the Convention rights - see, for example, section 57(2). The question whether an act by a member of the Scottish Executive is incompatible with Convention rights is a devolution issue and proceedings raising such questions attract the special procedures set out in Schedule 6.

This section provides that the only persons, apart from the Law Officers, who can bring proceedings on the ground that an act of a member of the Scottish Executive is incompatible with Convention rights or rely on Convention rights in proceedings are victims for the purposes of Article 34 of the Convention. This is similar to what is provided by section 7(1) of the Human Rights Act 1998. Article 34 requires applications to the European Court of Human Rights to be from “any person, non-governmental organisation or groups of individuals claiming to be a victim of a violation of a Convention right”.

This section also restricts the amount of damages which a court or tribunal may award in respect of such an act which is incompatible with Convention rights to the damages which could be awarded if section 8(3) and (4) of the Human Rights Act applied. Section 8(3) provides, in effect, that no award of damages should be made unless, taking account of all the circumstances of the case, the court is satisfied that “the award is necessary to afford just satisfaction to the person in whose favour it is made”. Section 8(4) provides that, in determining whether to award damages or the amount of the award, the court must take into account the principles applied by the European Court of Human Rights under Article 41 of the Convention.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	6-Oct-98	427
LR	2-Nov-98	77
L3	9-Nov-98	592

### **Details of Provisions**

Subsection (1) provides that the Scotland Act does not enable a person to bring proceedings in a court or tribunal on the grounds that an act is incompatible with the Convention rights or to rely on Convention rights in such proceedings unless he would be a “victim” for the purposes of Article 34 of the Convention (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights.

Subsection (2) provides that subsection (1) does not apply to the Law Officers (the Lord Advocate, the Advocate General, the Attorney General or the Attorney General for Northern Ireland). They will be able to bring such proceedings even although they are not victims.

Subsection (3) provides that the Scotland Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act 1998 applied.

Subsection (4) defines act for the purposes of this section. “Act” means (a) making any legislation and (b) any other act, or failure to act, of a member of the Scottish Executive.

[Section 101](#): Interpretation of Acts of the Scottish Parliament

### **Purpose and Effect**

This section makes provision for the interpretation of an Act or a Bill of the Scottish Parliament, or of subordinate legislation made, confirmed or approved or purporting to be made confirmed or approved by a member of the Scottish Executive. The

purpose of the section is to enable the courts to give effect to such legislation, wherever possible, rather than to invalidate it. It is intended to ensure that the courts will not invalidate such legislation merely because it could be read in such a way as to make it outside competence, such as outside the legislative competence of the Parliament or the competence of Scottish Ministers. It provides that, in that case, such legislation is to be read as narrowly as is required for it to be considered to be within competence, if such a reading is possible.

### **General**

This section is intended to assist the courts by providing a statutory interpretative rule when they are construing such Scottish legislation. Arguably, it does no more than replicate the normal common law rule of construction which the courts should apply when construing legislation which might be *ultra vires*, namely to seek, so far as it is possible to do so, to give effect to that legislation rather than invalidate it. This is sometimes called the principle of efficacy.

For example an ASP which purports to confer a power on the Scottish Ministers to hold a referendum on any matter could be read as enabling the Ministers to hold a referendum on independence or the Monarchy. Those are reserved matters and the ASP might therefore be read as relating to those reserved matters and therefore outside the legislative competence of the Parliament under section 29(2)(b). Rather than invalidating the ASP (or invalidating it to the extent that it could be so read), this section would require the ASP to be read, if it is possible to do so, as conferring a power to hold a referendum only on matters within the competence of the Parliament. However, if a provision clearly cannot be read to be within competence, for example an ASP providing only for a referendum on independence, then the section will not allow it to be read as being within competence.

The section also provides that the interpretative provision should apply to the interpretation of the provisions of a Bill before the Scottish Parliament as well as to those of an ASP. It will therefore apply in any case where the Judicial Committee of the Privy Council are considering any reference to them of a Bill or of a devolution issue in connection with an ASP.

There are other statutory interpretative rules which the courts are required to apply when construing such Scottish legislation. For example:

- (a) section 2(4) of the European Communities Act 1972 would require such legislation to “be construed and have effect subject to the foregoing provisions of this section” - see the gloss on the meaning of enactment in that section by paragraph 15(2)(b) of Schedule 8 to the Scotland Act; and
- (b) section 3(1) of the Human Rights Act 1998 would require such legislation “so far as it is possible to do so, to be read and given effect in a way which is compatible with the Convention rights” because ASPs and instruments under ASPs are subordinate legislation for the purposes of that Act.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LR	28-Oct-98	1952

### **SECTION 102: Powers of courts or tribunals to vary retrospective decisions**

#### **Purpose and Effect**

This section provides for a court or tribunal to remove, or limit any retrospective effect, or suspend any such effect, of a decision by it that an Act of the Scottish Parliament or

a provision of it is *ultra vires* or that a member of the Scottish Executive did not have the power to make subordinate legislation that he has purported to make.

It also provides that one of the criteria the court or tribunal must take into account when determining whether to use this power is the extent to which third parties would otherwise be adversely affected. The section also provides that if a court or tribunal is considering using this power it must in certain circumstances intimate that fact to the Lord Advocate and the appropriate law officer who may then become a party to the proceedings so far as they relate to the possible exercise of the power.

### **General**

The courts may find that an ASP, or a provision in an ASP, is outside the legislative competence of the Parliament. Such an ASP or provision would be “not law” as is stated in section 29(1). In other words, the effect of that decision would be that such an ASP or provision would be void *ab initio* i.e. it would never have had legal effect from the date of its enactment or commencement.

Similarly, the courts may find that some subordinate legislation made by Scottish Ministers is *ultra vires* because, for example, the power to make the legislation did not transfer to Scottish Ministers under section 53 because it was not exercised within devolved competence (section 54) or simply because the power was exercised beyond the limits of the delegated power. Again, the effect of that decision would be that such subordinate legislation would be void *ab initio*.

Such decisions could cause difficulty particularly if they are made some years after the ASP or the subordinate legislation has purported to come into force. It is doubtful whether the courts have the power, at common law, to vary the retrospective effect of their decisions, such as to provide that the decision should only have effect from the date of the decision or from some date other than the date when the defective provision purported to come into force.

This section confers such a power. Such a power is thought to be necessary since the court or tribunal will, in this situation, be declaring invalid legislation (whether primary or secondary) that had, until that point, been considered to be perfectly valid. This power affords the courts and tribunals the power to protect those who had been acting on that basis. A court may, for example, limit any retrospective effect which its decision may have by providing that it should only take effect from the date of its decision or from some other time. It would also allow the court to preserve the legal effects of anything already done in reliance on the erroneous provision.

This section also empowers the court to suspend the effect of its decision for any period to allow the defect to be corrected. This would be appropriate where, for example, it was likely that the defect would be corrected by an ASP or by a remedial order under section 12 of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001 \(asp 7\)](#) or by the UK Government in a Westminster Act or an order under section 30(2) or 107 of the Scotland Act.

In framing this section, account was taken of the similar provision in Article 172(1) of the Constitution of South Africa 1996.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	783
LC	8-Oct-98	588
LC	8-Oct-98	595

*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>
LC	8-Oct-98	598
LC	8-Oct-98	606
<b>Stage</b>	<b>Date</b>	<b>Column</b>
LC	8-Oct-98	608
LC	8-Oct-98	611

### **Details of Provisions**

Subsection (1) defines the circumstances in which the section will apply. It will apply where a court or tribunal decides that an Act of the Scottish Parliament or any provision in such an Act is not within the legislative competence of the Parliament or that a member of the Scottish Executive has purported to make, confirm or approve subordinate legislation when he had no power to do that.

The power itself is defined in subsection (2). If the court or tribunal makes such a decision, it may make an order to remove or limit any retrospective effect of that decision. It may also suspend the effect of the decision for any length of time and on any conditions to allow the defect in the Act or the subordinate legislation to be corrected.

Subsection (3) requires the court or tribunal, in deciding whether to make such an order, to have regard (amongst other things) to the extent to which third parties (i.e. those not a party to the proceedings in which the decision is made) would be adversely affected if the power were not exercised. The court or tribunal may however also take into account other relevant criteria as it sees fit.

Subsection (4) provides that if a court or tribunal is considering using the power conferred by this section it must intimate that to the Lord Advocate and the appropriate law officer (where the decision relates to a devolution issue) if that person is not already a party to the proceedings. This ensures that, where a Law Officer has already been given intimation that the proceedings raise a devolution issue but he has chosen not to become a party to those proceedings, the Law Officer will be given intimation of the fact that the court intends to make an order under section 102 as it relates to a devolution issue. “Appropriate law officer” is defined in subsection (7). Rules of court which provide for the giving of notice are [S.I. 1999/1345](#) (Rule of Court 25A.12), [S.I. 1999/1346](#) (Rule 40.12) and [S.I. 1999/1347](#) (Rules 8.9).

Subsection (5) provides that when a person is given intimation in terms of subsection (4) he may participate in the proceedings so far as they relate to the making of the order.

Subsection (6) provides that paragraphs 36 and 37 of Schedule 6 apply, with necessary modifications, for the purposes of subsections (4) and (5) as they apply for the purposes of that Schedule. This, in effect, enables the courts, in deciding any question of costs or expenses, to take into account the fact that the Lord Advocate has taken part in the proceedings in consequence of this section; and makes clear that general powers to regulate the procedures before any court or tribunal include power to make provisions for the purposes of subsections (4) and (5).

Subsection (7) is a technical provision that defines “intimation” in this section as including notice. It also provides that the “appropriate law officer” is to be the Advocate General in relation to proceedings in Scotland, the Attorney General in relation to proceedings in England and Wales or the Attorney General for Northern Ireland in relation to proceedings in Northern Ireland.

SECTION 103: The Judicial Committee

## **Purpose and Effect**

This section provides for the membership of the Judicial Committee of the Privy Council in proceedings under the Scotland Act and enables certain powers to be conferred on the Judicial Committee in relation to such proceedings. It also provides that decisions of the Judicial Committee in these proceedings will be binding on all other courts.

## **General**

The White Paper on Scotland's Parliament proposed in Chapter 4 that the Judicial Committee of the Privy Council should become the ultimate court of last resort on matters concerning the competence of the Parliament and the Executive.

This is reflected in:

- (a) section 33 which provides for scrutiny of Bills by the Judicial Committee following a reference by the Advocate General, Lord Advocate or the Attorney General within four weeks after its passing by the Parliament; and
- (b) Schedule 6 to the Act which defines devolution issues and provides for special procedures for proceedings raising such issues, including references of, or appeals upon, such issues to the Judicial Committee.

Section 103 provides for the membership of the Judicial Committee in proceedings under the Act and for the conferring of certain powers on the Judicial Committee in relation to such proceedings.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	204
LC	8-Oct-98	614
LC	8-Oct-98	620
LR	2-Nov-98	108
L3	9-Nov-98	592

## **Details of Provisions**

Subsection (1) provides that any decision of the Judicial Committee in proceedings under this Act shall be stated in open court. It also states that any such decision will be binding in all legal proceedings except proceedings before the Committee itself. This effectively means that the Judicial Committee's decisions will be binding on all other courts and tribunals but not binding on itself.

Subsection (2) provides for the membership of the Judicial Committee in proceedings under the Act.

Membership of the Judicial Committee normally includes the Lords of Appeal in Ordinary (Law Lords), the Lord Chancellor, the Lord Justices of Appeal and members of the Privy Council who have been judges in the higher courts of Commonwealth states.

Paragraph 4.17 of the White Paper proposed that membership of the Judicial Committee for the purposes of the Scotland Act should be restricted to the Law Lords and that at least 5 Law Lords should sit. However, this section extends membership to include those members of the Judicial Committee who are either serving or retired Law Lords or who hold or have held "high judicial office" as defined in section 25 of the Appellate Jurisdiction Act 1876. This will include serving and retired Lord Chancellor, judges

of the Court of Session and judges of the English ( or Northern Irish) High Court or Court of Appeal.

Section 5 of the Appellate Jurisdiction Act 1887 is disapplied because this extends the definition of “high judicial office” to include members of the Judicial Committee (and Lords of Appeal in Ordinary). This would, therefore, undermine the intended restriction of membership for Scotland Act purposes.

Subsection (3) provides that Her Majesty may by Order in Council, in relation to proceedings under this Act, confer such powers upon the Judicial Committee as She considers necessary or expedient, make rules for regulating the procedure before the Judicial Committee and apply the Judicial Committee Act 1833 with exceptions or modifications.

This power has been exercised in making the Judicial Committee (Devolution Issues) Rules 1999 (S.I. 1999/665) and the Judicial Committee (Powers in Devolution Cases) Order 1999 (S.I. 1999/1320).

Subsection (4) defines “proceedings under this Act” which is used throughout this section. Effectively, the provisions of section 103 apply to cases where the competence of a Bill, or any provision of a Bill, have been referred to the Judicial Committee for decision (section 33) or where the Judicial Committee is considering a “devolution issue” as defined in Schedule 6.

***SECTION 104: Power to make provision consequential on legislation of, or scrutinised by, the Parliament***

This section enables Her Majesty or a Minister of the Crown by subordinate legislation, subject to procedure at Westminster, to make provision which is considered necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament or by various classes of subordinate legislation.

**General**

To be effective, an ASP may require consequential provision to be made to the law relating to reserved matters or the law elsewhere in the UK, such as, for example, to make cross-border provisions for prisoners. It may also be necessary to provide for the enforcement of provisions of an ASP in the rest of the UK where this may be necessary or desirable to maintain a coherent scheme of enforcement throughout the UK. An example might be legislation making the conditions of Scottish fishing licences enforceable as a matter of English law.

However, the legislative competence of the Parliament to make such consequential provision is extremely limited. It may be able to make certain consequential amendments of the law on reserved matters by virtue of paragraph 3 of Schedule 4 but this power is very limited and, in any event, it does not enable the Parliament to legislate otherwise than as a matter of Scots law. Many consequential provisions require to take effect in the law of England.

Similar problems also apply to subordinate legislation made under an ASP and certain other classes of subordinate legislation made under a Westminster Act, such as a statutory instrument made by Scottish Ministers under powers transferred under section 53 and which is subject to supervision by the Scottish Parliament.

Accordingly, this section enables the UK Government to make subordinate legislation to deal with the consequences of provision made by or under an Act of the Scottish Parliament or by such subordinate legislation.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	624
LR	2-Nov-98	96
LR	2-Nov-98	98
LR	2-Nov-98	109

## **Details of Provisions**

Subsection (1) provides that subordinate legislation may make any provision considered necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament or made by certain subordinate legislation under a Westminster Act as mentioned in subsection (2).

Further provision about the making of such subordinate legislation is to be found in sections 112 to 115 and Schedule 7. It may take the form of an Order in Council or an order made by a Minister of the Crown. It is subject to negative procedure at Westminster unless it modifies an Act, in which case it is subject to affirmative procedure. An example of its exercise is the Public Finance and Accountability (Scotland) Act 2000 (Transfer of NAO Staff etc.) Order 2000 ([S.I. 2000/935](#)).

Subsection (2) specifies the classes of subordinate legislation under a Westminster Act to which subsection (1) applies. They are subordinate legislation made under a Westminster Act by:

- (a) a member of the Scottish Executive. This could be in the exercise of powers transferred by section 53 or by an executive devolution order under section 63;
- (b) Scottish public authority with mixed functions or no reserved functions. These expressions are defined in section 126(1) and paragraphs 1 and 2 of Part III of Schedule 5;
- (c) any other person (other than a Minister of the Crown) if the function of making the legislation is exercisable within devolved competence. This would include Orders in Council made by Her Majesty within devolved competence.

Such subordinate legislation will come under the control of the Scottish Parliament - see the note on section 118.

SECTION 105 - Power to make provision consequential on this Act

## **Purpose and Effect**

This section enables Her Majesty or a Minister of the Crown to make subordinate legislation, subject to procedure at Westminster, modifying any pre-commencement enactment, prerogative instrument or other instrument or document as is considered necessary or expedient in consequence of the Scotland Act.

## **General**

Given the wide implications of devolution, it would be impractical for the present Act to make provision for every modification of a pre-commencement enactment, prerogative instrument or other instrument or document which may be necessary as a consequence of the Act. Some modifications are, however, made in sections 117-123 and in Schedule 8.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	244
LC	8-Oct-98	624
L3	9-Nov-98	598

## **Details of Provisions**

The section provides that subordinate legislation may such make modifications of any pre-commencement enactment, prerogative instrument or other instrument or document as are considered necessary or expedient in consequence of the Scotland Act.

For the definition of “pre-commencement enactment”, see section 53(3).

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7. It may take the form of an Order in Council or an order made by a Minister of the Crown. It is subject to the negative procedure at Westminster unless it modifies primary legislation, in which case it is subject to the affirmative procedure.

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

The Scotland Act 1998 (Consequential Modifications) (No. 1) Order 1999 ([S.I. 1999/1042](#));

The Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 ([S.I. 1999/1820](#));

The Scotland Act 1998 (Consequential Modifications) Order 2000 ([S.I. 2000/2040](#));

The Scotland Act 1998 (Consequential Modifications) Order 2001 ([S.I. 2001/1400](#)).

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

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

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 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](#)).

SECTION 107: Legislative power to remedy *ultra vires* acts

### **Purpose and Effect**

This section enables provision to be made by subordinate legislation to remedy a provision of an Act of the Scottish Parliament or an exercise of a function by a member of the Scottish Executive which is, or is suspected to be, outwith the competence of the Parliament/Executive. The power to make such subordinate legislation is exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order.

### **General**

This section forms part of the set of provisions which deal with the handling of *ultra vires* acts by the Scottish Parliament or the Scottish Executive; the power of the Judicial Committee of the Privy Council and the other courts in Scotland, England and Wales and Northern Ireland to deal with disputes about the *vires* of Acts of the Scottish Parliament; and actions of members of the Scottish Executive.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	592
LC	8-Oct-98	594
LR	28-Oct-98	1952
LR	2-Nov-98	96
L3	9-Nov-98	598

### **Details of Provisions**

Section 107 provides a means by which problems resulting from *ultra vires* provisions of Acts of the Scottish Parliament or actions of a member of the Scottish Executive may be remedied.

It allows the UK Government, by subordinate legislation to make such provision as is considered necessary or expedient in consequence of any Act of the Scottish Parliament (or provision thereof) which is not, or may not be, within the legislative competence

of the Parliament or any purported exercise by member of the Scottish Executive of a function which is, or is suspected to be, *ultra vires*.

The situations in which this power may be used would include a situation where, after judicial deliberation, it was determined that a provision of an Act of the Scottish Parliament, was *ultra vires*. This power would allow the ASP to be amended and enable provision to be made to remedy any consequential problems, for example, concerning rights purportedly accrued or liabilities purportedly incurred by virtue of the Act. Such provision could be given retrospective effect thus putting third parties in the position they thought they were in before the flaw was discovered. In that sense this power is complementary to the power given to the courts in section 102 to limit or suspend the effect of a determination of *ultra vires*.

However, a determination by the courts that a provision or action is *ultra vires* is not a prerequisite for the use of this power. It could be used to remedy a defect, or suspected defect, before judicial proceedings were commenced thereby avoiding the necessity for them.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

The only occasion where this power has been used was to repeal a provision in an ASP which was discovered to relate to a reserved matter during the 4 week period after its passing. Instead of referring it to the JCPC under section 33, it was agreed between the UK Government and the Executive that it should be repealed as soon as the ASP had received the Royal Assent - see The Scotland Act 1998 (Regulation of Care (Scotland) Act 2001) Order 2001 ([S.I. 2001/12478](#)).

SECTION 108: Agreed redistribution of functions exercisable by the Scottish Ministers etc.

### **Purpose and Effect**

This section enables Her Majesty, by Order in Council, subject to the agreement of both the Westminster and the Scottish Parliament, to provide for functions exercisable by a member of the Scottish Executive to be transferred to a Minister of the Crown. It also enables such functions to be made exercisable concurrently with a Minister of the Crown or subject to special requirements

### **General**

There are two main circumstances in which it is envisaged that an Order is likely to be made under this provision, namely where it is desired:

- (a) to re-transfer functions back to a Minister of the Crown which have been executively devolved to the Scottish Ministers by an order under section 63; and
- (b) to transfer functions of the Scottish Ministers to a Minister of the Crown as a consequence of an Order under section 30(2) adding a new reserved matter into Schedule 5.

The provision could also be used to enable UK Ministers to exercise certain functions on a UK-wide basis, for example, in relation to the collection of certain statistics.

Section 56 provided an alternative mechanism for UK Ministers to retain concurrent powers in devolved areas, but that mechanism cannot be used after the function in question has transferred to the Scottish Ministers. Most of the functions under section 53 transferred on 1 July 1999.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	631
LC	8-Oct-98	634
LR	2-Nov-98	112

### **Details of Provisions**

Subsection (1) provides for Her Majesty, by Order in Council, to provide for the transfer of functions exercisable by a member of the Scottish Executive to a Minister of the Crown, or for such functions to be exercisable by a member of the Scottish Executive concurrently with, or with the agreement of, or after consultation with a Minister of the Crown.

Subsection (2) provides that where such an Order transfers to a Minister of the Crown a function which is exercisable only with the agreement of, or after consultation with, the Scottish Ministers, the First Minister or the Lord Advocate, that requirement is disapplied unless the Order provides otherwise. Requirements for consultation or agreement with other persons are not affected.

Subsection (3) provides that where an Order provides for a function to be transferred to a Minister of the Crown or to be exercisable by a Minister of the Crown concurrently with a member of the Scottish Executive, it may provide for it to be exercisable with the agreement of, or after consultation with, another person.

Subsection (4) provides that the section does not apply to those retained functions of the Lord Advocate which were exercisable by him immediately before he ceased to be a Minister of the Crown. Retained functions are defined in section 52(6).

SECTION 109: Agreed redistribution of property and liabilities

### **Purpose and Effect**

This section provides for the transfer of property, rights or interests from the Scottish Ministers or the Lord Advocate to a Minister of the Crown or a government department. It is to be used primarily in connection with the transfer of functions from the Scottish Ministers, First Minister or Lord Advocate to the UK Government under section 108.

### **General**

The power is similar to that in sections 60 and 62 (which provide for transfers of property to the Scottish Ministers and Lord Advocate), except that it may only be exercised by Her Majesty in Council and is subject to annulment by either Parliament.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	624

SECTION 110: Scottish taxpayers for social security purposes

### **Purpose and Effect**

This section provides 2 order-making powers to enable the Secretary of State to take account of the implications of varied Scottish rates of income tax for social security, child support, pension and war pension purposes. They allow him, for those purposes,

to determine whether a person is or is not to be treated as a Scottish taxpayer, and to specify what shall be treated as the Scottish rate of tax in any year of assessment.

The intention of the provisions is to ensure that benefit decisions can be made promptly without uncertainty over the appropriate tax rate to apply, where tax is relevant to benefit entitlement. In the great majority of cases, the powers will have no effect on benefit entitlement. They will reduce administrative costs which would otherwise arise, and prevent inconvenience to claimants both in Scotland and in the rest of the UK.

## **General**

This section is necessary because of the provisions in Part IV of the Act which enable the Scottish Parliament to vary the basic rate of income tax in respect of Scottish taxpayers, and in some circumstances to do so after the start of the tax year. It ensures that the Parliament's exercise of its powers can be accommodated without disruption to the reserved social security, child support and pension systems.

The order-making powers are applicable for all reserved matters under Head F of Part II of Schedule 5, although it is expected that their main use will be in relation to social security benefits and child support.

Entitlement to many social security benefits, including the main income-related benefits of Jobseeker's Allowance, Income Support, Family Credit and Housing/Council Tax Benefit, is assessed on income net of tax and National Insurance contributions. Where the Scottish Parliament exercises its power to vary the basic rate of income tax, it is necessary to determine whether a benefit claimant should be treated as a Scottish taxpayer in order to pay the right amount of benefit. The criteria set out in section 75 to decide whether or not a person is a Scottish taxpayer are (like other tax matters) designed to apply over a full year. But in order to make a clear decision for benefit purposes, it is necessary to know whether a person is a Scottish taxpayer or not at the point of claim.

Section 75 provides, in certain circumstances, for changes in the Scottish rate of tax at short notice and after the start of the tax year. It would present operational difficulties for the social security system to reflect changes at very short notice, and could mean that large numbers of benefit claims decided before a tax change might need to be re-examined.

The section provides powers to put the benefit position beyond doubt in both these cases, by specifying who is regarded as a Scottish taxpayer for benefit purposes and what the relevant rate of tax should be.

## **Details of Provisions**

Subsection (1) provides an enabling power to allow the Secretary of State to treat individuals of any description specified in the order as - or as not - a Scottish taxpayer for the purpose of any reserved matter set out in Head F of Part II of Schedule 5 (social security, child support, pensions - including public service pensions - and war pensions). Its main purpose is to remove uncertainty and the risk of delay in the assessment process, and to preclude the need to ask all benefit claimants, including claimants in England, about connections in Scotland. It is intended to exercise the power so that for benefit and child support purposes a person's address at the time of assessment will normally be the determining factor in deciding whether or not the Scottish tax rate should apply. In the overwhelming majority of cases, this administrative easement will have no effect on the amount of benefit.

Subsection (2) provides an enabling power to allow the Secretary of State to specify what shall be treated as the Scottish rate of tax for the purposes of social security, child support and pensions. The intention is to remove uncertainty over the relevant rate of tax, particularly for claims assessed in any part of a year before the Parliament passes a tax resolution.

Subsection (3) provides that orders under this section can apply to individuals irrespective of whether they are more closely connected with Scotland or another part of the United Kingdom for the purposes of Part IV.

Subsection (4) defines “Scottish taxpayer” by reference to in Part IV.  
SECTION 111: Regulation of Tweed and Esk fisheries

### **Purpose and Effect**

This section provides for the making of an Order in Council for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Rivers Tweed and Esk - thus enabling continuation of whole river fisheries management, following the devolution of fisheries matters in Scotland.

### **General**

This section provides a means to ensure continuation of a coherent legislative framework for the two Border rivers, applying consistently on both sides of the border. This is considered necessary in order to ensure effective fisheries management for the river systems, including their tributaries.

Salmon and freshwater fisheries management on the Tweed is governed by the Tweed Fisheries Acts 1857-1969, which provide for a River Tweed Council, drawn from the Tweed Commissioners, with rules particular to the Tweed governing fishing and applicable throughout the whole Tweed river system, including the Tweed Box (an area of inshore sea at the mouth of the Tweed at Berwick). In addition, certain provisions of Scottish public legislation governing salmon and freshwater fisheries also apply throughout the Tweed, even in England, and English fisheries legislation is disapplied.

For the Border Esk, fisheries management is governed in accordance with English legislation and Scottish legislation is disapplied, except for one provision (section 21 of the Salmon and Freshwater Fisheries (Protection)(Scotland) Act 1951) which makes it an offence in Scots law to take salmon illegally from the Esk in Scotland. Management of the Esk fisheries is a function of the Environment Agency.

The Scottish Parliament is able to exercise jurisdiction over the matters covered by this section but only within Scotland: the Scottish Parliament is restricted by virtue of section 29(2)(a) from making laws which would form part of the law of England. An Order in Council made under the present section enables common provisions to be made for the length of the Tweed and Esk Fisheries and to perpetuate the single fisheries regime which existed for these rivers before devolution.

Fisheries management applies to all freshwater species, and also to salmon, migratory trout and eels, which are not solely freshwater fish.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	634
LC	8-Oct-98	640
LR	2-Nov-98	113
L3	9-Nov-98	545

## **Details**

Subsection (1) provides for provision to be made by Order in Council for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Border rivers (as defined in subsection (4)). This extends to fishing for all species commonly found in freshwater, including notably the two species of most commercial importance in these rivers (i.e. salmon and trout). It is intended that such an Order in Council would include provision to establish management structures and procedures for such bodies; to establish rules applying directly to fishing activity (e.g. permitted fishing gear, close seasons); to levy charges to recover the costs of fisheries management; to create offences and empower enforcement authorities for the river and its catchment area; and to regulate such activities as may impact on fishing (e.g. dams and offtakes).

Subsection (2) provides that an Order in Council under subsection (1) may exclude the application of section 53 in relation to any Border rivers function, and may confer power to make subordinate legislation. Section 53 would otherwise transfer to the Scottish Ministers any function of a Minister of the Crown so far as it is exercisable within devolved competence.

Subsection (3) provides that an Order in Council under subsection (1) may confer functions on a Minister of the Crown, the Scottish Ministers or a public body in relation to the Border rivers, provide for existing functions to be exercisable by some other person, and provide for functions to be exercisable concurrently or jointly with, with the agreement of, or after consultation with, some other person.

Subsection (4) contains definitions particular to this section. Definitions of the fish species rely on the Salmon and Freshwater Fisheries Act 1975. In that Act:

*Eels* includes elvers and the fry of eels.

*Freshwater fish* means any fish living in fresh water exclusive of salmon and trout and of any kinds of fish which migrate to and from tidal waters, and of eels.

*Salmon* means all fish of the salmon species and includes parts of salmon.

*Trout* means any fish of the salmon family commonly known as trout, including migratory trout and char, and also includes part of a trout.

This provides a comprehensive definition of fish species to be subject to management regulations made by Order in Council.

“The River Tweed” is defined by reference to section 39 of the Salmon and Freshwater Fisheries Act 1975, which in turn refers to the definition contained in the Tweed Fisheries (Amendment) Act 1859, as itself amended by any bye-laws amending that definition. Section II of the 1859 Act defines the Tweed to include “every river, brook or stream which flows into the said river, and also the mouth or entrance of the said river, as described and defined in the Act”. Section IV of that Act (as amended by a Byelaw dated 30 September 1863) made under the Salmon Fisheries (Scotland) Act 1863 defines the mouth or entrance of the Tweed (commonly known as the Tweed Box) to include an area extending 5 miles out to sea and from the Scottish border to a point 7 miles south of the Queen Elizabeth pier in Berwick.

“The River Esk” is not otherwise defined in statute, and is therefore defined as being the river which, for part of its length, constitutes the border between England and Scotland; including its tributary streams (including the River Sark and its tributary streams) and such waters on the landward side of its estuary limits as are determined by an Order under subsection (1), together with its banks.

Subsection (5) provides that an Order under subsection (1) may modify the definition of the rivers Tweed and Esk contained in subsection (4) above.

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

This power has been exercised in making the Scotland Act 1998 (Border Rivers) Order 1999 ([S.I. 1999/1746](#)).