

*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 V: Miscellaneous and General

SECTION 88: Cross-border public authorities: initial status

Purpose and Effect

This section:

- (a) makes provision for public authorities which, in addition to other functions, have functions exercisable in or as regards Scotland which do not relate to reserved matters to be designated by Order in Council as “cross-border public authorities”;
- (b) disapplies the provisions in certain other sections in relation to authorities so specified;
- (c) requires a Minister of the Crown to consult the Scottish Ministers before he exercises certain functions in relation to such an authority; and
- (d) requires any report relating to such an authority which must be laid before the Westminster Parliament also to be laid before the Scottish Parliament.

General

This is one of a number of sections which make provision for public authorities which have remits which fall partly within the legislative competence of the Scottish Parliament. This includes bodies dealing only with devolved subjects, but which operate both in Scotland and England, and Scotland-only bodies which operate in both reserved and devolved areas. Specific provision is made for these authorities because of the effect of section 53. That section transfers Ministerial function which are exercisable within devolved competence to the Scottish Ministers and removes them to that extent from UK Government Ministers. In the case of functions exercisable in relation to public authorities - such as functions of appointment, funding or direction - the result could have been an unworkable distribution of functions between the two administrations.

The present section enables such authorities to be designated by Order in Council as cross-border public authorities. This then disapplies sections 53 and 118-121 from functions which are specifically exercisable in relation to such authorities. (Sections 118-121 translate subordinate legislation procedure and requirements for funding, auditing and reporting to the equivalents for the Scottish Parliament). Thus all Ministerial functions specifically exercisable in relation to such bodies are left with a Minister of the Crown.

However, the section also requires the Minister to consult the Scottish Ministers before exercising specific functions of appointment or removal or functions whose exercise might affect Scotland other than wholly in relation to reserved matters. It also imposes a requirement for any report relating to a cross-border public authority, which is required by a pre-commencement enactment (as defined in section 53) or a prerogative instrument to be laid at Westminster, to be laid also in the Scottish Parliament.

The consultation and reporting requirements under section 88 can be regarded as the “default” position for cross-border public authorities. That position can be modified under section 89 to provide, for example, that certain appointment or direction-making powers should be exercisable by the Scottish Ministers. This allows arrangements for accountability and control to be tailor-made for particular authorities.

Other related provisions are:

- (a) section 90, which makes provision where the Scottish Parliament legislates to remove the devolved functions of a cross-border public authority and which provides a power for its property and liabilities to be transferred in that circumstance, and
- (b) section 56(4), which permits the Scottish Ministers and a Minister of the Crown to exercise non-statutory powers jointly to establish, maintain, or abolish a body, office, or office-holder with cross-border responsibilities.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
CR	12-May-98	197
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LC	6-Oct-98	383
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Details of Provisions

Subsection (1) disapplies the following sections in relation to functions which are specifically exercisable in relation to a cross-border public authority:

- (a) section 53, which transfers Ministerial functions exercisable within devolved competence to the Scottish Ministers;
- (b) section 118, which modifies the effect of pre-commencement enactments with respect to functions relating to subordinate legislation;
- (c) section 119, which alters the effect of certain references in pre-commencement enactments to the Consolidated Fund or money provided by Parliament;
- (d) section 120, which alters the effect of provisions in pre-commencement enactments relating to accounts and audit; and
- (e) section 121, which requires reports, which are required by a pre-commencement enactment to be laid before the Westminster Parliament, to be laid before the Scottish Parliament instead of, or in addition to, Westminster.

Section 118 is also disapplied in relation to any function of a cross-border public authority.

Subsection (2) provides that the Scottish Ministers are to be consulted by a Minister of the Crown before he exercises any specific function relating to a cross-border public authority which either relates to appointments or the exercise of which might affect Scotland otherwise than wholly in relation to reserved matters.

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Subsection (3) requires reports (defined in subsection (7)) relating to cross-border public authorities which are required by a pre-commencement enactment to be laid before the Westminster Parliament to be laid before the Scottish Parliament.

Subsection (4) provides that the provisions of subsections (1) to (3) are subject to any provision made by any Order in Council under section 89, for example to transfer certain functions to the Scottish Ministers.

Subsection (5) defines a “cross-border public authority” for the purposes of the Act as any body, government department, office or office-holder specified in an Order in Council made under this section. Further provision about the making of this Order in Council is to be found in sections 112 to 115 and Schedule 7.

Subsection (6) provides that an Order may only specify such a body, government department, office or office-holder which, at the time when the Order is made, has, in addition to other functions, functions exercisable in or as regards Scotland which do not relate to reserved matters.

This power was exercised in making the Scotland Act 1998 (Cross-Border Public Authorities) (Specification) Order 1999 (S.I. 1999/1319) which specifies some 65 authorities.

Subsection (7) defines “report” (as mentioned in subsection (3)) as including accounts and any statement and “office-holder” as including employee or other post-holder.