

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

COMMENTARY

Part II: the Scottish Administration

SECTION 63: Power to transfer functions

Purpose and Effect

This section enables Her Majesty, by Order in Council, to provide for the transfer to the Scottish Ministers of functions of a Minister of the Crown which are exercisable in or as regards Scotland, even although they relate to reserved matters. It also enables such functions to be shared with the Scottish Ministers or to be exercised by a Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers.

General

Section 53 provides for the automatic transfer to Scottish Ministers of any functions of a Minister of the Crown “so far as they are exercisable within devolved competence” as defined in section 54. Most of the functions exercisable by Scottish Ministers will have transferred to them by this route.

However, there were certain functions which were exercisable by the Secretary of State for Scotland through the Scottish Office prior to devolution and which it was intended should be exercisable by the Scottish Ministers but which would not transfer to them under section 53 because they did not relate to devolved matters. This section was therefore intended to provide for the transfer of those functions and any other functions conferred upon a Minister of the Crown which it is proposed should be treated in the same way.

These functions could not, of course, be transferred automatically as in the case of section 53. It was therefore necessary to provide in this section for an order making power to identify the particular functions which were to be transferred. The section does not, however, limit the functions to be transferred to those which relate to reserved matters.

The only limitation placed upon the function to be transferred was that it had to be exercisable by a Minister of the Crown “in or as regards Scotland” and, by necessary implication, it had to be separately exercisable in or as regards Scotland. Where there is uncertainty about this, section 30(3) empowers an Order in Council to be made which would provide that specified functions are to be treated, for such purposes of this Act as may be specified (including section 63), as being, or as not being, functions which are exercisable in or as regards Scotland for further details, see the note on section 30.

Section 106 also enables provision to be made by Order in Council modifying a function exercisable by a Minister of the Crown “for the purpose of enabling or otherwise facilitating” its transfer under section 53 or 63. The Order may in particular provide for any function which is not separately exercisable in or as regards Scotland to be so exercisable - see the note on section 106.

This section also enables Scottish Ministers to share or to participate in the making of certain functions in various ways which are detailed in the subsections.

As the effect of this section was to enable Scottish Ministers to exercise functions in relation to matters which were outside the competence of the Scottish Parliament to legislate about, it is commonly referred to as “executive devolution”.

Further provision about the making of the Order in Council is to be found in sections 112 to 115 and Schedule 7. It is subject to Type A procedure which means that it is subject to draft affirmative procedure in both the Westminster Parliament and the Scottish Parliament. This ensures that functions are not transferred to be exercised by Scottish Ministers without their consent and without the knowledge and consent of the Scottish Parliament. Even although the Scottish Parliament may not have any legislative competence over the transferred function, nevertheless Scottish Ministers are accountable to the Parliament for their exercise.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CC	10-Feb-98	160
CC	10-Feb-98	205
CR	12-May-98	244
LC	28-Jul-98	1450
LC	30-Jul-98	1649
LC	30-Jul-98	1650

Details of Provisions

Subsection (1) enables Her Majesty, by Order in Council, to 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 or, or after consultation with, the Scottish Ministers.

“Functions” include any executive powers or duties, such as the power to grant licences or to pay grants and the duty to maintain registers, and the power to make subordinate legislation.

Where a function is exercisable “concurrently” with the UK Minister this means that both the Scottish Ministers and the UK Minister may exercise that function independently of each other.

Subsection (2) provides that, where an Order transfers a function to the Scottish Ministers or provides that it should be exercisable by them concurrently with the Minister of the Crown (under (a) or (b) above), then any existing requirement that the function can only be exercised with the agreement of, or after consultation with, another Minister of the Crown shall no longer apply to the exercise of the function by the Scottish Ministers, unless the Order expressly provides that it should continue to apply. A requirement to consult a person other than a Minister of the Crown will continue to apply.

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This is similar to the effect of section 55 in relation to functions transferred under section 53.

Subsection (3) provides that, where an Order transfers a function to the Scottish Ministers or provides that it should be exercisable by them concurrently with the Minister of the Crown (under (a) or (b) above), then the Order can impose a requirement for the function to be exercisable by the Scottish Ministers only with the agreement of, or after consultation with, a Minister of the Crown or other person.