



# Scotland Act 1998

## 1998 CHAPTER 46

### PART II

#### THE SCOTTISH ADMINISTRATION

##### *Ministers and their staff*

#### **44 The Scottish Executive**

- (1) There shall be a Scottish Executive, whose members shall be—
  - (a) the First Minister,
  - (b) such Ministers as the First Minister may appoint under section 47, and
  - (c) the Lord Advocate and the Solicitor General for Scotland.
- (2) The members of the Scottish Executive are referred to collectively as the Scottish Ministers.
- (3) A person who holds a Ministerial office may not be appointed a member of the Scottish Executive; and if a member of the Scottish Executive is appointed to a Ministerial office he shall cease to hold office as a member of the Scottish Executive.
- (4) In subsection (3), references to a member of the Scottish Executive include a junior Scottish Minister and “Ministerial office” has the same meaning as in section 2 of the House of Commons Disqualification Act 1975.

#### **45 The First Minister**

- (1) The First Minister shall be appointed by Her Majesty from among the members of the Parliament and shall hold office at Her Majesty’s pleasure.
- (2) The First Minister may at any time tender his resignation to Her Majesty and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.
- (3) The First Minister shall cease to hold office if a person is appointed in his place.

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- (4) If the office of First Minister is vacant or he is for any reason unable to act, the functions exercisable by him shall be exercisable by a person designated by the Presiding Officer.
- (5) A person shall be so designated only if—
  - (a) he is a member of the Parliament, or
  - (b) if the Parliament has been dissolved, he is a person who ceased to be a member by virtue of the dissolution.
- (6) Functions exercisable by a person by virtue of subsection (5)(a) shall continue to be exercisable by him even if the Parliament is dissolved.
- (7) The First Minister shall be the Keeper of the Scottish Seal.

#### **46 Choice of the First Minister**

- (1) If one of the following events occurs, the Parliament shall within the period allowed nominate one of its members for appointment as First Minister.
- (2) The events are—
  - (a) the holding of a poll at a general election,
  - (b) the First Minister tendering his resignation to Her Majesty,
  - (c) the office of First Minister becoming vacant (otherwise than in consequence of his so tendering his resignation),
  - (d) the First Minister ceasing to be a member of the Parliament otherwise than by virtue of a dissolution.
- (3) The period allowed is the period of 28 days which begins with the day on which the event in question occurs; but—
  - (a) if another of those events occurs within the period allowed, that period shall be extended (subject to paragraph (b)) so that it ends with the period of 28 days beginning with the day on which that other event occurred, and
  - (b) the period shall end if the Parliament passes a resolution under section 3(1) (a) or when Her Majesty appoints a person as First Minister.
- (4) The Presiding Officer shall recommend to Her Majesty the appointment of any member of the Parliament who is nominated by the Parliament under this section.

#### **47 Ministers**

- (1) The First Minister may, with the approval of Her Majesty, appoint Ministers from among the members of the Parliament.
- (2) The First Minister shall not seek Her Majesty's approval for any appointment under this section without the agreement of the Parliament.
- (3) A Minister appointed under this section—
  - (a) shall hold office at Her Majesty's pleasure,
  - (b) may be removed from office by the First Minister,
  - (c) may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament,
  - (d) if he resigns, shall cease to hold office immediately, and

- (e) shall cease to hold office if he ceases to be a member of the Parliament otherwise than by virtue of a dissolution.

#### **48 The Scottish Law Officers**

- (1) It is for the First Minister to recommend to Her Majesty the appointment or removal of a person as Lord Advocate or Solicitor General for Scotland; but he shall not do so without the agreement of the Parliament.
- (2) The Lord Advocate and the Solicitor General for Scotland may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.
- (3) Where the Lord Advocate resigns in consequence of such a resolution, he shall be deemed to continue in office until the warrant of appointment of the person succeeding to the office of Lord Advocate is granted, but only for the purpose of exercising his retained functions.
- (4) Subsection (3) is without prejudice to section 287 of the Criminal Procedure (Scotland) Act 1995 (demission of office by Lord Advocate).
- (5) Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.
- (6) In Schedule 2 to the House of Commons Disqualification Act 1975 (Ministerial offices) and Part III of Schedule 1 to the Ministerial and other Salaries Act 1975 (salaries of the Law Officers), the entries for the Lord Advocate and the Solicitor General for Scotland are omitted.

#### **49 Junior Scottish Ministers**

- (1) The First Minister may, with the approval of Her Majesty, appoint persons from among the members of the Parliament to assist the Scottish Ministers in the exercise of their functions.
- (2) They shall be known as junior Scottish Ministers.
- (3) The First Minister shall not seek Her Majesty's approval for any appointment under this section without the agreement of the Parliament.
- (4) A junior Scottish Minister—
  - (a) shall hold office at Her Majesty's pleasure,
  - (b) may be removed from office by the First Minister,
  - (c) may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament,
  - (d) if he resigns, shall cease to hold office immediately, and
  - (e) shall cease to hold office if he ceases to be a member of the Parliament otherwise than by virtue of a dissolution.

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## **50 Validity of acts of Scottish Ministers etc**

The validity of any act of a member of the Scottish Executive or junior Scottish Minister is not affected by any defect in his nomination by the Parliament or (as the case may be) in the Parliament's agreement to his appointment.

## **51 The Civil Service**

- (1) The Scottish Ministers may appoint persons to be members of the staff of the Scottish Administration.
- (2) Service as—
  - (a) the holder of any office in the Scottish Administration which is not a ministerial office, or
  - (b) a member of the staff of the Scottish Administration,shall be service in the Home Civil Service.
- (3) Subsection (1) and the other enactments conferring power to appoint such persons shall have effect subject to any provision made in relation to the Home Civil Service by or under any Order in Council.
- (4) Any Civil Service management function shall be exercisable by the Minister for the Civil Service in relation to the persons mentioned in subsection (2) as it is exercisable in relation to other members of the Home Civil Service; and, accordingly, section 1 of the Civil Service (Management Functions) Act 1992 (delegation of functions by Ministers) shall apply to any such function as extended by this section.
- (5) Any salary or allowances payable to or in respect of the persons mentioned in subsection (2) (including contributions to any pension scheme) shall be payable out of the Scottish Consolidated Fund.
- (6) Section 1(2) and (3) of the Superannuation Act 1972 (delegation of functions relating to civil service superannuation schemes etc.) shall have effect as if references to a Minister of the Crown (other than the Minister for the Civil Service) included the Scottish Ministers.
- (7) The Scottish Ministers shall make payments to the Minister for the Civil Service, at such times as he may determine, of such amounts as he may determine in respect of—
  - (a) the provision of pensions, allowances or gratuities by virtue of section 1 of the Superannuation Act 1972 to or in respect of persons who are or have been in such service as is mentioned in subsection (2), and
  - (b) any expenses to be incurred in administering those pensions, allowances or gratuities.
- (8) Amounts required for payments under subsection (7) shall be charged on the Scottish Consolidated Fund.
- (9) In this section—

“Civil Service management function” means any function to which section 1 of the Civil Service (Management Functions) Act 1992 applies and which is vested in the Minister for the Civil Service,

“the Home Civil Service” means Her Majesty's Home Civil Service.

### *Ministerial functions*

#### **52 Exercise of functions**

- (1) Statutory functions may be conferred on the Scottish Ministers by that name.
- (2) Statutory functions of the Scottish Ministers, the First Minister or the Lord Advocate shall be exercisable on behalf of Her Majesty.
- (3) Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Executive.
- (4) Any act or omission of, or in relation to, any member of the Scottish Executive shall be treated as an act or omission of, or in relation to, each of them; and any property acquired, or liability incurred, by any member of the Scottish Executive shall be treated accordingly.
- (5) Subsection (4) does not apply in relation to the exercise of—
  - (a) functions conferred on the First Minister alone, or
  - (b) retained functions of the Lord Advocate.
- (6) In this Act, “retained functions” in relation to the Lord Advocate means—
  - (a) any functions exercisable by him immediately before he ceases to be a Minister of the Crown, and
  - (b) other statutory functions conferred on him alone after he ceases to be a Minister of the Crown.
- (7) In this section, “statutory functions” means functions conferred by virtue of any enactment.

#### **53 General transfer of functions**

- (1) The functions mentioned in subsection (2) shall, so far as they are exercisable within devolved competence, be exercisable by the Scottish Ministers instead of by a Minister of the Crown.
- (2) Those functions are—
  - (a) those of Her Majesty’s prerogative and other executive functions which are exercisable on behalf of Her Majesty by a Minister of the Crown,
  - (b) other functions conferred on a Minister of the Crown by a prerogative instrument, and
  - (c) functions conferred on a Minister of the Crown by any pre-commencement enactment,but do not include any retained functions of the Lord Advocate.
- (3) In this Act, “pre-commencement enactment” means—
  - (a) an Act passed before or in the same session as this Act and any other enactment made before the passing of this Act,
  - (b) an enactment made, before the commencement of this section, under such an Act or such other enactment,
  - (c) subordinate legislation under section 106, to the extent that the legislation states that it is to be treated as a pre-commencement enactment.
- (4) This section and section 54 are modified by Part III of Schedule 4.

## **54 Devolved competence**

- (1) References in this Act to the exercise of a function being within or outside devolved competence are to be read in accordance with this section.
- (2) It is outside devolved competence—
  - (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or
  - (b) to confirm or approve any subordinate legislation containing such provision.
- (3) In the case of any function other than a function of making, confirming or approving subordinate legislation, it is outside devolved competence to exercise the function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or, as the case may be, conferring it so as to be exercisable in that way) would be outside the legislative competence of the Parliament.

## **55 Functions exercisable with agreement**

- (1) A statutory provision, or any provision not contained in an enactment, which provides for a Minister of the Crown to exercise a function with the agreement of, or after consultation with, any other Minister of the Crown shall cease to have effect in relation to the exercise of the function by a member of the Scottish Executive by virtue of section 53.
- (2) In subsection (1) “statutory provision” means any provision in a pre-commencement enactment other than paragraph 5 or 15 of Schedule 32 to the Local Government, Planning and Land Act 1980 (designation of enterprise zones).

## **56 Shared powers**

- (1) Despite the transfer by virtue of section 53 of any function under—
  - (a) section 17(1) of the Ministry of Transport Act 1919 (power to make advances for certain purposes),
  - (b) any Order in Council under section 1 of the United Nations Act 1946 (measures to give effect to Security Council decisions),
  - (c) section 9 of the Industrial Organisation and Development Act 1947 (levies for scientific research, promotion of exports, etc.),
  - (d) section 5 of the Science and Technology Act 1965 (funding of scientific research),
  - (e) section 1 of the Mineral Exploration and Investment Grants Act 1972 (contributions in respect of mineral exploration),
  - (f) sections 10 to 12 of the Industry Act 1972 (credits and grants for construction of ships and offshore installations),
  - (g) sections 2, 11(3) and 12(4) of the Employment and Training Act 1973 (power to make arrangements for employment and training etc. and to make certain payments),
  - (h) sections 7 to 9 and 11 to 13 of the Industrial Development Act 1982 (financial and other assistance for industry), and
  - (i) sections 39 and 40 of the Road Traffic Act 1988 (road safety information and training),

the function shall be exercisable by a Minister of the Crown as well as by the Scottish Ministers.

- (2) Despite the transfer of any other function by virtue of section 53, the function shall, if subordinate legislation so provides, be exercisable (or be exercisable so far as the legislation provides) by a Minister of the Crown as well as by the Scottish Ministers.
- (3) Subordinate legislation under subsection (2) may not be made so as to come into force at any time after the function in question has become exercisable by the Scottish Ministers.
- (4) Any power referred to in section 53(2)(a) to establish, maintain or abolish a body, office or office-holder having functions which include both—
  - (a) functions which are exercisable in or as regards Scotland and do not relate to reserved matters, and
  - (b) other functions,shall, despite that section, be exercisable jointly by the Minister of the Crown and the Scottish Ministers.
- (5) In subsection (4), “office-holder” includes employee or other post-holder.

## **57 Community law and Convention rights**

- (1) Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.
- (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 the Convention rights or with Community law.
- (3) Subsection (2) does not apply to an act of the Lord Advocate—
  - (a) in prosecuting any offence, or
  - (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland,which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

## **58 Power to prevent or require action**

- (1) If the Secretary of State has reasonable grounds to believe that any action proposed to be taken by a member of the Scottish Executive would be incompatible with any international obligations, he may by order direct that the proposed action shall not be taken.
- (2) If the Secretary of State has reasonable grounds to believe that any action capable of being taken by a member of the Scottish Executive is required for the purpose of giving effect to any such obligations, he may by order direct that the action shall be taken.
- (3) In subsections (1) and (2), “action” includes making, confirming or approving subordinate legislation and, in subsection (2), includes introducing a Bill in the Parliament.

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- (4) If any subordinate legislation made or which could be revoked by a member of the Scottish Executive contains provisions—
- (a) which the Secretary of State has reasonable grounds to believe to be incompatible with any international obligations or the interests of defence or national security, or
  - (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters,
- the Secretary of State may by order revoke the legislation.
- (5) An order under this section must state the reasons for making the order.

### *Property and liabilities*

## **59 Property and liabilities of the Scottish Ministers**

- (1) Property may be held by the Scottish Ministers by that name.
- (2) Property acquired by or transferred to the Scottish Ministers shall belong to, and liabilities incurred by the Scottish Ministers shall be liabilities of, the Scottish Ministers for the time being.
- (3) In relation to property to be acquired by or transferred to, or belonging to, the Scottish Ministers or liabilities incurred by the Scottish Ministers, references to the Scottish Ministers—
  - (a) in any title recorded in the Register of Sasines or registered in the Land Register of Scotland, or
  - (b) in any other document,
 shall be read in accordance with subsection (2).
- (4) A document shall be validly executed by the Scottish Ministers if it is executed by any member of the Scottish Executive.

## **60 Transfers to the Scottish Ministers**

- (1) Subordinate legislation may provide—
  - (a) for the transfer to the Scottish Ministers of any property belonging to a Minister of the Crown or government department, or
  - (b) for the Scottish Ministers to have such rights or interests in relation to any property belonging to a Minister of the Crown or government department as the person making the legislation considers appropriate (whether in connection with a transfer or otherwise).
- (2) Subordinate legislation may provide for the transfer to the Scottish Ministers of any liabilities to which a Minister of the Crown or government department is subject.
- (3) Subordinate legislation under this section may only be made in connection with any transfer or sharing of functions of a Minister of the Crown by virtue of section 53, 63 or 89 or in any other circumstances in which the person making the legislation considers it appropriate to do so for the purposes of this Act.

## **61 Property and liabilities of the Lord Advocate and the First Minister**

- (1) Property may be held by the Lord Advocate by that name.
- (2) Property acquired by or transferred to the Lord Advocate shall belong to, and liabilities incurred by the Lord Advocate shall be liabilities of, the Lord Advocate for the time being.
- (3) In relation to property to be acquired by or transferred to, or belonging to, the Lord Advocate or liabilities incurred by the Lord Advocate, references to the Lord Advocate—
  - (a) in any title recorded in the Register of Sasines or registered in the Land Register of Scotland, or
  - (b) in any other document,shall be read in accordance with subsection (2).
- (4) Any rights and liabilities acquired or incurred by the First Minister shall be rights or (as the case may be) liabilities of the First Minister for the time being.

## **62 Transfers to the Lord Advocate**

- (1) Subordinate legislation may provide—
  - (a) for the transfer to the Lord Advocate of any property belonging to a Minister of the Crown or government department, or
  - (b) for the Lord Advocate to have such rights or interests in relation to any property belonging to a Minister of the Crown or government department as the person making the legislation considers appropriate (whether in connection with a transfer or otherwise).
- (2) Subordinate legislation may provide for the transfer to the Lord Advocate of any liabilities to which a Minister of the Crown or government department is subject.
- (3) Subordinate legislation under this section may only be made in connection with the Lord Advocate becoming a member of the Scottish Executive or having any retained functions or in any other circumstances in which the person making the legislation considers it appropriate to do so for the purposes of this Act.

### *Transfer of additional functions*

## **63 Power to transfer functions**

- (1) Her Majesty may by Order in Council provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable—
  - (a) by the Scottish Ministers instead of by the Minister of the Crown,
  - (b) by the Scottish Ministers concurrently with the Minister of the Crown, or
  - (c) by the Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers.
- (2) Where an Order is made under subsection (1)(a) or (b) in relation to a function of a Minister of the Crown which is exercisable only with the agreement of, or after consultation with, another Minister of the Crown, the function shall, unless the Order provides otherwise, be exercisable by the Scottish Ministers free from any such requirement.

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- (3) An Order under this section may, in particular, provide for any function exercisable by the Scottish Ministers by virtue of an Order under subsection (1)(a) or (b) to be exercisable subject to a requirement for the function to be exercised with the agreement of, or after consultation with, a Minister of the Crown or other person.