

*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

### SCHEDULES

SCHEDULE 4: Enactments protected from modification

#### Details of Provisions

Part I: The protected provisions

Paragraph 1 provides that an ASP cannot modify, or confer power by subordinate legislation to modify, certain enactments. Those enactments are:

- (a) *Articles 4 and 6 of the Union with Scotland Act 1706 and the Union with England Act 1707* so far as they relate to freedom of trade. The Union of the Kingdoms of Scotland and England is a reserved matter by virtue of paragraph 1 of Schedule 5. However, the Acts of Union also contain provisions relating to freedom of trade;
- (b) *the Private Legislation Procedure (Scotland) Act 1936*. By virtue of amendments made to the 1936 Act by paragraph 5 of Schedule 8, private legislation may continue to be made under the 1936 Act procedure at Westminster about matters which are wholly or partly outside the legislative competence of the Scottish Parliament. Entrenchment of the Act by the present paragraph has the effect that Ministerial functions under the Act in relation to such legislation do not transfer to the Scottish Ministers;
- (c) Sections 1, 2 (other than subsection (2), the words following “such Community obligation” in subsection (3), and the words “subject to Schedule 2 to this Act” in sub-section (4)), 3(1) and (2) and 11(2), and Schedule 1 of the European Communities Act 1972). These are the key provisions of the 1972 Act which give effect to EC law in the law of the UK;
- (d) *Paragraphs 5(3)(b) and 15(4)(b) of Schedule 32 to the Local Government, Planning and Land Act 1980*. These provisions are concerned with a requirement for Treasury consent to the designation of enterprise zones. Their entrenchment by the present paragraph ensures that the Scottish Parliament cannot modify the requirement and that the function of giving consent does not transfer to the Scottish Ministers. Under section 55, this consent requirement is an exception to the general disapplication of requirements for UK Ministerial consent in relation to the exercise by the Scottish Ministers of functions within devolved competence. The exception is maintained because of the tax privileges conferred by enterprise zone status;
- (e) *Sections 140A to 140G of the Social Security Administration Act 1992*. This will ensure that, despite the general devolution of the funding of Scottish public authorities with mixed (reserved and otherwise) functions (see Part III of Schedule 5), functions of funding council tax benefit and housing benefit remain with the UK Government; and
- (f) *the Human Rights Act 1998*. Entrenchment of this Act ensures that the Scottish Parliament cannot modify the way in which the European Convention on Human Rights is given effect in UK law. Under section 29, the Scottish Parliament must legislate consistently with the Convention rights as given effect by the 1998 Act, and under section 57(2) a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or Act is incompatible with any of such rights.

Paragraph 2 provides that an ASP cannot modify, or confer power to modify, “the law on reserved matters”. “The law on reserved matters” means the law which is about reserved matters rather than, for example, planning law which, although it relates to a matter which is not reserved, may apply to a reserved matter such as coal mining. Sub-paragraph (2) defines the law on reserved matters as enactments (other than the Scotland Act itself, as there are specific provisions about the degree to which that may be modified in paragraph 4) and rules of law whose subject-matter is reserved by Schedule 5. Sub-paragraph (3) provides that the restriction on modification applies to a rule of Scots private or criminal law only to the extent that the rule in question is special to a reserved matter - a rule which results in a distinct and separate treatment of a reserved matter - and to certain other specified aspects of private law. However, under section 29(4) it is within legislative competence for the Scottish Parliament to modify Scots private or criminal law as it applies to reserved matters only if the purpose of the provision is to make the law in question apply consistently to reserved and non-reserved areas.

This paragraph has been modified by the Scotland Act 1998 (Modifications of Schedule 4) Order 2000 ([S.I. 2000/1831](#)) to prevent the Parliament from modifying certain rules of Scots private law about pension earmarking and sharing.

Paragraph 3 provides that paragraph 2 does not apply to modifications which are incidental to, or consequential on, provision which does not relate to reserved matters and which do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision. It includes provision to ensure that this test of necessity is judged by reference to the legislative powers of the Scottish Parliament. Thus, the fact that a consequential provision might be given effect by an Act of the UK Parliament or by an order made by a UK Minister will not affect what is considered to be necessary for the purposes of the test.

Under section 29, it is outside legislative competence to make provision which “relates to” a reserved matter, and the question of whether a provision relates to a reserved matter is to be determined, subject to some certain exceptions, by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. The Court can determine that a provision is for a permitted purpose, even if, as an ancillary matter, it affects reserved matters. However, paragraphs 2 and 3 of the present Schedule set out a test on necessity, under which modifications of the law on reserved matters may be made only where there are incidental to, or consequential on, provision which does not relate to reserved matters, and they do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.

Paragraph 4 provides that an ASP cannot modify, or confer power by subordinate legislation to modify, the Scotland Act itself. It also provides for certain exceptions to that rule, for example to allow the Parliament to legislate about its protections from judicial proceedings and to add to or limit the powers of the Scottish Parliamentary Corporate Body.

Sub-paragraph (2) provides that the paragraph does not apply to modifying:

Section 1(4), which provides that the validity of any proceedings of the Parliament is not affected by any vacancy in its membership;

Section 17(5), which provides that the validity of any proceedings of the Parliament is not affected by the disqualification of any person from being a member;

Section 19(7), which provides that the validity of any act of the Presiding Officer or a deputy is not affected by any defect in his election;

Section 21(5), which provides that property and liabilities to which the Parliament would be entitled/subject to be treated as property or liabilities of the Scottish Parliamentary Corporate Body;

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Section 24(2), which makes provision about the notice to be given to witnesses summoned to give evidence to the Parliament;

Section 28(5), which provides that the validity of an ASP is not affected by any invalidity in the proceedings of the Parliament leading to its enactment;

Section 39(7), which makes provision about the maximum level of fine to which a member of the Parliament would be liable in connection with offences relating to the registration and declaration of interests;

Sections 40-43, which make provision about legal proceedings by or against the Parliament etc., defamatory statements, contempt of court and corrupt practices;

Section 50, which provides that the validity of any act of a member of the Scottish Executive or junior Scottish Minister is not affected by any defect in their nomination by the Parliament (or the Parliament's agreement to their appointment);

Section 69(3), which provides that the validity of any act of the Auditor General for Scotland is not affected by any defect in his nomination by the Parliament;

Section 85, which makes provision about exemption from jury service of MSPs, members of the Scottish Executive and junior Scottish Ministers;

Section 93, which permits Ministers of the Crown and the Scottish Ministers to exercise functions on each others' behalf on an agency basis;

Section 97 which make provision for assistance to Opposition parties. This was added by [S.I. 1999/1749](#); and

Paragraphs 4(1) to (3) and 6(1) of Schedule 2, which make provision about the powers, proceedings and business of the Scottish Parliamentary Corporate Body.

Sub-paragraph (3) provides that this paragraph does not apply to the modification of any provision of the Scotland Act which charges any sum on the Scottish Consolidated Fund, requires any sum to be paid out of that Fund without further approval, or requires or authorises any sum to be paid into the Fund. This list was amended by the Scotland Act 1998 (Modifications of Schedule 4) Order 2000 ([S.I. 2000/1831](#)) to include any provision which requires any sum to be payable out of that Fund. However, certain provisions are excepted. Those are:

Section 64(7), which provides that certain receipts to be paid over to the Secretary of State shall be a charge on the Fund;

Sections 66(2) and 71(7), which provide for the sums required by the Scottish Ministers for the re-payment of borrowing or deemed borrowing from the Secretary of State (with interest) to be a charge on the Fund;

Sections 77 and 78, which provide for payments into and out of the Scottish Consolidated Fund in consequence of the operation of the tax-varying powers; and

Section 119, which translates statutory references to the Consolidated Fund to references to the Scottish Consolidated Fund.

Sub-paragraph (4) provides for a further exception to allow the Scottish Parliament to set up a fund, in addition to the Scottish Consolidated Fund, out of which loans may be made by the Scottish Ministers, and to amend Part III of the Act (which sets out the financial provisions) so far as necessary or expedient for that purpose on in consequence of the establishment of such a fund.

Sub-paragraph (5) provides that this paragraph does not prevent modification of enactments which are modified by this Act and that it does not prevent the Scottish Parliament from repealing provisions of the Scotland Act which amend other enactments if the provisions ceases to have effect in consequence of an ASP.

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Paragraph 5 lists certain modifications made by the Act which the Parliament cannot modify, or confer power by subordinate legislation to modify. These are:

- (a) *the effect of [section 119\(3\)](#) (which translates statutory references to the Consolidated Fund to references to the Scottish Consolidated Fund) in relation to any provision of an Act of Parliament relating to judicial salaries. This ensures that judicial salaries will remain a direct charge upon the Scottish Consolidated Fund;*
- (b) *the amendments made by [Schedule 8 to the Crown Suits \(Scotland\) Act 1857](#), [the Crown Proceedings Act 1947](#) and [the Criminal Procedure \(Scotland\) Act 1995](#), so far as they relate to the Advocate General for Scotland. These amendments take account of the transfer of the office of Lord Advocate to become a member of the Scottish Executive and the establishment of the new office of Advocate General for Scotland as the Scottish law officer to the UK Government; and*
- (c) *the amendments made to [the Lands Tribunal Act 1949](#) by [paragraph 9 of Schedule 8](#) (to provide that the remuneration of members of the Lands Tribunal for Scotland shall be charged on the Scottish Consolidated Fund) and to [the Scottish Land Court Act 1993](#) by [paragraph 29 of Schedule 8](#) (to provide that the First Minister will recommend the appointment of a person as chairman of the Court and that he shall consult the Lord President of the Court of Session before doing so).*

Paragraph 6 provides that an ASP cannot modify, or confer power by subordinate legislation to modify, enactments which relate to the powers which a Minister of the Crown shares by virtue of section 56. This ensures that where a Minister of the Crown has retained a concurrent power in a devolved area, the Scottish Parliament cannot remove that power.