

*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 5

#### Part I: General Reservations

Paragraphs 1 to 5: The Constitution

#### Purpose and Effect

These paragraphs reserve aspects of the Constitution, subject to certain exceptions.

#### Detail of Provisions

##### *Paragraph 1: Constitution*

Paragraph 1 provides that certain aspects of the Constitution are reserved matters. These aspects are:

- (a) the Crown, including the succession to the Crown and a regency;
- (b) the Union of the Kingdoms of Scotland and England;
- (c) the Parliament of the United Kingdom;
- (d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal; and
- (e) the continued existence of the Court of Session as a civil court of first instance and of appeal.

#### Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	19-May-98	787

Paragraphs 2-5 provide for exceptions to be made from this basic reservation and clarify the scope of what is excepted and what is reserved.

##### *Paragraph 2: Functions etc.*

Paragraph 2(1) provides that paragraph 1 does not have the effect of reserving Her Majesty's prerogative and other executive functions, or functions exercisable by any person acting on behalf of the Crown. This enables the Scottish Parliament to legislate about those functions where they do not relate to other reserved matters and enables such functions which are exercised by a Minister of the Crown in or as regards Scotland to transfer to the Scottish Ministers under section 53. (See also the note at the end of this Section on the giving of advice to Her Majesty.)

Paragraph 2(1)(c) also makes it clear that the offices in the Scottish Administration are not reserved matters so that the Scottish Parliament has the competence to amend or abolish such offices, such as the Keeper of the Registers of Scotland. The Scottish Parliament could not, however, amend or abolish the Ministerial offices in the Scottish Administration (i.e. the members of the Scottish Executive as provided for by section 44) by virtue of paragraph 4 of Schedule 4.

Paragraph 2(2) qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of honours and dignities or the functions of the Lord Lyon King of Arms with regard to the granting of arms i.e. the right to bear and use a coat of arms in Scotland (although this does not apply to the Lord Lyon King of Arms in his judicial capacity). This is required because otherwise, by virtue of paragraph 2(1), all the functions relating to honours and dignities (e.g. peerages, knighthoods, and decorations), such as the making of recommendations to the Queen regarding the grant of honours etc., and the functions of the Lord Lyon relating to the granting of arms would not be reserved. However, the functions of the Lord Lyon in his judicial capacity are not reserved. (See also the note at the end of this Section on the giving of advice to Her Majesty.)

Paragraph 2(3) qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of the management (in accordance with any enactment regulating the use of land) of the Crown Estate. This has the effect of ensuring that the Scottish Parliament cannot legislate about the Crown Estate Commissioners or their functions of managing the Crown property, rights and interests known as the Crown Estate under the Crown Estate Act 1961. The Scottish Parliament will, however, be able to legislate to affect the Crown Estate by virtue of paragraph 3(1).

Paragraph 2(4) qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of the functions of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters. This supplements the reservation of national security and interception of communications in Section B8.

Paragraph 2(5)<sup>1</sup> qualifies paragraph 2(1) by providing that it does not affect the reservation by paragraph 1 of the functions exercisable through the Export Credit Guarantee Department. The ECGD provides underwriting services and technical advice and assistance to exporters.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	903
CC	30-Mar-98	906
CC	30-Mar-98	907
CR	19-May-98	806
LR	3-Nov-98	142
LR	3-Nov-98	143

### ***Paragraph 3: Crown Property***

Paragraph 3(1) provides that paragraph 1 does not have the effect of reserving Crown property. Crown property is:

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<sup>1</sup> This paragraph was inserted by article 3 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (S.I. 1999/1749).

- (a) property belonging to Her Majesty in right of the Crown. This includes property which the Crown can sell and alienate, such as the foreshore, and rights and obligations over such property which are vested in the Crown as trustee for certain public rights and which cannot be alienated, such as the right to recreational use of the foreshore or the right of public navigation in the waters over the seabed. This property forms part of the Crown Estate which is managed by the Crown Estate Commissioners; and
- (b) property belonging to any person acting on behalf of the Crown or held in trust for Her Majesty for the purposes of any person acting on behalf of the Crown.

This will enable the Scottish Parliament, for example, to apply its planning legislation to Crown property, subject of course to any provisions in other reservations. It will also enable the Scottish Parliament, when legislating to create a new harbour or port, to extinguish any public rights over the foreshore or seabed which might be affected.

Paragraph 3(2) provides that paragraph 1 does not reserve the position of the Crown as ultimate superior of all feudal land in Scotland or the superiorities owned by the Prince and Steward of Scotland. This provision is required because it is not clear whether such property can be said to belong to the Crown “in right of the Crown”. It enables the Scottish Parliament to abolish the feudal system of land tenure, as in the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Paragraph 3(3) qualifies paragraph 3(1) by providing that it does not affect the reservation by paragraph 1 of:

- (a) the hereditary revenues of the Crown, other than revenues from *bona vacantia*, *ultimus haeres* and treasure trove. Hereditary revenues are derived from property vested in the Crown in right of the Crown and various other prerogative rights and privileges which are customarily surrendered by the Crown to the nation in exchange for a fixed annual income, known as the Civil List. *Bona vacantia*, *ultimus haeres* and treasure trove, are however devolved;
- (b) the royal arms and standard. This is required because otherwise it could be regarded as part of the property belonging to Her Majesty in right of the Crown; and
- (c) the compulsory acquisition of property held or used by a Minister of the Crown or government department.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	904
CR	19-May-98	806
LC	14-Jul-98	242

### ***Paragraph: 4 Crown’s private property***

Paragraph 4(1) provides that paragraph 1 does not have the effect of reserving property which the Queen holds in Her private capacity, such as Balmoral.

Paragraph 4(2) qualifies paragraph 4(1) by providing that it does not affect the reservation by paragraph 1 of the subject-matter of the Crown Private Estates Acts 1800 to 1873. These Acts regulate matters relating to such private estates, such as how they may be held or disposed of.

This provision enables the Scottish Parliament to legislate to affect the Queen’s private estates in Scotland. Any such provision in an Act of the Scottish Parliament will, however, require the Queen’s consent under standing orders made in accordance with paragraph 5 of Schedule 3.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	904

### ***Paragraph 5: Scottish Seal***

Paragraph 5 provides that paragraph 1 does not reserve the use of the Scottish Seal. “Scottish Seal” is defined in section 2(6). It is the Seal which is currently used in connection with certain matters, such as appointments made under Royal Warrants (e.g. of judges and QCs) and grants of lands. The Act provides that the First Minister is to be the Keeper of the Scottish Seal (section 45(7)) and that it is to be used in connection with proclamations by the Queen regarding certain elections (sections 2(5) and 3(2)) and the Royal Assent to Scottish Bills (section 28(3)). The Scottish Parliament will be able to provide that it should have other uses.

## **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	904
CR	19-May-98	787
LR	3-Nov-98	144

## **Advice to The Queen**

Special arrangements for giving advice to The Queen were described in a Prime Ministerial answer on 30 June 1999 (WA col 215) and an associated paper deposited in the House of Commons Library.

In cases where Her Majesty exercises a function which is exercisable within devolved competence for the purposes of the Scotland Act 1998 and She was, by convention, advised by a Minister of the Crown about the exercise of that function, then from 1 July 1999 She will be advised by the First Minister instead of by a Minister of the Crown. Examples of circumstances in which Her Majesty will in future be advised by the First Minister instead of by the Secretary of State in relation to the exercise of Her functions which relate in whole or in part to a devolved matter are shown below where they are relevant to paragraphs 1 to 5 of Schedule 5.

Her Majesty will be advised by the First Minister on:

the appointment of the Lord Lyon and Lyon Clerk.

use of the Royal Prerogative<sup>2</sup> including the use of Royal Names<sup>3</sup> and Royal Patronage<sup>4</sup>;

Receipt of and response to the submission of Loyal Addresses to Her Majesty from Churches and individuals in Scotland;

Response to a Petition submitted to Her Majesty;

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<sup>2</sup> In respect of the use of the Royal Prerogative, where the advice concerns a devolved matter the First Minister will advise Her Majesty.

<sup>3</sup> An organisation may only call itself “Royal” if it has the authority of Her Majesty. Requests to name a street or other place after a member of the Royal Family also require approval by Her Majesty. Where the application is for something that is in Scotland, the First Minister will advise Her Majesty.

<sup>4</sup> This refers to patronage of an organisation by a member of the Royal Family. Where the organisation is Scottish-based and operates in devolved areas the First Minister will advise Her Majesty.

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Appointment to offices in the Royal Household in Scotland, including HM Sculptor in Ordinary in Scotland; HM Painter and Limner in Scotland; the Royal Astronomer for Scotland; the Historiographer Royal in Scotland; the Keeper of Dumbarton Castle.

There are some matters in respect of which the Prime Minister gives advice to Her Majesty on the exercise of Her functions and on which it is appropriate for the Prime Minister to consult or to take advice from the First Minister. These matters include recommendations of Scottish candidates for honours and dignities, which are a reserved matter, and advice on the appointment of Lord Lieutenants in Scotland, the Lord High Commissioner to the General Assembly of the Church of Scotland and members of the Royal Commission on Environmental Pollution and the Forestry Commission.

### **Part I, *Paragraph 6: Political Parties***

#### **Purpose and Effect**

This paragraph reserves the registration and funding of political parties, except for making payments to assist MSPs in performing their Parliamentary duties.

#### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	21-Jul-98	858

#### **Details of Provisions**

This paragraph ensures that the registration and funding of political parties is a reserved matter, except for the making of payments to any political party for the purpose of assisting members of the Scottish Parliament who are connected with the party to perform their Parliamentary duties. This exception was added by article 2 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 ([S.I. 1999/1749](#)).

The registration and funding of political parties is dealt with in the Political Parties, Elections and Referendums Act 2000 which consolidated the Registration of Political Parties Act 1998 which used to deal with the registration of political parties.

Section 97 provides a power for Her Majesty, by Order in Council to provide for the Scottish Parliamentary Corporate Body to make payments to registered political parties for the purpose of assisting members of the Parliament who are connected with such parties to perform their Parliamentary duties. This power has been exercised in making the Scottish Parliament (Assistance for Registered Political Parties) Order 1999 ([S.I. 1999/1745](#)).

### **Part I, *Paragraph 7: Foreign affairs, etc.***

#### **Purpose and Effect**

This paragraph reserves foreign affairs, subject to certain exceptions.

#### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	914
LC	21-Jul-98	862

#### **Details of Provisions**

Reservation

Paragraph 7(1) provides that international relations, including:

- (a) relations with territories outside the UK, the European Communities (and their institutions) and other international organisations;
- (b) regulation of international trade; and
- (c) international development assistance and co-operation,

are reserved matters.

Subject to the exceptions in paragraph 7(2), this means that the conduct of international relations, including conduct of relations with the European Communities, is therefore a matter reserved to the UK Parliament and UK Government.

The reservation of international relations does not have the effect of precluding the Scottish Ministers and officials from communicating with other countries, regions, or international or European institutions, so long as the representatives of the Scottish Parliament or the Scottish Ministers do not purport to speak for the United Kingdom or to reach agreements which commit the UK.

Exceptions

Paragraph 7(2) makes certain exceptions to this reservation:

- (a) *Observing and implementing international obligations etc.* Firstly, paragraph 7(2)(a) provides that observing and implementing international obligations, obligations under the ECHR and obligations under Community law are not reserved. Community law and international obligations are defined in section 126(9) and (10).

So far as the legislative competence of the Scottish Parliament is concerned, this has the result that the Scottish Parliament will be able and required to legislate for the purpose of observing and giving effect to those obligations so far as they relate to devolved matters. Section 29(2)(d) provides that a provision of an Act of the Scottish Parliament would be beyond the legislative competence (i.e. *ultra vires*) of the Scottish Parliament if it was incompatible with any of the “Convention rights” (see section 126(1)) or with Community law. In the case of other international obligations, (i.e. not Convention obligations or EC law), which are not justiciable in our courts, section 35 enables the Secretary of State to make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent where he has reasonable grounds to believe that it would be incompatible with such obligations.

So far as executive competence is concerned, this exception also achieves the result that any obligations upon Ministers of the Crown to observe and implement international obligations in relation to devolved matters are transferred to the Scottish Ministers under section 53. In particular, this will mean that, in the case of EC obligations, the Scottish Ministers are liable under EC law for the same penalties as Ministers of the Crown if they fail to do so. Section 57(1) ensures, however, that Ministers of the Crown continue to share this responsibility and will have concurrent functions for the purpose of implementing EC obligations. In addition, section 57(2) makes a similar provision to section 29(2)(d) by providing that it would be *ultra vires* for a member of the Scottish Executive to make any subordinate legislation or to do any act which would be incompatible with any of the Convention rights or with EC law. There is also a similar provision to section 35 in section 58 enabling the Secretary of State to make an order revoking any subordinate legislation made by a member of the Scottish Executive or requiring him to make any such instrument if he considers that the instrument (or failure to make the instrument) would be incompatible with any international obligation (i.e. not Convention obligations or EC obligations).

- (b) *Assisting Ministers of the Crown.* Paragraph 7(2)(b) provides that assisting Ministers of the Crown in relation to any matter to which the reservation in paragraph 7(1) applies is not reserved.

This enables the Scottish Ministers to assist the UK Government in the conduct of international relations so far as relating to devolved matters and enables the Scottish Parliament to legislate about this. The Scottish Ministers will thus be able to assist Ministers of the Crown in the formulation, negotiation and implementation of policy relating to international relations. This allows the Scottish Ministers to be involved in the discussions within the UK Government about the formulation of the UK's policy position on all issues which touch on devolved matters; and allows participation where appropriate by the Scottish Ministers and officials in relevant European Council meetings and other negotiations with the UK's EU partners.

### **Executive devolution**

The following function has been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<a href="#">The Multilateral Investment Guarantee Agency Act 1988 (c.8)</a> , section 6.	The function of the Secretary of State of making, by order, provision for the attendance of witnesses, taking of evidence and production of documents in relation to certain arbitration proceedings.
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### **Part I, [Paragraph 8: Public Service](#)**

#### **Purpose and Effect**

This paragraph reserves matters relating to the Civil Service, subject to certain exceptions.

#### **General**

Section 51 provides for the staff of the Scottish Administration to be members of the Home Civil Service, as are the statutory office-holders in the Scottish Administration (see section 126(6)). It also makes provision for their salaries, allowances and pensions.

#### **Details of Provisions**

##### **Reservation**

Paragraph 8(1) states that the Civil Service of the State is a reserved matter. The Civil Service includes the Home Civil Service and the Diplomatic Service. The effect is that the Scottish Parliament is not able to legislate about matters relating to Civil Servants in Scotland, including their recruitment, selection, management, conduct, discipline, numbers, grading and terms and conditions of service. Matters relating to Civil Service pensions are reserved by Section F3 in Part II of the Schedule.

The Home Civil Service is ultimately regulated by the Royal Prerogative, and its management has been delegated to the Minister for the Civil Service. The Civil Service Management Code is issued under the authority of the Civil Service Order in Council 1995. Under the Civil Service (Management Functions) Act 1992, the Minister for the Civil Service has further delegated management functions to Ministers and office holders in charge of Departments. These include the authority to prescribe qualifications for appointment as Civil Servants, to determine the number and grading of posts (outside the Senior Civil Service) in such Departments and a wide range of other management functions. Those functions, which were delegated to the Secretary of State for Scotland in respect of Civil Servants who become staff of the Scottish Executive, have been delegated to the Scottish Ministers. This is provided for in section 51(4) and (6).

##### **Exceptions**

The subject-matter of the following enactments is excepted from the reservation:

- (a) *Part I of the Sheriff Courts and Legal Officers (Scotland) Act 1927*. This deals with the appointment of sheriff clerks, procurators fiscal and their deputies; and
- (b) *Part III of the Administration of Justice (Scotland) Act 1933*. This deals with the appointment and terms and conditions of service of officers of the High Court of Justiciary and the Court of Session, including the Principal Clerk of Justiciary, the Accountant of Court and Auditor of the Court of Session, staff in the Justiciary Office and the Court of Session, and Macers.

The officers concerned are already civil servants and by virtue of the Act continue to be members of the Home Civil Service. However, there are certain specialities of appointment and terms and conditions of service of such court staff which distinguish them from other civil servants and which are peculiarly Scottish, making it appropriate that legislative competence over these aspects should be not be reserved. See also the amendments to the 1927 and 1933 Acts in paragraphs 3 and 4 of Schedule 8.

[Schedule 5](#), Part I, [Paragraph 9](#): Defence

### **Purpose and Effect**

This paragraph reserves all matters relating to defence and the armed forces; but it does not reserve responsibility for civil defence or the right to confer enforcement powers on the armed forces in relation to sea fisheries matters.

### **General**

Defence includes matters relating to the armed forces (including for example, their equipment, resources and deployment), defence policy, strategy, planning and intelligence and plans for the maintenance of essential supplies and services in case of war.

The reservation will not however prevent the Scottish Parliament from legislating about civil defence or conferring powers on the armed forces, notably the Navy or the Air Force, in relation to sea fishing, in particular to enforce offences created under Scottish sea fisheries legislation.

### **Parliamentary Consideration**

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	30-Mar-98	939
LC	21-Jul-98	868

### **Details of Provisions**

#### **Reservation**

The reserved matters set out in paragraph 9(1) are as follows:

paragraph 9(1)(a): *The Defence of the Realm*. This provision is intended to ensure that any matters related to the defence of the realm are reserved. It is a supplementary concept to that of the armed forces (which are identified separately, see below) designed to cover all the matters for which the Ministry of Defence are responsible, for defence purposes. These matters include the various defence establishments and contractors carrying out work for defence purposes; the Ministry of Defence Police and the services cadet forces (which do not form part of the armed forces but serve defence purposes); and special provisions for the acquisition, use or disposal of land and property for defence purposes.

paragraph 9(1)(b): *The Naval, Military or Air Forces of the Crown, including reserve forces*. This is the second main leg of the reservation. It makes clear that all matters



concerned with the armed forces themselves are reserved. This includes their command, establishment, maintenance, organisation, staffing and funding and all matters connected with the enlistment, management, disciplining and pay and allowances of both the military and civilian components of the armed forces. This reservation also covers the creation of offences relating particularly to the armed forces (for example, the unauthorised wearing of military uniforms), matters concerned with the territorial, auxiliary and volunteer reserve associations, special provisions relating to the status of members of the armed forces and the disclosure of information on military activities. The reservation also covers benefits to members and former members of the armed forces and their dependants and the matter of war graves. Equipment and explosives research for the purposes of the armed forces are also covered.

paragraph 9(1)(c): *Visiting Forces*. A separate reservation is required in order to ensure that all matters relating to visiting forces are covered. These are the armed forces of other countries visiting or based in the UK, including both their military and civilian components.

paragraph 9(1)(d): *International Headquarters and Defence Organisations*. This is simply to make clear that matters concerned with headquarters or organisations designated for the purposes of the International Headquarters and Defence Organisations Act 1964 are reserved.

paragraph 9(1)(e): *Trading with the Enemy and Enemy Property*. This reservation covers matters relating to the control of trade with the enemy and the confiscation, control or administration of enemy property. These matters are all aspects of the conduct of war and the conclusion of peace. This provision is not intended in any way to restrict the competence of the Scottish Parliament to legislate generally about the law of property in Scotland.

Paragraph 9(2) provides that paragraph 9(1) does not reserve the following:

paragraph 9(2)(a): *Civil Defence*, in particular planning, organisation and preparation by civilian authorities. The provision of non-combative defence against hostile attack is not reserved. The exercise of civil defence functions by a member of the armed forces, visiting forces or other defence force or organisation is, however, reserved.

paragraph 9(2)(b): *The Conferral of Enforcement Powers in relation to Sea Fishing*. It is necessary also to make clear that the Scottish Parliament has competence to confer powers to enforce obligations in relation to sea fishing (in particular powers usually exercisable by British Sea Fisheries Officers) on members of the armed forces. This is because the Royal Navy in particular carries out certain enforcement duties on behalf of the Fisheries Departments.

## **Executive Devolution**

The following functions have been included in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<a href="#">The Reserve Forces Act 1996 (c.14)</a> , Schedule 5, paragraphs 10 and 12.	The functions of the Secretary of State to give directions relative to the charitable property of a disbanded unit and to apply by petition to the Court of Session concerning such property.
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The following functions have been made exercisable by a Minister of the Crown subject to a requirement for agreement of or consultation with the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)).

<a href="#">The Reserve Forces Act 1996 (c.14)</a> , sections 90(1) and (3) and 91(1) and (3).	Section 90(1) and (3) - The function of the Secretary of State and the Lord Chancellor to
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	appoint a panel of chairmen of reserve forces appeal tribunals and determine their term of appointment.
	Section 91(1) and (3) - The function of the Secretary of State and the Lord Chancellor to appoint a panel of ordinary members of reserve forces appeal tribunals and determine their term of appointment.

### ***Schedule 5, Part I, Paragraph 10: Treason***

#### **Purpose and Effect**

This paragraph reserves treason.

#### **General**

The law of treason covers the circumstances which can give rise to the crime of treason, treason felony, misprision of treason (i.e. the concealment of treason) and who can commit those crimes. There is no separate Scottish law of treason.

The crime of treason is based on the Treason Act 1351. It declares what offences are to be treason e.g. levying war against the sovereign in Her Realm. Certain of these forms of treason - compassing the death of or levying war against the sovereign - have been extended by judicial interpretation. These extended forms are known as constructive treason. The reservation also covers treason felony. This includes acts to depose the sovereign, or prompt any foreigner to invade the UK or any other part of Her Majesty's dominions or countries. Treason can be committed by any person who owes allegiance to the Crown (i.e. in particular British citizens, or temporary UK residents.)

#### **Details of Provisions**

Treason (including constructive treason), treason felony, and misprision of treason (including the question of who can commit those crimes) is reserved.