



# Scotland Act 1998

## 1998 CHAPTER 46

### PART VI

#### SUPPLEMENTARY

##### *Subordinate legislation*

#### **112 Subordinate legislation: general**

- (1) Any power to make subordinate legislation conferred by this Act shall, if no other provision is made as to the person by whom the power is exercisable, be exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order.
- (2) But the power to make subordinate legislation under section 129(1) providing—
  - (a) for the appropriation of sums forming part of the Scottish Consolidated Fund, or
  - (b) for sums received by any person to be appropriated in aid of sums appropriated as mentioned in paragraph (a),shall be exercisable only by Her Majesty by Order in Council.
- (3) References in this Act to an open power are to a power to which subsection (1) applies (and include a power to make subordinate legislation under section 129(1) whether or not the legislation makes provision as mentioned in subsection (2)).
- (4) An Order in Council under an open power may revoke, amend or re-enact an order, as well as an Order in Council, under the power; and an order under an open power may revoke, amend or re-enact an Order in Council, as well as an order, under the power.
- (5) Any power to make subordinate legislation conferred by this Act shall, in relation to its exercise by a Minister of the Crown or a member of the Scottish Executive, be exercisable by statutory instrument.

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### **113 Subordinate legislation: scope of powers**

- (1) References in this section to a power are to an open power and to any other power to make subordinate legislation conferred by this Act which is exercisable by Her Majesty in Council or by a Minister of the Crown, and include a power as extended by this section.
- (2) A power may be exercised so as to make different provision for different purposes.
- (3) A power (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to—
  - (a) those cases subject to specified exceptions, or
  - (b) any particular case or class of case.
- (4) A power includes power to make—
  - (a) any supplementary, incidental or consequential provision, and
  - (b) any transitory, transitional or saving provision,which the person making the legislation considers necessary or expedient.
- (5) A power may be exercised by modifying—
  - (a) any enactment or prerogative instrument,
  - (b) any other instrument or document,if the subordinate legislation (or a statutory instrument containing it) would be subject to any of the types of procedure referred to in Schedule 7.
- (6) But a power to modify enactments does not (unless otherwise stated) extend to making modifications of this Act or subordinate legislation under it.
- (7) A power may be exercised so as to make provision for the delegation of functions.
- (8) A power includes power to make provision for sums to be payable out of the Scottish Consolidated Fund or charged on the Fund.
- (9) A power includes power to 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.
- (10) A power may not be exercised so as to create any criminal offence punishable—
  - (a) on summary conviction, with imprisonment for a period exceeding three months or with a fine exceeding the amount specified as level 5 on the standard scale,
  - (b) on conviction on indictment, with a period of imprisonment exceeding two years.
- (11) The fact that a power is conferred does not prejudice the extent of any other power.

### **114 Subordinate legislation: particular provisions**

- (1) A power to make subordinate legislation conferred by any of the following provisions of this Act may be exercised by modifying any enactment comprised in or made under this Act (except Schedules 4 and 5): sections 89, 104, 107, 108 and 129(1).
- (2) The reference in subsection (1) to a power to make subordinate legislation includes a power as extended by section 113.

- (3) A power to make subordinate legislation conferred by any of the following provisions of this Act may be exercised so as to make provision having retrospective effect: sections 30, 58(4), 104 and 107.

#### **115 Subordinate legislation: procedure**

- (1) Schedule 7 (which determines the procedure which is to apply to subordinate legislation under this Act in relation to each House of Parliament and the Scottish Parliament) shall have effect.
- (2) In spite of the fact that that Schedule provides for subordinate legislation under a particular provision of this Act (or the statutory instrument containing it) to be subject to any type of procedure in relation to the Parliament, the provision conferring the power to make that legislation may be brought into force at any time after the passing of this Act.
- (3) Accordingly, any subordinate legislation (or the statutory instrument containing it) made in the exercise of the power in the period beginning with that time and ending immediately before the principal appointed day is to be subject to such other type of procedure (if any) as may be specified in subordinate legislation made under section 129(1).

#### **116 Transfer of property: supplementary**

- (1) This section applies in relation to subordinate legislation under section 60, 62, 90 or 109 or paragraph 2 of Schedule 2.
- (2) Any such subordinate legislation may, in particular—
- (a) provide for the creation of rights or interests, or the imposition of liabilities or conditions, in relation to property transferred, or rights or interests acquired, by virtue of such legislation,
  - (b) provide for any property, liabilities or conditions to be determined under such legislation,
  - (c) make provision (other than provision imposing a charge to tax) as to the tax treatment of anything done by virtue of such legislation.
- (3) No order shall be made by a Minister of the Crown by virtue of subsection (2)(c), and no recommendation shall be made to Her Majesty in Council to make an Order in Council by virtue of subsection (2)(c), without the agreement of the Treasury.
- (4) Subordinate legislation to which this section applies shall have effect in relation to any property or liabilities to which it applies despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict the transfer of the property or liabilities.
- (5) 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 of property by virtue of any subordinate legislation to which this section applies.
- (6) Any such right shall have effect in the case of any such transfer as if the transferee were the same person in law as the transferor and as if no transfer of the property had taken place.

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- (7) Such compensation as is just shall be paid to any person in respect of any such right which would, apart from subsection (5), have operated in favour of, or become exercisable by, that person but which, in consequence of the operation of that subsection, cannot subsequently operate in his favour or (as the case may be) become exercisable by him.
- (8) Any compensation payable by virtue of subsection (7) shall be paid by the transferor or by the transferee or by both.
- (9) Subordinate legislation under this subsection may provide for the determination of any disputes as to whether and, if so, how much, compensation is payable by virtue of subsection (7) and as to the person to whom or by whom it shall be paid.
- (10) Subsections (4) to (9) apply in relation to the creation of rights or interests, or the doing of anything else, in relation to property as they apply in relation to a transfer of property; and references to the transferor and transferee shall be read accordingly.
- (11) 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 section 60 or 62 or paragraph 2 of Schedule 2 shall be conclusive evidence of the transfer or (as the case may be) the fact that there has not been a transfer.
- (12) A certificate issued by the Secretary of State and the Scottish Ministers that any property or liability has, or has not, been transferred by virtue of an Order in Council under section 90 or 109 shall be conclusive evidence of the transfer or (as the case may be) the fact that there has not been a transfer.
- (13) In this section “right of return” means any right under a provision for the return or reversion of property in specified circumstances.

#### *General modification of enactments*

### **117 Ministers of the Crown**

So far as may be necessary for the purpose or in consequence of the exercise of a function by a member of the Scottish Executive within devolved competence, any pre-commencement enactment or prerogative instrument, and any other instrument or document, shall be read as if references to a Minister of the Crown (however described) were or included references to the Scottish Ministers.

### **118 Subordinate instruments**

- (1) Subsection (2) applies in relation to the exercise by a member of the Scottish Executive within devolved competence of a function to make, confirm or approve subordinate legislation.
- (2) If a pre-commencement enactment makes provision—
  - (a) for any instrument or the draft of any instrument made in the exercise of such a function to be laid before Parliament or either House of Parliament,
  - (b) for the annulment or approval of any such instrument or draft by or in pursuance of a resolution of either or both Houses of Parliament, or
  - (c) prohibiting the making of such an instrument without that approval,

the provision shall have effect, so far as it relates to the exercise of the function by a member of the Scottish Executive within devolved competence, as if any reference in it to Parliament or either House of Parliament were a reference to the Scottish Parliament.

(3) Where—

- (a) a function of making, confirming or approving subordinate legislation conferred by a pre-commencement enactment is exercisable by a Scottish public authority with mixed functions or no reserved functions, and
- (b) a pre-commencement enactment makes such provision in relation to the exercise of the function as is mentioned in subsection (2),

the provision shall have effect, so far as it relates to the exercise of the function by that authority, as if any reference in it to Parliament or either House of Parliament were a reference to the Scottish Parliament.

(4) Where—

- (a) a function of making, confirming or approving subordinate legislation conferred by a pre-commencement enactment is exercisable within devolved competence by a person other than a Minister of the Crown, a member of the Scottish Executive or a Scottish public authority with mixed functions or no reserved functions, and
- (b) a pre-commencement enactment makes such provision in relation to the exercise of the function as is mentioned in subsection (2),

the provision shall have effect, so far as it relates to the exercise of the function by that person within devolved competence, as if any reference in it to Parliament or either House of Parliament were a reference to the Scottish Parliament.

(5) If a pre-commencement enactment applies the Statutory Instruments Act 1946 as if a function of the kind mentioned in subsection (3) or (4) were exercisable by a Minister of the Crown, that Act shall apply, so far as the function is exercisable as mentioned in paragraph (a) of subsection (3) or (as the case may be) (4), as if the function were exercisable by the Scottish Ministers.

## **119 Consolidated Fund etc**

(1) In this section “Scottish functions” means—

- (a) functions of the Scottish Ministers, the First Minister or the Lord Advocate which are exercisable within devolved competence,
- (b) functions of any Scottish public authority with mixed functions or no reserved functions.

(2) Subject to subsections (3) and (5), a provision of a pre-commencement enactment which—

- (a) requires or authorises the payment of any sum out of the Consolidated Fund or money provided by Parliament, or
  - (b) requires or authorises the payment of any sum into the Consolidated Fund,
- shall cease to have effect in relation to any Scottish functions.

(3) 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

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- (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 any 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 required or authorised it to be paid into that Fund (as the case may be).
- (4) Subsections (2) and (3) do not apply to the words from the beginning of section 2(3) of the European Communities Act 1972 (general implementation of Treaties) to “such Community obligation”.
- (5) 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 have effect in relation 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 rules under section 65(1)(c) instead of being paid into that Fund.
- (6) Where a power to lend money under a pre-commencement enactment is exercisable by the Scottish Ministers, subsection (7) applies to any sums which, for the purpose or as the result of the exercise of the power, would be required (apart from that subsection)
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- (a) to be issued by the Treasury out of the National Loans Fund, or  
(b) to be paid into that Fund.
- (7) Those sums shall instead—
- (a) be paid out of the Scottish Consolidated Fund without further approval, or  
(b) be paid into that Fund,  
(as the case may be).

## **120 Accounts and audit**

A provision of a pre-commencement enactment which—

- (a) requires any account to be examined, certified and reported on by, or to be open to the inspection of, the Comptroller and Auditor General, or  
(b) requires him to have access to any other document for carrying out any such examination,

shall have effect in relation to any Scottish functions (within the meaning of section 119) as if the references to the Comptroller and Auditor General were to the Auditor General for Scotland.

## **121 Requirements to lay reports etc. before Parliament**

- (1) This section applies where—
- (a) a pre-commencement enactment makes provision for any report to be laid before Parliament or either House of Parliament, and  
(b) the report concerns Scottish functions.
- (2) If the report only concerns Scottish functions, it shall be laid instead before the Scottish Parliament.
- (3) In any other case, it shall be laid before the Scottish Parliament as well as before Parliament or (as the case may be) either House of Parliament.

- (4) In this section—  
“report” includes accounts and any statement,  
“Scottish functions” has the same meaning as in section 119.

## **122 Crown land**

- (1) In any provision about the application of any pre-commencement enactment to Crown land—  
(a) references to a Minister of the Crown or government department shall be read as including the Scottish Ministers and the Lord Advocate, and  
(b) references to a Minister of the Crown or government department having the management of the land shall be read as including any member of the Scottish Executive having the management of the land.
- (2) In this section, “Crown land” has the meaning given by section 242 of the Town and Country Planning (Scotland) Act 1997.

## **123 Stamp duty**

In section 55 of the Finance Act 1987 (Crown exemption from stamp duty) references to a Minister of the Crown shall be read as including the Scottish Ministers, the Lord Advocate and the Parliamentary corporation.

## **124 Modification of sections 94 and 117 to 122**

- (1) Subordinate legislation may provide for any provision of sections 94 and 117 to 122 not to apply, or to apply with modifications, in such cases as the person making the legislation considers appropriate.
- (2) Subordinate legislation made by Her Majesty in Council or a Minister of the Crown under this Act may, in connection with any other provision made by the legislation, also provide for any provision of sections 94 and 117 to 122 not to apply, or to apply with modifications.

### *Amendments and repeals*

## **125 Amendments and repeals**

- (1) Schedule 8 (which makes modifications of enactments) shall have effect.
- (2) The enactments mentioned in Schedule 9 are repealed to the extent specified in that Schedule.

### *Final provisions*

## **126 Interpretation**

- (1) In this Act—  
“body” includes unincorporated association,

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“constituencies” and “regions”, in relation to the Parliament, mean the constituencies and regions provided for by Schedule 1,

“constituency member” means a member of the Parliament for a constituency,

“the Convention rights” has the same meaning as in the Human Rights Act 1998,

“document” means anything in which information is recorded in any form (and references to producing a document are to be read accordingly),

“enactment” includes an Act of the Scottish Parliament, Northern Ireland legislation (within the meaning of the Northern Ireland Act 1998) and an enactment comprised in subordinate legislation, and includes an enactment comprised in, or in subordinate legislation under, an Act of Parliament, whenever passed or made,

“financial year” means a year ending with 31st March,

“functions” includes powers and duties, and “confer”, in relation to functions, includes impose,

“government department” means any department of the Government of the United Kingdom,

“the Human Rights Convention” means—

(a) the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950, and

(b) the Protocols to the Convention,

as they have effect for the time being in relation to the United Kingdom,

“Minister of the Crown” includes the Treasury,

“modify” includes amend or repeal,

“occupational pension scheme”, “personal pension scheme” and “public service pension scheme” have the meanings given by section 1 of the Pension Schemes Act 1993, but as if the reference to employed earners in the definition of personal pension scheme were to any earners,

“the Parliament” means the Scottish Parliament,

“parliamentary”, in relation to constituencies, elections and electors, is to be taken to refer to the Parliament of the United Kingdom,

“prerogative instrument” means an Order in Council, warrant, charter or other instrument made under the prerogative,

“the principal appointed day” means the day appointed by an order under section 130 which is designated by the order as the principal appointed day,

“proceedings”, in relation to the Parliament, includes proceedings of any committee or sub-committee,

“property” includes rights and interests of any description,

“regional member” means a member of the Parliament for a region,

“Scotland” includes so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland,

“Scottish public authority” means any public body (except the Parliamentary corporation), public office or holder of such an office whose functions (in each case) are exercisable only in or as regards Scotland,

“the Scottish zone” means the sea within British fishery limits (that is, the limits set by or under section 1 of the Fishery Limits Act 1976) which is adjacent to Scotland,



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“standing orders” means standing orders of the Parliament,

“subordinate legislation” has the same meaning as in the Interpretation Act 1978 and also includes an instrument made under an Act of the Scottish Parliament,

“tribunal” means any tribunal in which legal proceedings may be brought.

- (2) Her Majesty may by Order in Council determine, or make provision for determining, for the purposes of this 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 not.
- (3) For the purposes of this Act—
- (a) the question 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, having regard (among other things) to the likely effects in all the circumstances of any exercise of the function, but
  - (b) bodies to which paragraph 3 of Part III of Schedule 5 applies are to be treated as if all their functions were functions which relate to reserved matters.
- (4) References in this Act to Scots private law are to the following areas of the civil law of Scotland—
- (a) the general principles of private law (including private international law),
  - (b) the law of persons (including natural persons, legal persons and unincorporated bodies),
  - (c) the law of obligations (including obligations arising from contract, unilateral promise, delict, unjustified enrichment and negotiorum gestio),
  - (d) the law of property (including heritable and moveable property, trusts and succession), and
  - (e) the law of actions (including jurisdiction, remedies, evidence, procedure, diligence, recognition and enforcement of court orders, limitation of actions and arbitration),
- and include references to judicial review of administrative action.
- (5) References in this Act to Scots criminal law include criminal offences, jurisdiction, evidence, procedure and penalties and the treatment of offenders.
- (6) References in this Act and in any other enactment to the Scottish Administration are to the office-holders in the Scottish Administration and the members of the staff of the Scottish Administration.
- (7) For the purposes of this Act—
- (a) references to office-holders in the Scottish Administration are to—
    - (i) members of the Scottish Executive and junior Scottish Ministers, and
    - (ii) the holders of offices in the Scottish Administration which are not ministerial offices, and
  - (b) references to members of the staff of the Scottish Administration are to the staff of the persons referred to in paragraph (a).
- (8) For the purposes of this Act, the offices in the Scottish Administration which are not ministerial offices are—

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- (a) the Registrar General of Births, Deaths and Marriages for Scotland, the Keeper of the Registers of Scotland and the Keeper of the Records of Scotland, and
  - (b) any other office of a description specified in an Order in Council made by Her Majesty under this subsection.
- (9) In this Act—
- (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,
- are referred to as “Community law”.
- (10) In this Act, “international obligations” means any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights.
- (11) In this Act, “by virtue of” includes “by” and “under”.

## 127 Index of defined expressions

In this Act, the expressions listed in the left-hand column have the meaning given by, or are to be interpreted in accordance with, the provisions listed in the right-hand column.

<i>Expression</i>	<i>Provision of this Act</i>
Act of the Scottish Parliament	Section 28(1)
Advocate General	Section 32(4)
Auditor General for Scotland	Section 69
Body	Section 126(1)
By virtue of	Section 126(11)
Clerk, and Assistant Clerk	Section 20 and paragraph 3 of Schedule 2
Community law	Section 126(9)
Constituencies and constituency member	Section 126(1)
The Convention rights	Section 126(1)
Cross-border public authority	Section 88(5)
Devolved competence (in relation to the exercise of functions)	Section 54
Document	Section 126(1)
Enactment	Sections 113(6) and 126(1)
Financial year	Section 126(1)
Functions	Section 126(1)
Government department	Section 126(1)
The Human Rights Convention	Section 126(1)

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<i>Expression</i>	<i>Provision of this Act</i>
International obligations	Section 126(10)
Judicial Committee	Section 32(4)
Legislative competence	Section 29
Member of the Scottish Executive	Section 44(1)
Members of the staff of the Scottish Administration	Section 126(7)
Minister of the Crown	Section 126(1)
Modify	Section 126(1)
Occupational pension scheme, personal pension scheme and public service pension scheme	Section 126(1)
Office-holders in the Scottish Administration	Section 126(7)
Offices in the Scottish Administration which are not ministerial offices	Section 126(8)
Open power	Section 112(3)
The Parliament	Section 126(1)
“parliamentary” (in relation to constituencies, elections and electors)	Section 126(1)
The Parliamentary corporation	Section 21(1)
Pre-commencement enactment	Section 53(3)
Prerogative instrument	Section 126(1)
Presiding Officer	Section 19
Principal appointed day	Section 126(1)
Proceedings	Section 126(1)
Property	Section 126(1)
Regional list (in relation to a party)	Section 5(4)
Regional returning officer	Section 12(6)
Regional vote	Section 6(2)
Regions and regional member	Section 126(1)
Registered political party	Section 5(9)
Reserved matters	Schedule 5
Retained functions (in relation to the Lord Advocate)	Section 52(6)
Scotland	Section 126(1) and (2)
Scots criminal law	Section 126(5)

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<i>Expression</i>	<i>Provision of this Act</i>
Scots private law	Section 126(4)
Scottish Administration	Section 126(6)
Scottish Ministers	Section 44(2)
Scottish public authority	Section 126(1)
Scottish public authority with mixed functions or no reserved functions	Paragraphs 1 and 2 of Part III of Schedule 5
Scottish Seal	Section 2(6)
The Scottish zone	Section 126(1)
Staff of the Parliament	Paragraph 3 of Schedule 2
Standing orders	Section 126(1)
Subordinate legislation	Section 126(1)
Tribunal	Section 126(1)

## **128 Expenses**

- (1) There shall be paid out of money provided by Parliament—
  - (a) any expenditure incurred by a Minister of the Crown by virtue of this Act, and
  - (b) any increase attributable to this Act in the sums payable out of money so provided under any other enactment.
- (2) There shall be paid into the Consolidated Fund any sums received by a Minister of the Crown by virtue of this Act which are not payable into the National Loans Fund.

## **129 Transitional provisions etc**

- (1) Subordinate legislation may make such provision as the person making the legislation considers necessary or expedient for transitory or transitional purposes in connection with the coming into force of any provision of this Act.
- (2) If any of the following provisions come into force before the Human Rights Act 1998 has come into force (or come fully into force), the provision shall have effect until the time when that Act is fully in force as it will have effect after that time: sections 29(2)(d), 57(2) and (3), 100 and 126(1) and Schedule 6.

## **130 Commencement**

- (1) Sections 19 to 43, Parts II to V, sections 117 to 124 and section 125 (except so far as relating to paragraphs 10, 11, 19 and 23(1) and (6) of Schedule 8) shall come into force on such day as the Secretary of State may by order appoint.
- (2) Different days may be appointed under this section for different purposes.

## **131 Extent**

Section 25 extends only to Scotland.

**132 Short title**

This Act may be cited as the Scotland Act 1998.