

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

COMMENTARY

Part VI: Supplementary

SECTION 112: Subordinate legislation: general

General

The Scotland Act 1998 contains nearly 40 separate powers to make subordinate legislation. These powers vary widely in scope and importance, with some intended for single use and others forming part of the mechanism for the long-term management of the devolution arrangements. The powers are to be exercised by the UK Government, the Scottish Ministers or by Her Majesty in Council, and are generally subject to parliamentary scrutiny in the United Kingdom Parliament, the Scottish Parliament or both.

Sections 112 to 115 and Schedule 7 draw together the provisions relating to the extent of these powers, to the procedure required in the Westminster and/or Scottish Parliaments, and to the person by whom each power is exercisable. This approach avoids the need to specify these matters in each section, thus simplifying the overall structure of the Act.

Section 113, and 114 contains standard provisions commonly accorded to powers to make subordinate legislation, such as an ability to make supplementary provision, to delegate functions and to charge sums on the Consolidated Fund. In certain cases, particularly where the UK Government is empowered to take action as a result of action of the Scottish Parliament or Executive, subordinate legislation may make provision having retrospective effect.

Each of the powers conferred elsewhere in the Act require to be read together with these sections.

The table at the end of this note shows the effect of sections 112 to 115 and Schedule 7 for each power.

Details of Provisions

Subsection (1) provides that where no other provision is made as to the person by whom a power is exercisable, then it is to be exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order. Subsection (3) provides that such powers are to be referred to as "open powers".

Such powers are generally expressed in the form "Subordinate legislation may ..." and are to be found in sections:

56(2)	concurrent exercise of functions;
60	transfer of property etc. to the Scottish Ministers;

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62	transfer of property etc. to the Lord Advocate;
60	transfer of property etc. in connection with functions transferred under section 63;
107	power to remedy <i>ultra vires</i> acts;
104	power to make provision consequential on Acts of the Scottish Parliament;
105	power to make provision consequential on the Scotland Act;
106	power to adapt certain Ministerial and other functions;
116(9)	determination of disputes over compensation relating to transfer of property;
115(3)	power to make transitory and transitional provision;
124(1)	modification of sections 94 and 117-122;
129(1)	transitional provisions etc.

It is also found in paragraph 2 of Schedule 2 relating to the transfer of property etc. to the Scottish Parliamentary Corporate Body.

These open powers are similar to the power in section 1 of the European Communities Act 1972, which may be exercised by either a Minister of the Crown by order or by Her Majesty by Order in Council.

Powers to make subordinate legislation are normally conferred on either a Minister of the Crown (or the Treasury) by order, or on Her Majesty by Order in Council. The Act contains examples where powers are allocated in this way. For example, the powers in section 103 in connection with the Judicial Committee of the Privy Council are to be exercised by Her Majesty by Order in Council. Powers connected with the finance provisions and the tax-varying powers are generally exercisable by the Treasury. Powers which are subject only to proceedings in the Scottish Parliament are exercisable by Her Majesty by Order in Council (except section 18(5)). Powers in relation to the conduct of elections are exercisable by the Secretary of State (section 12).

This section provides a novel power for subordinate legislation to be made either by a Minister of the Crown by order or by Her Majesty by Order in Council where there is no other provision in the Act as to the person by whom the power is exercisable. This is known as an “open power”. This reflects in part the wide scope of some of the powers and the fact that different uses of any power may have very different levels of importance. For example, a minor consequential provision could be made by order made by a Minister of the Crown under section 105 whereas it might be more desirable for a significant amendment of primary legislation to be made by Order in Council under that section. The section also enables affirmative resolution procedure to be used in the Parliament or Parliaments concerned in the case of the exercise of an open power, unless the Act provides expressly that subordinate legislation under a particular provision must be an affirmative instrument, and permits a statutory instrument under an open power to be combined with another order or Order in Council as appropriate. These provisions are similar to those in section 2(2) of and paragraph 2(2) of Schedule 2 to the European Communities Act 1972, which permits Community rights and obligations to be incorporated in UK law by Order in Council or in regulations made by a designated Minister, with the option of using affirmative or negative resolution procedure.

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Any statutory instrument made in exercise of an open power is only subject to procedure in the Westminster Parliament.

Subsection (2) provides for an exception from the general rule about the exercise of open powers by requiring that the power under section 129(1) (transitory or transitional provision in connection with the coming into force of the Scotland Act) is to be exercisable only by Her Majesty by Order in Council where it is used to provide for appropriation of sums forming part of the Scottish Consolidated Fund or for appropriations in aid. Also of relevance in these circumstances is paragraph 4 of Schedule 7, which requires such orders to be subject to a different type of parliamentary procedure (affirmative rather than negative). Subsection (3) also provides that references to an open power include section 129 when used in this way, even though specific provision has been made as to the person who may exercise it.

The power in section 129(1) was exercised in this way in making the Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Order 1999 ([S.I. 1999/674](#)) which provided for appropriations and appropriations in aid for the financial year 1999-2000, for which also see [S.S.I. 1999/175](#) and [2000/69](#)).

Subsection (4) provides that an Order in Council under an open power may revoke, amend or re-enact an order, as well as an Order in Council, already made under that power (and vice versa). This complements section 14 of the Interpretation Act 1978, which provides for the revocation etc. of orders. This provision is necessary to ensure that the exercise of a power is not constrained by any earlier exercise of it.

Subsection (5) provides that any power to make subordinate legislation, in relation to its exercise by a Minister of the Crown or a member of the Scottish Executive, is to be exercisable by statutory instrument. This attracts provisions of enactments such as the Statutory Instruments Act 1946, which make general provision about the making of subordinate legislation.