

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

POWERS TO MAKE SUBORDINATE LEGISLATION

This table shows:

The section under which subordinate legislation may be made, along with a brief description of the power.

The person by whom the subordinate legislation may be made, i.e.

SofS = the Secretary of State by order;

Treas. = the Treasury by order;

SM = the Scottish Ministers by order;

HM = Her Majesty by Order in Council; or

Open = either a Minister of the Crown by order or Her Majesty by Order in Council.

The procedure which applies (if any) in the Westminster and Scottish Parliaments:

Type = Type of procedure, as set out in paragraph 2 of Schedule 7 (subject to the provisions of paragraphs 3 and 4 and Schedule 7 providing for alternative procedure for certain special cases.

A = order to be laid in draft and approved by Parliament;

N = order subject to annulment in pursuance of a resolution of Parliament; or

N(A) = order made under open powers, or an Order under sections 89 or 90, which may be laid in draft and approved by Parliament or subject to annulment in pursuance of a resolution of Parliament.

“Parliament” is to be read as referring to both Houses of Parliament, the House of Commons, or the Scottish Parliament as appropriate.

Whether orders may make modifications of the Scotland Act (other than Schedules 4 and 5) or may make provision having retrospective effect.

All powers to make subordinate legislation are exercisable by statutory instrument; may make different provision for different purposes; may be exercised in relation to a particular case or class of case; may make supplementary and transitional provision; may make provision for delegation of functions; and may make provision for sums to be payable out of, or charged on, the Scottish Consolidated Fund. Subordinate legislation made by a Minister of the Crown or by Her Majesty in Council may make provision for the payment of sums out of money provided by Parliament or for sums to be charged on and paid out of the Consolidated Fund. Most may make modifications of enactments, prerogative instruments etc., other than the Scotland Act and subordinate legislation under it.

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| Power | | Procedure | | | | | |
|----------------|---|------------------|-------------|------------------|--------------------|---------------------|----------------------|
| Section | Description | Made by | Type | W'minster | Scot. Parl. | Mod Scot Act | Retrospective |
| 2(1) | Specification of date of first ordinary general election | SofS | C | A | | | |
| 12(1) | Conduct of elections | SofS | C | A | | | |
| 12(6) | Designation of regional returning officers | SofS | | | | | |
| 15 | Disqualification of office holders from membership of Parliament | HM | D | | A | | |
| 18(5) | Alteration of maximum amount of caution | SM | J | | N | | |
| 30(2) | Modification of Schedules 4 & 5 | HM | A | A | A | See 30(2) and (4) | Yes |
| 30(3) | Functions exercisable in or as regards Scotland | HM | A | A | A | See 30(2) and (4) | Yes |
| 35 | Prohibition of submission of Bill for Royal Assent in certain circumstances | SofS | I | N | | | |
| 38 | Form etc. of Letters Patent and royal proclamations | HM | J | | N | | |
| 56(2) | Shared powers | Open | G | N(a) | | | |
| 58(1) | Prohibition of action incompatible with international obligations | SofS | I | N ¹ | | | |
| 58(2) | Requiring action to give effect to international obligations | SofS | I | N | | | |
| 58(4) | Revocation of subordinate legislation in certain circumstances | SofS | I | N | | | Yes |
| 60 | Transfer of property etc. to the Scottish Ministers | Open | G | N(a) | | | |
| 62 | Transfer of property etc. to the Lord Advocate | Open | G | N(a) | | | |
| 63 | Transfer of functions to the Scottish Ministers | HM | A | A | A | | |
| 64(5) | designation of receipts payable into Scot Consolidated Fund | Treas. | K | N (HofC) | | | |

¹ Requirement does not apply to an order merely revoking an order under this subsection. See note to Table in Schedule 7.

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| Power | | Procedure | | | | | | |
|----------------|---|------------------|----------------|-----------|----------------|---------------|-----------------|----------------------|
| Section | Description | Made by | Type | W' | minster | Scot. | Mod | Retrospective |
| | | | | | | Parlt. | Scot Act | |
| 67 | Increase of maximum sum which may be lent to Scottish Ministers | SofS | E | A | (HofC) | | | |
| 71(6) | Registers of Scotland borrowing | SofS | K | N | (HofC) | | | |
| 79(1) | Provision in consequence of tax-varying power | Treas. | E | A | (HofC) | | See 79(1) | See 79(4) |
| 79(2) | Exclusion of tax-varying power in respect of particular enactments | Treas. | E | A | (HofC) | | See 79(1) | See 79(4) |
| 79(3) | Effect of tax-varying resolution on operation of PAYE | Treas. | K ² | N | (HofC) | | | See 79(4) |
| 88 | Cross-border public authorities: initial status | HM | I | N | | | | |
| 89 | Adaptation of cross-border public authorities | HM | F | N(a) | N(a) | | Yes | |
| 90 | Transfer of property etc. of cross-border public authorities | HM | F | N(a) | N(a) | | | |
| 93 | Agency arrangements | HM | H | N | N | | | |
| 97 | Assistance for opposition parties | HM | A | A | A | | | |
| 103(3)a | Conferral of powers on Judicial Committee of Privy Council | HM | I | N | | | | |
| 103(3)b | Application of Judicial Committee Act 1833 | HM | I | N | | | | |
| 103(3)c | Making rules of procedure for JCPC | HM | | | | | | |
| 104 | Provision consequential on Acts of the Scottish Parliament | Open | G | N(a) | | | Yes | Yes |
| 105 | Provision consequential on Scotland Act | Open | G | N(a) | | | | |
| 106 | Adaptation of functions | Open | G | N(a) | | | | |
| 107 | Remedying <i>ultra vires</i> acts | Open | G | N(a) | | | Yes | Yes |
| 108 | Agreed re-distribution of functions | HM | A | A | A | | Yes | |
| 109 | Agreed redistribution of property & liabilities | HM | H | N | N | | | |
| 110(1) | Treatment of individuals as Scottish taxpayers for social security purposes | SofS | C | A | | | | |

2 See note to Table in Schedule 7.

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| Power | | Procedure | | | | | |
|-----------------------|--|------------------|----------------|------------------|--------------------|---------------------|----------------------|
| Section | Description | Made by | Type | W'minster | Scot. Parl. | Mod Scot Act | Retrospective |
| 110(2) | Determination of basic rate of tax for social security purposes | SofS | I | N | | | |
| 111 | Regulation of Tweed and Esk fisheries | HM | A | A | A | | |
| 116(9) | Determination of disputes over compensation relating to transfer of property | Open | G | N(a) | | | |
| 124(1) | Modification of sections 94 and 117 to 122 | Open | G | N(a) | | | |
| 126(2) | Determination of boundary of Scottish waters | HM | B | A | | | |
| 126(8) | Variation of definition of Scottish Administration | HM | H | N | N | | |
| 129(1) | Transitory and transitional provisions | Open | G ³ | N(a) | | Yes | |
| 130(1) | Commencement | SofS | | | | | |
| Schd.2 Para. 2 | Transfer of property etc. to SPCB | Open | G | N(a) | | | |
| Schd. 2 Para. 7 | Crown status for SPCB | HM | H | N | N | | |

SECTION 113: Subordinate legislation: scope of powers

Purpose and Effect

This section requires subordinate legislation made under powers provided by the Act to be made by statutory instrument, and permits such subordinate legislation to:

- make different provision for different purposes, or for particular cases or classes of case;
- include supplementary and transitional provision;
- provide for delegation of functions;
- in some cases modify other enactments, prerogative instruments or other instruments or documents;
- provide for payment of sums out of, or for sums to be charged on, the Consolidated Fund or Scottish Consolidated Fund.

It also limits the punishment which may be imposed for any criminal offence created in subordinate legislation under the Act.

³ See also paragraph 4 of Schedule 7.

¹ Requirement does not apply to an order merely revoking an order under this subsection. See note to Table in Schedule 7.

² See note to Table in Schedule 7.

³ See also paragraph 4 of Schedule 7.

General

See note to section 112.

Details of provisions

Subsection (1) effectively provides that the rest of the provisions of the section apply to any power under the Act to make subordinate legislation which is exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order (whether the power is expressed to be exercisable by these persons or it is an open power, in which case section 112(1) applies).

The only power to make subordinate legislation under the Act which is thereby excluded is the power under section 18(5) which is exercisable by the Scottish Ministers, and for which none of the remainder of this section would be relevant.

Subsection (2) permits subordinate legislation to make different provision for different purposes.

Subsection (3) provides that, as well as being exercised in relation to all cases to which it extends, a power may be exercised in relation to any particular case or class of case, or to all cases subject to exceptions. This power is likely to be of relevance to the power in section 110 to treat individuals as being, or as not being, Scottish taxpayers.

Subsection (4) provides that subordinate legislation may make such supplementary, incidental or consequential provision and such transitory, transitional or saving provision as the person making it considers necessary or expedient.

Subsections (5) and (6) provide that subordinate legislation may modify any enactment or prerogative instrument or other instrument or document, provided that the instrument is subject to one of the forms of parliamentary procedure provided in Schedule 7. This therefore excludes powers such as that in section 103(3)(c) to make rules of procedure for the Judicial Committee of the Privy Council, which are not subject to parliamentary procedure.

Subsection (6) provides that this power does not extend to modifying the Scotland Act itself or subordinate legislation made under it. Section 114, however, permits certain subordinate legislation to make such modifications.

"Modify" is defined by section 126(1) as including amendment and repeal. Where this power is used to modify primary legislation, the special provisions in paragraph 3 of Schedule 7 affect the parliamentary procedure to which the instrument is to be subject.

Section 30(4) makes its own provision about modification of enactments etc. including the Scotland Act and subordinate legislation under it.

Subsection (7) permits subordinate legislation under the Act to make provision for the delegation of functions. This makes clear that the rule against sub-delegation does not apply.

Subsection (8) provides that subordinate legislation under the Act may make provision for sums to be payable out of, or charged on, the Scottish Consolidated Fund.

Subsection (9) provides that subordinate legislation under the Act may provide for sums to be paid out of money provided by Parliament or to be charged on and paid out of the Consolidated Fund.

Subsection (10) restricts the punishment which can be imposed for criminal offences created in subordinate legislation made under the Act. The power to create offences does not need to be expressly conferred, but this provision limits its extent. The approach is similar to that in the European Communities Act 1972.

Subsection (11) ensures that powers to make subordinate legislation under the Act are not exclusive, i.e. the fact that a particular thing can be done under one power does not mean that the same thing cannot be done under another power.

SECTION 114: Subordinate legislation: particular provisions

General

See note to section 112

Details of provisions

Subsection (1) permits subordinate legislation made under certain provisions of the Act to modify the Scotland Act (except Schedules 4 and 5) and subordinate legislation made under the Act. The relevant provisions are:

| | |
|----------------|--|
| section 89 | adaptation of cross-border public authorities; |
| section 104 | power to make provision consequential on Acts of the Scottish Parliament etc.; |
| section 107 | power to remedy <i>ultra vires</i> acts; |
| section 108 | agreed re-distribution of transferred functions; |
| section 129(1) | power to make transitory and transitional provision. |

Section 30(2) and (4) permit Orders in Council under section 30 to make modifications of Schedules 4 and 5 of the Act, and of other provisions in or under the Act.

Subsection (2) provides that the reference in subsection (1) to a power to make subordinate legislation modifying the Scotland Act and subordinate legislation under that Act includes that power as extended by section 113. For example, section 113(4) extends powers so that they include power to make supplementary, consequential provision or transitional provisions, and it may be that modifications to the Scotland Act are necessitated by such supplementary etc. provisions rather than by the main power itself.

Subsection (3) permits subordinate legislation made under certain provisions of the Act to have retrospective effect. The relevant provisions are:

| | |
|---------------|--|
| section 30 | power to modify Schedule 5 (reserved matters); |
| section 58(4) | power to revoke certain subordinate legislation; |
| section 104 | power to make provision consequential on Acts of the Scottish Parliament etc.; |
| section 107 | power to remedy <i>ultra vires</i> acts. |

SECTION 115: Subordinate legislation: procedure

Purpose and Effect

This section makes provision as to the procedure to which subordinate legislation made under the Scotland Act is to be subject in the UK and/or Scottish Parliaments.

General

Most orders under the Act are subject to some form of procedure in the Westminster Parliament only. Others, such as those relating to the disqualification from membership of the Scottish Parliament, and the procedures for Royal Assent to Acts of the Scottish Parliament, are subject to procedure in the Scottish Parliament only. Some orders are subject to procedure in both the Westminster and Scottish Parliaments. This is used where both Parliaments have an interest, for example in the modification of the list of reserved matters, the executive devolution of functions to the Scottish Ministers and in the adaptation of cross-border public authorities.

Some orders are expressly made subject to affirmative resolution procedure, requiring the Parliament(s) to take an active part in the making of the order. This is the case for orders which are considered to be most important, such as the provisions relating to elections, modification of the list of reserved matters; the adaptation of Ministerial functions (e.g. in relation to fisheries), and the determination of the boundary of Scottish waters. With the exception of minor orders such as orders appointing regional returning officers (section 12(5)) which require no Parliamentary procedure, all other orders are subject to negative resolution procedure and can be annulled in pursuance of a resolution of Parliament, unless for the reasons explained in the following paragraphs they are dealt with as an affirmative instrument.

Details of provisions

Subsection (1) introduces Schedule 7, which determines the Parliamentary procedure to which subordinate legislation under the Act is to be subject. See the note on Schedule 7 for further information.

Subsections (2) and (3) deal with the transitional circumstances where, by virtue of Schedule 7, a power to make subordinate legislation is subject to procedure in the Scottish Parliament but the power needs to be exercised before the Scottish Parliament itself is in existence. For example, the power in section 15 to specify office-holders who are disqualified from membership of the Scottish Parliament is to be subject to Type D procedure (laid in draft and approved by the Scottish Parliament), but a list of office-holders is clearly required for the first elections to the Parliament. Subsections (2) and (3) provide that such powers may nevertheless be brought into force at any time after the passing of the Scotland Act (although this may be before the Parliament is in existence) and that subordinate legislation under the power may be made subject to a different type of procedure for the period until the principal appointed day (1 July 1999), with this procedure being specified by subordinate legislation under section 129(1).

This power was exercised in making the Scotland Act 1998 (Transitory and Transitional Provisions) (Subordinate Legislation under the Act) Order 1998 ([S.I. 1998/3216](#)

), which adjusted the procedures for orders under sections 15, 38 and 97 and paragraphs 2 and 7 of Schedule 2. In the case of orders under section 15, which were mentioned above, the first order was made subject to Type B procedure (laid in draft and approved by both Houses of the UK Parliament).

As from the principal appointed day (1st July 1999), the parliamentary procedure for all orders is as set out in Schedule 7, and the powers in subsections (2) and (3) are effectively spent.

SECTION 116: Transfer of property: supplementary

Purpose and Effect

This section makes further provision in relation to the transfer of property under sections 60, 62, 90 and 109 and paragraph 2 of Schedule 2 dealing with property held by the Scottish Parliamentary Corporate Body (SPCB).

General

This section is linked to the series of provisions dealing with the transfer of property and liabilities to the Scottish Ministers and the Lord Advocate and to the SPCB. Sections 60 and 62 enable subordinate legislation to provide for the transfer of certain property and liabilities to the Scottish Ministers in connection with the exercise of their devolved functions and to the Lord Advocate in connection with the exercise of his retained functions. Section 109 provides for the reverse mechanism to that in sections 60 and 62, allowing property to be transferred from the Scottish Ministers and Lord Advocate to UK Ministers or government departments. Section 90 provides for the transfer of property of cross-border public authorities and paragraph 2 of Schedule 2 provides for the transfer of property to the SPCB.

Details of Provisions

Subsection (1) provides that this section applies in relation to subordinate legislation transferring property and liabilities under sections 60 (Transfers to the Scottish Ministers), 62 (Transfers to the Lord Advocate), 90 (power to transfer property of cross-border public authorities), 109 (agreed redistribution of property and liabilities) and paragraph 2 of Schedule 2 which provides for the transfer of property to the SPCB.

Subsection (2) provides that any subordinate legislation under those provisions may in particular:

provide for the creation of rights or interests, or the imposition of liabilities or conditions in relation to property transferred, or rights and interests acquired under the legislation;

provide for any property, liabilities and conditions to be determined by virtue of such legislation, rather than being specified in it; and

make provision (other than provision imposing a charge to tax) as to the tax treatment of anything done by or under such legislation. An example of this would be exemption from stamp duty, in respect of the transfers of the property of cross-border public authorities.

Subsection (3) provides that the power under subsection (2)(c) to make provision as to the tax treatment of a transfer may be exercised only with the agreement of the Treasury.

Subsection (4) provides that subordinate legislation to which this section applies has effect in relation to property or liabilities to which it applies despite any provision which would otherwise prevent, penalise or restrict the transfer of the property or liabilities.

Subsection (5) provides that a right of pre-emption, right of irritancy, right of return or other similar right shall not operate or become exercisable as a result of any transfer under subordinate legislation to which this section applies.

Subsection (6) provides that the rights in subsection (5) shall have effect in the case of any transfer under subordinate legislation to which this section applies as if the transferee were the same person in law as the transferor and as if no transfer of property had taken place.

Subsection (7) provides for just compensation to be paid to any person in respect of a right which, apart from subsection (5) would have operated in favour of that person or be exercisable by him, but which in consequence of the operation of subsection (5) cannot subsequently operate in his favour or be exercisable by him.

Subsection (8) provides that any compensation payable under subsection (7) shall be paid by the transferor, transferee or both.

Subsection (9) provides that subordinate legislation under this section can provide for the determination of any disputes as to whether and to whom or by whom such compensation is to be paid and how much that compensation should be.

This power has been exercised up to September 2001 in article 12(2) of
[S.I. 1999/1104](#)
; article 6(2) of
[S.I. 1999/1105](#)
; and article 4(2) of
[S.I. 1999/1106](#)

Subsection (10) provides that subsections (4) to (9) apply in relation to the creation of rights or interests or the doing of anything else in relation to property in the same way as they apply to transfers of property.

Subsection (11) provides that a certificate issued by the Secretary of State that any property or liability has, or has not, been transferred by virtue of subordinate legislation under various powers is to be taken as conclusive evidence of the transfer (or lack thereof).

Subsection (12) makes similar provision to subsection (11) in respect of transfers under sections 90 and 109. In these cases the certificate is to be issued jointly by the Secretary of State and the Scottish Ministers.

Subsection (13) defines “right of return” as any right under a provision for the return or reversion of property in specified circumstances.

SECTION 117: Ministers of the Crown

Purpose and Effect

This section modifies references to a Minister of the Crown in any pre-commencement enactment and in other instruments or other documents to read as, or to include, references to the Scottish Ministers so far as may be necessary for the purpose of, or in consequence of, the exercise of a function within devolved competence by a member of the Scottish Executive.

General

This section forms part of a set of sections which are concerned with making general modifications to pre-commencement enactments following devolution. The section supplements section 53 which makes provision for the transfer of ministerial functions to the Scottish Ministers.

Parliamentary Consideration

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

Details of Provisions

The section provides that references to a Minister of the Crown in any pre-commencement enactment or prerogative instrument, or other instrument or document should be read as being or including references to the Scottish Ministers so far as may be necessary for the purpose of or in consequence of the exercise of a function within devolved competence by a member of the Scottish Executive.

“Pre-commencement enactment” is defined in section 53(3).

This section has also been applied to those functions transferred to the Scottish Ministers by order under section 63.

SECTION 118: Subordinate instruments

Purpose and Effect

This section modifies references in any pre-commencement enactment to the procedure in the Westminster Parliament to which certain subordinate legislation is subject so that it is subject to procedures in the Scottish Parliament rather than the Westminster Parliament.

It applies to subordinate legislation made, confirmed or approved by a member of the Scottish Executive (or certain other persons) within devolved competence. It also applies to subordinate legislation made by a Scottish public authority with mixed functions or no reserved functions (whether or not within devolved competence) or by certain other persons within devolved competence, such as Her Majesty by Order in Council.

General

This section forms part of a set of sections concerned with modifying pre-commencement enactments following devolution.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR | 12-May-98 | 244 |
| LR | 2-Nov-98 | 11 |

Details of Provisions

Subsection (1) provides that subsection (2) applies in relation to the exercise within devolved competence by a member of the Scottish Executive of a function to make, confirm or approve subordinate legislation. In other words, it applies to powers to make subordinate legislation which have transferred to the Scottish Ministers under section 53.

Subsection (2) states that, if any pre-commencement enactment makes provision for a statutory instrument or a draft of an instrument to be laid before either or both Houses of Parliament or for the annulment or approval by resolution of such an instrument, then, in relation to subordinate legislation made, confirmed or approved by a member of the Scottish Executive within devolved competence, any references to either or both Houses of Parliament shall instead be a reference to the Scottish Parliament.

Thus where a function of making regulations has transferred to the Scottish Ministers under section 53, and those regulations would previously have been subject to annulment in the UK Parliament, regulations made by the Scottish Ministers would be subject to annulment in the Scottish Parliament.

Subsection (3) makes similar provision in relation to functions of making, confirming or approving subordinate legislation exercisable by a Scottish public authority with mixed functions or no reserved functions.

A Scottish public authority with mixed functions or no reserved functions is defined in section 126(1) and paragraphs 1 and 2 of Part III of Schedule 5 (e.g. local authorities or the Registrar General for Births, Deaths and Marriages for Scotland).

Unlike subsections (2) and (4), this is not restricted to the exercise of functions within devolved competence so, for example, regulations made by the Registrar General which relate to a reserved matter such as abortion will be subject to procedure in the Scottish Parliament.

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Subsection (4) makes similar provision to subsection (2) in relation to functions of making, confirming or approving subordinate legislation exercisable by a person other than a Minister of the Crown or those persons dealt within subsections (2) and (3) within devolved competence e.g. Her Majesty in Council or the Privy Council.

Subsection (5) ensures that if a pre-commencement enactment applies the Statutory Instruments Act 1946 to statutory instruments made by a person other than a Minister of the Crown as if they were made by a Minister of the Crown then the 1946 Act will apply in cases to which subsection (3) or (4) applies as if the subordinate legislation were made by Scottish Ministers.

Where the subordinate legislation which is referred to in this section is made by statutory instrument, the Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999 (

[S.I. 1999/1096](#)

) includes them in the definition of Scottish Statutory Instrument, disapplies the Statutory Instruments Act 1946 to S.S.I.s and makes its own provision. The Standing Orders of the Parliament make provision for the way in which the Parliament and its committees exercise these parliamentary procedures in relation to S.S.I.s and scrutinise them.

SECTION 119: Consolidated Fund, etc.

Purpose and Effect

This section modifies references to the UK Consolidated Fund or the National Loans Fund in any pre-commencement enactment to ensure that, in relation to Scottish functions as defined in the section, sums are paid or issued out of, and paid into the Scottish Consolidated Fund rather than the UK Consolidated Fund or the National Loans Fund.

General

This section is one of three dealing with the Scottish Consolidated Fund. Section 64 establishes the Fund, provides for sums to be paid into it and, subject to provision made by the Scottish Parliament, for disposal of, or accounting for, such sums. Section 65 deals with the circumstances in which sums may be paid out of the Fund, and the purposes for which such sums may be applied.

Section 29(2)(b) and paragraph 5(a) of Schedule 4 protect section 119(3) in relation to judicial salaries from amendment by the Scottish Parliament.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR | 12-May-98 | 197 |
| CR | 12-May-98 | 254 |
| CR | 19-May-98 | 764 |
| LR | 2-Nov-98 | 11 |

Details of Provisions

Subsection (1) defines the “Scottish functions” in relation to which the modifications apply as (a) functions of the Scottish Ministers, the First Minister or the Lord Advocate which are exercisable within devolved competence and (b) functions of any Scottish public authority with mixed functions or no reserved functions.

A Scottish public authority with mixed functions or no reserved functions is defined in section 126(1) and paragraphs 1 and 2 of Part III of Schedule 5 (e.g. local authorities or the Registrar General for Births, Deaths and Marriages for Scotland).

Subsection (2) provides that, subject to subsections (3) and (5), a provision of a pre-commencement enactment which requires or authorises the payment of any sum out of the Consolidated Fund or money provided by Parliament, or requires or authorises the payment of any sum into the Consolidated Fund, shall cease to have effect.

Subsection (3) states that a provision of a pre-commencement enactment which (a) charges any sum on the Consolidated Fund, (b) requires the payment of any sum out of the Consolidated Fund without further appropriation, or (c) requires or authorises the payment of any sum into the Consolidated Fund by a person other than a Minister of the Crown shall have effect in relation to Scottish functions, as if it provided for the sum to be charged on the Scottish Consolidated Fund, or required it to be paid out of that Fund without further approval or paid to that Fund as the case may be.

Subsection (4) restricts the application of subsections (2) and (3) in relation to section 2(3) of the European Communities Act 1972. It provides that section 107 of the Act shall not apply to the words in section 2(3) of the 1972 Act from the beginning of that subsection to “such Community obligation”.

It is necessary to ensure that section 119 does not apply to the first part of section 2(3) of the 1972 Act, down to the words “such Community obligation” because that part relates to charges required to meet payments to the European institutions and payments in respect of contributions or loans to the European Investment Bank. It is not the intention that such charges should be capable of being met out of the Scottish Consolidated Fund.

Subsection (5) states that a provision of a pre-commencement enactment which authorises any sums to be applied as money provided by Parliament instead of being paid into the Consolidated Fund, shall apply to any Scottish functions as if it authorised those sums to be applied as if they had been paid out of the Scottish Consolidated Fund (in accordance with the rules under section 65(1)(c)) instead of being paid into that Fund.

Subsections (6) and (7) apply where a power to lend money is exercisable by the Scottish Ministers under a pre-commencement enactment, and for the purpose or as a result of the exercise of the power, sums would require to be issued by the Treasury out of the National Loans Fund or be paid into that Fund. Subsection (7) provides that those sums shall instead be paid out of the Scottish Consolidated Fund without further approval, or be paid into that Fund.

SECTION 120: Accounts and audit

Purpose and Effect

This section modifies certain references to the UK Comptroller and Auditor General in any pre-commencement enactment, in relation to Scottish functions (as defined in section 119) to refer to the Auditor General for Scotland.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR | 12-May-98 | 197 |
| CR | 12-May-98 | 254 |
| CR | 19-May-98 | 764 |
| LR | 2-Nov-98 | 11 |

Details of Provisions

This section states that a provision of a pre-commencement enactment which requires accounts to be examined, certified or reported on by, or to be open to inspection of the Comptroller and Auditor General, or requires him to have access to other documents for such examinations shall have effect in relation to “Scottish functions” (as defined in section 119(1)) as if the references to the Comptroller and Auditor General were to the Auditor General for Scotland. This is necessary to ensure continued arrangements for independent audit of public expenditure relating to Scottish functions.

SECTION 121: Requirements to lay reports etc. before Parliament

Purpose and Effect

This section modifies any provision in a pre-commencement enactment which provides for any report to be laid before the Westminster Parliament or either House of that Parliament in the case where the report concerns Scottish functions (as defined in section 119). It makes provision to ensure that these reports are laid before the Scottish Parliament instead of or as well as the Houses of Parliament.

General

A number of pre-commencement enactments make provision for reports to be laid before the House of Commons, the House of Lords, or both. This section ensures that such reports, where they concern Scottish functions, are to be laid before the Scottish Parliament.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC | 8-Oct-98 | 645 |

Details of Provisions

Subsection (1) states that this section applies where a “pre-commencement enactment” makes provision for a report which concerns “Scottish functions” to be laid before one or both Houses of Parliament.

“Pre-commencement enactment” is defined in section 53(3) and “Scottish functions” is defined in section 119(1).

Subsection (2) requires the report to be laid instead before the Scottish Parliament if it concerns only Scottish functions.

Subsection (3) requires reports, in other cases, to be laid before the Scottish Parliament and one or both Houses of Parliament.

Subsection (4) provides a definition of the terms “report” and “Scottish functions”.

See also the Scotland Act 1998 (Transitory and Transitional Provisions)(Laying of Reports) Order 1999 ([S.I. 1999/1594](#)).

SECTION 122: Crown land

Purpose and Effect

This section modifies references to a Minister of the Crown or a government department in

any provision about the application of any pre-commencement enactment to Crown land.

General

This section forms part of a set of sections dealing with property matters. Sections 59 and 61 make provision for the holding of property and liabilities by the Scottish Ministers and the Lord Advocate. Sections 60 and 62 enable subordinate legislation to provide for the transfer of certain property and liabilities to the Scottish Ministers in connection with the exercise of their devolved functions and to the Lord Advocate in connection with the exercise of his retained functions. Section 123 extends the exemption from payment of stamp duty to the Scottish Ministers, the Lord Advocate and the Scottish Parliamentary Composite Body.

Details of Provisions

Subsection (1) provides that any references to a Minister of the Crown or government department in any provision about the application of any pre-commencement enactment to Crown land should be read as including the Scottish Ministers and the Lord Advocate.

It also provides that references in such provisions to a Minister of the Crown or government department having the management of the land includes any member of the Scottish Executive having the management of the land. This ensures that provisions in existing enactments applying to Crown land also apply in relation to land belonging to or being managed by members of the Scottish Executive.

Subsection (2) defines “Crown land” as having the meaning given by section 242 of the Town and Country Planning (Scotland) Act 1997, that is land in which there is a Crown interest which means an interest belonging to Her Majesty in right of the Crown or to a government department or held in trust for Her Majesty for the purposes of a government department.

SECTION 123: Stamp duty

Purpose and Effect

The purpose of this section is to exempt any conveyance, transfer or lease made to the Scottish Ministers, Lord Advocate or the SPCB from liability for stamp duty in the same way that such conveyances etc. to a Minister of the Crown are exempt. This section provides for references to a Minister of the Crown in section 55 of the Finance Act 1987 (which provides for Crown exemption from stamp duty) to be read as including the Scottish Ministers, the Lord Advocate and the Scottish Parliamentary Composite Body.

Details of Provisions

Section 55 of the Finance Act 1987 provides for exemption from stamp duty under Schedule 1 of the Stamp Act 1891 in respect of any conveyance, transfer or lease made or agreed to be made to a Minister of the Crown or the Solicitor for the affairs of Her Majesty’s Treasury.

This section provides that any references in section 55 of the 1987 Act to a Minister of the Crown should be read as including the Scottish Ministers, the Lord Advocate and the Scottish Parliamentary Composite Body.

SECTION 124: Modification of

[sections 94](#)

and

[117 to 122](#)

Purpose and Effect

This section enables Her Majesty or a Minister of the Crown, by subordinate legislation, to provide that any the provisions of sections 94 and 117 to 122 (which contain a number of general modifications to pre-commencement enactments etc. in connection with the transfer of functions to the Scottish Ministers) should not apply, or apply with modifications, in particular cases.

Detail of Provisions

Subsection (1) enables Her Majesty or a Minister of the Crown, by subordinate legislation, to provide that any the provisions of sections 94 and 117 to 122 (which contain a number of general modifications to pre-commencement enactments etc. in connection with the transfer of functions to the Scottish Ministers) should not apply, or apply with modifications, in particular cases.

Subsection (2) enables any subordinate legislation made by Her Majesty or a Minister of the Crown, in connection with any other provision made by that legislation, also to provide that any the provisions of sections 94 and 117 to 122 should not apply, or apply with modifications.

For example, the executive devolution orders under section 63, which provide for the transfer of certain Ministerial functions to the Scottish Ministers, apply with modifications the general modification in sections 94 and 117 to 121.

SECTION 125: Amendments and repeals

Purpose and Effect

This section gives effect to Schedule 8, which makes modifications to existing legislation, and to Schedule 9, which lists the enactments which are to be repealed.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR | 28-Oct-98 | 1959 |

Details of Provisions

The section gives effect to Schedules 8 and 9. Details of the modifications and repeals are contained in the notes on those Schedules.

SECTION 126: Interpretation

Purpose and Effect

This section provides for the interpretation of various terms used in the Act.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC | 30-Mar-98 | 951 |
| CC | 31-Mar-98 | 1162 |
| CR | 12-May-98 | 197 |
| CR | 12-May-98 | 244 |
| CR | 19-May-98 | 754 |
| CR | 19-May-98 | 823 |

*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> |
|--------------|-------------|---------------|
| CR | 19-May-98 | 824 |
| LC | 8-Oct-98 | 655 |
| LC | 8-Oct-98 | 656 |
| LC | 8-Oct-98 | 657 |
| LR | 28-Oct-98 | 1918 |
| L3 | 9-Nov-98 | 545 |
| L3 | 9-Nov-98 | 601 |
| L3 | 9-Nov-98 | 602 |

Details of Provisions

Subsection (1) defines a number of terms used in the Act.

Subsection (2) enables Her Majesty by Order in Council to determine, or make provision for determining, for the purposes of the Act, any boundary between waters which are to be treated as internal waters or territorial sea of the United Kingdom, or sea within British fishery limits, adjacent to Scotland and those which are to be treated as adjacent to other parts of the United Kingdom.

Section 126 (1) defines:

- (a) “Scotland” as including “so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland”; and
- (b) “the Scottish zone” as meaning the sea within British fishery limits which is adjacent to Scotland. (The Scottish zone is used in the reservation of sea fishing in section C6 of Part II of Schedule 5.)

It is therefore necessary to distinguish clearly between those parts of the internal waters and territorial sea of the UK and of British fishery limits which are in future to be treated as part of Scotland for the purpose of matters devolved to the Scottish Parliament. Such a boundary will, for example, be required in the internal waters of the Solway Firth, in the territorial sea on the East Coast, and in the west, between Scotland and England (outside the Solway Firth), between Scotland and the Isle of Man and between Scotland and Northern Ireland and, in the British fishery limits around Rockall.

The matters being devolved to the Scottish Parliament which may be affected by such boundaries include: inshore fisheries management (including salmon fisheries in the Solway Firth); control of pollution from landward sources; regulation of possible inshore developments such as aquaculture or marine dredging; licensing deposits in the sea; and enforcement of criminal law. Offshore oil activities would not be affected, since such matters are reserved.

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

This power was exercised in making the Scottish Adjacent Waters Boundaries Order 1999 ([S.I. 1999/1126](#)).

Subsection (3) makes provision for determining various questions as to whether the functions of a body etc. relate to reserved matters.

Paragraph (a) provides that any question as to whether any function of a body, government department, office or office-holder relates to reserved matters is to be determined by reference to the purpose for which the function is exercisable. This purpose test echoes that which is included in section 29 (3). This ensures that a function of such a body is not deemed to relate to reserved matters merely because it incidentally affects reserved matters.

Paragraph (b) makes it clear that the bodies to which paragraph 3 of Part III of Schedule 5 applies (bodies or classes of bodies reserved by name in Schedule 5 plus the equal opportunities bodies etc.) are to be treated as if all their functions were functions which relate to reserved matters. This is to ensure that such bodies, even if they have functions which relate to devolved matters, do not fall to be treated as cross-border public authorities under section 88 or to be summonable by the Scottish Parliament under section 23. Such bodies are to remain accountable only to Whitehall and Westminster.

Subsection (4) defines what is meant by references in the Act to Scots private law - see section 29(4) and paragraph 2(3) of Schedule 4. It includes the general principles of private law (including private international law), the law of persons, the law of obligations, the law of property and the law of actions. The definition also includes judicial review of administrative action so that amendments to that law are also subject to the provisions of section 29(4).

Subsection (5) defines what is meant by references in the Act to Scots criminal law. It includes jurisdiction, criminal offences, evidence, procedure and penalties and the treatment of offenders.

Subsections (6) to (8) define the term “Scottish Administration” for the purposes of the Scotland Act and other enactments.

These subsections define references to the Scottish Administration as being to:

- (a) the office-holders in the Scottish Administration:
 - (i) members of the Scottish Executive and junior Scottish Ministers; and
 - (ii) holders of non-ministerial offices, as follows:
 - the Registrar General of Births, Deaths and Marriages for Scotland;
 - the Keeper of the Registers of Scotland;
 - the Keeper of the Records of Scotland; and
 - any other office of a description specified in an Order in Council; and
- (b) the members of the staff of the Scottish Administration i.e. the staff of the persons referred to in (a). Those staff, together with the non-ministerial office holders, are all civil servants under section 51(2).

The power to make an Order in Council was exercised in the Scottish Administration (Offices) Order 1999 ([S.I. 1999/1127](#)).

Subsection (9) defines “Community law” for the purposes of the Act as:

- (a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and
- (b) all those remedies and procedures from time to time provided for by or under the Community Treaties.

The definition of Community law thus includes all rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Community Treaties as

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

defined by section 1(2) of the European Communities Act 1972, or as specified in an order under section 1(3) of that Act. It also includes international agreements to which the Communities are party and which form part the Community legal order.

Subsection (10) defines what is meant by references in the Act to “international obligations”. These include any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights. “Convention rights” are defined in subsection (1) by reference to the Human Rights Act 1998.

Subsection (11) provides that the term “by virtue of” includes “by” and “under”.
SECTION 127: Index of defined expressions

Purpose and Effect

This section provides a table of expressions used in the Act and the appropriate provisions of the Act in which they are defined or in accordance with which they are to be interpreted.

General

A number of expressions are used widely in the Act. This section provides a simple reference to their definitions to aid interpretation.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR | 12-May-98 | 197 |
| CR | 12-May-98 | 244 |
| CR | 19-May-98 | 754 |
| Stage | Date | Column |
| LC | 21-Jul-98 | 818 |
| LC | 21-Jul-98 | 835 |
| LC | 23-Jul-98 | 1145 |
| LC | 27-Jul-98 | 1336 |
| LC | 30-Jul-98 | 1721 |
| LC | 6-Oct-98 | 309 |
| LC | 8-Oct-98 | 624 |
| LC | 8-Oct-98 | 655 |
| LR | 28-Oct-98 | 1918 |
| LR | 2-Nov-98 | 11 |
| L3 | 9-Nov-98 | 602 |

SECTION 128: Expenses

Purpose and Effect

This section provides for Parliament to provide money to cover the expenditure of Ministers of the Crown resulting from the Scotland Act. It also requires certain sums received by Ministers of the Crown to be paid into the Consolidated Fund.

Details of Provisions

Subsection (1) provides that any expenditure:

- (a) incurred by a Minister of the Crown by virtue of the Scotland Act; and
- (b) any increase attributable to the Scotland Act in the sums payable out of money provided by Parliament under any other enactment,

shall be paid out of money provided by Parliament.

Subsection (2) provides that any sums received by a Minister of the Crown by virtue of the Scotland Act shall be paid into the Consolidated Fund, unless they are otherwise directed to be paid into the National Loans Fund (see for example sections 67(4) and 71(8)).

SECTION 129: Transitional provisions etc.

Purpose and Effect

This section provides for subordinate legislation to make transitory and transitional provision in connection with the commencement of the Act. It also provides for the interaction of the commencement of the Scotland Act and the Human Rights Act 1998.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------------|---------------|
| CC | 4-1079 Mar-98 | |
| CC | 31-1162 Mar-98 | |
| CR | 6-734 May-98 | |
| Stage | Date | Column |
| CR | 19-785 May-98 | |
| LC | 6-427 Oct-98 | |
| LR | 28-2072 Oct-98 | |

Details of Provisions

Subsection (1) enables Her Majesty by Order in Council or a Minister of the Crown by order to make such provision as is considered necessary or expedient for transitory or transitional purposes in connection with the coming into force of any provision of the Scotland Act.

As at September 2001 this power has been exercised as follows:

| | |
|--------------------------------|--|
| S.I. 1998/3216 | The Scotland Act 1998 (Transitional and Transitory Provisions) (Subordinate Legislation under the Act) Order 1998. |
| S.I. 1999/441 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Finance) Order 1999. |
| S.I. 1999/674 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Order 1999. |

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

| | |
|-----------------|--|
| S.I. 1999/901 | The Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999. |
| S.I. 1999/1017 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999. |
| S.I. 1999/1081 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Grants to Members and Officeholders) Order 1999. |
| S.I. 1999/1082 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Scottish Parliamentary Pension Scheme) Order 1999. |
| S.I. 1999/1095 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Standing Orders and Parliamentary Publications) Order 1999. |
| S.I. 1999/1096 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999. |
| S.I. 1999/1097 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Salaries and Allowances) Order 1999. |
| S.I. 1999/1098 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Administration of the Parliament) Order 1999. |
| S.I. 1999/1334 | The Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Amendment Order 1999. |
| S.I. 1999/1350 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999. |
| S.I. 1999/1351 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Order 1999. |
| S.I. 1999/1379 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999. |
| S.I. 1999/1593 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999. |
| S.I. 1999/1594 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Laying of Reports) Order 1999. |
| S.I. 1999/1595 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Amendment Order 1999. |
| S.I. 1999/1891 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Grants to Members and Officeholders and Scottish Parliamentary Pension Scheme) Amendment Order 1999. |
| S.I. 1999/3273 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Finance) Amendment Order 1999. |
| S.S.I. 1999/175 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Amendment Order 1999. |
| S.S.I. 2000/69 | The Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Amendment (Scotland) Order 2000. |

Subsection (2) makes provision to take account of the possibility (which occurred) that the Human Rights Act 1998 might not be brought into force until after the creation of the Scottish Executive and Parliament. In fact, the Human Rights Act did not come into force until 2 October 2000. It was, however, intended that the Scottish Executive and the Parliament should be required to observe the Convention rights from the date when they assumed their powers. The date of the assumption of powers was 1 July

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

1999 in the case of the Parliament and Scottish Ministers and 20 May 1999 in the case of the Lord Advocate (see the note on section 57). This subsection therefore provides that provisions of the Scotland Act, which refer to the Human Rights Act, were to have effect as they would have effect when the Human Rights Act was brought into force.

SECTION 130: Commencement

Purpose and Effect

This section provides for the commencement by order of certain of the provisions in the Act and for subordinate legislation to make transitory and transitional provision in connection with the commencement.

General

This section governs the commencement of the provisions of the Act, other than sections 1 to 18, 112 to 116 and 125 to 132, Schedule 7 and certain provisions in Schedule 8. These sections and Schedules, which mainly relate to the elections to the Scottish Parliament, the making of subordinate legislation, commencement interpretation, extent and the short title, came into force immediately on Royal Assent.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR | 3-Nov-98 | 261 |
| L3 | 9-Nov-98 | 602 |

Details of Provisions

Subsection (1) provides that sections 19 to 43, Parts II to V (sections 44 to 111) and sections 117 to 124 and section 125 (in relation to certain provisions in Schedule 8) are to come into force on such day as the Secretary of State may by order appoint. This order is not subject to any Parliamentary procedure. Section 126 provides for a day appointed by such an order to be designated as the principal appointed day. This is of relevance for the interpretation of references to enactments in Schedule 5, as provided for by Part III of that Schedule.

Subsection (2) provides that different days may be appointed for different purposes.

This power has been exercised by the Secretary of State in making the Scotland Act 1998 (Commencement) Order 1998 (

[S.I. 1998/3178](#)

).

Purpose and Effect

This section sets out the extent of the Act.

General

The Act in general extends to the whole of the United Kingdom.

Details of Provisions

This section makes an exception for section 25. That section creates an offence in connection with the power of the Parliament to summon persons or require documents and extends to Scotland only.

SECTION 132: Short title

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

Purpose and Effect

This section gives the short title of the Act.

General

The choice of short title reflects that of similar legislation in the past, such as the Scotland Act 1978 and the Wales Act 1978.

Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC | 28-Jan-98 | 357 |

Details of Provisions

The section provides that the Act may be cited as the Scotland Act 1998.