

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

# SCOTLAND ACT 1998

---

## EXPLANATORY NOTES

### COMMENTARY

#### *Derivations*

The table below shows the legislative history of each of the provisions in the Act, providing the clause, Schedule or paragraph number in each print of the Bill. For example in the “Lords R” print (which is the Bill as amended in Lords Committee, as used at Report stage), what was clause 40 eventually became section 4 of the Scotland Act.

| <i>Act</i> | <i>Lords 3R<br/>HL Bill 155</i> | <i>Lords R<br/>HL Bill 155</i> | <i>Lords C<br/>HL Bill 119</i> | <i>Comm R<br/>Bill 166</i> | <i>Comm C<br/>Bill 104</i> |
|------------|---------------------------------|--------------------------------|--------------------------------|----------------------------|----------------------------|
| 1          | 1                               | 1                              | 1                              | 1                          | 1                          |
| 2          | 2                               | 2                              | 2                              | 2                          | 2                          |
| 3          | 3                               | 3                              | 3                              | 3                          | 3                          |
| 4          | 4                               | 40                             | 40                             | 40                         | 40                         |
| 5          | 5                               | 4                              | 4                              | 4                          | 4                          |
| 6          | 6                               | 5                              | 5                              | 5                          | 5                          |
| 7          | 7                               | 6                              | 6                              | 6                          | 6                          |
| 8          | 8                               | 7                              | 7                              | 7                          | 7                          |
| 9          | 9                               | 8                              | 8                              | 8                          | 8                          |
| 10         | 10                              | 9                              | 9                              | 9                          | 9                          |
| 11         | 11                              | 10                             | 10                             | 10                         | 10                         |
| 12         | 12                              | 11                             | 11                             | 11                         | 11                         |
| 13         | 13                              | 12                             | 12                             | 12                         | 12                         |
| 14         | 14                              | 13                             | 13                             | 13                         | 13                         |
| 15         | 15                              | 14                             | 14                             | 14                         | 14                         |
| 16         | 16                              | 15                             | 15                             | 15                         | 15                         |
| 17         | 17                              | 16                             | 16                             | 16                         | 16                         |
| 18         | 18                              | 17                             | 17                             | 17                         | 17                         |
| 19         | 19                              | 18                             | 18                             | 18                         | 18                         |
| 20         | 20                              | 19                             | 19                             | 19                         | 19                         |
| 21         | 21                              | 20                             | 20                             | 20                         | 20                         |

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

| <b>Act</b> | <b><i>Lords 3R</i></b><br><b><i>HL Bill 155</i></b> | <b><i>Lords R</i></b><br><b><i>HL Bill 155</i></b> | <b><i>Lords C</i></b><br><b><i>HL Bill 119</i></b> | <b><i>Comm R</i></b><br><b><i>Bill 166</i></b> | <b><i>Comm C</i></b><br><b><i>Bill 104</i></b> |
|------------|---|--|--|--|--|
| 22         | 22  | 21   | 21   | 21   | 21   |
| 23         | 23  | 23   | 23   | 23   | 23   |
| 24         | 24  | 23   | 23   | 23   | 23   |
| 25         | 25  | 24   | 24   | 24   | 24   |
| 26         | 26  | 25   | 25   | 25   | 25   |
| 27         | 27  | 26   | 26   | 26   | 26   |
| 28         | 28  | 27   | 27   | 27   | 27   |
| 29         | 29  | 28   | 28   | 28   | 28   |
| 30         | 30  | 29   | 29   | 29   | 29   |
| 31         | 31  | 30   | 30   | 30   | 30   |
| 32         | 32  | 31   | 31   | 31   | 31   |
| 33         | 33  | 32   | 32   | 32   | 32   |
| 34         | ---   | ---  | ---  | ---  | ---  |
| 35         | 35  | 33   | 33   | 33   | 33   |
| 36         | 34  | 34   | 34   | 34   | 34   |
| 37         | 37  | 35   | 35   | 35   | 35   |
| 38         | 38  | 36   | 36   | 36   | 36   |
| 39         | 39  | 22   | 22   | 22   | 22   |
| 40         | 40  | ---  | ---  | ---  | ---  |
| 41         | 41  | 37   | 37   | 37   | 37   |
| 42         | 42  | 38   | 38   | 38   | 38   |
| 43         | 43  | 39   | 39   | 39   | 39   |
| 44         | 44  | 41   | 41   | 41   | 41   |
| 45         | 45  | 42   | 42   | 42   | 42   |
| 46         | 46  | 43   | 43   | 43   | 43   |
| 47         | 47  | 44   | 44   | 44   | 44   |
| 48         | 48  | 45   | 45   | 45   | 45   |
| 49         | 49  | 46   | 46   | 46   | 46   |
| 50         | 50  | ---  | ---  | ---  | ---  |
| 51         | 51  | 47   | 47   | 47   | 47   |
| 52         | 52  | 48   | 48   | 48   | 48   |
| 53         | 53  | 49   | 49   | 49   | 49   |
| 54         | 54  | 50   | 50   | 50   | 50   |
| 55         | 55  | 51   | 51   | 51   | 51   |
| 56         | 56  | 52   | 52   | 52   | 52   |
| 57         | 57  | 53   | 53   | 53   | 53   |

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

| <b>Act</b> | <b><i>Lords 3R</i></b><br><b><i>HL Bill 155</i></b> | <b><i>Lords R</i></b><br><b><i>HL Bill 155</i></b> | <b><i>Lords C</i></b><br><b><i>HL Bill 119</i></b> | <b><i>Comm R</i></b><br><b><i>Bill 166</i></b> | <b><i>Comm C</i></b><br><b><i>Bill 104</i></b> |
|------------|---|--|--|--|--|
| 58         | 58  | 54   | 54   | 54   | 54   |
| 59         | 59  | 55   | 55   | 55   | 55   |
| 60         | 60  | 56   | 56   | 56   | 56   |
| 61         | 61  | 57   | 57   | 57   | 57   |
| 62         | 62  | 58   | 58   | 58   | 58   |
| 63         | 63  | 59   | 59   | 59   | 59   |
| ---        | ---   | ---  | 60   | 60   | 60   |
| 64         | 64  | 60   | 61   | 61   | 61   |
| 65         | 65  | 61   | 62   | 62   | 62   |
| 66         | 66  | 62   | 63   | 63   | 63   |
| 67         | 67  | 63   | 64   | 64   | 64   |
| 68         | 68  | 64   | 65   | 65   | 65   |
| 69         | 69  | 65   | ----   | ----   | ----   |
| 70         | 70  | 66   | 66   | 66   | 66   |
| 71         | 71  | 67   | 67   | 67   | 67   |
| 72         | 72  | 68   | 68   | 68   | 68   |
| 73         | 73  | 69   | 69   | 69   | 69   |
| 74         | 74  | 70   | 70   | 70   | 70   |
| 75         | 75  | 71   | 71   | 71   | 71   |
| 76         | 76  | 72   | 72   | 72   | 72   |
| 77         | 77  | 73   | 73   | 73   | 73   |
| 78         | 78  | 74   | 74   | 74   | 74   |
| 79         | 79  | 75   | 75   | 75   | 75   |
| 80         | 80  | 76   | ---  | ---  | ---  |
| 81         | 81  | 77   | 76   | 76   | 76   |
| 82         | 82  | 78   | 77   | 77   | 77   |
| 83         | 83  | 79   | 78   | 78   | 78   |
| 84         | 84  | 80   | 79   | 79   | 79   |
| 85         | 85  | 81   | 80   | 80   | 80   |
| 86         | 86  | 82   | 81   | 81   | 81   |
| 87         | 87  | 83   | 82   | 82   | 82   |
| 88         | 84  | 84   | 83   | 83   | 83   |
| 89         | 89  | 85   | 84   | 84   | 84   |
| 90         | 90  | 86   | 85   | 85   | 85   |
| 91         | 91  | 87   | 86   | 86   | 86   |
| 92         | 92  | ---  | ----   | ---  | ---  |

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

| <b>Act</b> | <b><i>Lords 3R</i></b><br><b><i>HL Bill 155</i></b> | <b><i>Lords R</i></b><br><b><i>HL Bill 155</i></b> | <b><i>Lords C</i></b><br><b><i>HL Bill 119</i></b> | <b><i>Comm R</i></b><br><b><i>Bill 166</i></b> | <b><i>Comm C</i></b><br><b><i>Bill 104</i></b> |
|------------|---|--|--|--|--|
| 93         | 93  | 88   | 87   | 87   | 87   |
| 94         | 94  | 89   | 88   | 88   | 88   |
| 95         | 95  | 90   | 89   | 89   | 89   |
| 96         | 96  | 91   | 90   | 90   | 90   |
| 97         | 97  | ---  | ---  | ---  | ---  |
| 98         | 98  | 92   | 91   | 91   | 91   |
| 99         | 99  | ---  | ---  | ---  | ---  |
| 100        | 100   | 93   | ---  | ---  | ---  |
| 101        | 101   | ---  | ---  | ---  | ---  |
| 102        | 102   | 95   | 93   | 93   | 93   |
| 103        | 103   | 96   | 94   | 94   | 94   |
| 104        | 104   | 97   | 95   | 95   | 95   |
| 105        | 105   | 98   | 96   | 96   | 96   |
| 106        | 106   | 99   | 97   | 97   | 97   |
| 107        | 107   | 94   | 92   | 92   | 92   |
| 108        | 108   | 100  | 98   | ---  | ---  |
| 109        | 109   | 101  | ---  | ---  | ---  |
| 110        | 110   | 102  | 99   | 98   | 98   |
| 111        | 111   | 103  | 100  | 99   | 99   |
| 112        | 112   | 104  | 101-103  | 100-102  | 100-102  |
| 113        | 113   | 105  | 101-103  | 100-102  | 100-102  |
| 114        | 114   | 106  | 101-103  | 100-102  | 100-102  |
| 115        | 115   | 107  | 101-103  | 100-102  | 100-102  |
| 116        | 116   | 108  | 104  | 103  | 103  |
| 117        | 117   | 109  | 105  | 104  | 104  |
| 118        | 118   | 110  | 106  | 105  | 105  |
| 119        | 119   | 111  | 107  | 106  | 106  |
| 120        | 120   | 112  | 107  | 106  | 106  |
| 121        | 121   | 113  | 108  | 107  | 107  |
| 122        | 122   | 114  | 109  | 108  | 108  |
| 123        | 123   | 115  | 110  | 109  | 109  |
| 124        | 124   | 116  | ---  | ---  | ---  |
| 125        | 125   | 117  | 111  | 110  | 110  |
| 126        | 126   | 118  | 112  | 111  | 111  |
| 127        | 127   | 119  | 113  | 112  | 112  |
| 128        | 128   | 120  | 114  | 113  | 113  |

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

| <b>Act</b> | <b><i>Lords 3R</i><br/><i>HL Bill 155</i></b> | <b><i>Lords R</i><br/><i>HL Bill 155</i></b> | <b><i>Lords C</i><br/><i>HL Bill 119</i></b> | <b><i>Comm R</i><br/><i>Bill 166</i></b> | <b><i>Comm C</i><br/><i>Bill 104</i></b> |
|------------|---|--|--|--|--|
| 129        | 129   | 121  | 115  | 114                                      | 114                                      |
| 130        | 130   | 122  | 115  | 114                                      | 114                                      |
| 131        | 131   | 123  | 116  | 115                                      | 115                                      |
| 132        | 132   | 124  | 117  | 116                                      | 116                                      |
| S. 1       | S. 1  | S. 1   | S. 1   | S. 1                                     | S. 1                                     |
| S. 2       | S. 2  | S. 2   | S. 2   | S. 2                                     | S. 2                                     |
| S. 3       | S. 3  | S. 3   | S. 3   | S. 3                                     | S. 3                                     |
| S. 4       | S. 4  | S. 4   | S. 4   | S. 4                                     | S. 4                                     |
| S. 5       | S. 5  | S. 5   | S. 5   | S. 5                                     | S. 5                                     |
| S. 6       | S. 6  | S. 6   | S. 6   | S. 6                                     | S. 6                                     |
| S. 7       | S. 7  | S. 7   | ---  | ---                                      | ---                                      |
| S. 8 § 1   | S. 8 § 1                                      | S. 8 § 1                                     | S. 7 § 1                                     | ---                                      | ---                                      |
| S. 8 § 2   | S. 8 § 2                                      | S. 8 § 2                                     | S. 7 § 2                                     | S. 7 § 1                                 | S. 7 § 1                                 |
| S. 8 § 3   | S. 8 § 3                                      | S. 8 § 3                                     | S. 7 § 3                                     | ---                                      | ---                                      |
| S. 8 § 4   | S. 8 § 4                                      | S. 8 § 4                                     | S. 7 § 4                                     | ---                                      | ---                                      |
| S. 8 § 5   | S. 8 § 5                                      | S. 8 § 5                                     | S. 7 § 5                                     | S. 7 § 2                                 | S. 7 § 2                                 |
| S. 8 § 6   | S. 8 § 6                                      | ---  | ---  | ---                                      | ---                                      |
| S. 8 § 7   | S. 8 § 7                                      | S. 8 § 6                                     | S. 7 § 6                                     | S. 7 § 3                                 | S. 7 § 3                                 |
| S. 8 § 8   | S. 8 § 8                                      | S. 8 § 7                                     | S. 7 § 7                                     |  | ---                                      |
| S. 8 § 9   | S. 8 § 9                                      | S. 8 § 8                                     | S. 7 § 8                                     | S. 7 § 4                                 | S. 7 § 4                                 |
| S. 8 § 10  | S. 8 § 10                                     | S. 8 § 9                                     | S. 7 § 9                                     | S. 7 § 5                                 | S. 7 § 5                                 |
| S. 8 § 11  | S. 8 § 11                                     | S. 8 § 10                                    | S. 7 § 10                                    | S. 7 § 6                                 | S. 7 § 6                                 |
| S. 8 § 12  | S. 8 § 12                                     | S. 8 § 11                                    | S. 7 § 11                                    | ---                                      | ---                                      |
| S. 8 § 13  | S. 8 § 13                                     | S. 8 § 12                                    | S. 7 § 12                                    | ---                                      | ---                                      |
| S. 8 § 14  | S. 8 § 14                                     | ---  | ---  | ---                                      | ---                                      |
| S. 8 § 15  | S. 8 § 15                                     | S. 8 § 13                                    | S. 7 § 13                                    | S. 7 § 7                                 | S. 7 § 7                                 |
| S. 8 § 16  | S. 8 § 16                                     | S. 8 § 14                                    | S. 7 § 14                                    | S. 7 § 8                                 | S. 7 § 8                                 |
| S. 8 § 17  | S. 8 § 17                                     | S. 8 § 15                                    | S. 7 § 15                                    | ---                                      | ---                                      |
| S. 8 § 18  | S. 8 § 18                                     | S. 8 § 16                                    | ---  | ---                                      | ---                                      |
| S. 8 § 19  | S. 8 § 19                                     | S. 8 § 17                                    | S. 7 § 16                                    | S. 7 § 9                                 | S. 7 § 9                                 |
| S. 8 § 20  | S. 8 § 20                                     | S. 8 § 18                                    | S. 7 § 17                                    | S. 7 § 10                                | S. 7 § 10                                |
| S. 8 § 21  | S. 8 § 21                                     | S. 8 § 19                                    | ---  | ---                                      | ---                                      |
| S. 8 § 22  | S. 8 § 22                                     | S. 8 § 20                                    | S. 7 § 18                                    | ---                                      | ---                                      |
| S. 8 § 23  | S. 8 § 23                                     | S. 8 § 21                                    | S. 7 § 19                                    | S. 7 § 11                                | S. 7 § 11                                |
| S. 8 § 24  | S. 8 § 24                                     | S. 8 § 22                                    | S. 7 § 20                                    | S. 7 § 12                                | S. 7 § 12                                |
| S. 8 § 25  | S. 8 § 25                                     | S. 8 § 23                                    | S. 7 § 21                                    | S. 7 § 13                                | S. 7 § 13                                |

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

| <i>Act</i> | <i>Lords 3R<br/>HL Bill 155</i> | <i>Lords R<br/>HL Bill 155</i> | <i>Lords C<br/>HL Bill 119</i> | <i>Comm R<br/>Bill 166</i> | <i>Comm C<br/>Bill 104</i> |
|------------|---------------------------------|--------------------------------|--------------------------------|----------------------------|----------------------------|
| S. 8 § 26  | S. 8 § 26                       | S. 8 § 24                      | ---                            | ---                        | ---                        |
| S. 8 § 27  | S. 8 § 27                       | S. 8 § 25                      | S. 7 § 22                      | ---                        | ---                        |
| S. 8 § 28  | S. 8 § 28                       | S. 8 § 26                      | S. 7 § 23                      | S. 7 § 14                  | S. 7 § 14                  |
| S. 8 § 29  | S. 8 § 29                       | S. 8 § 27                      | S. 7 § 24                      | ---                        | ---                        |
| S. 8 § 30  | S. 8 § 30                       | S. 8 § 28                      | S. 7 § 25                      | S. 7 § 15                  | S. 7 § 15                  |
| S. 8 § 31  | S. 8 § 31                       | S. 8 § 29                      | S. 7 § 26                      | S. 7 § 16                  | S. 7 § 16                  |
| S. 8 § 32  | S. 8 § 32                       | S. 8 § 30                      | S. 7 § 27                      | S. 7 § 17                  | S. 7 § 17                  |
| S. 8 § 33  | S. 8 § 33                       | S. 8 § 31                      | S. 7 § 28                      | S. 7 § 18                  | S. 7 § 18                  |
| S. 8 § 34  | S. 8 § 34                       | S. 8 § 32                      | ---                            | ---                        | ---                        |
| S. 9       | S. 9                            | S. 9                           | S. 8                           | S. 8                       | S. 8                       |

## SECTION 1: The Scottish Parliament

### Purpose and Effect

This section establishes the Scottish Parliament. It provides for the election of constituency members of the Parliament under the simple majority system and regional members by proportional representation. The section also ensures that the validity of Parliamentary proceedings is unaffected if any seats are vacant. The section introduces Schedule 1, which provides for the constituencies, electoral regions and number of members to be returned per region and provides for the Boundary Commission for Scotland to recommend any necessary changes to the regions and the number of regional members.

### General

This section has links with sections 2 and 3 dealing with the election of members to the Parliament.

This section also has links with section 5 relating to candidates standing for election as constituency members or Regional members; sections 6, 7 and 8 on the return of regional members; sections 9 and 10 on vacancies and Schedule 1 which is concerned with constituencies of the Parliament, regions and regional members.

### Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 357           |
| CC           | 28-Jan-98   | 412           |
| LC           | 8-Jul-98    | 1234          |
| LC           | 8-Jul-98    | 1277          |
| LC           | 8-Jul-98    | 1295          |
| LR           | 22-Oct-98   | 1567          |

### Details of Provisions

Subsection (1) provides for the establishment of a Scottish Parliament.

Subsection (2) provides for one member of the Parliament to be returned for each constituency by means of the simple majority system or “first past the post” system (73 members are currently returned on this basis - see Schedule 1). These members are returned either at a general election (see sections 2, 3 and 5) or at a by-election to fill vacancies in constituency seats (section 9).

Subsection (3) deals with the return of regional members from each of the eight regions by means of the additional member system of proportional representation, as provided for in sections 6, 7 and 8 (56 members are currently returned on this basis - see Schedule 1). They are returned either at general elections (see sections 2, 3 and 5) or under section 10 in the case of a vacancy in regional seats.

Subsection (4) provides that the validity of any proceedings of the Parliament is unaffected by any vacancy in its membership.

Subsection (5) introduces Schedule 1, which provides for the constituencies and regions, the number of members to be returned per region and for alteration of the regions and of those numbers.

## **SECTION 2: Ordinary general elections**

### **Purpose and Effect**

This section provides for the holding of ordinary general elections of members of the Scottish Parliament. In particular, it provides for elections on the first Thursday in May every 4 years; variation of the date of the election within prescribed limits; dissolution of the Parliament prior to an election; and the meeting of the Parliament following an election.

Provision is also made for appointing the day on which the poll at the first ordinary general election should be held, and the day, time and place for the meeting of the Parliament following that poll.

### **General**

This section forms part of the set dealing with the election of members of the Scottish Parliament. Section 1 requires members to be elected for each constituency and region, with Schedule 1 defining the constituencies and regions and setting the number of members to be elected for each region.

Sections 2 and 3 deal with the holding of general elections of members. Section 2 covers ordinary general elections, which are to be held every 4 years, whilst section 3 covers extraordinary general elections, which are held if the Parliament resolves that it should be dissolved or fails to nominate a First Minister within a set period.

Vacancies in individual constituency or regional seats are dealt with by sections 9 and 10.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 460           |
| LC           | 8-Jul-98    | 1342          |
| LC           | 8-Jul-98    | 1349          |
| LR           | 22-Oct-98   | 1618          |

## **Details of Provisions**

Subsection (1) provides for the poll at the first ordinary general election to be held on a day to be appointed by the Secretary of State. The subsection also makes provision for the Secretary of State to fix the date, time and place for the meeting of the Parliament following the first election. Accordingly, the Scottish Parliament (First Ordinary General Election and First Meeting) Order 1999 ([S.I. 1999/788](#)) was made fixing the date of the first ordinary general election as 6 May 1999 and of the first meeting of the Parliament as 12 May 1999.

Subsection (2) provides that subsequent ordinary general elections are to be held on the first Thursday in May four calendar years after the previous such election, unless an alternative date is set under subsection (5).

Subsections (3) and (4) ensure that the Parliament will be dissolved automatically on a date before the election timetable begins running. They provide that if the poll is to be held on the first Thursday in May, the Parliament is dissolved at the beginning of the “minimum period” which ends with that day. The minimum period means the period determined in accordance with an order made by the Secretary of State under section 12(1) (which enables provision to be made in particular as to the conduct of the election). The “minimum period” is defined by article 89 of the Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)) as being 25 days (excluding Saturday, Sunday, bank holidays etc. as set out in rule 2 of Schedule 2 to that Order).

Subsection (3) also requires the Parliament to meet within 7 days following the poll - see section 4 for the calculation of the 7 day period. The intention is to avoid any significant hiatus between the election and the first meeting. Section 46 requires that, within 28 days of the poll, the Parliament must nominate one of its members for appointment as First Minister.

Subsection (5) provides for an alternative date to be set for an ordinary general election. In some circumstances the first Thursday in May may be inappropriate for the holding of a poll. This provision provides some limited flexibility to vary the date. The Presiding Officer may propose an alternative day for the election to Her Majesty. This date may not be more than one month earlier or one month later than the first Thursday in May. Her Majesty may then, by proclamation under the Scottish Seal, dissolve the Parliament, require the poll to be held on the proposed day, and require the Parliament to meet within seven days. Section 4 provides for the calculation of the seven day period. The Standing Orders of the Parliament provide that the date and time of the first meeting of Parliament after all general elections, subsequent to the first, is to be determined by the Presiding Officer and notified to members. Provisions about the form, recording and publication of royal proclamations under this subsection are contained in section 38 and the Scottish Parliament (Letters Patent and Proclamations) Order 1999 ([S.I. 1999/737](#)).

Subsection (6) makes provision about the use of the term “the Scottish Seal” in the Act. It provides that that expression means Her Majesty’s Seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal of Scotland. See also section 38 (letters patent and proclamations) and section 45(7), which provides for the First Minister to be the Keeper of the Scottish Seal.

## **SECTION 3: Extraordinary general elections**

### **Purpose and Effect**

This section provides for the holding of extraordinary general elections of members of the Scottish Parliament.



## **General**

This section forms part of the set dealing with the election of members of the Scottish Parliament.

Section 1 requires members to be elected for each constituency and region. Sections 2 and 3 deal with the holding of general elections of members. Section 2 covers ordinary general elections, which are to be held every 4 years, whilst section 3 covers extraordinary general elections, which are held if the Parliament resolves that it should be dissolved or fails to nominate a First Minister within a set period.

Vacancies in individual constituency or regional seats are dealt with by sections 9 and 10.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 460           |
| LC           | 8-Jul-98    | 1342          |
| LC           | 8-Jul-98    | 1351          |
| LC           | 8-Jul-98    | 1354          |
| LR           | 22-Oct-98   | 1640          |
| L3           | 9-Nov-98    | 509           |

## **Details of Provisions**

Subsection (1) provides for an extraordinary general election to be held in two sets of circumstances:

where the Parliament resolves that it should be dissolved. If the resolution is passed on a division, it requires two-thirds of the total membership of the Parliament to vote in favour (i.e.  $2/3$  of  $129 = 86$ ); or

where the Parliament fails to nominate one of its members for appointment as First Minister within the time allowed under section 46.

In such circumstances, the Presiding Officer is required to propose a day for the holding of the poll.

Subsection (2) provides that, on such a proposal, Her Majesty may by proclamation dissolve the Parliament, require an extraordinary general election to be held on the day proposed, and require the Parliament to meet within seven days (see section 4 for calculation of the 7-day period). It will be for the Parliament itself to decide on the precise date, within that 7-day period, on which that meeting should be held. The Standing Orders of the Parliament provide for this to be determined by the Presiding Officer and notified to members.

Provisions about the form, recording and publication of royal proclamations under this subsection are contained in section 38 and the Scottish Parliament (Letters Patent and Proclamations) Order 1999 ([S.I. 1999/737](#)).

Subsection (3) provides that, if the date of a poll under this section is within 6 months of the normal date for the next ordinary general election, that ordinary general election will not be held. However, by virtue of subsection (4), that will not affect the year in which the subsequent ordinary general election is to be held.

For example, an ordinary general election is held in May 2003. The next ordinary election would normally be in May 2007. But an extraordinary general election is held

in December 2006. The next ordinary election will nevertheless take place in May 2011, 4 years from the due date of May 2007.

#### **SECTION 4: Calculating time for meeting of the Parliament**

##### **Purpose and Effect**

This section specifies the days which are to be disregarded when calculating the time between the date of a general election and the date on which the Parliament must meet.

##### **General**

This section is related to sections 2 and 3, which are concerned with the timing of general elections and extraordinary general elections and the timing of the first meeting of the Parliament to be held after such elections.

##### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 28-Oct-98   | 2022          |

##### **Details of Provisions**

This section applies for the purposes of subsections (3)(b) and (5)(c) of section 2 and subsection (2)(c) of section 3, which provide that after a general election the Parliament must meet within a period of seven days beginning on the day immediately following the poll at that election. In calculating the seven day period certain days must be disregarded. These are Saturdays, Sundays, Christmas Eve, Christmas Day, Good Friday, bank holidays in Scotland and days appointed for public thanksgiving or mourning.

#### **SECTION 5: Candidates**

##### **Purpose and Effect**

This section indicates how persons may stand for election as members of the Scottish Parliament for constituencies or regions. It prohibits a person from being a candidate to be a constituency member in more than one constituency and provides that a person may only stand for election both as a constituency member and as a regional member when that constituency is in that region. This section allows registered political parties to submit lists of candidates to contest regional seats. It also allows individuals to stand for election as regional members.

##### **General**

The section forms part of a set covering the election of members to the Parliament. It is closely connected to section 6 which deals with votes for registered political parties and individual candidates standing for regional seats; sections 7 and 8 which deal with the allocation of regional seats; and sections 9 and 10 which are concerned with filling vacancies. Section 15 provides for the disqualification of persons from membership of the Parliament.

##### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 412           |
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 225           |

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 14-Jul-98   | 151           |
| LC           | 14-Jul-98   | 153           |
| LC           | 14-Jul-98   | 165           |
| LC           | 14-Jul-98   | 188           |
| LC           | 14-Jul-98   | 197           |
| LR           | 22-Oct-98   | 1643          |
| LR           | 22-Oct-98   | 1650          |
| LR           | 22-Oct-98   | 1653          |
| L3           | 9-Nov-98    | 509           |
| L3           | 9-Nov-98    | 510           |
| L3           | 9-Nov-98    | 513           |

### **Details of Provisions**

Subsection (1) provides for candidates to stand for election as constituency members or as regional members. It does not prevent a person from standing for both a constituency and a regional seat, subject to the provisions of subsections (7) and (8), but any person so standing could only be returned for one of those seats.

Subsection (2) provides that a person may not be a candidate to be a constituency member for more than one constituency. This is different to the rules which apply as respects the UK Parliament where a person may stand in more than one constituency.

Subsection (3) provides that candidates for regional seats must either be included in a list submitted by a registered political party or be individual candidates.

Subsection (4) enables any registered political party to submit a list of candidates to the regional returning officer. (For mechanisms, see paragraph 6 of Schedule 2 to the Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)) (“the Elections Order”)). Subsection (9) defines what is meant by a registered political party.

In view of the provisions of sections 8(4) (the allocation of seats to regional members) and 10 (regional vacancies), the names on the list will require to be ranked in order and this ranking is done by the registered political party. This is called a “closed list” system.

Subsection (5) provides for a party’s list to have effect for the general election and for any vacancy occurring among the regional members after that election and before the next general election. Vacancies for regional members which arise during the life of the Parliament will be filled from that list. Section 10 makes provision in this regard.

Subsection (6) provides for a maximum of twelve names on a party’s list of candidates. A list may include a single name. Although a party cannot win more than 7 seats in a region, some candidates on the list may be returned as constituency members and thus left out of account in applying the rules for returning the regional members. Regional vacancies will be filled from the lists used at the previous general election. So it is helpful for a party to be able to have more persons on the list than can in fact be returned as regional members at the election.

Subsection (7) provides that a person cannot be nominated in a party’s list if he or she is standing for another party or as an individual, or in another region. This restriction applies regardless of whether the candidate is standing as a constituency candidate or a regional candidate.

Subsection (8) provides that a person may not be an individual candidate to be a regional member for a region if he is standing for a party or in another region (whether as a constituency candidate or as a list candidate).

The net effect of subsections (2), (7) and (8) is that the only circumstances in which a person can be a candidate in more than one capacity at an election are:

A candidate representing a party who stands for a constituency seat may also be included in that party's regional list for the region in which the constituency lies.

A candidate who does not represent a political party who stands for a constituency seat may also be an individual candidate for the region in which the constituency lies.

Subsection (9), as originally enacted, provided that "registered political party" meant a party registered under the Registration of Political Parties Act 1998. It has since been amended, to provide that it means a party registered under Part II of the [Political Parties, Elections and Referendums Act 2000 \(c.41\)](#) - see section 158 and paragraph 13(2) of Schedule 21, and [S.I. 2001/222](#), Article 2, Schedule 1, Part 1.

#### SECTION 6: Poll for regional members

### Purpose and Effect

This section is concerned with the election of regional members. It allows electors to cast a vote, in a poll for regional members, either in favour of a registered political party that has submitted a regional list or an individual candidate.

### General

This section is linked to sections 7 and 8 on the return of regional members.

### Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 225           |
| LR           | 22-Oct-98   | 1654          |

### Details of Provisions

Subsection (1) states that this section and sections 7 and 8 are about the return of regional members at a general election.

Subsection (2) provides for the holding of polls in each constituency, at which an elector may cast a vote (a "regional vote") for either a registered political party which has put forward a regional list or for an individual candidate for return as a regional member for that region.

The voting system allows the electors to vote for a party that has submitted a regional list but not a particular individual named in it. The Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)) for the rules relating to the publication of the names of those standing in the regional polls.

Subsection (3) provides that the right to vote for a registered political party list or individual in a region is in addition to the right to vote for a constituency candidate. Electors are, therefore, entitled to cast 2 votes but there is no obligation on them to do so.

#### SECTION 7: Calculation of regional figures

## **Purpose and Effect**

This section provides that constituency seats must be determined before the allocation of regional members seats can take place. It also provides for the calculation of the relevant figures (referred to in the Act as “regional figures”) which will determine how regional member seats are to be allocated to parties and to individuals.

## **General**

This section is part of the set of three sections concerned with the return of regional members at a general election. The method of calculating the regional figures uses what is referred to as the D’ Hondt formula in section 7(2) where a regional figure is calculated by dividing the total regional votes by 1+ the number of seats already held. This seeks to ensure that the average number of votes required to win one regional seat shall be, so far as possible, the same for each party.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 225           |
| LC           | 14-Jul-98   | 204           |
| LR           | 22-Oct-98   | 1658          |
| LR           | 22-Oct-98   | 1661          |

## **Details of Provisions**

Subsection (1) provides that all candidates to be returned as constituency members within an electoral region must be determined before the return of the regional members for that region. This is because the regional member seats are allocated on a corrective basis, taking account of the number of constituency seats a party has gained.

This was modified by Rule 70 in Schedule 2 of the Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)) to deal with the situation where a candidate dies before a result is returned. “Constituencies included in the region” is to be construed as reference to all of the constituencies included in the region except those in relation to which rule 70(1) applies.

Subsection (2) provides that, for each registered political party which has submitted a list of candidates, the number of regional votes recorded in each constituency throughout the region are added together and divided by the number of constituency seats gained plus one. Parties who do not gain any constituency seats can be involved in the calculations. The resultant figure is called the “regional figure”. Taking constituency seats into the calculations means that additional seats are allocated correctively as opposed to on a simple proportional basis. In other words, a party, which has won disproportionately few constituency seats having regard to their regional vote, may be compensated by being allocated additional seats from the party’s regional list. However, only the regional vote is used in the calculation; votes cast in the ballot for constituency members are disregarded for this purpose.

Subsection (3) provides that each time a party gains a regional member seat the “regional figure” for that party is recalculated taking into account the seat thus gained by adding it to the divisor i.e. the previous aggregate number of constituency seats gained by the party plus one.

Subsection (4) provides that the “regional figure” for individual candidates is simply the total number of regional votes cast for the individual in each constituency in the

region. By virtue of section 8(3), any individual candidate who has been returned as a constituency member is disregarded when allocating regional seats.

#### **SECTION 8: Allocation of seats to regional members**

##### **Purpose and Effect**

This section sets out the process for determining the allocation of seats to regional members for each region following calculation of the “regional figure” in section 7 for registered political parties and individual candidates. It provides that candidates on party lists shall be returned in the order they appear on the list but that where any such candidates have already been returned as constituency or regional members they shall be disregarded. Provision is also made for individual candidates to be disregarded if and when they are returned and for parties to be similarly disregarded when their list is exhausted.

##### **General**

This section is one of three dealing with the return of regional members. It is closely linked to section 6, which deals with polls for regional members, and section 7, which deals with calculation of regional figures.

##### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 225           |
| CR           | 12-May-98   | 229           |

##### **Details of Provisions**

Subsection (1) provides that the first regional member seat within a region is allocated to the registered political party or individual with the highest regional figure, as determined by section 7. This will not necessarily be the party with the highest total of regional votes since account must be taken of the number of seats already won in the constituency ballots. A worked example is given below.

Subsection (2) provides that the second and subsequent seats for the region are allocated to the party or individual candidate with the highest regional figure calculated in accordance with section 7(3). When a party gains a seat, its regional figure is recalculated to ensure that the corrective aspect of the system continues to apply.

Subsection (3) provides that an individual candidate who has been returned as a constituency member or as a regional member should be disregarded from further calculations.

Subsection (4) provides for regional member seats allocated to parties to be filled by candidates in the order in which they appear in the party list.

Subsection (5) provides that, for the purposes of this section and section 10 (regional vacancies) any person in a party’s list who is returned as a member of Parliament shall be treated as ceasing to be in the list, even if the return is void.

Subsection (6) provides that, if a party’s regional list has been used up because of the allocation of regional seats and election of constituency members included on the list, the party will be excluded from further calculations.

Subsection (7) deals with a situation where two or more parties or individual candidates have the same regional figure and effectively provides that in that event a seat shall

be allocated to each party or, as the case may be, individual. Section 12(2)(f) enables an order under section 12 to modify section 8(7) “to ensure the allocation of the correct number of seats for the region”. Rule 63 in Schedule 2 of the Scottish Parliament (Elections etc.) Order 1999 (S.I. 1999/787) (“the Elections Order”) amends subsection (7) to deal with the situation where the application of section 8 (7) would require the return of too many candidates. As modified, subsection (7) provides that where the application of subsection (7) would result in the return of too many candidates for the region, subsection (8) will apply.

Subsection (8), inserted by Rule 63 in Schedule 2 of the Elections Order, provides that in the situation where subsection (7)(b) applies, then 1 vote will be added to the regional votes given for the relevant party or candidate and the regional figure recalculated.

Subsection (9), also inserted by the Elections Order, provides that where the operation of section (8) would still result in too many seats being allocated, the regional returning officer shall decide between the parties or candidates concerned by lot.

### **Allocation of Seats in the North East of Scotland Region**

An example based on votes cast in the North-East Scotland Region on 6 May 1999 is shown in the table below.

| <b>North-East Scotland Region</b> | <b>Labour</b>  | <b>Lib Dem</b> | <b>SNP</b>     | <b>Con</b>     | <b>Green</b>  | <b>Result</b> |
|-----------------------------------|----------------|----------------|----------------|----------------|---------------|---------------|
| Party Vote                        | 72666          | 49843          | 92329          | 52149          | 8067          |               |
| Constituency MSPs                 | 4              | 3              | 2              | 0              | 0             |               |
| 1st Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 3=30776$ | $\div 1=52149$ | $\div 1=8067$ | Con win       |
| 2nd Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 3=30776$ | $\div 2=26075$ | $\div 1=8067$ | SNP win       |
| 3rd Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 4=23082$ | $\div 2=26075$ | $\div 1=8067$ | Con win       |
| 4th Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 4=23082$ | $\div 3=17383$ | $\div 1=8067$ | SNP win       |
| 5th Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 5=18466$ | $\div 3=17383$ | $\div 1=8067$ | SNP win       |
| 6th Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 6=15388$ | $\div 3=17383$ | $\div 1=8067$ | Con win       |
| 7th Additional Member             | $\div 5=14533$ | $\div 4=12461$ | $\div 6=15388$ | $\div 4=13037$ | $\div 1=8067$ | SNP win       |
| No of Additional Members          | 0              | 0              | 4              | 3              | 0             |               |
| Total No of MSPs                  | 4              | 3              | 6              | 3              | 0             |               |

The table does not include smaller parties or an individual candidate (who received 2303 votes).

- The number of votes cast for each party list is divided by the number of constituency MSPs gained plus one. For example, the Labour party gained 4 constituency MSPs so the party list vote is divided by 5.

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

- After that calculation is done, the party with the highest regional figure gains the first regional seat. In this case that is quite clearly the Conservative Party who had a high vote but no constituency MSPs.
- For the second to seventh regional seats the same calculations are carried out but seats gained are included, e.g. when competing for the second regional seat the Conservative Party vote is divided by 2.
- The final regional seat was secured by 15,388 “votes” or 5.4 per cent of the total vote. An independent candidate would have had to secure a similar level of support in order to gain a seat.

## SECTION 9: Constituency vacancies

### Purpose and Effect

This section provides for a by-election to be held within three months of a constituency seat becoming vacant. It also provides however that the by-election should not be held if the last day on which it could be held is within 3 months of the due date of the poll in the next ordinary general election. Existing members and candidates for any other vacancy may not stand.

### General

The section is related to the group of sections dealing with elections and within the set dealing with vacancies which also includes section 10 covering regional vacancies. The other main related sections are section 1(2) which provides for constituency elections to be contested under the first-past-the-post system; section 2(5) in relation to varying the date for holding general elections; and section 5 which deals with candidates.

### Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 226           |
| LC           | 14-Jul-98   | 209           |

### Details of Provisions

Subsection (1) provides for a by-election to be held when the seat of a constituency member becomes vacant (subject to subsection (4)).

Subsection (2) states that the date of the poll in that by-election shall be fixed by the Presiding Officer.

Subsection (3) provides that the date of the poll in the by-election should be no later than three months after the vacancy arises unless notification of the vacancy is not made to the Presiding Officer within one month of the vacancy arising. In such circumstances the date of the election is to be fixed within three months of it being brought to the Presiding Officer’s attention.

Subsection (4) provides that a by-election shall not be held if the latest date for holding the poll in that by-election would fall within the period of three months ending with the due day of the poll in the next ordinary general election. This avoids the cost and work of the election process for the sake of filling a seat for a short period of months.

Subsection (5) provides for the Standing Orders of the Parliament to determine the date on which a vacancy is deemed to have occurred.

Subsection (6) provides that a person who is already a member of the Parliament or a candidate to fill another vacancy is not eligible to stand for election at a by-election.



## SECTION 10: Regional vacancies

### Purpose and Effect

This section makes provision for filling regional member vacancies. If a seat is vacated by a member allocated from a registered political party list the vacancy will be filled by the next person on the list willing to serve. This will be notified to the Presiding Officer by the Regional Returning Officer. If the vacancy cannot be filled in that way (because, for example, the list is exhausted) or if the seat was previously filled by an independent individual member, the seat will remain vacant until the next general election.

### General

This section follows on from those dealing with general elections and the return of regional members. The section forms a set with section 9 which deals with constituency vacancies.

### Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 229           |
| LC           | 14-Jul-98   | 212           |
| LR           | 22-Oct-98   | 1661          |
| L3           | 9-Nov-98    | 514           |
| L3           | 9-Nov-98    | 516           |

### Details of Provisions

Subsection (1) states that the section applies where a regional member seat is vacant.

Subsection (2) provides that if the vacancy arises where the former member concerned was returned at the general election as an individual, or the seat cannot be filled in accordance with the following provisions, for instance because the registered political party's list is exhausted or there is no-one left on the list willing to serve as a regional member or acceptable to the party, then the seat will remain vacant until the next general election.

Subsection (3) provides that, if the vacancy arises where the former member was returned from a registered political party's list, the regional returning officer shall notify the Presiding Officer of the name of the person who is to fill the vacancy.

Subsections (4) and (5) can be modified by an order under section 12 by virtue of section 12(3). They were modified by Article 88 of the Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)) ("the Elections Order") with effect from 11 March 1999.

Subsection (4), as modified by the Elections Order, provides that the Regional Returning Officer shall ascertain the person who is highest on the party's list and take such steps as he considers reasonable to contact that person and obtain a written statement that he is willing to serve and a certificate signed by or on behalf of the party's nominating officer, stating that he may be returned as a regional member from that list.

Subsection (4A), inserted by the Elections Order, provides that if the Regional Returning Officer, after a period that he considers reasonable, considers his attempts to contact that person to be unsuccessful or he has not received the statement and certificate, he may proceed to contact the next person on the list and so on. This

subsection also allows the regional returning officer to approach subsequent persons on the list where the first choice is unwilling to serve or the party does not provide the certificate. The procedure is repeated until the vacancy is filled or the list is exhausted.

Subsection (5), as modified by the Elections Order, provides that where the statement and certificate required are provided by a person, the Regional Returning Officer will notify that person's name to the Presiding Officer.

Subsection (5A), inserted by the Elections Order, deals with the case where a person previously contacted provides the required statement and certificate only after the Regional Returning Officer has contacted the next or a subsequent person on the list. It provides that such a statement and certificate is to have no effect unless and until the next person who has been contacted has not provided the required statement or certificate or indicates that he is not willing to serve.

Subsection (6) provides that, where the Regional Returning Officer has, under section (3), notified the Presiding Officer of the name of the person from a party list to fill the vacancy, that person shall be regarded as having been returned as a regional member on the day on which the notification was received by the Presiding Officer.

Subsection (7) provides for standing orders to determine the date on which a vacancy is to be treated as occurring. The Standing Orders of the Parliament provide that this date is to be determined by the Presiding Officer and notified to the Parliament.

However, unlike the three month limitation imposed on the filling of constituency vacancies in section 9(3), regional vacancies may be filled at any time (as long as the vacancy is created by a person who was returned from a party list).

#### **SECTION 11: Electors**

##### **Purpose and Effect**

This section provides for who is able to vote in elections to the Parliament. It provides that the persons entitled so to vote will, essentially, be those entitled to vote in Scottish local government elections. The section prevents electors from casting more than one constituency vote or more than one regional vote. It also prevents electors from voting in more than one constituency.

##### **General**

This section also relates to elections and is linked to section 12.

##### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 229           |
| LC           | 14-Jul-98   | 219           |

##### **Details of Provisions**

Subsection (1) provides that the persons entitled to vote in a general election or by-election for membership of the Parliament are those who, on the day of the poll:

would be entitled to vote at a local government election in an electoral area all of which or part of which falls within the constituency; and

are registered in the register of local government electors at an address within the constituency.

Subsection (2) provides that those eligible to vote may, in any constituency, cast only one vote in the poll for constituency members and only one vote in the regional member poll. It also provides that electors will be able to vote in only one constituency.

These provisions mean that members of the House of Lords and EC nationals resident in Scotland will be able to vote if their names appear on the register of local government electors. Commonwealth citizens and citizens of the Republic of Ireland resident in Scotland are also eligible to vote. However, Scots resident abroad will not be eligible to vote in the Parliamentary elections.

SECTION 12: Power to make provision about elections

### **Purpose and Effect**

This section enables the Secretary of State by order to make provisions for the holding of elections. That includes provisions about the general conduct of elections, return of members, registration of electors, levels of election expenses and combination of Scottish Parliament elections with other elections.

### **General**

This election related section is related to section 11.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 229           |
| LC           | 14-Jul-98   | 220           |

### **Details of Provisions**

Subsection (1) provides for the Secretary of State by order to make provision:

for the conduct of elections to the Parliament;

for questioning such an election and the consequences of election irregularities; and

for the return of members otherwise than at an election i.e. regional members.

The Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)), made in exercise of this power, covers the detailed arrangements for the conduct of elections and the process for dealing with election irregularities.

Further provision about the making of this order is to be found in sections 112 to 115 and Schedule 7. Paragraph 1 of Schedule 7 provides that the order is subject to Type C procedure which means that the Secretary of State cannot make the order unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament. Elections to the Scottish Parliament are a reserved matter. Section B3 of Schedule 5 makes further provision in this regard.

Subsection (2) expands further upon the scope of the order-making power provided by subsection (1). It makes it clear that it enables provision to be made:

for the registration of electors;

for disregarding alterations to the register of electors;

about limits on the election expenses of individual candidates. As originally enacted, this also referred to the expenses of registered political parties, but these words were repealed, as from 16 February 2001, by section 158 and paragraph 13(3) of Schedule 21 of the [Political](#)

[Parties, Elections and Referendums Act 2000 \(c.41\)](#). See also Article 1 of The Political Parties, Elections and Referendums Act 2000 (Commencement No. 1 and Transitional Provisions) Order 2001 ([S.I. 2000/222](#));

for elections to the Parliament to be held on the same day as other elections (e.g. for local government and the European Parliament);

to modify the operation of section 7(1), which provides for the return of constituency members to be determined before the process of allocating regional members can proceed, where a poll at a constituency election is abandoned (or notice of it is countermanded) so that special provision can be made enabling the regional members to be returned even though not all of the constituency members have been returned; and

to modify the effect of section 8(7) to ensure that the correct number of seats are allocated. The note on section 8 gives details of the order made.

Subsection (3) makes it clear that subsection (1)(c) will enable section 10(4) and (5), which deal with the filling of regional vacancies from a party's list, to be modified. The note on section 10 gives details of the exercise of this power).

Subsection (4) supplements and elaborates on the scope of subsections (1) and (2).

Paragraph (a) enables the established statutory procedures for elections to be applied, subject to any necessary alterations.

Paragraph (b) provides that an order may amend forms contained in, or in regulations or rules made under, the Representation of the People Acts to enable such forms to be used for elections to the Parliament as well as for their original purpose.

Paragraph (c) enables consequential modification of any legislative provision relating to the registration of Parliamentary or local government electors (e.g. the Town & Country Planning (Control of Advertisements) Regulations 1992).

Subsection (5) provides that the return of a member at an election to the Parliament may be questioned only under Part III (legal proceedings) of the Representation of the People Act 1983, as applied and modified by an order under subsection (1). However, section 18 permits an action to be raised in the Court of Session seeking a declarator that the person who was returned as a member of the Parliament is disqualified.

Subsection (6) defines, for the purposes of the Act (e.g. section 10), the "regional returning officer" as the person designated as such in an order made by the Secretary of State. This order is not subject to any Parliamentary procedure.

The Regional Returning Officer is, the person who, under section 41 of the Representation of the People Act 1983, is the returning officer at elections of councillors for the local authority for the local government area corresponding to that particular region (see The Scottish Parliament (Regional Returning Officers)(Scotland)(No.2) Order 1999 ([S.I. 1999/829](#)), revoking ([S.I. 1999/270](#))).

SECTION 13: Term of office of members

### **Purpose and Effect**

This section sets out the term of office of a member of the Scottish Parliament, which will begin on the day the member is declared to be returned and ends when the Parliament is dissolved.

### **Details of Provisions**

The term of office of a member will begin on the day on which the member is declared to be returned, namely:

- (a) in the case of a constituency member, the day when, after the election (whether a general or a by-election) the constituency returning officer declares the candidate to be elected and returns the candidate's name to the Clerk of the Parliament in accordance with Rule 60 of the Scottish Parliamentary Election Rules set out in Schedule 2 to the Scottish Parliament (Elections etc.) Order 1999 (S.I. 1999/787);
- (b) in the case of a regional member who was returned following a general election, this is the day when the regional returning officer has announced the individual candidates or the candidates on a party list to whom the regional member seats have been allocated, declared those candidates to have been elected and returned their names to the Clerk of the Parliament in accordance with Rule 64 in Schedule 2 of the Scottish Parliamentary Election Rules (S.I. 1999/787); and
- (c) in the case of a regional member who was returned to fill a vacancy by virtue of section 10(6), the day on which notification of the name of that member was received by the Presiding Officer.

The term of office of a member ends when the Parliament is dissolved. The Parliament is dissolved, in the case of an ordinary general election, in accordance with sections 2(3)(a) or (5) and, in the case of an extraordinary general election, in accordance with section 3(2). The term of office may, however, be shortened by the effect of other provisions of the Act: for example section 14 (resignation of a member), death, disqualification (section 17) or failure to take the required oath of allegiance.

#### SECTION 14: Resignation of members

##### **Purpose and Effect**

This section provides for a member to resign his membership of the Parliament. A vacancy caused by the resignation may be filled under the provisions of sections 9 or 10.

##### **Details of Provisions**

This section provides a means for members of the Scottish Parliament to resign their seats by giving notice in writing to the Presiding Officer. The situation in the House of Commons is different as there is no provision for Members to resign their seats and it is necessary for them to be appointed to certain offices which thereby disqualify them from membership of the House.

#### SECTION 15: Disqualification from membership of the Parliament

##### **Purpose and Effect**

This section sets out the grounds on which a person is disqualified from becoming a member or continuing to be a member of the Scottish Parliament. The general approach is that, subject to three exceptions described in section 16, the grounds for disqualification are broadly the same as those governing membership of the House of Commons.

##### **General**

This section forms part of the set on disqualification.

The section is related to section 16 on exceptions and relief from disqualification; section 17 which details the effect of disqualification; and section 18 which covers legal proceedings as to disqualification. The disqualification provisions do not prohibit "dual mandates" so it is possible for a person to be a member of both the House of Commons and the Scottish Parliament.

This section specifies the persons who are disqualified from membership of the Scottish Parliament. There are other provisions which prevent certain persons from standing as a candidate or prospective candidate for election to the Scottish Parliament:

- (a) the Local Government Officers (Political Restrictions) Amendment Regulations 1998 ([S.I. 1998/3116](#)) extends the restrictions on holders of politically restricted posts under a local authority in Scotland to include a restriction on standing as a candidate for election to the Scottish Parliament. See also [S.I. 1999/715](#), which makes similar provision in relation to holders of politically restricted posts under a local authority in England; and
- (b) the Servants of the Crown (Parliamentary, European Parliamentary, National Assembly for Wales, New Northern Ireland Assembly and Scottish Parliament Candidature) Order 1999 made by Her Majesty in Council on 10 March 1999 under the prerogative. This Order restricts the rights of Crown servants to become candidates or prospective candidates for election to, among others, the Scottish Parliament, whether as a constituency or as a regional member.

## Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 460           |
| CR           | 12-May-98   | 229           |
| CR           | 12-May-98   | 230           |
| LC           | 14-Jul-98   | 225           |
| LR           | 22-Oct-98   | 1664          |

## Details of Provisions

Subsection (1) sets out the main grounds of disqualification from membership of the Scottish Parliament but it is subject to the exceptions provided for in section 16.

Subsection (1)(a) provides that a person who is disqualified from membership of the House of Commons under section 1(1)(a) to (e) of the House of Commons Disqualification Act 1975 is also disqualified from membership of the Scottish Parliament. Section 1(1)(a) to (e) disqualifies judges, civil servants (which would include staff of the Scottish Administration), members of the armed forces, members of police forces and members of foreign legislatures. Section 1(1)(e) of the 1975 Act was amended by the [Disqualifications Act 2000 c.42](#) to remove the exclusion of the members of the legislature of Ireland.

Subsection (1)(b) provides that a person, who is disqualified from membership of the House of Commons, otherwise than under the House of Commons Disqualification Act 1975, is also disqualified from membership of the Scottish Parliament. This covers common law and other statutory disqualifications and has the effect of excluding from membership:

persons under the age of 21 who are disqualified by the Parliamentary Elections Act 1695, section 7;

aliens who are disqualified at common law and by virtue of the Act of Settlement 1700, section 3, as amended by the [British Nationality Act 1981 \(c.61\)](#), Schedule 7. Irish or Commonwealth citizens are not regarded as aliens for this purpose. Section 16(2) also excepts EU citizens who are resident in the UK;

persons who are mentally ill and who are disqualified at common law. The procedure for the vacation of their seats is specified in section 141 of the [Mental Health Act 1983 \(c.20\)](#), as amended by paragraph 19 of Schedule 8 of this Act;

undischarged bankrupts who are disqualified by section 427 of the [Insolvency Act 1986 \(c.45\)](#), as amended by paragraph 23(6) of Schedule 8 of this Act;



persons guilty of corrupt or illegal practices are disqualified under the Representation of the People Act 1983;

convicted prisoners serving a sentence of more than one year's detention ( or an indefinite sentence) in the UK or Ireland are disqualified by the [Representation of the People Act 1981 \(c.34\)](#);

peers are disqualified because, as members of the House of Lords, they are already members of the UK Parliament but not Irish peers by virtue of the Peerage Act 1963. Section 16(1) (a) lifts this disqualification; and

Section 16 makes provision in relation to members of the Clergy.

Subsection (1)(c) specifically disqualifies Lords of Appeal in Ordinary, thus placing them in the same position as other judges. Lords of Appeal in Ordinary are not specifically disqualified under the House of Commons Disqualification Act 1975 because being members of the House of Lords they are automatically disqualified from the House of Commons. However, section 16(1) enables members of the House of Lords to be eligible for membership of the Scottish Parliament and therefore this provision is required to ensure that Lords of Appeal in Ordinary are not also exempted.

Subsection (1)(d) provides for Her Majesty, by Order in Council to specify office-holders who will be disqualified from membership of the Parliament. Further provision about the making of this Order in Council is to be found in sections 112 to 115 and Schedule 7.

Part 1 of the Schedule to the Scottish Parliament (Disqualification) Order 1999 ([S.I. 1999/680](#)) specifies the office holders who are disqualified from membership of the Parliament. The list is based upon the list contained in Schedule 1 to the House of Commons Disqualification Act 1975 and includes, for example, the chairmen and members of bodies such as the Crofters Commission, Scottish Enterprise and Highlands and Islands Enterprise. However, the power is not restricted to specifying office-holders who are listed in Schedule 1 to the 1975 Act and would enable office holders to be specified where it is thought that it would be inappropriate for them to be members of the Scottish Parliament even although they may still be able to be members of the UK Parliament.

Subsection (2) provides for Her Majesty by Order in Council to specify office-holders from membership for particular constituencies or electoral regions in the Scottish Parliament. Part II of the Schedule to the Scottish Parliament (Disqualification) Order 1999 ([S.I. 1999/680](#)) is made under this power. It provides that Lords Lieutenant or Lieutenants, who hold office or discharge their functions in relation to a specified area or one of the cities of Aberdeen, Dundee, Edinburgh or Glasgow, are disqualified from membership for any constituency or electoral region which wholly or partly comprises that area or city. However, they could still stand for membership of the Parliament for a constituency or region elsewhere in Scotland.

Subsection (3) provides that "office-holder" includes employee or other post-holder.  
SECTION 16: Exceptions and relief from disqualification

### **Purpose and Effect**

This section provides for certain persons to be exempt from certain of the disqualification provisions for the membership of the Parliament provided for in section 15. It also provides, in certain circumstances, for the Parliament to disregard a disqualification in relation to a particular person.

### **General**

This section is one of four dealing with disqualification.

## **Details of Provisions**

Subsection (1), as now amended, provides that a person is not disqualified from being a member of the Scottish Parliament merely because he is a peer or he is a Lord Spiritual. These persons would be disqualified by virtue of section 15(1)(b).

Section 16(1)(b), as enacted, provided that a person was not disqualified merely because he has been ordained or he is a minister of any religious denomination. However the [House of Commons \(Removal of Clergy Disqualification\) Act 2001 \(c.13\)](#) removed the disqualification of the clergy (except for Lords Spiritual) from the House of Commons. It ceased therefore to be necessary to refer in section 16(1)(b) to a person who was ordained or was a minister. Section 16(1)(b) was amended by paragraph 4 of Schedule 1 to the 2001 Act to refer simply to refer to a person who is a Lord Spiritual.

This provision would not have the effect of exempting from disqualification a Lord of Appeal in Ordinary because it is not simply by virtue of being a peer that he is disqualified - see section 15(1)(c).

Subsection (2) provides that a citizen of the European Union resident in the UK is not disqualified from membership because of section 3 of the Act of Settlement 1700 - see section 15(1)(b) above. This is based upon paragraph 5(3)(e) of Schedule 1 to the [European Parliamentary Elections Act 1978 \(c.10\)](#), as inserted by [S.I. 1994/342](#), which excepts citizens of the EU resident in the UK from disqualification for election as a UK representative to the European Parliament.

Subsections (3) and (4) provide that the Parliament may resolve to disregard any disqualification incurred by a person on any ground other than one falling within section 15(1)(b) (see above). To do so it must consider that the grounds for disqualification have been removed and that it is proper to disregard the disqualification. This makes similar provision to the [House of Commons Disqualification Act 1975 \(c.24\)](#), section 6(2).

Subsection (5) provides that any resolution of the Parliament to disregard a disqualification does not affect proceedings under Part III of the Representation of the People Act 1983, as applied by an Order under section 12 (the power to make provisions about elections). These provisions were applied by article 85 and Schedule 6 to the Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)).

Any such resolution will also not enable the Parliament to disregard a disqualification established by the Court of Session in proceedings under section 18 (judicial proceedings as to disqualification).

SECTION 17: Effect of disqualification

## **Purpose and Effect**

This section sets out the consequences of disqualification in relation to persons returned as members of the Parliament and members who become disqualified during their term of office.

## **General**

This section is the third to provide for disqualification. It follows on from the sections dealing with disqualification and exemptions from disqualification.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 413           |
| CR           | 12-May-98   | 230           |



| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 22-Oct-98   | 1567          |
| LR           | 22-Oct-98   | 1665          |

### **Details of Provisions**

Subsection (1) provides that if a person is elected when disqualified, either from membership of the Parliament as a whole or from membership for a particular constituency or region, the election is void and the seat becomes vacant. Reference to disqualification from membership for a particular constituency or region is intended to cover the holders of offices which may be specified in an order under section 15(2), for example, Lords-Lieutenant.

Subsection (2) provides that if any member of the Parliament becomes disqualified during his/her term of office he will cease to be a member and his seat will become vacant.

Subsection (3) provides for subsections (1) and (2) to have effect subject to any resolution of the Parliament under section 16(4) disregarding a disqualification.

Subsection (4) provides that subsection (2) also has effect subject to section 141 of the Mental Health Act 1983 and section 427 of the Insolvency Act 1986. These make special provision as to the vacation of seats of members of the UK Parliament who are detained in mental institutions or are declared bankrupt, and amendments are made to them in Schedule 8 to apply them to the members of the Scottish Parliament.

Where these provisions apply, the disqualified members seat will not be vacated immediately and therefore, he does not cease to be a member of the Parliament until the seat is vacant. However, in the meantime, he may not participate in any proceedings of the Parliament and other rights and privileges may be withdrawn on a resolution of the Parliament.

Subsection (5) provides that the validity of any proceedings of the Parliament will not be affected by the fact that any member is disqualified or becomes disqualified, either for the Parliament as a whole or for a particular constituency or region. "Proceedings" includes proceedings in committees and sub-committees under section 126(1).

SECTION 18: Judicial proceedings as to disqualification

### **Purpose and Effect**

This section provides for a procedure before the Court of Session for establishing whether a member of the Parliament is disqualified or has been disqualified from membership. It is similar to the procedure before the Judicial Committee of the Privy Council provided in relation to disqualification from membership of the House of Commons by section 7 of the House of Commons Disqualification Act 1975. It provides a simpler and less restrictive alternative procedure to the procedure by way of election petition under Part III of the [Representation of the People Act 1983 \(c.2\)](#) as applied to the Scottish Parliament by virtue of Schedule 6 to the Scottish Parliament (Elections etc.) Order 1999 ([S.I. 1999/787](#)).

### **General**

This section is the fourth dealing with disqualification.

### **Details of Provisions**

Subsection (1) provides for a person, who claims that a member of the Parliament is or has, since his election, been disqualified, to be able to apply to the Court of Session

for a declarator to that effect (i.e. a court order which establishes and declares that to be the case).

Subsection (2) provides for an application under subsection (1) to be made whether the grounds of disqualification on which it is based are alleged to have existed at the time of the election or to have arisen sometime after the election.

Subsection (3) provides that the Court may not make a declarator on grounds which existed at the time of the election if an election petition is pending or has been tried in which the disqualification on these grounds is or was an issue. This is necessary in order to avoid a conflict between an application under this section and an election petition. It also provides that the Court shall not make a declarator if a resolution has already been passed by the Parliament under section 16 to the effect that a disqualification shall be disregarded. This is necessary in order to avoid a conflict with a resolution of the Parliament.

Subsection (4) provides for the person in respect of whom the application is made, i.e. the member of the Scottish Parliament, to defend the application rather than some other person e.g. a returning officer.

Subsection (5) empowers the Court of Session to require any person who applies to the court for such a declarator to give caution (security) of up to £5000 for the expenses of the application. Provision is also made for the Scottish Ministers to vary the maximum amount by order, which, by virtue of Schedule 7, is subject to negative resolution procedure in the Scottish Parliament. This is intended to deter frivolous or vexatious applications, and is the same maximum sum which an election court may order in relation to an election petition.

Subsection (6) provides that the Court of Session's decision on an application is final.

Subsection (7) defines "disqualification" for the purpose of this section as meaning disqualification from membership of the Parliament as a whole or disqualification from membership for the particular constituency or region for which the member purports to sit.

#### **SECTION 19: Presiding Officer**

##### **Purpose and Effect**

This section provides for the election of a Presiding Officer and two deputies by the Parliament. It also provides for the term of office of the Presiding Officer and deputies; the exercise of Presiding Officer functions by a deputy if the Presiding Officer is unable to act or his office is vacant, delegation of the Presiding Officer's functions to a deputy and participation of the Presiding Officer and deputies in proceedings of the Parliament.

##### **General**

This section about the Presiding Officer is one of three sections set under the heading of the Presiding Officer and Administration. Other sections in the Act relating to the Presiding Officer and setting out his statutory functions include:

Sections 2, 3 and 9 - recommending to Her Majesty the date for holding general elections and fixing the dates of by-elections;

Sections 10 and 14 - receiving notification of a member's resignation and of the filling of a vacancy in a regional seat;

Section 21 - membership of the Scottish Parliamentary Corporate Body;

Section 26 - administering oaths to witnesses before the Parliament;

Sections 31 to 35 - scrutiny of Bills and submission of Bills for Royal Assent; and

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

Sections 45 and 46 - recommending to Her Majesty the Parliament's choice of First Minister and the appointment of another member to exercise the First Minister's functions in certain circumstances.

The Standing Orders of the Parliament also provide that the Presiding Officer shall have such other functions as may be conferred upon him or her by the Parliament or by the Standing Orders.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 529           |
| LC           | 14-Jul-98   | 230           |
| LC           | 14-Jul-98   | 236           |
| LR           | 22-Oct-98   | 1667          |
| LR           | 22-Oct-98   | 1674          |
| L3           | 9-Nov-98    | 516           |

### **Details of Provisions**

Subsection (1) requires the Parliament at its first meeting following a general election to elect from amongst its membership a Presiding Officer and two deputies. The elections have to take place after members take their oath of allegiance because the members cannot take part in any proceedings until they have done so under section 84(2). The Standing Orders of the Scottish Parliament further detail the procedure for the election of the Presiding Officer and deputies.

Subsection (2) provides for a Presiding Officer or deputy to hold office until:

a new Presiding Officer is elected;

he resigns;

he ceases to be a member otherwise than by virtue of a dissolution; or

he is removed from office by resolution of the Parliament.

In other words, the Presiding Officer and the deputies will not cease to hold office merely because of the dissolution of the Parliament before a general election. They will continue to hold office until such time as the new Parliament elects a Presiding Officer (and the deputies) under subsection (1).

Subsection (3) requires the Parliament to elect a replacement for the Presiding Officer or a deputy who ceases to hold office for any reason before dissolution of the Parliament. The Standing Orders of the Parliament make further provision in this regard.

Subsection (4) provides that the Presiding Officer's functions may be exercised by a deputy if the office is vacant or if the Presiding Officer is for any reason unable to act.

Subsection (5) empowers the Presiding Officer, subject to standing orders, to authorise any deputy to exercise functions on his behalf.

Subsection (6) enables standing orders to regulate the participation of the Presiding Officer and deputies in proceedings of the Parliament. In particular they may cover any constraints on the way in which the Presiding Officer and deputies may vote in proceedings which they chair.

Subsection (7) provides that the validity of any act of the Presiding Officer or a deputy is not affected by any defect in his election.

#### **SECTION 20: Clerk of the Parliament**

##### **Purpose and Effect**

This section provides for the appointment of a Clerk of the Parliament, who is an employee of the Scottish Parliamentary Corporate Body (SPCB). The section also provides for an Assistant Clerk to act in place of the Clerk in the event of the office being vacant or where circumstances exist preventing the Clerk from undertaking his functions. Authority is also provided for the Clerk to delegate his functions to any Assistant Clerk or other Parliamentary staff.

##### **General**

This section is linked to section 21 providing for the establishment of the Scottish Parliamentary Corporate Body (SPCB) which oversees the administration of the Parliament and represent it in legal matters. It also appoints the Clerk.

Paragraph 3(1) of Schedule 2 requires the SPCB to appoint Assistant Clerks and also allows it to appoint other staff. The Clerk and other persons appointed by the SPCB are the staff of the Parliament whose terms and conditions of appointment are determined by the SPCB - see paragraph 3(2) and (3) of that Schedule. Paragraph 5 enables the SPCB to delegate any of its functions to the Presiding Officer (elected under section 19), or to the Clerk.

The Clerk has statutory functions under sections 24 (giving notice to witnesses) and 28 (writing the date of Royal Assent on Acts of the Scottish Parliament). Other functions are conferred upon the Clerk by the Standing Orders.

Provision was made for the appointment of a Temporary Clerk for the period before a permanent appointment was made by the Scotland Act 1998 (Transitory and Transitional Provisions) (Administration of the Parliament) Order 1999 ([S.I. 1999/1098](#)).

##### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 529           |
| LC           | 14-Jul-98   | 238           |

##### **Details of Provisions**

Subsection (1) establishes the office of Clerk of the Parliament. The Clerk is the senior official and plays a major role in the workings of the Parliament.

Subsection (2) provides for the Clerk to be appointed by the SPCB.

Subsections (3) and (4) provide for any Assistant Clerk appointed by the SPCB to exercise the functions of the Clerk, if the office of Clerk is vacant or the Clerk is unable to act for any reason. The Clerk also has the power to authorise any Assistant Clerk or other member of the staff of the Parliament, appointed by the SPCB, to carry out functions on his behalf.+

#### **SECTION 21: Scottish Parliamentary Corporate Body**

##### **Purpose and Effect**

This section provides for the establishment, membership and functions of the Scottish Parliamentary Corporate Body (SPCB) which oversees the administration of the

Parliament and represents it in legal matters. The Parliament itself is not a body corporate and the establishment of a corporate body for it simplifies its administrative and legal arrangements. The SPCB carries out the functions conferred on it in the Scotland Act and may have additional functions conferred on it by virtue of other enactments. It carries out its functions under directions issued by the Parliament and has powers to appoint staff, hold property, and enter into contracts.

The SPCB will consist of the Presiding Officer and 4 other members of the Parliament. The detailed arrangements for the SPCB are set out in Schedule 2.

### **General**

This section forms part of a set dealing with the administration of the Parliament including section 19 (Presiding Officer) and section 20 (Clerk of the Parliament). Detailed provisions relating to the SPCB are set out in Schedule 2.

The concept of the SPCB is based on similar arrangements in place at Westminster. The House of Commons (Administration) Act 1978 establishes the House of Commons Commission as a corporate body for the purposes of appointing staff. The Parliamentary Corporate Bodies Act 1992 establishes Corporate Officers for both the House of Commons and the House of Lords, with powers to hold property and to enter into contracts for the purposes of the respective Houses.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 529           |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| CC           | 29-Jan-98   | 543           |
| CR           | 12-May-98   | 230           |
| LR           | 22-Oct-98   | 1675          |

### **Details of Provisions**

Subsection (1) establishes the Scottish Parliamentary Corporate Body which in the Act is referred to as “the Parliamentary corporation”. This subsection also provides that the SPCB is to perform the functions conferred on it under the Act or under any other enactment.

Subsection (2) provides for the membership of the SPCB to be the Presiding Officer and four members of the Parliament who are to be appointed in accordance with standing orders. Standing Orders make provision for the members to be appointed by the Presiding Officer either after an election by the Parliament or, if any of the offices is not filled after an election, by the Presiding Officer. This membership is intended to ensure close Parliamentary control of the SPCB.

Subsection (3) places a duty on the SPCB to provide or make arrangements for the Parliament to be provided with the property, staff and services which are required for the Parliament’s purposes. These are the main functions of the SPCB. Further detailed provisions as to the SPCB’s functions, powers, proceedings etc. are set out in Schedule 2.

Under subsection (4) the Parliament has the power to give special or general directions to the SPCB for the purposes of or in connection with the exercise of its functions.

Subsection (5) provides that any property and liabilities acquired or incurred by the Parliament and which relate to matters within the general responsibility of the SPCB,

shall be treated as property or liabilities of the SPCB. By virtue of section 126(1) property includes rights and interests of any description, and so will include contractual rights. This provision may be modified by the Scottish Parliament by virtue of paragraph 4(2) of Schedule 4.

Subsection (6) provides that any expenses of the SPCB, such as staff salaries etc., are payable out of the Scottish Consolidated Fund. This provision may be modified by the Scottish Parliament by virtue of the amendment made to paragraph 4(3) of Schedule 4 by Article 3 of [S.I. 2000/1831](#).

Subsection (7) places a duty on the SPCB to pay any fees or other sums of money it receives into the Scottish Consolidated Fund. This is subject to any provision made by or under an Act of the Scottish Parliament for the disposal of, or accounting for, such money. Such provision is now made by the [Public Finance and Accountability \(Scotland\) Act 2000 \(2000 asp 1\)](#) but, until 1 April 2000, it was made by [S.I. 1999/441](#).

Subsection (8) gives effect to Schedule 2 which makes further provision about the SPCB.

#### SECTION 22: Standing orders

### **Purpose and Effect**

This section requires the proceedings of the Scottish Parliament to be regulated by standing orders.

### **General**

The matters which the Act requires to be dealt with in standing orders are:

- the fixing of the date on which a constituency vacancy is to be treated as occurring (section 9(5));

- the fixing of the date on which a regional vacancy is to be treated as occurring (section 10(7));

- the appointment of four members to the Scottish Parliamentary Corporate Body (section 21(2));

- regulation of the proceedings of the Parliament (section 22(1));

- the form and manner of making of statements on whether a Bill is within the legislative competence of the Parliament (section 31(3));

- stages of Bills (section 36(1));

- reconsideration of Bills (section 36(4));

- provision for final stage of Bill following its reconsideration (section 36(5));

- consideration by the Parliament of financial reports and accounts laid before it (section 70(3));

- who may move motions on tax-varying resolutions (section 74(5)); and

- those matters which are listed in Schedule 3, namely preservation of order, the holding of proceedings in public, the reporting and publishing of proceedings, political allegiance of the Presiding Officer and deputies, committees and Bills requiring Crown consent.

The Act also mentions certain matters about which standing orders may make provision. These are:

- the exercise of the Presiding Officer's functions by a deputy (section 19(5));

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

the participation of the Presiding Officer and his deputies in the proceedings of the Parliament (section 19(6));

power of committees or sub-committees to call for witnesses and documents (section 23(8));

administration of oath to persons giving evidence before Parliament (section 26(1));

payment of allowances and expenses to persons attending Parliament to give evidence or producing documents (section 26(4));

participation of Scottish Law Officers in the proceedings of the Parliament if they are not members (section 27(1));

publication of statements on legislative competence in relation to Bills (section 31(3));

provision for expediting proceedings in relation to a particular Bill (section 36(2));

provision for different procedures for different types of Bills (section 36(3)); and

the matters mentioned in Schedule 3, namely exclusion from proceedings of members contravening standing orders on preservation of order; withdrawal of rights and privileges of members of the Parliament; conditions of attendance of members of the public at proceedings; appointment of committees and sub-committees; and exclusion of non-members of committees and sub-committees from their proceedings.

In addition standing orders may cover such other matters as the Parliament may decide.

Before the Scotland Act was passed, the Secretary of State for Scotland established a Consultative Steering Group, consisting of various persons and representatives, including those from the four main political parties in Scotland. It reported on the working procedures of the Scottish Parliament. Its report informed the drafting of transitional standing orders in the Scotland Act 1998 (Transitory and Transitional Provisions) (Standing Orders and Parliamentary Publications) Order 1999 ([S.I. 1999/1095](#)). The form and structure of these Standing Orders were also influenced by the rules of procedures for the European Parliament. The Parliament adopted its own Standing Orders with effect from 17 December 1999 which were based largely on those in [S.I. 1999/1095](#). They are amended from time to time by the Parliament.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 203           |
| CR           | 12-May-98   | 231           |
| LC           | 14-Jul-98   | 242           |

## **Details of Provisions**

Subsection (1) provides that the proceedings of the Parliament are to be regulated by standing orders. “Proceedings”, in relation to the Parliament, is defined in section 126(1) as including proceedings of any committee or sub-committee.

Subsection (2) gives effect to Schedule 3 which lists various matters which the standing orders must or may include.

SECTION 23: Power to call for witnesses and documents

## **Purpose and Effect**

This section provides the Parliament with powers to require witnesses to appear before it to give evidence or to produce documents. The section provides the Parliament with an

ability to scrutinize, question and investigate matters concerning any subject for which any member of the Scottish Executive has general responsibility.

## **General**

This section should be read with sections 24, 25 and 26 which form the general package of provisions which confers upon the Parliament and its committees the necessary powers to scrutinise and investigate matters. These provisions are essential to ensure that the Scottish Parliament is able to hold the Scottish Executive and other bodies to account and to investigate and scrutinise any subject for which any member of the Scottish Executive has general responsibility. The Standing Orders of the Parliament make further provision in this regard.

On 1 November 2000, the Parliament approved a motion setting out certain principles which it commended to Committees as guidelines to be followed by them when seeking official information from the Scottish Executive and in particular exchanges between officials and Ministers on policy issues. The motion made it clear that, as part of its policy of openness, the Executive should make as much information as possible publicly available; that, while officials can provide Committees with factual information, the Committees should look to Ministers to account for the policy decisions which they have taken and that “where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of those exchanges is respected”. In other words, in the exceptional case where a Committee may find it necessary to look at these exchanges, it should, rather than seeking to require their production publicly in exercise of its powers under section 23, be prepared to enter into arrangements in terms of which it can see the documents in confidence.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 571           |
| CC           | 29-Jan-98   | 572           |
| CR           | 12-May-98   | 197           |
| LC           | 16-Jul-98   | 485           |
| LC           | 21-Jul-98   | 771           |
| LC           | 21-Jul-98   | 776           |
| LC           | 21-Jul-98   | 779           |
| LR           | 28-Oct-98   | 1917          |
| LR           | 28-Oct-98   | 1918          |
| LR           | 28-Oct-98   | 1920          |
| LR           | 28-Oct-98   | 1921          |
| LR           | 28-Oct-98   | 1925          |
| LR           | 28-Oct-98   | 1941          |
| LR           | 28-Oct-98   | 1944          |
| L3           | 9-Nov-98    | 531           |
| L3           | 9-Nov-98    | 532           |



## **Details of Provisions**

Subsection (1) provides that the Parliament may require any person to attend its proceedings for the purpose of giving evidence or to produce documents in that person's custody or control which relate to any matters concerning "any subject for which any member of the Scottish Executive has general responsibility".

"Proceedings" includes proceedings of committees and sub-committees of the Parliament (section 126(1)) and subsection (8) sets out the conditions in which the power in subsection (1) may be exercised by a committee or sub-committee. "Document" includes anything in which information is recorded in any form (section 126(1)). The reference to "person" would include a legal person, such as a body corporate under section 25(5).

There is no definition of what is meant by "any subject for which any member of the Scottish Executive has general responsibility" but it is not limited to matters where functions have been conferred upon a member of the Scottish Executive, whether in relation to devolved or reserved matters. It would also cover matters which fall within the general policy responsibility of a member of the Scottish Executive, even where the functions may be carried out by an office holder, such as the Keeper of the Registers of Scotland.

This is the main criterion which requires to be satisfied before the Parliament can impose any requirement upon any person under this section. The other subsections all refer back to "such a requirement" under this subsection and impose additional restrictions in different circumstances.

Subsection (2) provides that the Parliament may, subject to subsection (3), only impose a requirement under subsection (1) on a person outside Scotland in connection with the discharge by him of functions of the Scottish Administration or of functions of a Scottish public authority or a cross-border public authority or Border rivers functions which concern a subject for which any member of the Scottish Executive has general responsibility.

"Scottish Administration" is defined in section 126(6)-(8); "Scottish public authority" in section 126(1); "cross-border public authority" in section 88(5) and "Border rivers functions" in section 111(4).

This would enable, for example, the Parliament to summon a member of a cross-border public authority, who resides outside Scotland, in connection with the discharge by him of the functions of that authority in relation to devolved matters in or as regards Scotland. Those functions would concern a subject for which a member of the Scottish Executive has general policy responsibility, even although that member of the Scottish Executive does not have any general policy responsibility for the cross-border public authority itself.

Subsection (3) provides that, in relation to the exercise of functions of a Minister of the Crown, the Parliament may only impose such a requirement under subsection (1) on a person who is or has been a Minister of the Crown or a person in Crown employment (e.g. one of his civil servants under the *Carltona* doctrine) where the exercise of that function concerns a subject for which any member of the Scottish Executive has general responsibility. This is, however, subject to subsection (4).

This would enable, for example, the Parliament to summon a Minister of the Crown (or his civil servants) in relation to the exercise of his functions in connection with the devolved functions of a cross-border public authority because those devolved functions would concern a subject for which a member of the Scottish Executive has general policy responsibility. Other examples might be where functions are exercisable by the Scottish Ministers but only with the agreement of, or after consultation with, a Minister of the Crown. This subsection would enable the Parliament to require that Minister or his civil servants to give evidence in connection with the discharge of his function, such

as the reasons for giving or refusing consent or the views which he expressed upon consultation.

“Minister of the Crown” includes the Treasury - see section 126(1).

“Crown employment” is defined by reference to section 191(3) of the Employment Rights Act 1996 which defines it as “employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.”

Subsection (4) qualifies subsection (3) by providing that the Parliament may not impose such a requirement upon a Minister of the Crown or a person in Crown employment in connection with the exercise of functions which are exercisable:

- (a) by the Scottish Ministers as well as by a Minister of the Crown, such as, for example, the shared functions under sections 56 or 57(1); or
- (b) by a Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers. Subsection (4)(b) is qualified by subsection (5).

Section 44 makes provision in relation to Scottish Ministers.

Subsection (5) provides that subsection (4)(b) does not prevent the Parliament imposing such a requirement in connection with the exercise of functions which do not relate to reserved matters.

The effect of subsections (4) and (5) is that, although a Minister of the Crown or his civil servants will not be a compellable witness in respect of the discharge of his functions merely because they are exercisable with the agreement of or after consultation with the Scottish Ministers, they will be compellable if those functions relate to devolved matters. For example, under subsection (3), it has been pointed out that a Minister of the Crown, or his civil servants, may be a compellable witness in relation to the exercise of his functions in relation to the devolved functions of a cross-border public authority. Subsection (5) ensures that this remains the position even although the Minister of the Crown is required by section 88(2) or by an order under section 89 to consult Scottish Ministers before exercising those functions.

Subsection (6) provides that the Parliament may not impose such a requirement upon a person in connection with the discharge by him of the functions of any body where all of the functions of the body relate to reserved matters. Section 126(3) makes provision for determining whether the functions of a body relate to a reserved matter.

Subsection (7) provides that the Parliament may not impose such a requirement upon a judge of any court or a member of any tribunal in connection with the discharge of by him of his functions as such a member.

“Tribunal” is defined in section 126(1) as meaning any tribunal in which legal proceedings may be brought.

Subsection (8) permits committees and sub-committees of the Parliament to exercise the power to call witnesses and documents if they are expressly authorised to do so by standing orders or otherwise. The Standing Orders of the Parliament provide a general authorisation for committees.

Subsection (9) states that a person is not obliged to answer any question or to produce any document which he would be entitled to refuse to answer or produce in court proceedings in Scotland. There are various circumstances in which the courts in Scotland recognise the right of a person to refuse to answer questions or to produce documents, such as where they may lead to self incrimination or breach legal confidentiality or where the documents were prepared for the purposes of litigation in certain circumstances, or where disclosure would be contrary to the public interest.

Subsection (10) provides that a procurator fiscal is not obliged to answer any question or produce any document concerning the operation of the criminal prosecution system in any particular case if the Lord Advocate considers that doing so might prejudice criminal proceedings in that case or would be contrary to the public interest, and he has authorised the procurator fiscal to decline to answer the question or produce the document. Section 27(3) makes provision in relation to the protection afforded to the Scottish Law Officers.

SECTION 24: Witnesses and documents: notice

### **Purpose and Effect**

This section sets out how any requirement by the Parliament under section 23 to call for witnesses or documents is to be effected.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 197           |
| LC           | 21-Jul-98   | 778           |

### **Details of Provisions**

Subsection (1) requires the Clerk of the Parliament to give written notice:

- (a) to witnesses notifying them of the time and place at which they are required by the Parliament to attend, and the subjects concerning which they will be required to give evidence; or
- (b) to document holders notifying them of the documents which they need to produce, the date by which they should be available and the subjects to which the documents should relate.

Subsection (2) sets out requirements in relation to service of notices. A notice is to be sent by registered post or recorded delivery. In the case of an individual, it is to be sent to his usual or last known address or to an address for service, where he has given one. In any other case (e.g. a health board or another public body), the notice is to be sent to the person's registered or principal office.

SECTION 25: Witnesses and documents: offences

### **Purpose and Effect**

This section makes it an offence for a person who is required to attend the Parliament to give evidence or to produce necessary documents to fail to do what is required by the notice served on him under section 24(1). It applies only to Scotland by virtue of section 131.

### **General**

This section should be read with the notes on sections 23, 24 and 26.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 572           |
| CR           | 12-May-98   | 197           |
| LC           | 21-Jul-98   | 779           |
| LR           | 28-Oct-98   | 1944          |

## **Details of Provisions**

Subsection (1) provides that it is a criminal offence for a person to whom a notice under section 24(1) has been given to:

- (a) refuse, or fail, to attend proceedings as required by the notice;
- (b) refuse or fail to answer any question concerning the subjects specified in such a notice;
- (c) deliberately alter, suppress, conceal or destroy any document which is required by such a notice to be produced; or
- (d) refuse or fail to produce such a document.

Subsection (2) provides that subsection (1) is subject to:

section 23(9), which provides that a person is not obliged to answer any question or produce any document which he would be entitled to refuse to answer or produce in court proceedings in Scotland;

section 23(10), which provides that a procurator fiscal is not obliged to answer any question or produce any document relating to the operation of the criminal prosecution system in a particular case, on the Lord Advocate's authorisation; and

section 27(3), which provides that the Lord Advocate or Solicitor General for Scotland may in any proceedings of the Parliament, decline to answer any question or produce any document relating to the operation of the criminal prosecution system in any particular case if he considers that answering the question or producing the document might prejudice criminal proceedings in that case or would otherwise be contrary to the public interest.

Subsection (3) provides that it is a defence for a person charged with an offence under subsection (1)(a), (b) or (d) above to prove that he had a reasonable excuse for the refusal or failure.

Subsection (4) sets the penalty in the case of a person found guilty of an offence under subsection (1) as a fine not exceeding level 5 on the standard scale or imprisonment for not more than three months.

Subsection (5) makes provision for the case where an offence under the section is committed by a body corporate. Where the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or similar officer of the body corporate or any person purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence, and liable to be proceeded against accordingly.

SECTION 26: Witnesses and documents: general

## **Purpose and Effect**

This section deals with various matters relating to the giving of evidence and production of documents to the Parliament including administering the oath to witnesses, the creation of a criminal offence where a person refuses to take the oath and the payment of allowances and expenses. It applies to everyone who gives evidence or produces documents to the Parliament, not just those who do so in response to a notice under section 24(1).

## **General**

This section should be read in conjunction with the notes on sections 23-25.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 572           |
| LC           | 21-Jul-98   | 781           |

## **Details of Provisions**

Subsection (1) empowers the Presiding Officer or any other person authorised by standing orders to administer an oath to any person giving evidence to the Parliament and to require such a person to take the oath. The Standing Orders of the Parliament authorise the conveners of committees to administer the oath. This section applies both to a person who has been required to attend and to a person who attends by invitation. A person will be able to make a solemn affirmation as an alternative to taking the oath as provided for in the Oaths Act 1978.

Subsection (2) creates an offence where a person refuses to take the oath when required to do so.

Subsection (3) by reference to section 25(4) provides that the person found guilty of an offence will be liable to a fine not exceeding level 5 on the standard scale or to not longer than three months imprisonment.

Subsection (4) allows for standing orders to provide for the payment of expenses and allowances to people who attend to give evidence to the Parliament or produce documents, whether or not they were required to do so by a notice under section 23(8). “Document” is defined in section 126(1).

Subsection (5) provides that a person is taken to comply with a requirement to produce a document if he produces a copy of, or an extract of the relevant part of, the document.

**SECTION 27: Participation of the Scottish Law Officers**

## **Purpose and Effect**

This section makes provision about the participation of the Lord Advocate or the Solicitor General for Scotland in the proceedings of the Scottish Parliament. In particular it makes provision about a Law Officer’s participation if he is not a member of the Scottish Parliament (MSP) and his entitlement to decline to answer questions about the operation of the criminal prosecution system in particular cases under certain circumstances.

## **General**

This section is part of the set dealing with the proceedings of the Scottish Parliament.

Section 48 makes provision about the appointment of the Lord Advocate and the Solicitor General for Scotland but does not require them to be members of the Scottish Parliament. Section 27(1) makes provision about their participation in proceedings of the Parliament if they are not MSPs.

Section 27 (3) is one of a number of provisions which safeguard the independence of the Lord Advocate and the Solicitor General in connection with the exercise by them of their prosecution functions. Section 29(2)(e) provides that it would be outside the competence of the Parliament to legislate to remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. Section 48(5) provides that any decision taken by the Lord Advocate as head of those systems shall continue to be taken by him independently of any other person.

Section 27 (3) is intended to protect the Scottish Law Officers from inappropriate questioning in relation to particular criminal cases. This protection also extends to the procurator fiscal by section 23(10). However, subject to that, the Scottish Law Officers will be accountable to the Scottish Parliament for their actions and decisions in relation to the operation of the criminal justice system, including those relating to individual cases: this provision merely protects them from divulging details of particular cases where it would be inappropriate for them to do so.

There are other provisions which also prevent the Parliament from raising matters in relation to particular cases which may either constitute a contempt of court or breach the *sub judice* rule. Its proceedings are subject to the Contempt of Court Act 1981 (see section 42) and paragraph 1 of Schedule 3 requires standing orders to include provision to prevent conduct which would constitute a criminal offence or a contempt of court and to include a *sub judice* rule. In addition, section 23(9), which deals with the Parliament's power to call for witnesses and documents, is also relevant in that it provides that a person is not obliged to answer a question or to produce a document if he would be entitled to refuse to do so in a court in Scotland.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 21-Jul-98   | 782           |
| LR           | 28-Oct-98   | 1944          |

### **Details of Provisions**

Subsection (1) provides that, if either the Lord Advocate or the Solicitor General is not a member of the Scottish Parliament, he may participate in its proceedings to the extent specified by the Parliament's standing orders but may not vote, and that otherwise standing orders may apply to him in the same way as to an MSP. "Proceedings" includes proceedings of committees and sub-committees - see section 126(1). The Standing Orders of the Parliament permit the Scottish Law Officers to participate as fully in the proceedings of the Parliament as any other member but they may not vote or be appointed a member of the SPCB or the Parliamentary Bureau.

Subsection (2) qualifies subsection (1) by making it clear that it is without prejudice to section 39 which requires the Parliament to make provision about members' interests. Section 39(8)(b) provides that for this purpose the Law Officers are to be subject to the same rules as MSPs even if they are not members of the Parliament.

Subsection (3) provides that the Lord Advocate or the Solicitor General for Scotland may decline to answer questions or to provide documents relating to the operation of the criminal prosecution system in relation to about particular criminal cases if he considers that doing so might prejudice the proceedings in that case or would otherwise be contrary to the public interest. There is a similar provision in relation to a procurator fiscal in section 23(10).

SECTION 28: Acts of the Scottish Parliament

### **Purpose and Effect**

This section provides that the Parliament may make laws, sets out the arrangements for Bills of the Scottish Parliament, once passed, to receive Royal Assent as signified by Her Majesty under the Scottish Seal, and makes general provisions relating to the making of laws by the Scottish Parliament. It also confirms that the UK Parliament remains sovereign.

## **General**

This section empowers the Scottish Parliament to make legislation. It forms part of the set of sections which deal with the legislative competence of the Parliament and the passing of legislation. Sections 29-36 make further provision in this regard.

Provision about the numbering, citation, publication and interpretation of Acts of the Scottish Parliament are matters for the Parliament but, until the Scottish Parliament makes such provision, transitional provisions are contained in the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 ([S.I. 1999/1379](#)).

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 28-Jan-98   | 357           |
| LC           | 21-Jul-98   | 785           |
| LC           | 21-Jul-98   | 793           |
| LR           | 28-Oct-98   | 1945          |
| LR           | 28-Oct-98   | 1947          |

## **Details of Provisions**

Subsection (1) confers the power on the Scottish Parliament to make laws, to be known as Acts of the Scottish Parliament (ASP). This is subject to section 29 which imposes limitations upon the legislative competence of the Parliament.

Subsection (2) provides that proposed Acts are to be known as Bills. A Bill will become an Act of the Scottish Parliament when it has been passed by the Parliament and has received Royal Assent.

Subsection (3) contains provisions regarding Royal Assent. A Bill receives Royal Assent at the beginning of the day on which Letters Patent under the Scottish Seal signed with Her Majesty's own hand signifying Her Majesty's Assent are recorded in the Register of the Great Seal by the Keeper of the Registers of Scotland. The form of these Letters Patent is prescribed by the Scottish Parliament (Letters Patent and Proclamations) Order 1999 ([S.I. 1999/737](#)) which is made under section 38. Section 38(2) requires the Keeper, on recording the Letters Patent signifying Her Majesty's Assent to a Bill, to intimate the date of recording to the Clerk.

Subsection (4) provides that the date of Royal Assent shall be written by the Clerk on the Act of the Scottish Parliament and shall form part of it. In addition, the date when Royal Assent is given to an ASP is usually given in the next Business Bulletin of the Parliament.

Subsection (5) provides that the validity of an Act of the Scottish Parliament is not affected by any invalidity in the proceedings of the Parliament leading to its enactment. What is meant by any invalidity in the proceedings of the Parliament is not defined but there are other provisions in the Act which envisage that the proceedings may be invalid for some reason-see sections 1(4) and 17(5). However, this subsection is intended to protect ASPs from being challenged on procedural grounds, for example, on the grounds that some rule in the standing orders regulating the proceedings of the Parliament has not been complied with - see Lord Sewel H.L. *Deb* vol 593 col 1946. However, it is not thought that this subsection would protect an ASP from challenge if the Bill had not been passed by the Parliament before it had been submitted for Royal Assent because this would not meet the requirements of section 28(2).

Subsection (6) confirms that every Act of the Scottish Parliament shall be judicially noticed (i.e. it does not need to be proved in any court proceedings). The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 ([S.I. 1999/1379](#)) makes provision for the publication of ASPs by or under the authority of the Queen's Printer for Scotland (see section 92) and for the master copy of the ASP to be kept by the Keeper of the Records.

Subsection (7) makes it clear that the power of the Westminster Parliament to make laws for Scotland is not affected. This express provision confirms the sovereignty of the United Kingdom Parliament.

Lord Sewel indicated in the House of Lords during the passage of the Scotland Bill (H.L. *Deb* vol. 592 col. 791) that "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament". This has come to be known as the Sewel Convention. The House of Commons agreed to follow this practice by adopting on 21 October 1999 the 4<sup>th</sup> Report of the House of Commons Procedures Committee, *The Procedural Consequences of Devolution* (HC 185 1998-99). The Government agreed to obey the Convention in paragraph 13 of the *Memorandum of Understanding and Supplementary Agreements* between it and the devolved administrations, first presented to Parliament in July 2000. The Government and the Scottish Executive have also issued further guidance on the Convention.

SECTION 29: Legislative competence

### **Purpose and Effect**

This section limits the competence of the Scottish Parliament to make laws. It provides that an Act of the Scottish Parliament (ASP) will not be law so far as any provision of it is outside the legislative competence of the Parliament. It then defines that what is meant by a provision of an ASP being outside the legislative competence of the Parliament is if it would form part of the law of a country other than Scotland or confer or remove functions exercisable otherwise than in or as regards Scotland, relates to reserved matters, is in breach of the restrictions in Schedule 4, is incompatible with any of "the Convention rights" (i.e. the rights under the European Convention on Human Rights which are defined and given effect in the Human Rights Act 1998) or with European Community law, or would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. The section also makes provision to ensure that the Scottish Parliament can legislate about Scots private law and Scots criminal law, provided it does so to make the law apply consistently to reserved and devolved matters.

### **General**

This section is part of a set dealing with legislation of the Scottish Parliament. Section 28 provides for the Parliament to be able to make laws known as Acts of the Scottish Parliament (ASPs). Section 30 introduces the list of reserved matters (which are set out in Schedule 5) and provides for the modification of Schedules 4 and 5 by subordinate legislation. Sections 31 to 33 and 36 make provision for the scrutiny of Bills and ASPs to establish whether their provisions are within the powers of the Parliament and for the necessary procedural arrangements for this. Section 35 provides for the Secretary of State to have the power to intervene to prevent submission of a Bill for Royal Assent in certain limited circumstances. Sections 98, 101 to 103 and Schedule 6 make provision in relation to the judicial determination of questions about the legislative competence of the Scottish Parliament. Scots private law and Scots criminal law are defined in section 126(4) and (5). Schedule 4 sets out restrictions on modification of a number of enactments and rules of law. Schedule 5 defines reserved matters.

This section is also one of a number dealing with the relations between the Parliament and the Scottish Executive, the UK Government and the European Union. Although



relations with the EU are reserved to the UK Government, the Parliament and the Executive will be responsible for observing and implementing Community law in relation to devolved matters (see also Schedule 5 and section 126).

Responsibility for secondary legislation and any other executive functions are devolved by virtue of section 53 in so far as the functions do not relate to reserved matters or the retained functions of the Lord Advocate. Section 63 allows for subordinate legislation to specify additional functions to be exercised by the Scottish Ministers. See also section 57 in relation to Community law and Convention rights and section 58 in relation to the Secretary of State's power to prevent or require action to be taken.

### **Parliamentary Consideration**

The interrelationships between section 29 and Schedules 4 and 5 were explained by Lord Sewel on 21 July 1998 (H.L. *Deb.* vol. 592 cols. 818-822) during consideration of the Scotland Bill by the House of Lords.

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 254           |
| CC           | 29-Jan-98   | 601           |
| LC           | 21-Jul-98   | 816           |
| LC           | 21-Jul-98   | 818           |
| LC           | 21-Jul-98   | 829           |
| LR           | 28-Oct-98   | 1952          |
| LR           | 28-Oct-98   | 2037          |

### **Details of Provisions**

Subsection (1) provides that an Act of the Scottish Parliament is not law so far as any provision in it is outside the legislative competence of the Scottish Parliament.

If a provision of an ASP is held to be outside the legislative competence of the Parliament, section 29(1) does not render the whole Act invalid. It only provides that the Act is "not law so far as" that invalid provision is concerned.

A provision, which is outside the legislative competence of the Parliament, is "not law" and will never have been law. It is *ultra vires* the Parliament's competence and therefore void *ab initio*. This could have quite drastic effects, particularly if this invalidity is only found to be the case by the courts after the ASP has been in operation for some years. Accordingly, section 102 empowers a court, where it decides that an ASP or some provision in it is not within the legislative competence of the Parliament, to make an order removing or limiting the retrospective effect of its decision or suspending its effect for a period to allow the defect to be corrected.

Subsection (2) provides that a provision is outside the legislative competence of the Parliament if any of the five paragraphs apply.

*Paragraph (a)* mentions two circumstances. It provides that a provision is outside that competence if it would form part of the law of any country or territory other than Scotland. "Scotland" is defined by section 126(1) to include the internal waters and territorial seas adjacent to Scotland. This provision would, therefore, prevent the Scottish Parliament from legislating as a matter of English law but it does not prevent a provision in an ASP from having extra-territorial effect provided it does so only as a matter of Scots law. If it is necessary, in consequence of an ASP for some provision to be made in the law in the rest of the UK, for example, some cross border provision,

section 104 enables the Secretary of State to make such provision by subordinate legislation.

*Paragraph (a)* also provides that a provision is outside that competence if it confers or removes functions exercisable otherwise than in or as regards Scotland. There is no definition of what is meant by a function exercisable “as regards Scotland” but it is clear that there has to be some connection or nexus with Scotland. There are other references in the Act to functions being exercisable “in or as regards Scotland” - see sections 63, 88(6), 90(1) and in the definition of Scottish public authority in section 126(1). It is also implicit in the concept of “devolved competence” (see section 54) so that, for example, it is only functions of a Minister of the Crown which are exercisable in or as regards Scotland which are transferred to the Scottish Ministers under section 53. The question whether a function is exercisable in or as regards Scotland is specifically made a devolution issue by paragraph 1(f) of Schedule 6. Section 30(3) enables Her Majesty, by Order in Council, to specify functions which are to be treated, for such purposes of the Act as may be specified (including for the purposes of legislative competence) as being or as not being exercisable “in or as regards Scotland”.

*Paragraph (b)* provides that a provision is outside the legislative competence of the Parliament if it relates to reserved matters. Reserved matters are defined in Schedule 5.

What is meant by a provision “relating to” a reserved matter is dealt with in section 29(3).

*Paragraph (c)* provides that a provision is outside the legislative competence of the Parliament if it is in breach of the restrictions in Schedule 4. Schedule 4 imposes various restrictions preventing the Scottish Parliament from modifying various enactments or rules of law, such as the law on reserved matters. Accordingly, even if the provision does not relate to reserved matters, it may still be outside its competence if it does so by modifying the law on reserved matters contrary to that Schedule. The notes on Schedule 4 give further detail in this regard.

*Paragraph (d)* provides that a provision is outside the legislative competence of the Parliament if it would be incompatible with any of the Convention rights or with Community law.

The effect of this provision is to make it *ultra vires* for a provision of an ASP to be incompatible with any of the Convention rights or with Community law.

The expression “Convention rights” is defined in section 126(1) as having the same meaning as in the Human Rights Act 1998. That Act came into force on 2 October 2000 but, until that time, section 129(2) provided that section 29(2)(d) should have effect as it would have after that date.

The expression “Community law” is defined in section 126(9) in similar terms as in the European Communities Act 1972. It is also modified by section 106(6) in the case of an obligation under Community law which is a quantitative obligation and it is split in terms of section 106.

*Paragraph (e)* provides that a provision is outside the legislative competence of the Parliament if it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. This is one of the provisions in the Act which are intended to safeguard the position of the Lord Advocate. It does not prevent the Scottish Parliament from amending or even completely altering those systems from what they are at present.

Subsection (3) provides that, for the purposes of this section, the question of whether a provision of an Act of the Scottish Parliament “relates to” a reserved matter is to be determined, subject to sub-section (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

When this amendment was made at Committee Stage in the House of Lords on 21 July 1998 (H.L. *Deb* vol. 592 col. 818 *et seq*), Lord Sewel indicated that it was necessary to ensure that the Scottish Parliament could legislate about devolved matters, such as planning or pollution, even although they might affect reserved matters, such as coal mining. He explained that it had been intended to rely upon the “respection doctrine” which the courts had developed in determining whether a provision was “in respect of” some matter in cases arising from the Commonwealth and the Government of Ireland Act 1920. The classic statement of the respection doctrine was by Lord Atkin in the Northern Irish case of *Gallagher v Lynn* 1937 AC 863 at 870:

“It is well established that you are to look at the “true nature and character of the legislation”... the “pith and substance of the legislation”. If, on the view of the statute as a whole, you find the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorised field.

However, in order to avoid any doubt as to whether the courts would apply that doctrine, it was reflected in statutory form as the purpose test in section 29(3). The courts are therefore required by statute to determine whether a provision “relates to” a reserved matter by reference to “the purpose of the provision”. In determining its purpose, the courts are to have regard, amongst other things, to its effect in all the circumstances. It may be that it is thought that a provision might have two or more purposes but section 29(3) does not say that the courts are to determine what is the dominant purpose. It requires the courts to determine what is “the” purpose of the provision or, in other words, what the provision is about, what is its “true nature”, its “pith and substance”.

How are the courts to do this? In determining the purpose of a provision, the courts are required to have regard to “its effect in all the circumstances”. A provision might be said to have many effects and among them might well be the fact that it “affects” reserved matters. The courts would be required to have regard to that in determining what is “its effect in all the circumstances”. The courts are also required to have regard to other things. These may include the legislative context, what is stated in the Parliament to be the purpose of the provision and what may be said to be its legislative intention.

Once the courts have determined that the purpose does not relate to reserved matters, the fact that it may affect them, even significantly, is irrelevant. This is similar to the effect of the respection doctrine. The fact that there can be a provision which does not relate to reserved matters but which nevertheless affects them is implied by subsection (4).

Subsection (4) qualifies subsection (3) by making special provision as to whether a provision in an ASP relates to reserved matters where it modifies Scots private law or Scots criminal law as it applies to reserved matters. It provides that, even although such a provision would not otherwise relate to reserved matters (that is, by the application of the purpose test in subsection (3)), it is nevertheless to be treated as relating to reserved matters unless “the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise”.

Scots private law and Scots criminal law are defined in section 126(4) and (5). Scots private law is defined as including not only the various familiar areas of the civil law of Scotland but also judicial review of administrative action.

The application of the purpose test may well result in a provision in an ASP amending Scots private law and Scots criminal law being regarded as not “relating” to reserved matters even although it might substantially affect them. Subsection (4), however, deems such a provision to relate to reserved matters (and therefore to be invalid) unless it can be said that “the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise” i.e. to both reserved and devolved matters.

SECTION 30: Legislative competence: supplementary

## **Purpose and Effect**

This section introduces the list of reserved matters in Schedule 5. It also provides power, by Order in Council, to modify Schedules 4 or 5 and to specify that functions should be treated as being, or not being, exercisable “in or as regards Scotland” for particular purposes.

## **General**

This section is part of a set dealing with the legislative competence of the Scottish Parliament. Section 28 provides for the Parliament to be able to make laws known as Acts of the Scottish Parliament (ASPs). Section 29 limits the legislative competence of the Scottish Parliament to make ASPs. Sections 31 to 36 make provision for the scrutiny of the *vires* of Bills of the Scottish Parliament and for associated procedural matters. Schedule 4 sets out restrictions on modification of a number of enactments and rules of law. Schedule 5 defines reserved matters.

This section provides a power to modify the legislative competence of the Parliament by making modifications to Schedules 4 and 5 and by deeming functions to be or not to be exercisable in or as regards Scotland. This power is exercisable by Her Majesty by Order in Council. Further provision about the making of an Order in Council under section 30 is to be found in sections 112 to 115 and Schedule 7. In particular, section 114(3) provides that it may have retrospective effect and Schedule 7 provides that it is subject to Type A procedure, namely that it is subject to affirmative resolution in both the UK and Scottish Parliaments.

Section 30 therefore permits certain alterations to be made to the legislative competence of the Scottish Parliament but only with the agreement of both Parliaments. This is the only way in which the Scotland Act envisages that subordinate legislation under that Act can modify Schedules 4 and 5. The Westminster Parliament could, of course, make such alterations unilaterally by virtue of its sovereignty (section 28(7)).

Under section 30(3), an Order in Council may be made specifying functions which are to be treated as being or not being exercisable in or as regards Scotland for different purposes of the Act such as sections 53 and 63.

However, before a function can be specified in such an Order in Council as being exercisable in or as regards Scotland, it must be capable of being exercisable separately in or as regards Scotland. Where this is not already the case, section 106 enables an Order in Council to be made to modify a function to make it so exercisable for the purpose of enabling or facilitating its transfer to the Scottish Ministers. This power was exercised in the Scotland Act 1998 (Modification of Functions) Order 1999 ([S.I. 1999/1756](#)) and in the Scotland Act 1998 (Modification of Functions) Order 2000 ([S.I. 2000/1458](#)).

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 607           |
| CR           | 12-May-98   | 254           |
| LC           | 21-Jul-98   | 835           |
| LC           | 21-Jul-98   | 843           |
| LR           | 28-Oct-98   | 1918          |

## **Details of Provisions**

Subsection (1) provides that Schedule 5 (which defines reserved matters) shall have effect. Under section 29(2)(b) a provision in an ASP which relates to reserved matters is outside the legislative competence of the Scottish Parliament.

Subsection (2) provides that Her Majesty may by Order in Council modify Schedules 4 or 5 in ways which She considers necessary or expedient.

This power has been exercised in the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 ([S.I. 1999/1749](#)), the Scotland Act 1998 (Modifications of Schedule 4) Order 2000 ([S.I. 2000/1831](#)), the Scotland Act 1998 (Modification of Schedule 5) Order 2000 ([S.I. 2000/3252](#)) and the Scotland Act 1998 (Modification of Schedule 5) Order 2001([S.I. 2001/1456](#)).

Subsection (3) provides that Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of this Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland. See the general note above and the note on section 29(2)(a).

Section 30 (3) was inserted into the Bill principally for the purpose of enabling provision to be made to make it clear which Ministerial functions relating to the regulation of sea fisheries outside Scotland would transfer to the Scottish Ministers under section 53 and what would be the competence of the Scottish Parliament to confer or remove such functions from them - see *H.L. Deb* 21 July 1998 vol. 592 col. 835 *et seq.* This was given effect to in the Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 1999 ([S.I. 1999/1748](#)). That Order also made provision in respect of functions relating to prisoners, agriculture and marine dredging.

The power has also been exercised for the purposes of section 63 which makes provision for an Order in Council to transfer additional functions which are exercisable in or as regards Scotland to the Scottish Ministers including functions relating to reserved matters examples include article 2 of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 ([S.I. 2000/1563](#)) and article 2 of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 ([S.I. 2000/3253](#)).

Subsection (4) provides that an Order in Council under this section may also make such modifications of any enactments, prerogative instruments, other instruments or documents as is considered necessary or expedient in connection with other provision made by the Order. This includes any enactment in or made under the Scotland Act.

SECTION 31: Scrutiny of Bills before introduction

## **Purpose and Effect**

This section deals with the responsibility of the Scottish Executive to scrutinise Bills which they introduce to ensure they are within the competence of the Parliament and to make a statement to that effect. It also requires the Presiding Officer to take a view on the legislative competence of a Bill and to state his decision.

## **General**

This section forms part of the set dealing with the legislative competence of the Parliament.

An Executive Bill (that is, a Bill introduced by a member of the Scottish Executive) cannot be introduced without a statement by the member in charge of it that it is, in his view, within the legislative competence of the Parliament. However, this does not apply to a “Member’s Bill” or a “Private Bill”.

All Bills require a statement from the Presiding Officer on or before the introduction of the Bill as to whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and to state his decision. The Standing Orders also require the Presiding Officer, if he considers that the provisions of the Bill would not be within legislative competence, to state what those provisions are and the reasons for his view. There is a similar provision in the case of Private Bills in Standing Orders.

The fact that the Presiding Officer considers that a Bill, or any provision in it, would not be within the legislative competence of the Parliament does not prevent the introduction of the Bill. He does not therefore exercise a veto over the introduction of a Bill. However, any such view is something which will be taken into account by the Scottish Executive and the Parliament during the passage of the Bill and, if it is passed, by the UK and Scottish Law Officers in determining whether to refer the Bill to the Judicial Committee of the Privy Council under section 33.

Amendments which are made to a Bill during its passage do not require any similar statements. Furthermore, the question whether an amendment is within the legislative competence of the Parliament is not a matter which is taken into account in determining its admissibility. The Standing Orders of the Parliament make further provision in this regard.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 28-Jul-98   | 1349          |
| LC           | 28-Jul-98   | 1354          |
| LC           | 28-Jul-98   | 1358          |
| LR           | 28-Oct-98   | 1960          |
| LR           | 28-Oct-98   | 1961          |
| L3           | 9-Nov-98    | 532           |

### **Details of Provisions**

Subsection (1) requires a member of the Scottish Executive in charge of a Bill to make a statement on or before introduction of the Bill stating that in his view the provisions of the Bill would be within the legislative competence of the Parliament. This only applies to an Executive Bill, that is a Bill introduced by a member of the Executive. The Standing Orders of the Parliament require that this statement forms part of the documents which are required to accompany a Bill on its introduction, known as the “accompanying documents”.

Subsection (2) requires the Presiding Officer to decide on or before the introduction of a Bill whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and to state his decision. This statement is required in the case of every Bill which is introduced into the Parliament. The Standing Orders provide that this statement must form part of the “accompanying documents” for a Bill.

The Standing Orders also require the Presiding Officer, if he considers that the provisions of the Bill would not be within legislative competence, to state what those provisions are and the reasons for his view. There is a similar provision in the case of Private Bills.

Subsection (3) provides that the form of any statement and the manner in which it is to be made should be determined under standing orders and that standing orders may provide for any statement to be published.

SECTION 32: Submission of Bills for Royal Assent

## **Purpose and Effect**

The section provides that it is for the Presiding Officer to submit Bills for Royal Assent but prohibits him from doing so in certain circumstances. He cannot do so during the time when the Law Officers may refer it to the Judicial Committee under section 33, if the Judicial Committee is deciding a reference on it or the Secretary of State may intervene under section 35. The Presiding Officer may also not submit a Bill for Royal Assent in its original form if the Judicial Committee decides that the Bill or a provision of it are outside the Parliament's competence or if the reference is withdrawn under section 34(2)(b) so that the Parliament may reconsider it.

## **General**

This section forms one of a number of Sections on the passing of legislation in the Parliament.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 203           |
| LC           | 28-Jul-98   | 1368          |
| LC           | 28-Jul-98   | 1379          |
| LC           | 28-Jul-98   | 1390          |
| LR           | 28-Oct-98   | 1961          |
| LR           | 28-Oct-98   | 1963          |
| LR           | 28-Oct-98   | 2003          |
| L3           | 9-Nov-98    | 532           |
| LCCLA        | 17-Nov-98   | 1171          |

## **Details of Provisions**

Subsection (1) provides that it is for the Presiding Officer to submit Bills for Royal Assent. No-one else can do so other than a deputy Presiding Officer in terms of section 19(4) or (5). Bills require Royal Assent before they can become Acts of the Scottish Parliament.

Subsection (2) provides that the Presiding Officer shall not submit a Bill for Royal Assent at any time when:

- (a) the Advocate General, the Lord Advocate or the Attorney General may make a reference in relation to the Bill under section 33; or
- (b) the Judicial Committee is considering any such reference; or
- (c) an order may be made by the Secretary of State under section 35 prohibiting the Presiding Officer from submitting the Bill for Royal Assent.

Under section 33, any of the specified Law Officers may refer to the Judicial Committee the question whether the Bill, or any provision in it, is within the legislative competence of the Parliament. They may do so at any time during the period of 4 weeks after the passing of the Bill or after any subsequent approval of the Bill after its reconsideration in terms of section 36(5). An order under section 35 may be made by the Secretary of State at any time during the same period but, if the Bill is referred to the Judicial Committee, the Secretary of State has a further period of 4 weeks after the reference has been decided or otherwise disposed of by the Judicial Committee in which to make

the order. Bills may be submitted more quickly for Royal Assent in cases where the Law Officers and the Secretary of State notify the Presiding Officer as provided for in sections 33 and 35.

If a reference to the Judicial Committee is made, the Presiding Officer cannot submit the Bill for Royal Assent until the reference has been decided or otherwise disposed of by the Judicial Committee, such as by the Judicial Committee agreeing to the withdrawal of the reference.

Subsection (3) provides that the Presiding Officer shall not submit a Bill in its unamended form for Royal Assent if:

- (a) the Judicial Committee decides that the Bill or any part of it is outside the legislative competence of the Parliament; or
- (b) a reference made in relation to a Bill under section 33 has been withdrawn following a request for withdrawal of the reference under section 34(2)(b).

This ensures that the Presiding Officer cannot submit a Bill for Royal Assent containing provisions in their original form which the Judicial Committee have found to be outside the competence of the Parliament or about which there may have been questions referred to the Judicial Committee but the reference has been withdrawn in the circumstances described in section 34. However, it does not prevent the Presiding Officer from submitting such a Bill after it has been amended following a reconsideration of it by the Parliament in terms of section 36, but only after the period (normally 4 weeks) allowed for a further reference to the Judicial Committee under section 33 or the making of an order under section 35.

Subsection (4) provides a definition of the ‘Advocate General’ to mean the Advocate General for Scotland (see section 87) and the ‘Judicial Committee’ to mean the Judicial Committee of the Privy Council (see section 103).

**SECTION 33: Scrutiny of Bills by the Judicial Committee**

### **Purpose and Effect**

This section provides that the Advocate General, the Lord Advocate or the Attorney General may refer a Bill of the Scottish Parliament, or any provision of such a Bill, to the Judicial Committee of the Privy Council (“the Judicial Committee”) for determination of whether it is within the legislative competence of the Parliament. Such a reference may only be made within the 4 week period beginning with the passing of a Bill or its subsequent approval following reconsideration of it by the Parliament.

### **General**

This section forms part of the set of provisions in sections 31 to 34 dealing with the scrutiny of Bills to ensure that they are within the legislative competence of the Scottish Parliament before they are submitted for Royal Assent. It provides for the determination of such questions by the Judicial Committee at the instance of one of the specified Law Officers.

These questions may also be raised in court or tribunal proceedings after Royal Assent by any member of the public who has title and interest to sue, such as by way of judicial review. Schedule 6 provides for certain special procedures to apply when they do arise, for example, to ensure that the UK and Scottish Law Officers are given an opportunity to participate and that these questions can be determined ultimately by the Judicial Committee. Schedule 6 also enables any of the specified Law Officers to bring such proceedings or to refer the matter directly to the Judicial Committee.

Section 103 makes provision for the procedure and membership of the Judicial Committee in cases arising under either section 33 or Schedule 6. The rules regulating the procedure on a reference under section 33 are contained in the Judicial Committee



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

(Devolution Issues) Rules Order 1999 (S.I. 1999/665). The powers of the Judicial Committee in such cases are also dealt with in the Judicial Committee (Powers in Devolution Cases) Order 1999 (S.I. 1999/1320).

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 202           |
| CR           | 12-May-98   | 203           |
| LR           | 28-Oct-98   | 1952          |
| LR           | 28-Oct-98   | 2004          |

### **Details of Provisions**

Subsection (1) provides that the Advocate General, the Lord Advocate or the Attorney General may refer the question as to whether a Bill of the Scottish Parliament or any provision of it is within the Parliament's legislative competence to the Judicial Committee for a decision.

Subsection (2) prescribes when such a reference by those Law Officers may be made. It may be made during a period of four weeks following either the passing of the Bill by the Parliament or the approval of a Bill by the Parliament on its reconsideration in accordance with the Standing Orders made by virtue of section 36(5).

If the Law Officers do not refer a Bill to the Judicial Committee within that four week period, then the Presiding Officer will be free to submit it for Royal Assent at the end of that period, subject to any order made by the Secretary of State under section 35. If, however, a reference is made, the Presiding Officer will not be able to submit the Bill for Royal Assent until it has been decided or otherwise disposed of by the Judicial Committee by virtue of section 32(2)(b).

Subsection (3) qualifies subsection (2) by providing that a Law Officer shall not refer a Bill to the Judicial Committee if he has already notified the Presiding Officer that he does not intend to make a reference in relation to that Bill. However, if, after giving such a notification, the Bill has been approved by the Parliament on reconsideration, then that notification does not preclude him making a reference during the second four week period following such approval in terms of subsection (2)(b).

The provision to allow the Law Officers to notify their intention not to refer a Bill will allow for cases where it is intended that the Bill should be brought into force as soon as possible, such as in the case of emergency legislation. The Presiding Officer will be entitled to submit a Bill for Royal Assent as soon as all the Law Officers so notify and the Secretary of State has notified him that he does not propose to make an order under section 35. So far as the Law Officers are concerned, this, of course, depends on general agreement that the Bill raises no question of *vires* which ought to be referred.

SECTION 34: ECJ references

### **Purpose and Effect**

This section makes provision in a case where a reference has been made to the Judicial Committee under section 33 and the Judicial Committee has, in turn, made a reference for a preliminary ruling to the European Court of Justice (ECJ). In such a case, if the Scottish Parliament resolves to reconsider the Bill, the Law Officer making the reference to the Judicial Committee is required to request the withdrawal of the reference to the Judicial Committee.

## **General**

The kind of circumstance in which a reference to the Judicial Committee might lead to a reference for a preliminary ruling to the ECJ is where there is some dispute as to whether a provision in the Bill is incompatible with EC law. If there is a question as to what is the EC law, this question should be referred to the ECJ for a preliminary ruling. However it will be for the Judicial Committee to determine whether the provision in the Bill is incompatible with whatever the ECJ hold the law to be.

If such a reference is made to the ECJ, this could lead to a considerable delay before the Bill might be able to be enacted and commenced. This could be unfortunate if the provision in question is not an essential part of the Bill or could easily be amended or deleted so as to remove the problem. This section is intended to enable the reference to the Judicial Committee to be withdrawn if the Parliament resolves that it is prepared to reconsider the Bill. If the Judicial Committee agree that the reference can be withdrawn, this does not mean that the Presiding Officer can then submit the Bill for Royal Assent in its original state: section 32(3)(b) prevents this.

However, if the Parliament amends the Bill on reconsideration, the Law Officers have a further period of 4 weeks in which to refer the Bill again to the Judicial Committee. The Secretary of State also has a further period of 4 weeks in which to decide whether to make an order under section 35.

This is the only circumstance in which the Parliament is able to reconsider a Bill after it has been referred to the Judicial Committee and before the Judicial Committee have reached a decision on the reference.

Procedures for reconsideration of Bills are provided for the Standing Orders of the Parliament.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 28-Jul-98   | 1398          |
| LR           | 28-Oct-98   | 2006          |

## **Details of Provisions**

Subsection (1) provides that this section applies where a reference has been made to the Judicial Committee by a Law Officer under section 33 and the Judicial Committee has, in turn, made a reference for a preliminary ruling and neither of those references has been decided or otherwise disposed of. A reference for a preliminary ruling is defined in subsection (3).

Subsection (2) provides that, if the Parliament resolves to reconsider the Bill, the Presiding Officer shall notify the Advocate General, the Lord Advocate and the Attorney General of that fact and the Law Officer who made the reference to the Judicial Committee is required to request the withdrawal of the reference. There is no obligation upon the Judicial Committee to accede to such a request.

Subsection (3) defines a “reference for a preliminary ruling” as meaning a reference of a question to the ECJ under Article 177 of the Treaty establishing the European Community, Article 41 of the Treaty establishing the European Coal and Steel Community or Article 150 of the Treaty establishing the European Atomic Energy Community.

SECTION 35: Power to intervene in certain cases

## **Purpose and Effect**

This section enables the Secretary of State, to intervene, by order, to prohibit the Presiding Officer from submitting a Bill for Royal Assent in certain limited circumstances. It also specifies when the order can be made and what it must contain.

## **General**

This section is one of a number dealing with the legislative competence of the Parliament.

The limits upon the legislative competence of the Scottish Parliament are set out in sections 28-30, together with the list of reserved matters in Schedule 5 and the entrenched enactments and rules of law in Schedule 4. Any provision in an Act of the Scottish Parliament which falls outside those limits is *ultra vires* and void, subject to any order made by the courts under section 102. There are various provisions providing for a Bill to be scrutinised before it is enacted to ensure that it is *intra vires*, both before its introduction (section 31) and by the Judicial Committee after it has been passed but before it is submitted for Royal Assent (sections 32- 34). After the Bill has been enacted, any question as to whether the Act or some provision in it is outside the legislative competence of the Parliament is a devolution issue and attracts the special procedures in Schedule 6

However, there are certain limited circumstances where the UK Government can exercise a policy control or veto over what legislation is enacted by the Scottish Parliament, even although it is within its competence. This section defines what those circumstances are. There is a related power in section 58(4) enabling the Secretary of State, in similar circumstances, to revoke subordinate legislation made by a member of the Scottish Executive.

## **Parliamentary Consideration**

Ministers explained these provisions in the House of Lords during the passage of the Scotland Bill on 28 July 1998 and 28 October 1998.

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 262           |
| LC           | 28-Jul-98   | 1391          |
| LC           | 28-Jul-98   | 1397          |
| LR           | 28-Oct-98   | 2006          |
| LR           | 28-Oct-98   | 2008          |
| L3           | 9-Nov-98    | 535           |

## **Details of Provisions**

Subsection (1) provides that the Secretary of State may make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent if the Bill contains provisions:

- (a) which the Secretary of State has reasonable grounds to believe would 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 he has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

Subsection (1)(a) enables the Secretary of State to prevent a Bill from being enacted where he has reasonable grounds to believe that it would be incompatible with the UK's international obligations.

“International obligations” are defined in section 126(10) as meaning “any international obligations of the United Kingdom other than obligations to observe and implement Community law or the Convention rights”.

In relation to EC law rights or rights under the European Convention on Human Rights (“Convention rights”), there is a *vires* control in the Act: section 29(2)(d) provides that any provision in an ASP which is incompatible with Community law or any of the Convention rights is outside the legislative competence of the Scottish Parliament.

However, other international obligations cannot be protected by such a *vires* control because, except in certain limited circumstances, they are not normally justiciable as a matter of domestic law. Accordingly, it is necessary to ensure that they can be protected by the Secretary of State by the use of the power in this section (see also section 58 in relation to the actions of the Scottish Executive).

*Subsection (1)(a)* also enables the Secretary of State to prevent a Bill from being enacted where he has reasonable grounds to believe that it would be incompatible with the interests of defence or national security. These are reserved matters by virtue of paragraph 9 of Part I, and Section B8 of Part II, of Schedule 5 and therefore provisions in an ASP cannot relate to them (see section 29(2)(b)). Nevertheless, an ASP could have a significant effect upon such reserved matters (see the note on section 29). In view of the national importance of defence and national security, it was thought appropriate that they should be given this special protection.

*Subsection (1)(b)* enables the Secretary of State to prevent a Bill from being enacted which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

Provisions in an ASP cannot relate to reserved matters (section 29(2)(b)) and they, generally, cannot modify “the law on reserved matters” by virtue of section 29(2)(c) and paragraph 2 of Schedule 4. Nevertheless, they could have a significant effect upon reserved matters (see the note on section 29).

Subsection (2) requires the order to identify the Bill and the provisions concerned, and state the reasons why it is being made.

Further provisions about the making of the order are to be found in sections 112 to 115 and Schedule 7. The Order is subject to “Type I” procedure i.e. it is subject to annulment in pursuance of a resolution of either House of Parliament.

Subsection (3) gives the Secretary of State four weeks from the Scottish Parliament passing the Bill, or approving it following reconsideration, or after a reference under section 33 being decided or otherwise disposed of by the Judicial Committee, in which to make the Order.

Subsection (4) prevents the Secretary of State from making an order if he has previously notified the Presiding Officer that he does not intend to do so, unless the Parliament has meanwhile approved the Bill following reconsideration.

Subsection (5) provides that an order ceases to have effect if the Scottish Parliament approves the Bill following reconsideration (section 36(5) and under Standing Orders Rule 9.9). (See also the note on section 36(4)). If the Parliament approves the Bill, then, under subsection (3), the Secretary of State has a further 4-week period in which to make a further order if he is still not content.

SECTION 36: Stages of Bills

## **Purpose and Effect**

This section requires the standing orders to make provision for the various stages which a Bill will normally go through in the Parliament. Different procedures may, however, be made for certain different kinds of Bills. They must also provide for the reconsideration of a Bill after it has been passed in certain limited circumstances.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |  |
|--------------|-------------|---------------|--|
| CR           | 12-May-98   | 203           |  |
| CR           | 12-May-98   | 743           |  |
| LR           | 28-Oct-98   | 2010          |  |
| LR           | 28-Oct-98   | 2018          |  |

## **Details of Provisions**

Subsection (1) requires the standing orders to make provision for 3 stages which a Bill must normally go through in the Parliament, namely:

- (a) a general debate on it with an opportunity to vote on its general principles;
- (b) a detailed consideration of it, with an opportunity to vote on its details; and
- (c) a final stage at which it can be passed or rejected.

The Standing Orders of the Parliament provide for these three stages. Although these three stages are similar to the procedures which a Bill has to go through in each House at Westminster, the procedures leading up to a Stage One debate in the Scottish Parliament are, in particular, markedly different. They involve a report on the Bill by the relevant Committee, usually after evidence has been taken upon the Bill from the Scottish Executive and interested groups and individuals.

Subsection (2) provides that subsection (1) does not prevent standing orders making provision to enable the Parliament to expedite proceedings in relation to a particular Bill. This provision is necessary to ensure that, for example, emergency legislation can be adequately dealt with. The Standing Orders of the Parliament make provision for an expedited procedure for those Executive Bills which are Emergency Bills. This procedure was used in respect of the [Mental Health \(Public Safety and Appeals etc.\) \(Scotland\) Act 1999 \(asp 1\)](#) and the [Erskine Bridge Tolls Act 2001 \(asp 12\)](#).

Subsection (3) allows the standing orders to make different provision from that required under subsection (1) for certain different kinds of Bills, namely Bills which restate the law, Bills which repeal spent enactments and private Bills. The Standing Orders have made provision for different procedures.

Subsection (4) requires the standing orders to provide for the reconsideration of a Bill passed by the Parliament if (and only if):

- (a) the Judicial Committee decide that the Bill or any provision of it is outside the legislative competence of the Parliament;
- (b) the Judicial Committee refers the Bill to the ECJ for a preliminary ruling and the reference to the Judicial Committee by the Law Officers in relation to the Bill under section 33 is withdrawn following a request for withdrawal of the reference under section 34(2)(b); or
- (c) the Secretary of State has made an order in relation to the Bill under section 35 prohibiting the Presiding Officer from submitting it for Royal Assent.

Subsection (5) requires the standing orders to ensure that any Bill amended on reconsideration is subject to a final stage where it can be approved or rejected.

Subsection (6) ensures other provisions in the Bill which refer to a Bill being passed are read, in cases where the Bill has been amended on reconsideration, as references to the Bill being approved. The references are in section 28(2) (when Bills become Acts), section 36(4) (reconsideration after passing), section 38(1)(a) (Letters Patent signifying Royal Assent to a Bill passed by the Parliament), and paragraph 7 of Schedule 3 (Crown consent before passing).

#### SECTION 37: Acts of Union

### **Purpose and Effect**

This section provides that the Acts of Union are to have effect subject to the provisions of the Scotland Act.

### **General**

This section seeks to ensure that nothing in the Act, or anything authorised by the Act, such as the provisions authorising the Scottish Parliament to make laws, could be challenged on the grounds that it is contrary to the Acts of Union.

The Acts of Union were passed by the Scottish Parliament and the English Parliament and gave effect to the Treaty of Union between Scotland and England and Wales.

This section is intended to make it clear that it is Parliament's intention that, in so far as there may be any inconsistencies between the Acts of Union and provisions in this Act, including anything authorised by the Act, the Acts of Union are to have effect subject to what is in, or authorised by, this Act.

There are, however, various provisions in the Scotland Act which prevent the Scottish Parliament from modifying certain matters mentioned in the Acts of Union. Paragraph 1(2)(a) of Schedule 4 prevents the Parliament from modifying Articles 4 and 6 of the Acts of Union "so far as they relate to freedom of trade". Article 4 provides in part that "all the subjects of the United Kingdom of Great Britain shall from and after the Union have full freedom and intercourse of trade and navigation to and from any port or place within the United Kingdom..."

In addition, paragraph 4(1) of Schedule 4 has the effect of preventing the Parliament from amending the Scotland Act, including references in that Act to the Court of Session or the High Court (such as section 95 or Schedule 6) but, by virtue of paragraph 9 of that Schedule, the Parliament could change the titles of these courts and of the judges in them.

#### SECTION 38: Letters Patent and proclamations

### **Purpose and Effect**

This section makes further provision in relation to Letters Patent signifying Royal Assent to Bills of the Scottish Parliament and in relation to royal proclamations dissolving the Parliament and providing for elections to be held. It also makes provision for a Wafer Scottish Seal and for it to be used instead of the Scottish Seal itself.

### **General**

Section 28 provides for Bills of the Scottish Parliament to become Acts when they have received Royal Assent. Royal Assent is given by recording in the Register of the Great Seal Letters Patent under the Scottish Seal signed with Her Majesty's own hand signifying Her Assent to the Bill. Sections 2(5) and 3(2) provide for dissolution of the Scottish Parliament and the fixing of dates for election by royal proclamation under the Scottish Seal.

Letters Patent and proclamations for similar purposes in relation to the UK Parliament and the elections to that Parliament pass under the Great Seal of the United Kingdom. However, in relation to the Scottish Parliament and elections to that Parliament it was considered more appropriate that they should pass under the Scottish Seal. All documents passed under the Scottish Seal are recorded in the Register of the Great Seal.

Section 45(7) provides that the First Minister is to be the Keeper of the Scottish Seal and, by virtue of paragraph 5 of Part I of Schedule 5, it is within the competence of the Scottish Parliament to make provision as to the use of the Scottish Seal.

Section 38 also makes provision for a Wafer Scottish Seal to be used in place of the Scottish Seal. This is because the Scottish Seal would have to be affixed as wax pendant attached by a ribbon, which is a cumbersome and expensive process, for every Letters Patent signifying Her Majesty's Assent to a Bill or every Royal proclamation. In terms of the Wafer Scottish Seal Directions 1999 ([S.S.I. 1999/130](#)), made under this section, the Wafer Scottish Seal takes the form of an embossment on a die. The provision made by this section and these directions is similar to that made for a Wafer Great Seal (of the United Kingdom) by the Great Seal Act 1884.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| L3           | 9-Nov-98    | 538           |

### **Details of Provisions**

Subsection (1) requires the Keeper of the Registers of Scotland to record in the Register of the Great Seal all Letters Patent signed by Her Majesty signifying Royal Assent to Bills passed by the Parliament and all royal proclamations providing for the dissolution of the Parliament and the holding of elections which have passed under the Scottish Seal.

Subsection (2) requires the Keeper to intimate to the Clerk of the Scottish Parliament the date of the recording of Letters Patent. Section 28(3) provides that the date of recording in the Register is the date of Royal Assent and section 28(4) requires the Clerk to endorse this date on the Act of the Scottish Parliament in question.

Subsection (3) provides for more detailed provision as to the preparation and publication of such Letters Patent and proclamations to be set out in an Order in Council. The Scottish Parliament (Letters Patent and Proclamations) Order makes this provision ([S.I. 1999/737](#)).

Subsection (4) allows for impressions of the Scottish Seal to be made, the exact details of size and material being specified in a direction made by the First Minister. The Wafer Scottish Seal Directions 1999 ([S.S.I. 1999/130](#)) were made by the First Minister on 19 October 1999.

Subsection (5) states that each impression provided for in subsection (4) is to be known as a Wafer Scottish Seal and shall be kept in accordance with directions made by the First Minister.

Subsection (6) states that if a Wafer Scottish Seal is used on any Letters Patent signifying Royal Assent to Bills of the Scottish Parliament or any royal proclamation dissolving the Parliament and providing for elections then that document has the same validity as if it had passed under the Scottish Seal.

SECTION 39: Members' interests

### **Purpose and Effect**

This section requires the Parliament to make "provision" by or under an Act of the Scottish Parliament for the registration and declaration of members' interests and for

the rules which members must comply with when taking part in proceedings of the Parliament. This provision must also prohibit members from advocating any matter on behalf of a person by specified means, or urging other members to do so, in return for payment or benefit. The section also creates a criminal offence where a member is found to be guilty of contravening those provisions. The provisions of this section will apply to the Scottish Law Officers even if they are not members of the Parliament. The section sets out the minimum requirements for the provisions.

### **General**

This section imposes a statutory duty upon the Scottish Parliament to make provision by or under an Act of the Scottish Parliament about members' interests. This is in addition to the provision about corrupt practices which is made by section 43.

Until the Parliament makes such provision, transitional provision is made by the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 (S.I. 1999/1350). In *Whaley v Lord Watson of Invergowrie* 2000 SLT 475, a petition was brought by persons who had a financial interest in hunting seeking an interdict to prevent Lord Watson from introducing a Bill to ban hunting on the grounds that this would infringe a provision in that Order. The Court of Session held that the Order did not give rise to rights which could be enforced by members of the public.

A Code of Conduct for Members was agreed to by the Parliament in February 2000.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 564           |
| LC           | 16-Jul-98   | 476           |
| LC           | 16-Jul-98   | 477           |
| LC           | 16-Jul-98   | 484           |
| LR           | 22-Oct-98   | 1682          |

### **Details of Provisions**

Subsection (1) requires provision to be made for the establishment of a register of members' interests which is to be published and made available for public inspection.

Subsection (2) requires provision to be made to require a member with a financial interest to register it in the register and to declare a financial interest before taking part in any proceedings of the Parliament relating to that matter. Apart from the fact that it is indicated that financial interest includes benefits in kind, what is meant by financial interest for either of these purposes is left to the Parliament to define.

Subsection (3) requires the provision made under sub-section (2) about members' interests to include any provision which the Parliament considers appropriate to prevent a member with a financial interest for either of the purposes mentioned in subsection (2) from taking part in proceedings of the Parliament which relate to that matter or to restrict his participation in such proceedings.

Subsection (4) requires provision to be made to prohibit a member from advocating or initiating any cause or matter on behalf of another person, by any means specified in the provision, in consideration of any payment or benefit in kind of a description so specified. It also requires the Parliament to prohibit members from urging other members, in consideration for payment or benefit in kind, to advocate or initiate any cause or matter on behalf of any person by any such means.



Subsection (5) requires the provisions to include such provision as the Parliament considers appropriate to exclude any member who fails to comply with or contravenes the provision made under subsections (1) to (4) from proceedings of the Parliament.

Subsection (6) creates a criminal offence if a member takes part in proceedings without having registered a financial interest or declared a financial interest, in contravention of the provisions made under subsection (2) and (3) or the provisions made under subsection (4).

Subsection (7) provides that a person found guilty of such an offence will be liable to a fine not exceeding level 5 on the standard scale.

Subsection (8) defines “provision” as meaning provision made by or under an Act of the Scottish Parliament and ensures that the section applies to the Lord Advocate and the Solicitor General for Scotland whether or not they are members of the Parliament. SECTION 40: Proceedings by or against the Parliament etc.

### **Purpose and Effect**

This section makes provision as to how legal proceedings are brought by or against the Parliament or its officers and staff but prevents any coercive order being granted against the Parliament, whether directly or indirectly.

### **General**

Apart from the protection from defamation in section 41, there is no general provision which seeks to exclude judicial proceedings being brought against the Parliament or any MSP in respect of anything said or done in the Parliament. There is nothing similar to the privilege conferred upon the Westminster Parliament by Article 9 of the Bill of Rights Act 1688 which confers upon “proceedings in Parliament” protection from being “impeached or questioned” in any “court or place out of Parliament”.

Against this background, this section makes provision as to how legal proceedings may be taken by or brought against the Parliament. Instead of protecting the Parliament or its proceedings by preventing such judicial proceedings from being brought, this section restricts the remedies which may be granted directly or indirectly against the Parliament. It prevents coercive orders being granted by the Parliament which would require it to do something or prevent it from doing something on the grounds that this could interfere unduly with the proceedings of the Parliament. Instead, it will be open to the courts to make a declarator and it would then be for the Parliament to decide how it should react.

Similar protection is also provided for MSPs, the Presiding Officer and his deputies, the SPCB and staff of the Parliament if the effect of making an order would be to give relief against the Parliament. This is intended to prevent the protection for the Parliament being circumvented by taking action instead against individual members or office-holders. This follows the same approach as is taken in civil proceedings against the Crown in section 21 of the [Crown Proceedings Act 1947 \(c.44\)](#).

It is possible for the Parliament to modify sections 40-43 and to make its own provision about such protections - see paragraph 4(2) of Schedule 4.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| L3           | 9-Nov-98    | 538           |

### **Details of Provisions**

Subsection (1) provides that the Scottish Parliamentary Corporate Body (the Parliamentary corporation) is the body which represents the Scottish Parliament in all

legal proceedings by or against the Parliament. As the Parliament is an unincorporated association consisting of all its members, it was thought that it would be more practical and convenient if legal proceedings were brought by or against the SPCB on behalf of the Parliament. The SPCB is in many respects the legal persona of the Parliament and, in any event, the property rights and liabilities of the Parliament, which are likely to give rise to most of the legal proceedings against the Parliament, are treated as those of the SPCB - see section 21(5).

Subsection (2) provides that any legal proceedings by or against the Presiding Officer or a deputy or any member of staff of the Parliament should be brought by or against the SPCB on his behalf. Provision is made for this in case proceedings are brought by or against the Presiding Officer or a member of the Parliament's staff, such as the Clerk, in his official capacity. It is not thought that it would apply where, for example, a member of the staff may be bringing an action in a personal capacity against the SPCB arising out of his contract for employment with the SPCB.

Subsection (3) provides for the remedies a court may take against the Parliament. A court will not be able to make an order for suspension, interdict, reduction or specific performance or other like order (including an interim order) but may make a declarator. This is similar to what is provided in section 21(1)(a), as read with section 47, of the Crown Proceedings Act 1947 except that it refers expressly to suspensions and to other like orders. Subsection (5) makes it clear that references to an order include an interim order.

Subsection (4) extends the protection given to the Parliament by similarly restricting the remedies which may be granted in legal proceedings against an MSP, the Presiding Officer and his deputies, the SPCB and staff of the Parliament if the effect of making such an order would be to give relief against the Parliament. This is intended to prevent the protection for the Parliament being circumvented by taking action instead against individual members or office-holders. This is similar to what is provided in section 21(2) of the Crown Proceedings Act 1947.

The effect of this subsection was considered by the Court of Session in *Whaley v Lord Watson of Invergowrie* 2000 SLT 475 where it was held that it did not prevent an interdict being granted against a MSP from introducing a Bill on the grounds that he would thereby be breaching some provision of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 ([S.I. 1999/1350](#)). As the Lord President stated at page 482:

"...the subsection does not bar a remedy against a member simply because it may have some consequential effects on the working of the Parliament: the bar applies only where the interdict against the member would have the effect of granting relief, i.e. a legal remedy, against the Parliament.

Subsection (5) makes it clear that references to an order include an interim order.  
SECTION 41: Defamatory statements

### **Purpose and Effect**

This section confers absolute privilege for the purposes of the law of defamation on any statement made in the proceedings of the Parliament and on the publication of any statement under the authority of the Parliament.

### **General**

This section is concerned with the proceedings of the Parliament and is intended to ensure that members are free to debate and the Parliament is free to report on matters of public interest without fear of an action for defamation being raised. The privilege of freedom of speech is part of the law and custom of the Westminster Parliament. It is

also reflected in Article 9 of the Bill of Rights Act 1688 which confers on “proceedings in Parliament” protection from being “impeached or questioned” in any court.

No similar privilege is conferred upon proceedings in the Scottish Parliament – see the note on section 40. However, this section and section 42 protect statements made in such proceedings and their publication against proceedings for defamation and contempt of court.

It is possible for the Parliament to modify sections 40-43 and to make its own provision about such protections under paragraph 4(2) of Schedule 4.

There are other provisions which make provision in relation to defamation. For example the amendments made to the Defamation Act 1952 by paragraphs 10 and 11 of Schedule 8 make provision in relation to defamation at elections, and amendments to the Public Order Act 1986 by paragraph 24 of that Schedule make provision in relation to reports of parliamentary proceedings.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 28-Jul-98   | 1443          |

### **Details of Provisions**

Subsection (1) provides that for the purposes of the law of defamation any statement made in the proceedings of the Parliament and the publication under the authority of the Parliament of any statement is absolutely privileged. It applies for the purposes of the law of defamation in any part of the UK by virtue of the fact that the Act generally extends throughout UK (see section 131).

*Subsection (1)(a)* confers absolute privilege upon any statement made in the proceedings of the Parliament. The expression “statement” is defined in subsection (2).

The expression “proceedings in the Parliament” is defined in section 126(1) to include proceedings of any committee or sub-committee. It is not otherwise defined. It is intended that it should be construed in a similar way as “proceedings in Parliament” has been construed for the purposes of Article 9 of the Bill of Rights Act 1688 - see H.L. *Deb* 28 July 1998 vol 592 cols 1447 - 1448.

*Subsection (1)(b)* confers absolute privilege upon the publication under the authority of the Parliament of any statement.

The Standing Orders of the Parliament provide that “Any statement which is required or authorised to be published in pursuance of these Rules is published under the authority of the Parliament”. This would cover the publication of the minutes of proceedings, the Official Report and the Journal which are required to be published under Standing Orders and the broadcasting of proceedings which may be authorised under Standing Orders. It would also include the publication of any report or other document which is laid before the Parliament and which the Clerk is required by the Parliament to publish under Standing Orders.

Subsection (2) provides that “statement” for the purposes of this section has the same meaning as in the [Defamation Act 1996 \(c.31\)](#). Section 17 of the 1996 Act defines it as meaning “words, pictures, visual images, gestures or any other method of signifying meaning”. This expression would therefore cover any oral and written statements, motions, papers etc which are made “in proceedings of the Parliament” and the publication of them in the official report of proceedings of the Parliament. It would also cover live radio or television broadcasts and extracts of such broadcasts published with the authority of the Parliament.

SECTION 42: Contempt of Court

## **Purpose and Effect**

This section disapplies the rule of strict liability for contempt of court in relation to publications made in, or in reports of, proceedings of the Scottish Parliament in relation to a Bill or subordinate legislation.

## **General**

The proceedings of the Scottish Parliament, unlike those of Westminster, are subject to the law of contempt of court. No express provision is needed for this because the law of contempt of court and particularly the strict liability rule in the Contempt of Court Act 1981 will apply automatically unless expressly disapplied.

The strict liability rule is defined by section 1 of the Contempt of Court Act 1981 as that whereby conduct may be treated as a contempt of court regardless of intent to interfere with the course of justice in particular legal proceedings. In terms of section 2 of that Act the rule only applies to a publication which creates a substantial risk that the course of justice in active legal proceedings will be seriously impeded or prejudiced. Section 5 of the Act provides that the rule does not apply to publications made during a discussion in good faith of public affairs if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

Paragraph 1 of Schedule 3 requires standing orders to include provision “for preventing conduct which would constitute ... a contempt of court” and a *sub judice* rule. This is contained in the Standing Orders of the Parliament.

The present section is intended to ensure that the Scottish Parliament is not prevented from legislating on any matter simply because anything said or done in the proceedings for the purposes of considering a Bill or subordinate legislation might be treated as a contempt of court under the “strict liability rule”.

This section forms part of a group of sections which afford some protection to proceedings in the Parliament. It is possible for the Parliament to modify sections 40-43 and to make its own provision about such protections - see paragraph 4(2) of Schedule 4.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 28-Jul-98   | 1449          |
| LC           | 28-Jul-98   | 1450          |

## **Details of Provisions**

Subsection (1) provides that the strict liability rule shall not apply to any publication:

- (a) made in the proceedings of the Scottish Parliament in relation to a Bill or subordinate legislation; or
- (b) to the extent that it consists of a fair and accurate report of such proceedings made in good faith.

Subsection (1)(a) is necessary to ensure that the Scottish Parliament is able to consider and pass legislation about any matter even if that matter may be the subject of proceedings before a court which are active. Subsection (1)(b) is designed to protect those who report such proceedings in good faith.

The note on section 41 sets out what is meant by proceedings in the Parliament.

Subsection (2) provides that the “strict liability rule” and “publication” have the same meanings as in the Contempt of Court Act 1981. Section 1 of that Act states that “the

strict liability rule means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so". Section 2 of the 1981 Act states that for the purposes of the rule, "publication" includes any speech, writing, programme in a cable programme service, or other communication in whatever form, which is addressed to the public at large or any section of the public.

#### **SECTION 43: Corrupt practices**

### **Purpose and Effect**

This section makes members and staff of the Parliament subject to liability for criminal offences under the Prevention of Corruption Acts 1889 to 1916 by making the Parliament a public body for the purposes of those Acts.

### **General**

The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 are known together as the Prevention of Corruption Acts 1889 to 1916. The Acts create certain offences related to bribery and corruption of and by members, officers or servants of local authorities, government departments and other public bodies in connection with that body's business.

This section ensures that the Parliament is a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916, thus ensuring that the existing law in this area applies to members and staff of the Scottish Parliament.

It is possible for the Parliament to modify sections 40-43 and to make its own provision about such matters (see paragraph 4(2) of Schedule 4).

## **Part II: the Scottish Administration**

### **SECTION 44: The Scottish Executive**

### **Purpose and Effect**

This section provides for the establishment of the Scottish Executive. In particular it provides for:

- the composition of the Scottish Executive; and

- the members of the Scottish Executive to be referred to collectively as the Scottish Ministers.

It also provides that a person may not hold Ministerial office in the UK Government and also be a member of the Scottish Executive.

### **General**

Section 44 is the first section of Part II providing for the establishment of the Scottish Administration. The Scottish Administration (as defined in section 126(6)) comprises the First Minister and other members of the Scottish Executive, junior Scottish Ministers, holders of certain offices such as the Keeper of the Registers of Scotland, and the staff of the Scottish Administration.

Section 44 provides for the creation of the Scottish Executive. Sections 45 and 46 provide for the appointment of the First Minister. Section 47 provides for the appointment of Ministers, section 48 provides for the appointment of the Scottish Law Officers, and section 49 provides for the appointment of junior Scottish Ministers.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 160           |
| CC           | 29-Jan-98   | 530           |
| LC           | 14-Jul-98   | 230           |
| LC           | 28-Jul-98   | 1450          |
| LC           | 28-Jul-98   | 1458          |
| LC           | 28-Jul-98   | 1464          |
| LC           | 28-Jul-98   | 1470          |
| LR           | 28-Oct-98   | 2026          |
| L3           | 9-Nov-98    | 539           |

## **Details of Provisions**

Subsection (1) establishes the Scottish Executive and provides that its members are to be the First Minister, such Ministers as the First Minister may appoint under section 47, the Lord Advocate and the Solicitor General for Scotland.

Junior Scottish Ministers are not members of the Scottish Executive nor are the staff included in it. However, in practice, the name of the Scottish Executive is used to describe not only its statutory members but the whole organisation, including those members, junior Scottish Ministers and the staff.

Subsection (2) provides that the members of the Scottish Executive should be referred to collectively as the Scottish Ministers.

Subsection (3) provides that a person who holds a Ministerial office (which as defined means a Ministerial office in the UK Government) 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 has to cease to hold office as a member of the Scottish Executive. The effect is that a person cannot be a Minister in both the UK Government and in the Scottish Executive at the same time.

Subsection (4) provides that references in subsection (3) to:

- (a) members of the Scottish Executive are to include junior Scottish Ministers; and
- (b) “Ministerial office” is to have the same meaning as in section 2 of the House of Commons Disqualification Act 1975. Section 2 of that Act defines “ministerial office” by reference to the offices specified in Schedule 2 to the Act and refers to a ministerial office in the UK Government.

## ***SECTION 45: The First Minister***

### **Purpose and Effect**

This section provides for the appointment of the First Minister by Her Majesty. It makes provision for his term of office, for his resignation, and for his functions to be undertaken by a member of the Scottish Parliament if the office of the First Minister is vacant or if he is unable to act.

The section also provides that the First Minister shall be Keeper of the Scottish Seal.

## **General**

Section 45 is the second of a group of sections about the Scottish Administration.

Section 44 provides for the Scottish Executive. Section 45 and 46 provide for the appointment of the First Minister. Section 47 provides for the appointment of Ministers and section 49 provides for the appointment of junior Scottish Ministers.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 185           |
| LC           | 28-Jul-98   | 1474          |

## **Details of Provisions**

Subsection (1) provides for the First Minister to be appointed by Her Majesty from among members of the Scottish Parliament. It further provides that he shall hold office at Her Majesty's pleasure. In terms of section 46, it is for the Parliament to nominate one of its members for appointment as First Minister and for the Presiding Officer to recommend to Her Majesty the appointment of that nominated person.

Subsection (2) provides that the First Minister may tender his resignation at any time. It also requires the First Minister to resign if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

Subsection (3) provides that the First Minister shall cease to hold office on the appointment of his successor.

Subsections (4) and (5) provide that, if the office of the First Minister is vacant, or if he is for any reason unable to act, his functions will be exercisable by a member of the Scottish Parliament, designated by the Presiding Officer. If the Parliament has been dissolved, the Presiding Officer may designate a person who ceased to be a member by virtue of the dissolution. The Standing Orders of the Parliament require the Presiding Officer to notify the Parliament of the name of any person whom he has designated.

Subsection (6) provides that a member designated under subsection (4) shall be capable of exercising the functions of the First Minister even if the Parliament is subsequently dissolved.

Subsection (7) provides that the First Minister shall be Keeper of the Scottish Seal. "The Scottish Seal" is defined in section 2(6) as being "Her Majesty's Seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal of Scotland". The First Minister became the Keeper on 6 May 1999 when this subsection was commenced. Previously, the Secretary of State for Scotland was the Keeper of this Seal in terms of section 8 of the Secretary of State for Scotland Act 1885.

SECTION 46: Choice of the First Minister

## **Purpose and Effect**

Section 45 provides for the First Minister to be appointed by Her Majesty. This section makes provision about the way in which a person is chosen for such appointment. It provides for the Parliament to nominate one of its members for appointment as First Minister and for the Presiding Officer to recommend to Her Majesty the appointment of the person nominated by the Parliament.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 185           |
| LC           | 28-Jul-98   | 1474          |

## **Details of Provisions**

Subsection (1) requires the Parliament, within the period allowed in subsection (3), to nominate one of its members for appointment as First Minister if one of the events mentioned in subsection (2) occurs. The Standing Orders of the Parliament set out the procedure and system of voting for the nomination of a person as First Minister.

The period allowed for nomination is normally 28 days after the occurrence of the event in question. If the Parliament fails to make a nomination within that period, then the Presiding Officer is required by section 3(1)(b) to propose a day for the holding of an extraordinary general election.

Subsection (2) specifies four events which trigger the procedure for the nomination of the First Minister, namely:

- (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 (other than in consequence of his resignation; or
- (d) the First Minister ceasing to be a member of the Parliament, other than on a dissolution (e.g. by resigning his seat under section 14).

Subsection (3) provides that the period within which the Parliament must nominate a First Minister is 28 days from the date of the relevant event.

However, that period may be extended under subsection (3)(a) if another of the specified events occurs within that period of 28 days, in which case the period is extended so that it ends 28 days after the occurrence of the second event.

Subsection (3)(b) provides that the 28 day period shall end if the Parliament resolves to dissolve itself under section 3(1)(a) in which case an extraordinary general election requires to be held and a new 28 day period begins to run from the day of the holding of the poll. The period also ends when Her Majesty appoints a First Minister. This prevents the Parliament from seeking to change its nomination after the person has been appointed.

Subsection (4) requires the Presiding Officer to recommend to Her Majesty the appointment of any member of the Scottish Parliament nominated for First Minister under this section.

SECTION 47: Ministers

## **Purpose and Effect**

This section provides for the appointment of Ministers by the First Minister from among members of the Parliament. Appointments require the approval of the Parliament and Her Majesty. The section also makes provision about the tenure of office of such Ministers.



## **Background**

This section forms part of a group of sections about the Scottish Administration. Section 44 provides for the Scottish Executive whose members are known as Scottish Ministers. Scottish Ministers include Ministers appointed under this section as well as the First Minister (see sections 45 and 46) and the Scottish Law Officers (see section 48).

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 160           |
| CC           | 10-Feb-98   | 185           |
| LC           | 28-Jul-98   | 1477          |

## **Details of Provisions**

Subsection (1) provides that the First Minister may, with the approval of Her Majesty, appoint Ministers from among the members of the Scottish Parliament. These Ministers must, therefore, be MSPs.

Subsection (2) provides that the First Minister shall not seek Her Majesty's approval for any appointment under this section without obtaining the Parliament's agreement. The Standing Orders of the Parliament make provision for the agreement of the Parliament to be sought, by motion, to the appointment of either an individual MSP to be a Minister or for a slate of 2 or more MSPs to be Ministers. A slate may be amended by the Parliament to delete the name of a particular member or members.

Subsection (3) makes provision about the tenure of office of a Minister appointed under this section. It provides that he shall hold office at Her Majesty's pleasure, may be removed from office by the First Minister, may resign at any time and must do so if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament. Subsection (3) further provides that a Minister shall cease to hold office immediately on resigning and shall cease to hold office if he ceases to be a member of Parliament other than by virtue of a dissolution (e.g. by resigning from his seat).

There is no requirement in the Act for the Parliament to be notified when a Minister ceases to hold office except where he resigns. Provision for this is made in the Standing Orders of the Parliament.

SECTION 48: The Scottish Law Officers

## **Purpose and Effect**

This section makes provision about the Law Officers to the Scottish Executive. In particular, it makes provision about the appointment of the Lord Advocate and the Solicitor General for Scotland and their removal from office; about the independence of the Lord Advocate in his capacity as the head of the systems of criminal prosecution and investigation of deaths in Scotland; and about the removal of references to the Lord Advocate and Solicitor General from the House of Commons Disqualification Act 1975 and the Ministerial and other Salaries Act 1975 consequential on them ceasing to be Ministers of the Crown.

## **General**

Prior to devolution, the Lord Advocate and Solicitor General for Scotland were Ministers in the UK Government. Apart from his Law Officer function of advising the Government on matters of Scots law and representing it in civil proceedings, the prime responsibility of the Lord Advocate was for the prosecution of crimes and for the

investigation of deaths in Scotland. As a Departmental Minister in charge of part of the Scottish Courts Administration, he was also responsible for the policy on certain matters concerned with the administration of justice, such as civil jurisdiction and procedure, evidence, diligence etc. The Solicitor General acted as his deputy under section 2(1) of the Law Officers Act 1944.

As none of these matters are reserved, the White Paper on Scotland's Parliament stated that it was "appropriate that the Law Officers of the Scottish Executive should be the Lord Advocate and the Solicitor General for Scotland" (para. 4.8). It was therefore necessary to provide for their transfer into the Scottish Executive. This is effected by section 44 providing that the Lord Advocate and the Solicitor General are members of the Scottish Executive and that they, together with the First Minister and the Ministers appointed under section 47, are to be known collectively as the Scottish Ministers. It is also effected by this section making provision as to how they are to be appointed within the Scottish Executive and by ensuring that amendments are made consequential upon them ceasing to be Ministers of the Crown in the UK Government.

The Scottish Law Officers ceased to be members of the UK Government and became members of the Scottish Executive on 20 May 1999 by virtue of Article 2(2) of and Schedule 4 to the Scotland Act 1998 (Commencement) Order 1998 ([S.I. 1998/3216](#)). Although there was no change in the persons who were Lord Advocate and the Solicitor General, it was still necessary for them to be appointed in terms of section 48.

When he became a member of the Scottish Executive on 20 May 1999, the Lord Advocate carried with him his existing functions as head of the systems of prosecution and investigation of deaths in Scotland. These are part of his "retained functions" under section 52(6).

Amendments were also made to the Crown Suits (Scotland) Act 1856 by Schedule 8 paragraph 2 to enable civil proceedings, which are being brought by or against any part of the Scottish Administration (e.g. the Scottish Ministers), to be brought by or against the Lord Advocate on its behalf.

However the functions of the Lord Advocate connected with the administration of justice were transferred to the Secretary of State just before the Lord Advocate ceased to be a member of the UK Government - see the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 ([S.I. 1999/678](#)) and a written answer to a Parliamentary Question given by the Prime Minister on 22 March 1999 (H.C. *Deb* vol. 328 col. 9w). These functions were then transferred on 1 July 1999 to the Scottish Ministers either under section 53 or in the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 ([S.I. 1999/1750](#)) made under section 63 of the Act.

Certain of the functions of the Lord Advocate in relation to reserved matters were transferred to the Advocate General for Scotland, who was appointed under section 87 to provide legal advice to the UK Government on matters of Scots law under the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999 ([S.I. 1999/679](#)).

Subsection (5) of the present section is one of a number of provisions which safeguard the independence of the Lord Advocate and the Solicitor General in exercising their prosecution functions. Section 29 provides that it would be outside the competence of the Parliament to legislate to remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland. Section 27 deals with the participation of the Law Officers in the proceedings of the Parliament and includes provision for either of them to decline to provide documents or to answer questions about particular criminal cases if he considers that doing so might prejudice the proceedings in that case or would otherwise be contrary to the public interest.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 28-Jul-98   | 1458          |
| LC           | 28-Jul-98   | 1483          |
| LR           | 28-Oct-98   | 2028          |
| LR           | 28-Oct-98   | 2029          |

## **Details of Provisions**

Subsection (1) provides that the First Minister is responsible for recommending to Her Majesty the appointment of a person as Lord Advocate or Solicitor General for Scotland and for recommending the removal of either but prohibits him from doing so without the agreement of the Scottish Parliament.

The Standing Orders of the Parliament make provision for the agreement of the Parliament to be sought, by motion, to the recommendation to be made by the First Minister about the appointment of the Scottish Law Officers and the motion may relate to either or both of the Scottish Law Officers. Where it relates to both, the motion may be amended by the Parliament to delete the name of one of them.

There is no requirement that the Lord Advocate or the Solicitor General has to be a member of the Parliament. Where they are not, there are special provisions regarding their participation in the proceedings of the Parliament under section 27 and the Standing Orders.

Unlike the case of the other members of the Scottish Executive, the Scottish Law Officers can only be removed from office by Her Majesty and after the agreement of the Parliament. This adds to their security of tenure.

Subsection (2) provides that the Lord Advocate and the Solicitor General 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.

The Standing Orders of the Parliament require the Presiding Officer to notify the resignation to the Parliament.

Subsection (3) provides that where the Lord Advocate has resigned in consequence of a vote of no confidence, he shall be deemed to continue in office until the warrant of appointment for his successor is granted, but only for the purpose of exercising his retained functions. Retained functions are defined in section 52(6) and refers in particular to his functions as head of the systems of criminal prosecution and investigation of deaths in Scotland. This provision is required to ensure that there is continuity in criminal proceedings.

Subsection (4) provides that subsection (3) is without prejudice to section 287 of the Criminal Procedure (Scotland) Act 1995 providing for the demission of office by Lord Advocate. Section 287 provides for indictments raised by a Lord Advocate to remain effective even although he has demitted office and for indictments to run in the name of the Solicitor General for Scotland if the office of Lord Advocate is vacant. Section 287(5) provides that, where both the Lord Advocate and Solicitor General demit office on the same day (as would happen in the event of a vote of no confidence - see subsection (2) above), the Lord Advocate is deemed to continue in office for the purposes of the 1995 Act until the appointment of his successor.

Subsection (5) protects the independence of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland by providing that any decision made by him in that capacity is to continue to be taken by

him independently of any other person. This is intended to ensure that the traditional independence of the Lord Advocate in taking those decisions when he was a member of the UK Government continues now that he is a member of the Scottish Executive.

The provisions in subsection (6) are necessary to disengage the offices of Lord Advocate and Solicitor General for Scotland from the UK Government. This subsection removes them from the list of Ministerial offices in Schedule 2 to the House of Commons Disqualification Act 1975. Section 2 of that Act limits the number of holders of Ministerial offices who are entitled to sit in the House of Commons at any one time. Subsection (6) also removes the two offices from Part III of Schedule 1 to the Ministerial and other Salaries Act 1975. That Part lists the Law Officers to the UK Government and specifies their salaries. See also the Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999 ([S.I. 1999/901](#)), which includes transitional provisions relating to these amendments.

#### SECTION 49: Junior Scottish Ministers

### Purpose and Effect

This section provides for the appointment of junior Scottish Ministers by the First Minister from among members of the Parliament. Junior Scottish Ministers (JSMs) assist the Scottish Ministers in the exercise of their functions. Appointments require the approval of Her Majesty following the agreement of the Parliament. The section also makes provision about the tenure of office of junior Scottish Ministers.

### Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 185           |
| CC           | 10-Feb-98   | 186           |
| CR           | 19-May-98   | 754           |
| LC           | 28-Jul-98   | 1477          |

### Details of Provisions

Subsections (1) and (2) provide that the First Minister may, with the approval of Her Majesty, appoint junior Scottish Ministers from among members of the Scottish Parliament to assist the Scottish Ministers in the exercise of their functions.

This terminology is intended to reflect the *Carltona* doctrine, by which civil servants are able to act for Ministers, so that junior Scottish Ministers are able to act for the Scottish Ministers. This is also reflected in the fact that, in practice, those appointed as junior Scottish Ministers are known as “deputy Minister”.

Subsection (3) provides that the First Minister shall not seek Her Majesty’s approval for any appointment under this section without obtaining the Parliament’s agreement. The Standing Orders of the Parliament make provision for the agreement of the Parliament to be sought, by motion, to the appointment of either an individual MSP to be a JSM or for a slate of 2 or more MSPs to be JSMs. A slate may be amended by the Parliament to delete the name of a particular member or members.

Subsection (4) provides that a junior Scottish Minister so appointed shall hold office at Her Majesty’s pleasure, may be removed from office by the First Minister, may resign at any time and must do so if the Scottish Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament. Subsection (4) further provides that a junior Scottish Minister shall cease to hold office immediately on resigning, and shall cease to hold office on ceasing to be a member of the Parliament other than on a dissolution.

## SECTION 50: Validity of acts of Scottish Ministers etc.

### **Purpose and Effect**

This section ensures that the validity of acts of members of the Scottish Executive or junior Scottish Ministers are not affected by any defect in the way in which the Parliament has either nominated or agreed to their appointment.

### **General**

This section ensures that the validity of the acts of Ministers cannot be questioned because of any defect in any parliamentary proceedings which have to be followed with regard to their appointment. Similar protection is given to the Presiding Officer and deputies (section 19), members of the Scottish Parliamentary Corporate Body (Schedule 2), and the Auditor General for Scotland (section 69).

### **Details of Provisions**

Section 50 provides that 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 in the Parliament's agreement to his appointment. It would not, therefore, be possible to challenge the acts of a Minister on the basis, for example, that his or her nomination or appointment was not made in accordance with the Scotland Act or Standing Orders.

SECTION 51: The Civil Service

### **Purpose and Effect**

This section makes provision as respects the staff of the Scottish Administration. In particular it provides that:

the Scottish Ministers may appoint persons to be members of the staff of the Scottish Administration;

the staff of, and the holders of any non-ministerial office in, the Scottish Administration are members of the Home Civil Service and, accordingly, their appointment is subject to the provisions of the Civil Service Order in Council; and

responsibility for the management of such staff will ultimately remain with the Minister for the Civil Service (i.e. the Prime Minister) but provision is made enabling responsibility for the day to day management of such staff to be delegated to the Scottish Ministers in the same way as happens for government departments in the UK Government.

### **General**

Prior to devolution, the Secretary of State for Scotland had various different statutory powers to appoint staff in the Scottish Office, the courts and prisons and in the Department of the Registers of Scotland and the Scottish Record Office etc. The Lord Advocate appointed staff in his Department, in the Crown Office and in the Procurator Fiscal service. As the functions carried out by those departments and bodies were devolved, they became in effect part of the Scottish Administration. The Scottish Administration is defined in section 126(6)-(8) to include not only Ministers but also the holders of those non-ministerial offices (such as the Keeper of the Registers of Scotland etc.) and the staff of the Scottish Administration.

The existing powers of the Secretary of State and the Lord Advocate to appoint such staff were, so far as possible, replaced by section 51(1) which confers upon the Scottish Ministers the power to appoint staff of the Scottish Administration.

Section 51(2) makes it clear that the staff of the Scottish Administration and the holder of any non-ministerial office in the Scottish Administration are members of the Home

Civil Service and section 51(3) ensures that the power to appoint such persons is subject to the Civil Service Order in Council.

Although the Scottish Ministers have therefore the power to appoint persons to be civil servants, the Civil Service itself is a reserved matter by virtue of paragraph 8 of Part I of Schedule 5. There is an exception from that reservation for various statutory provisions relating to the appointment of sheriff clerks, procurators fiscal etc. and officers of the High Court of Justiciary and the Court of Session.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 19-May-98   | 754           |
| LC           | 28-Jul-98   | 1458          |
| LR           | 28-Oct-98   | 2037          |

### **Details of Provisions**

Subsection (1) gives the Scottish Ministers the power to appoint persons to be members of the staff of the Scottish Administration. The staff of the Scottish Administration include the staff of the Lord Advocate, such as in the Crown Office or in the Procurator Fiscal service. It also includes the staff of the various non-ministerial offices who are part of the Scottish Administration, such as the Keeper of the Registers of Scotland.

Subsection (2) provides for service as the holder of any office in the Scottish Administration which is not a ministerial office or a member of the staff of the Scottish Administration to be service in the Home Civil Service. This ensures that all these persons are civil servants in the Home Civil Service and there is no separate civil service created as in the case of Northern Ireland.

Offices in the Scottish Administration which are not ministerial offices are defined by section 126(8) and include 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. It also includes the offices specified in the Scottish Administration (Offices) Order 1999 ([S.I. 1999/1127](#)).

Subsection (3) makes the power of the Scottish Ministers to appoint staff under subsection (1) and other statutory powers to appoint such persons (e.g. that of the Registrar General of Births, Deaths and Marriages for Scotland) subject to any provisions made in relation to the Home Civil Service by or under any Order in Council.

This provision ensures, in particular, that, subject to any delegation permitted under subsection (4), the standards of entry to the Home Civil Service and the management of the service, including the terms and conditions of service, are similar throughout the UK.

The first part of subsection (4) makes it clear that any civil service management function shall be exercisable by the Minister for the Civil Service (i.e. the Prime Minister) in relation to the staff of the Scottish Administration as it is exercisable in relation to other members of the Home Civil Service.

The second part of subsection (4) makes it clear that the power which the Minister for the Civil Service has under section 1 of the Civil Service (Management Functions) Act 1992 to delegate any civil service management function also applies to any civil service management function in relation to the staff of the Scottish Administration.

Subsection (5) provides that salary and allowances payable to or in respect of the persons mentioned in subsection (2) shall be payable out of the Scottish Consolidated Fund. This includes the contributions to any pension scheme.

Subsection (6) provides that section 1(2) and (3) of the Superannuation Act 1972 shall have effect as if references to a Minister of the Crown (other than the Minister for the Civil Service) included the Scottish Ministers. This allows functions relating to civil service pensions to be delegated to the Scottish Ministers.

Subsection (7) requires the Scottish Ministers to make payments to the Minister for the Civil Service of such amounts as he may determine in respect of the pensions etc. payable to persons who are or have been in service as mentioned in subsection (2) and in respect of any expenses to be incurred in administering those pensions etc.

Subsection (8) provides that any amounts required for payments by virtue of subsection (7) shall be charged on the Scottish Consolidated Fund.

Subsection (9) provides definitions of the terms “civil service management function” and “the Home Civil Service”.

SECTION 52: Exercise of functions

### **Purpose and Effect**

Section 52 provides for statutory functions to be conferred on “the Scottish Ministers”. It also provides that statutory functions of the Scottish Ministers, the First Minister and the Lord Advocate shall be exercisable on behalf of Her Majesty. It provides for functions conferred on the Scottish Ministers to be exercisable by any of them and for acts or omissions by or in relation to any of them to be treated as acts or omissions of or in relation to each of them, except for the Lord Advocate’s retained functions and functions conferred on the First Minister alone.

### **General**

This section forms part of a group of sections concerned with Ministerial functions. The section ensures that the Scottish Executive have collective responsibility for any function exercisable by any member of the Executive, other than the specific functions conferred on the First Minister or Lord Advocate.

### **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          |
| LR           | 28-Oct-98   | 2037          |
| L3           | 9-Nov-98    | 541           |

### **Details of Provisions**

Subsection (1) provides that statutory functions may be conferred on the Scottish Ministers by that name.

Subsection (2) provides that statutory functions of the Scottish Ministers and statutory functions conferred on the First Minister or the Lord Advocate in their singular capacities, shall be exercisable on behalf of Her Majesty.

Subsection (3) provides that statutory functions conferred on the Scottish Ministers shall be exercisable by any member of the Scottish Executive. This ensures that functions conferred on the Scottish Ministers collectively may legally be exercisable by any one of them. In practice, it is for the First Minister to determine administratively which

Minister is to exercise any particular statutory function by allocating the Ministerial portfolios. This provision only applies to statutory functions conferred upon the Scottish Ministers and not specifically upon the First Minister or the Lord Advocate.

Subsection (4) provides that any act or omission of, or in relation to, any member of the Scottish Executive be treated as an act or omission of, or in relation to, each of them. Similarly any property acquired or liability incurred by any member of the Scottish Executive shall be treated as if it were acquired or incurred by each of them. "Property" is defined in section 126(1) as including rights and interests of any description. This ensures that there is collective legal responsibility among the members of the Scottish Executive and, in particular, joint and several liability for any acts or omissions of any one of them. This is qualified by subsection (5).

Subsection (5) provides that subsection (4) does not apply to in relation to the exercise of functions conferred on the First Minister alone or the Lord Advocate's retained functions. This exception means that the First Minister and the Lord Advocate are solely legally responsible for how they exercise, or fail to exercise, their respective functions.

The "retained functions" of the Lord Advocate are defined in subsection (6). Functions conferred upon the Lord Advocate may, however, be exercised by the Solicitor General for Scotland under section 2(1) of the Law Officers Act 1944.

Subsection (6) defines the Lord Advocate's "retained functions" as meaning: (a) any functions exercisable by the Lord Advocate 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.

On (a), reference is made to the note on section 48 for a description of what happened to the functions of the Lord Advocate before he ceased to be a Minister of the Crown on 20 May 1999. The effect was that the only functions which were exercisable by the Lord Advocate immediately before he ceased to be a Minister of the Crown were those relating to his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland. It was those functions which he retained when he became a member of the Scottish Executive on that date.

However (b) makes it clear that the concept of "retained functions" also includes any future statutory functions which are conferred upon the Lord Advocate alone after 20 May 1999 in a Westminster Act or an Act of the Scottish Parliament or in subordinate legislation. It would be appropriate for functions to be conferred upon him alone where they related to his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Subsection (7) provides that, in this section, "statutory functions" means functions conferred by virtue of any enactment.

SECTION 53: General transfer of functions

### **Purpose and Effect**

This section makes provision for the transfer to the Scottish Ministers of Ministerial functions in so far as they are exercisable within devolved competence, as defined in section 54. The effect of the section is that Ministerial functions under pre-existing legislation, prerogative and other executive functions exercisable by a Minister of the Crown on behalf of Her Majesty and other functions conferred on a Minister of the Crown by a prerogative instrument, will transfer to the Scottish Ministers, so far as they are exercisable in or as regards Scotland, except so far as they are exercisable in relation to matters outside the legislative competence of the Scottish Parliament.



## **General**

This section and section 54 forms part of the set dealing with the functions of the Scottish Executive. Section 52 provides for statutory functions conferred on the Scottish Ministers to be exercisable by any one of them.

This section is a key element in the structure of the Act. It provides for the automatic transfer of Ministerial functions to the Scottish Ministers. It describes the types of functions to be transferred and transfers them “so far as they are exercisable within devolved competence” (which is defined in section 54).

The functions to be transferred require to be exercisable “in or as regards Scotland” because this is implicit in the concept of “devolved competence” (see note on section 54). 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 53), as being, or as not being, functions which are exercisable in or as regards Scotland - see the note on section 30.

The functions to be transferred also require to be separately exercisable within devolved competence. Section 106 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. The Order may in particular provide for any function which is not separately exercisable in or as regards Scotland or otherwise within devolved competence to be so exercisable - see the note on section 106.

If the function to be transferred requires to be exercised with the agreement of or after consultation with a Minister of the Crown, section 55 provides that this requirement does not apply to the exercise by the Scottish Ministers of functions transferred to them.

To the extent that a function is transferred from a Minister of the Crown to the Scottish Ministers, it ceases to be exercisable by the Minister of the Crown. However sections 56 and 57(1) provide for certain exceptions to this.

Sections 117 to 123 make general modifications to existing pre-commencement enactments in relation to the exercise by the Scottish Ministers of functions transferred to them.

Reference is also made to the Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999 ([S.I. 1999/901](#)), which includes transitional and savings provisions relating to the transfer of functions under section 53.

Section 63 provides for the transfer of additional functions to the Scottish Ministers. This enables certain functions to be transferred to the Scottish Ministers which would not transfer under section 53 because they are not within “devolved competence”. Section 108 enables functions, to be transferred from the Scottish Ministers to UK Ministers. Both powers require the agreement of both the UK and Scottish Parliaments.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 244           |
| LR           | 28-Oct-98   | 2038          |
| L3           | 9-Nov-98    | 541           |

## **Details of Provisions**

Subsection (1) provides that 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.

This subsection has the effect of automatically transferring the functions from a Minister of the Crown to the Scottish Ministers but only “so far as they are exercisable within devolved competence”. To the extent that the function is exercisable outside devolved competence, then it is not transferred and remains with the Minister of the Crown. What devolved competence means is defined in section 54.

However, a function can only transfer if it is separately exercisable within devolved competence and section 106 may be used to facilitate its transfer by making it separately exercisable.

Sections 56 and 57(1) make provision for certain functions to continue to be exercisable by a Minister of the Crown as well as by the Scottish Ministers.

Subsection (2) defines the functions which may be transferred as being:

- (a) those prerogative and other executive functions exercisable by Ministers on behalf of Her Majesty;
- (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 not the retained functions of the Lord Advocate as defined in section 52(6).

The “prerogative and other executive functions exercisable by Ministers on behalf of Her Majesty” would include any non-statutory functions which are exercisable by a Minister of the Crown. These functions are not confined to functions which were possessed by a Minister of the Crown when section 53 was commenced on 1 July 1999. They would include functions acquired thereafter by a Minister of the Crown so far as they are exercisable within devolved competence, such as the function of implementing any new EC or international obligation relating to a devolved matter.

The “functions conferred on a Minister of the Crown by a prerogative instrument” are also not time limited and would therefore include any function conferred upon a Minister of the Crown by a Royal Charter made under the prerogative after 1 July 1999. “Prerogative instrument” is defined in section 126(1).

The statutory functions which are transferred are limited to functions conferred on a Minister of the Crown by any “pre-commencement enactment” which is defined in subsection (3). However a Westminster enactment which is passed after devolution may contain a provision which deems it or certain provisions in it to be a pre-commencement enactment. This would then enable functions conferred by that enactment upon a Minister of the Crown to transfer to Scottish Ministers under section 53 “so far as they are exercisable within devolved competence”.

Subsection (3) defines a “pre-commencement enactment” for the purposes of the Act as:

- (a) an Act passed before or in the same session in which the Scotland Act was passed and any other enactment made before the passing of this Act;
- (b) subordinate legislation made under such an Act or other enactment before the commencement of section 53 on 1 July 1999; and
- (c) subordinate legislation made under section 106 (power to adapt functions) to the extent that the subordinate legislation states that it is to be treated as a pre-commencement enactment. This is to ensure that functions which are modified under section 106 after 1 July 1999 in order to facilitate transfer can be transferred under section 53.

Subsection (4) draws attention to the fact that this section and section 54 are modified by Part III of Schedule 4. That modifies the general effect of the devolved competence test for certain enactments and other aspects of the law which that Schedule protects from modification by the Scottish Parliament. Paragraph 12 of the Schedule has the effect that, in general, Ministerial functions conferred by such enactments which are protected from modification are not transferred. However, paragraph 13 provides for some exceptions to that in relation to, for example, the European Communities Act 1972 and the Human Rights Act 1998, so that certain Ministerial functions under those Acts are transferred to the Scottish Ministers.

SECTION 54: Devolved competence

### **Purpose and Effect**

This section defines what is meant by a function being exercised within or outside devolved competence for the purposes of the Act. This is of particular relevance to determining what functions are transferred to the Scottish Ministers by virtue of section 53. In general, a function is exercisable within devolved competence if it could be conferred by an Act of the Scottish Parliament. The intention is to align the executive competence of the Scottish Ministers closely with the legislative competence of the Parliament.

### **General**

This section forms part of the set dealing with the establishment of the Scottish Administration and its functions. Section 53 makes provision for the transfer to the Scottish Ministers of Ministerial functions “so far as they are exercisable within devolved competence”.

Sections 117-119 modify pre-commencement enactments in connection with the exercise of a function by a member of the Scottish Executive within devolved competence.

The expression “within devolved competence” is also used in other contexts. Section 118(4) refers to the exercise of a function within devolved competence to make, confirm or approve subordinate legislation conferred by a pre-commencement enactment upon a person other than a member of the Scottish Executive etc so as to apply, for example, to a function conferred upon Her Majesty to make an Order in Council where that is exercisable within devolved competence.

The question whether a function is exercisable within devolved competence is made a devolution issue by paragraph 1(f) of Schedule 6.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 244           |
| LC           | 21-Jul-98   | 818           |
| LR           | 28-Oct-98   | 2038          |

### **Details of Provisions**

Subsection (1) provides that references in the Act to the exercise of a function being within or outside devolved competence should be read in accordance with this section. However, as with the definition of the legislative competence of the Parliament in section 29, it is defined negatively by defining what is meant by exercising a function outside devolved competence.

Subsection (2) indicates that it would be outside devolved competence to make a certain provision in subordinate legislation or to confirm or approve subordinate legislation containing such provision. The provision in question is one which it would be outside the legislative competence of the Parliament (which is defined by section 29) to include in an Act of the Scottish Parliament. This means that any Ministerial function to make, confirm or approve subordinate legislation in a pre-commencement enactment only transfers to the Scottish Ministers under section 53 to the extent that any provision made under it could be included in an ASP.

Section 118(1) and (2) modify the procedure contained in any pre-commencement enactment in relation to the exercise by Scottish Ministers within devolved competence of any function to make, confirm or approve subordinate legislation.

Subsection (3) applies to functions other than those relating to making, confirming or approving subordinate legislation. It provides that it is outside devolved competence to exercise such functions (or to exercise them in any way) if a provision of an Act of the Scottish Parliament conferring those functions (or conferring them so as to be exercisable in that way) would be outside the Parliament's legislative competence. This means in effect that any such Ministerial function in a pre-commencement enactment only transfers to the Scottish Ministers under section 53 to the extent that it would be within the legislative competence of the Parliament to confer it by an ASP. The Parliament can only confer a function which is exercisable within its legislative competence, for example a function which is exercisable in or as regards Scotland or compatible with Community law or any Convention rights.

**SECTION 55: Functions exercisable with agreement**

### **Purpose and Effect**

This section provides that any existing requirements for a function to be exercised by a Minister of the Crown only with the agreement of, or after consultation with, another Minister of the Crown should cease to have effect in relation to the exercise of any function transferred to a member of the Scottish Executive by virtue of section 53. An exception is made for the designation of enterprise zones where a requirement for Treasury consent is maintained because of the tax privileges conferred by such status.

### **General**

This section forms part of the set dealing with the conferral of functions upon members of the Scottish Executive. Section 53 makes provision for the transfer of Ministerial functions exercisable within devolved competence. Some of those functions can only be exercised with the consent of, or after consultation with, another Minister of the Crown, such as the Treasury.

There are two reasons for dispensing with these requirements when the functions are exercised by the Scottish Ministers. Firstly, it would in general be inappropriate for these controls to continue to apply when the Scottish Ministers are exercising those functions. Secondly, in many cases, the function of being consulted, or of giving agreement, would have itself transferred to the Scottish Ministers and it would be confusing to require Scottish Ministers to consult or agree with themselves.

This section therefore dispenses with these requirements. An exception is made for functions under the Local Government, Planning and Land Act 1980 of designating enterprise zones. This reflects the need for continuing Treasury oversight of the tax privileges conferred by the grant of enterprise zone status.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 205           |

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 28-Jul-98   | 1491          |
| LR           | 28-Oct-98   | 2039          |

### **Details of Provisions**

Subsection (1) provides that any statutory provision, or any provision not contained in an enactment, requiring a Ministerial function to be exercised only with the agreement of, or after consultation with, another Minister of the Crown should cease to have effect when the function is exercised by a member of the Scottish Executive by virtue of section 53. Section 126(1) defines “Minister of the Crown” as including the Treasury. “Agreement” is intended to include also requirements of consent, concurrence or approval.

Subsection (2) defines “statutory provision” for the purposes of subsection (1) as any provision of any pre-commencement enactment (as defined by section 53(3)) other than paragraph 5 or paragraph 15 of Schedule 32 to the Local Government, Planning and Land Act 1980. Paragraph 5 of Schedule 32 to the 1980 Act confers a power upon the Secretary of State, with the consent of the Treasury, to make an order designating an enterprise zone. Paragraph 15 confers a power to modify such an order, again with the consent of the Treasury. This ensures that the consent requirement is not removed by subsection (1).

Paragraph 1(2)(d) of Schedule 4 lists the provisions requiring the consent of the Treasury amongst the enactments protected from modification by the Scottish Parliament. By virtue of Part III of Schedule 4, the function of giving consent in each case will not transfer to the Scottish Ministers.

SECTION 56: Shared powers

### **Purpose and Effect**

This section provides for certain exceptions to the general rule that functions which are transferred to the Scottish Ministers by virtue of section 53 will cease to be exercisable by Ministers of the Crown in or as regards Scotland. This enables the UK Government, for example, to provide financial assistance to industry in Scotland. The section also enables the Scottish Ministers and a Minister of the Crown to exercise jointly non-statutory powers in order to establish, maintain or abolish bodies, offices and office-holders.

### **General**

This section forms part of the set dealing with the functions of members of the Scottish Executive. Section 53 makes provision for the transfer of functions of a Minister of the Crown so far as they are exercisable within devolved competence so that they will be exercisable by the Scottish Ministers instead of by a Minister of the Crown.

The present section provides for some exceptions to this general rule where it makes sense for the function to continue to be exercisable within devolved competence by a Minister of the Crown as well as by Scottish Ministers. Section 57(1) provides for a further exception in respect of functions exercisable for the purposes set out in section 2(2) of the European Communities Act 1972. These functions are called “shared” or “concurrent” functions - see section 63(1). They are not exercisable jointly but they are exercisable separately by a Minister of the Crown and by the Scottish Ministers.

Where functions remain exercisable by a Minister of the Crown by virtue of this section, paragraph 6 of Schedule 4 prevents an Act of the Scottish Parliament from modifying (or conferring power to modify) any enactment so far as the enactment relates to powers

exercisable by a Minister of the Crown by virtue of this section. This does not, however, prevent the Scottish Parliament from repealing or amending the enactment so far as it relates to powers exercisable by the Scottish Ministers while leaving the powers exercisable by UK Ministers untouched.

Certain other functions which are executively devolved to the Scottish Ministers by an order under section 63 are similarly made exercisable by UK Ministers as well as by the Scottish Ministers.

The section also provides for certain non-statutory functions to be exercised jointly by a Minister of the Crown and the Scottish Ministers.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 205           |
| CR           | 12-May-98   | 244           |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| LR           | 28-Oct-98   | 2039          |
| LR           | 28-Oct-98   | 2040          |

### **Details of Provisions**

Subsection (1) provides that, despite the transfer by virtue of section 53 of any function under certain specified enactments, the function will be exercisable by a Minister of the Crown as well as by the Scottish Ministers.

The specified enactments are:

- (a) *Section 17(1) of the Ministry of Transport Act 1919*. That section empowers the Minister to make advances out of moneys provided by Parliament to any authority, company or person, either as grants or as loans, for the construction, improvement or maintenance of railways, light railways, tramways, harbours, docks, piers, canals, or inland navigations, or for the promotion and improvement of transport services by land or by water.
- (b) *Any Order in Council under section 1 of the United Nations Act 1946*. Such Orders in Council are made to give effect to UN Security Council resolutions. This enables pre-existing regimes for licensing exports etc in pursuance of UN sanctions to continue to operate on a UK-wide basis. By virtue of paragraph 6 of Schedule 8, Orders in Council under the 1946 Act can continue to be made with UK-wide effect but, if an Order includes any provision which would be within the legislative competence of the Scottish Parliament, it requires to be laid before the Scottish Parliament as well as before the Westminster Parliament.
- (c) *Section 9 of the Industrial Organisation and Development Act 1947*. That section empowers certain UK Ministers, by order, to impose levies on industry for the purposes of funding bodies concerned with scientific research, promotion of export trade, or the improvement of design.
- (d) *Section 5 of the Science and Technology Act 1965*. That section empowers the Secretary of State to fund scientific research, the dissemination of its results and related matters.
- (e) *Section 1 of the Mineral Exploration and Investment Grants Act 1972*. That section empowers the Secretary of State to contribute towards expenditure on exploration for mineral deposits in Great Britain or in UK territorial waters or continental shelf.

- (f) *Sections 10 to 12 of the Industry Act 1972.* These sections empower the Secretary of State to guarantee loans for the construction of ships and offshore installations and to pay grants in respect of the interest on such loans.
- (g) *Sections 2, 11(3) and 12(4) of the Employment and Training Act 1973.* These sections provide powers to make arrangements for employment and training and to make certain payments in relation to employment and training.
- (h) *Sections 7 to 9 and 11 to 13 of the Industrial Development Act 1982.* Sections 7 to 9, 11 and 12 empower the Secretary of State to provide financial assistance to industry, to provide advice to businesses, and to promote careers in industry. Section 13 empowers Ministers to make grants or loans towards the cost of improving basic services with a view to contributing to the development of industry.
- (i) *Sections 39 and 40 of the Road Traffic Act 1988.* These sections empower the Secretary of State to provide for promoting road safety by disseminating information or advice relating to the use of roads, and to contribute towards the costs of measures for promoting road safety.

Subsection (2) enables subordinate legislation to provide for any other function which is transferred by virtue of section 53 to be exercisable (so far as the subordinate legislation provides) by a Minister of the Crown as well as by the Scottish Ministers. This power has been exercised in the Scotland Act 1998 (Concurrent Functions) Order 1999 ([S.I. 1999/1592](#)).

Subsection (3) provides that the power in subsection (2) may not be exercised so that subordinate legislation made under it comes into force at any time after the function in question has been transferred. That date was 1 July 1999 for the initial suite of functions transferred to the Scottish Ministers. However, the power may also be used if, at some time in the future, further functions are transferred to the Scottish Ministers, such as in consequence of extending the legislative competence of the Scottish Parliament and therefore also the concept of devolved competence.

Subsection (4) provides that any power referred to in section 53(2)(a) (those of Her Majesty's prerogative and other executive functions which are exercisable on Her behalf by a Minister of the Crown) 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 section 53, be exercisable jointly by the Minister of the Crown and the Scottish Ministers. This enables the Scottish Ministers and the UK Government to establish jointly, for example, an advisory committee to advise both administrations about a matter of common interest (e.g. some environmental matter) or a company or trust to operate on a cross-border basis.

Subsection (5) provides a definition of "office-holder" for the purposes of subsection (4).

SECTION 57: Community law and Convention rights

### **Purpose and Effect**

This section:

- (a) makes it clear that section 53 has the effect of transferring to Scottish Ministers any functions of Ministers of the Crown of observing and implementing Community law in relation to devolved matters in or as respects Scotland; but

- (b) provides that, notwithstanding such transfer, Ministers of the Crown shall continue to be able to exercise those functions as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972; and
- (c) provides that members of the Scottish Executive have no power to make subordinate legislation, or to do any other act, if the subordinate legislation or act is incompatible with Community law or with rights under the European Convention of Human Rights (ECHR) which are given effect to in UK law.
- (d) ensures that the Lord Advocate is able to enjoy the protection afforded by section 6(2) of the Human Rights Act 1998 in prosecuting offences or in his capacity as the head of the systems of criminal prosecution and investigation of deaths.

## **General**

This section forms part of the set dealing with the establishment of the Scottish Administration and its functions. Section 53 makes provision for the transfer to the Scottish Ministers of Ministerial functions so far as exercisable within devolved competence.

Section 56 provides for some exceptions to the general rule that any transferred functions should no longer be exercisable by a Minister of the Crown in or as regards Scotland. The present section provides for the further exception that UK Ministers are to retain functions for the purpose of observing and implementing Community obligations as respects devolved matters as regards Scotland.

This section is also one of a number of provisions which deal with Community obligations and with rights under the ECHR which are given effect to in UK law by the Human Rights Act 1998 (“the Convention rights”). Paragraph 7 of Part 1 of Schedule 5 provides that international relations, including those with the European Communities (and their institutions), are reserved matters but there is an exception for observing and implementing international obligations, obligations under the ECHR and under Community law. This has the effect that the responsibility of a Minister of the Crown for observing and implementing these obligations in or as regards Scotland transfers to Scottish Ministers under section 53 so far as they relate to devolved matters. The opening words of section 57(1) make it clear that this is the effect of section 53.

However, functions transferred by section 53 are only exercisable by Scottish Ministers within devolved competence. By virtue of section 54, this in effect means that they are only exercisable in the same way as if they had been conferred by an ASP. This in turn means that those functions can only be exercised by Scottish Ministers compatibly with the Convention rights and with Community law because an ASP can only confer a function to be exercised in that way - section 29(2)(d). However, this only applies in the case of functions transferred under section 53. It does not apply to functions conferred upon Scottish Ministers by other means, such as by an order under section 63. Section 57(2) is, therefore, a general across the board provision which makes it clear that a member of the Scottish Executive has no power (and would therefore be acting *ultra vires*) if he was to exercise any function incompatibly with the Convention rights or with Community law.

This means that a member of the Scottish Executive is prevented by a *vires* control from ever exercising any function incompatibly with the Convention rights or with Community law. Any question as to whether they may have done so (or whether any failure by them to act is incompatible) is a devolution issue in terms of paragraph 1(d) and (e) of Schedule 6.



## Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 30-Jul-98   | 1623          |
| LR           | 28-Oct-98   | 2040          |

## Details of Provisions

Subsection (1) provides that, despite the transfer to the Scottish Ministers of functions in relation to observing and implementing Community law by virtue of section 53, 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. Section 2(2) enables Ministers to make regulations to implement any Community obligation, or for the purpose of dealing with matters arising out of any such obligation. Community law is defined in section 126(9).

The intention is that it should continue to be possible for a Minister of the Crown to exercise functions, such as to make regulations under section 2(2) of the 1972 Act or some other statutory provision, for the purpose of implementing an EC obligation as respects a devolved matter. There may be circumstances where it is convenient and sensible for European Community obligations to be implemented through a single set of regulations having effect across the whole of the UK, rather than having separate regulations for Scotland. This will be a matter for agreement between the Scottish Executive and UK Ministers.

Subsection (2) provides that 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. Convention rights are defined in section 126(1) as having the same meaning as in the Human Rights Act 1998 and mean the rights which are given effect to throughout the UK by that Act.

The effect of this provision is to impose a *vires* control upon Scottish Ministers so that they would be acting *ultra vires* if they acted incompatibly with any of the Convention rights or with Community law.

The reference in this context to Community law is modified by section 106(6) in the case of an obligation under Community law which is a quantitative obligation and it is split in terms of section 106.

This provision applied to the Lord Advocate as soon as he became a member of the Scottish Executive on 20 May 1999 (see note on section 48) and to the Scottish Ministers as from 1 July 1999. There have been a number of cases raising the question of whether the Lord Advocate is acting incompatibly with Convention rights in bringing or continuing some prosecution, such as *Starrs v Ruxton* 2000 JC 80 (temporary sheriffs).

Subsection (3) provides that subsection (2) does not apply to an act of the Lord Advocate in prosecuting any offence or 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.

Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority, which includes the Lord Advocate, to act in a way which is incompatible with a Convention right. Section 6(2) provides that section 6(1) does not apply if (a) as a result of provisions in primary legislation, the public authority could not have acted differently or (b) the public authority was acting to give effect to or enforce provisions made under primary legislation. This is intended to protect a public authority where a Westminster Act required it to breach a Convention right.

SECTION 58: Power to prevent or require action

## **Purpose and Effect**

This section enables the Secretary of State by order to direct that any proposed action by a member of the Scottish Executive shall not be taken if he has reasonable grounds to believe it would be incompatible with any international obligations or to direct a member of the Scottish Executive to take action (including the making or introduction in the Parliament of legislation) which he has reasonable grounds to believe is required to give effect to such obligations.

It also enables the Secretary of State to revoke subordinate legislation made by, or which could be revoked by, a member of the Scottish Executive where it contains provisions which he has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security of the United Kingdom; or a provision which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters.

## **General**

This section forms part of the set dealing with the functions of the Scottish Administration including sections 53 and 54 which make provision for the transfer to the Scottish Ministers of Ministerial functions exercisable within devolved competence and section 63 which provides for the transfer of additional functions by executive devolution.

Apart from the fact that a member of the Scottish Executive is accountable to the Parliament for the way in which he exercises his functions, the normal control upon the exercise of these functions is a *vires* control exercised by the courts. The effect of sections 53 and 54 is that the functions transferred under section 53 require to be exercised within devolved competence and of section 57(2) is that it would be *ultra vires* for a member of the Scottish Executive to act (or to fail to act) in a way which would be incompatible with any of the ECHR rights incorporated in UK law or with European Community law - see the note on section 57. Any question whether the exercise or non-exercise of a function by a member of the Scottish Executive is *ultra vires* on these grounds is a devolution issue for the purposes of Schedule 6.

However, there are certain limited circumstances where, even although it may be within their competence, the UK Government can exercise a policy control to prevent something which Scottish Ministers propose to do or require them to take some action or to revoke any subordinate legislation made by them. This section defines what those circumstances are.

This section is similar to section 35 which enables the Secretary of State, in certain circumstances, to prevent Bills from being submitted for Royal Assent.

## **Parliamentary Consideration**

Lord Sewel explained these provisions to the House of Lords during its consideration of the Scotland Bill on 28 July 1998.

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 229           |
| LC           | 28-Jul-98   | 1397          |
| LC           | 30-Jul-98   | 1621          |
| LC           | 30-Jul-98   | 1623          |
| LR           | 28-Oct-98   | 2008          |

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 28-Oct-98   | 2042          |
| LR           | 28-Oct-98   | 2043          |

### **Details of Provisions**

Subsection (1) provides that, where the Secretary of State has reasonable grounds to believe that 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 should not be taken.

“International obligations” are defined in section 126(10) to mean any international obligations of the UK other than obligations to observe and implement Community law or the Convention rights. It is also modified by section 106(6) in the case where the international obligation is a quantitative obligation and it is split in terms of section 106.

What is meant by “action” in this context is defined by subsection (3) which provides that it includes the making, confirming or approving subordinate legislation.

As mentioned in the general note, a member of the Scottish Executive would be acting *ultra vires* if he acted incompatibly with any of the Convention rights or with Community law. However, it was not possible to make it *ultra vires* for a member of the Scottish Executive to act in a way which would be incompatible with any other international obligation of the UK because those international obligations have not been incorporated into domestic law and, except in certain limited circumstances, they are not normally justiciable as a matter of domestic law. Accordingly, it was thought necessary to ensure that the Secretary of State had powers to prevent Scottish Ministers from acting incompatibly with any international obligation.

Subsection (2) provides that, where the Secretary of State has reasonable grounds to believe that any action which is capable of being taken by a member of the Scottish Executive is necessary in order to give effect to any international obligations, he may by order direct that the action shall be taken.

What is meant by “action” in this context is defined by subsection (3) which provides that it includes the making, confirming or approving subordinate legislation and the introducing of a Bill in the Parliament.

This is the only provision in the Act which enables the UK Government to direct a member of the Scottish Executive as to what he has to do. This is generally necessary because any Ministerial functions to implement these international obligations within devolved competence would have transferred to the Scottish Ministers under section 53 and the UK Government would not be able to exercise them. There is no equivalent to section 57(1) in the case of these international obligations. There may also be circumstances in which the UK Government would think it necessary to direct a member of the Scottish Executive to introduce a Bill into the Parliament to implement the international obligation even although the Westminster Parliament would be able to pass the necessary legislation for this purpose (section 28(7)).

Subsection (3) defines “action” for the purposes of subsections (1) and (2) as mentioned above.

Subsection (4) empowers the Secretary of State to make an order revoking subordinate legislation made by a member of the Scottish Executive, or which would be within the competence of the Scottish Executive to revoke, if:

- (a) it contains provisions which he has reasonable grounds to believe to be incompatible with any international obligations or the interests of defence or national security; or

- (b) it contains a provision which makes modifications of the law as it applies to reserved matters and which he has reasonable grounds to believe to have an adverse effect on the operation of the law as it applies to reserved matters.

This provision is required because, if the Ministerial function to make or revoke the subordinate legislation in question has been transferred to the Scottish Ministers under section 53, a Minister of the Crown would no longer have the power to exercise that function.

These provisions are similar to the powers given to the Secretary of State by section 35 to make an order preventing a Bill from being submitted for Royal Assent and reference is made to the note upon section 35(1).

Subsection (5) requires any order under this section to state the reasons why it is being made. The order would be subject to judicial review.

Further provision about the making of the order is to be found in sections 112 to 115 and Schedule 7. In particular, under Schedule 7, orders made under this section are subject to negative resolution procedure in either House of the United Kingdom Parliament. An exception is made for an order which merely revokes an order under section 58(1), which would not be subject to any Parliamentary procedure.

**SECTION 59: Property and liabilities of the Scottish Ministers**

### **Purpose and Effect**

This section makes general provision relating to the property and liabilities of the Scottish Ministers, namely provision as to how property may be held by them, how there is perpetual succession to their property and liabilities, and how documents may be validly executed by them.

### **General**

This is the first of a series of four sections dealing with the property and liabilities of the Scottish Ministers, including the First Minister and the Lord Advocate.

This section makes general provision regarding the property and liabilities of Scottish Ministers. Section 61 makes similar provision in relation to the property and liabilities of the Lord Advocate and the First Minister.

Sections 60 and 62 make provision for the transfer to Scottish Ministers and the Lord Advocate respectively of property and liabilities belonging to the UK Government.

Property is defined in section 126(1) to include rights and interests of any description. This will therefore include rights under a contract or in any Memorandum and Articles of Association.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 30-Jul-98   | 1640          |

### **Details of Provisions**

Subsection (1) provides for property to be held by the Scottish Ministers in that name without the need for any further designation. This makes it clear, for example, that the title to any heritable property belonging to the Scottish Ministers may be taken in the name of the Scottish Ministers.

Subsection (2) provides that property acquired by or transferred to the Scottish Ministers shall belong to those who are the Scottish Ministers for the time being. The same applies

to the liabilities of the Scottish Ministers. This ensures that there is perpetual succession to such the property and liabilities: they remain vested in the Scottish Ministers, even although there may be changes in who the Scottish Ministers are or even if there is an entirely new Scottish Executive appointed.

Subsection (3) provides that, in relation to the property and liabilities of the Scottish Ministers, references to them in titles recorded in the Register of Sasines or registered in the Land Register of Scotland and in any other document (e.g. a contract) are to be read as meaning the Scottish Ministers for the time being in accordance with subsection (2). This provision is necessary to support the provision in subsection (2) about perpetual succession.

Subsection (4) provides that documents are validly executed by the Scottish Ministers if they are executed by any member of the Scottish Executive. The [Requirements of Writing \(Scotland\) Act 1995 \(c.7\)](#), as amended by paragraph 31 of Schedule 8 to the Scotland Act, makes provision as to how documents are signed by a member of the Scottish Executive.

SECTION 60: Transfers to the Scottish Ministers

### **Purpose and Effect**

This section confers power, by way of subordinate legislation, to transfer to the Scottish Ministers property and liabilities of the UK Government in connection with any transfer or functions to the Scottish Ministers or to provide them with rights or interests in such property where the property is not being transferred.

### **General**

This is the second in a series of four sections dealing with the property and liabilities of the Scottish Executive, including the First Minister and the Lord Advocate. See the general note to section 59.

Further provision about the making of subordinate legislation under this section is to be found in sections 112 to 115 and Schedule 7. In general, the powers may be exercised by Her Majesty by Order in Council or by a Minister of the Crown by order and, in either case, if the instrument is made without a draft having been approved by each House of the Westminster Parliament, it is subject to annulment in pursuance of a resolution of either House of that Parliament.

This power was exercised in making the Transfer of Property (Scottish Ministers) Order 1999 ([S.I. 1999/1104](#)).

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 244           |
| LC           | 14-Jul-98   | 240           |
| LC           | 30-Jul-98   | 1647          |

### **Details of Provisions**

Subsection (1) confers power, by subordinate legislation, to 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 rights or interests in relation to any such property (whether in connection with its transfer or otherwise). This power has to be read subject to subsection (3) which limits its scope.

Subsection (2) confers power, by subordinate legislation, to provide for the transfer to the Scottish Ministers of any liabilities to which a Minister of the Crown or government department is subject. This power has also to be read subject to subsection (3) which limits its scope.

Subsection (3) limits the scope of the order which may be made under this section by providing that it can 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.

Section 53 provides for the automatic transfer of Ministerial functions to the Scottish Ministers so far as they are exercisable within devolved competence; section 63 provides for the transfer of specific Ministerial functions to the Scottish Ministers relating to reserved matters etc and section 89 provides for an Order in Council to be made in connection with the functions relating to a cross border public authority.

Under the Transfer of Property (Scottish Ministers) Order 1999 ([S.I. 1999/1104](#)), general provision is made for the transfer of rights and interests in land and corporeal moveable property (other than excepted property) used wholly or mainly for or in connection with a transferred function i.e. a function which is transferred to the Scottish Ministers by virtue of sections 53, 63 or 89. Special provision is made for special cases.  
**SECTION 61: Property and liabilities of the Lord Advocate and the First Minister**

### **Purpose and Effect**

This section makes general provision relating to the property and liabilities of the Lord Advocate and of the First Minister.

### **General**

This is the third of a series of four sections dealing with the property and liabilities of the Scottish Executive, including the First Minister and the Lord Advocate. See the general note to section 59.

### **Details of Provisions**

Subsection (1) provides for property to be held by the Lord Advocate in that name without the need for any further designation.

Subsection (2) provides that property acquired by or transferred to the Lord Advocate shall belong to the Lord Advocate for the time being. The same applies to the liabilities of the Lord Advocate. This ensures that there is perpetual succession to such property and liabilities, which remains vested in the Lord Advocate for the time being despite the appointment of any successor.

Subsection (3) provides that, in relation to the property and liabilities of the Lord Advocate, references to the office in titles recorded in the Register of Sasines or registered in the Land Register of Scotland and in any other document (e.g. a contract) and any other documents are to be read as meaning the Lord Advocate for the time being in accordance with subsection (2).

Subsection (4) provides that any rights and liabilities acquired or incurred by the First Minister shall belong to the First Minister for the time being. It is envisaged by section 52 that statutory functions may be conferred on the First Minister alone and therefore it will be possible that he will acquire rights or incur liabilities in relation to such functions.

**SECTION 62: Transfers to the Lord Advocate**

## **Purpose and Effect**

This section confers power, by way of subordinate legislation, to transfer to the Lord Advocate property and liabilities of the UK Government in connection with any transfer of functions to him or to provide him with rights or interests in such property where the property is not being transferred.

## **General**

This is one of a series of sections dealing with the property and interests of the Scottish Executive, including the First Minister and the Lord Advocate. See the general note to section 59.

Further provision about the making of subordinate legislation under this section is to be found in sections 112 to 115 and Schedule 7. In general, the powers may be exercised by Her Majesty by Order in Council or by a Minister of the Crown by order and, in either case, the instrument is subject to annulment in pursuance of a resolution of either House of the Westminster Parliament.

This power was exercised in making the Transfer of Property (Lord Advocate) Order 1999 ([S.I. 1999/1105](#)).

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 205           |
| LC           | 14-Jul-98   | 240           |
| LC           | 30-Jul-98   | 1647          |

## **Details of Provisions**

Subsection (1) confers power, by subordinate legislation, to 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 rights or interests in relation to any such property (whether in connection with its transfer or otherwise). This power has to be read subject to subsection (3) which limits its scope.

Subsection (2) confers power, by subordinate legislation, to provide for the transfer to the Lord Advocate of any liabilities to which a Minister of the Crown or government department is subject. This power has also to be read subject to subsection (3) which limits its scope.

Subsection (3) limits the scope of the order which may be made under this section by providing that it can 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. Retained functions are defined in section 52(6).

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          |



| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| 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.

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.

### **Part III: Financial Provisions**

#### **SECTION 64: Scottish Consolidated Fund**

#### **Purpose and Effect**

The purpose of this section is to make provision for a Scottish Consolidated Fund and for:

- (a) sums to be paid into the Fund by the Secretary of State from time to time, out of monies provided by Parliament (i.e. the Parliamentary grant);
- (b) sums received by an office-holder in the Scottish Administration to be paid into the Fund subject to any provision made by, or under, an Act of the Scottish Parliament for the disposal of, or accounting for, such sums;

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

(c) sums to be paid to the Secretary of State, by the Scottish Ministers in respect of certain receipts designated by order of the Treasury, and for these sums to be charged on the Fund; and

(d) the Fund to be held by the Paymaster General.

## **General**

Section 65 deals with the circumstances in which sums may be paid out of the Scottish Consolidated Fund, and the purposes for which such sums may be applied. Section 119 makes general modifications of enactments including modifications for the purpose of ensuring that sums are, where appropriate, paid into or out of the Scottish Consolidated Fund instead of the UK Consolidated Fund or National Loans Fund.

Paragraph 4 of Schedule 4 allows the Scottish Parliament to modify some parts of the Scotland Act in relation to the Scottish Consolidated Fund.

For the financial year 1999/00, transitional financial arrangements were made by [S.I. 1999/441](#) and [3273](#) and transitional appropriations by [S.I. 1999/674](#), [S.S.I. 1999/175](#) and [S.S.I. 2000/69](#). Financial arrangements are now regulated by and under the [Public Finance and Accountability \(Scotland \) Act 2000 \(asp 1\)](#).

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 12-Feb-98   | 568           |
| CC           | 12-Feb-98   | 569           |
| CC           | 12-Feb-98   | 612           |
| CR           | 19-May-98   | 754           |
| CR           | 19-May-98   | 759           |
| LC           | 30-Jul-98   | 1654          |
| LC           | 30-Jul-98   | 1657          |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| LC           | 30-Jul-98   | 1658          |
| LC           | 30-Jul-98   | 1660          |
| LC           | 30-Jul-98   | 1679          |
| LC           | 30-Jul-98   | 1697          |
| LC           | 30-Jul-98   | 1701          |
| LR           | 28-Oct-98   | 2045          |

## **Details of Provisions**

Subsection (1) establishes a Scottish Consolidated Fund.

Subsection (2) requires the Secretary of State from time to time to make payments into the Fund out of money provided by Parliament of such amounts as he may determine (i.e. the Parliamentary grant). There is no provision for the Secretary of State to make an order determining the sums to be transferred. Parliamentary approval will be granted by the normal means of approving estimates, through the annual Appropriation Act and the various Consolidated Fund Acts.

Subsection (3) provides, subject to subsection (4), for sums received by an office-holder in the Scottish Administration (as defined in section 126(6)) to be paid into the Fund.

Subsection (4) enables the Parliament, through such provision as may be made by or under an Act of the Scottish Parliament, to authorise the retention of receipts by any office-holder in the Scottish Administration to set against expenditure. This is so as to enable the Scottish Parliament to make equivalent arrangements as apply to the UK Consolidated Fund whereby provision can be made by the UK Parliament for sums to be appropriated in aid of the sum voted. It will also enable the Scottish Parliament to make arrangements for net accounting of receipts in certain circumstances. Such provision was made in the [Public Finance and Accountability \(Scotland\) Act 2000 \(asp 1\)](#); section 7 enables receipts to be applied in connection with relevant authorised expenditure and section 9 enables the Keeper of the Registers of Scotland to retain his receipts and apply them towards his expenditure.

Subsection (5) provides that the Treasury may, after consulting with the Scottish Ministers, by order designate receipts of any description specified in the order which are payable into the Fund, as receipts to be paid to the Secretary of State. Further provision about the making of this order is to be found in sections 112 to 115 and Schedule 7.

This power was exercised in making the Scotland Act 1998 (Designation of Receipts) Order 2000 ([S.I. 2000/687](#)) which designated, with effect from 1 April 2000, certain receipts for this purpose.

Subsection (6) provides that the Scottish Ministers shall make payments to the Secretary of State at such times and by such methods as the Treasury may from time to time determine, of sums equal to the amount outstanding in respect of designated receipts.

The purpose of subsections (5) and (6) is to ensure that certain receipts (such as interest payments, fines, return on public dividend capital) which are currently paid into the UK Consolidated Fund continue to be paid into that Fund after devolution by the Scottish Ministers, through the Secretary of State.

Subsection (7) provides that amounts required for the payment of sums under subsection (6) shall be charged on the Fund so that they can be paid out without first requiring the approval of the Scottish Parliament.

Subsection (8) provides that the Fund shall be held with the Paymaster General.  
SECTION 65: Payments out of the Fund

### **Purpose and Effect**

The purpose of this section is to set out the circumstances in which sums may be paid out of the Scottish Consolidated Fund.

In addition, the section provides that sums paid out of the Scottish Consolidated Fund must not be applied for any purpose other than that for which they were charged or paid out.

### **General**

This section is one of three dealing with the Scottish Consolidated Fund. Section 64 establishes the Fund, provides for sums to be paid into it by the Secretary of State and, subject to provision made by the Scottish Parliament for disposal of or accounting for such sums, for receipts of the Scottish Administration to be paid into it. It also states that the Fund is to be held with the Paymaster General and makes arrangements for certain receipts, designated by the Treasury, to be paid by the Scottish Ministers to the Secretary of State.

Section 119 makes general modifications of enactments including modifications for the purpose of ensuring that sums are, where appropriate, paid into and out of the SCF instead of the UK Consolidated Fund or the National Loans Fund.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 12-Feb-98   | 612           |
| CC           | 12-Feb-98   | 613           |
| CC           | 12-Feb-98   | 614           |
| LC           | 30-Jul-98   | 1703          |
| LR           | 28-Oct-98   | 2049          |

### **Details of Provisions**

Subsection (1) provides that a sum may only be paid out of the Scottish Consolidated Fund if:

- (a) it has been charged on the Fund by any enactment;
- (b) it is payable out of the Fund without further approval by virtue of this Act;
- (c) it is paid out for or in connection with any of the purposes mentioned in subsection (2) in accordance with rules made by or under an Act of the Scottish Parliament. These rules will provide the procedure by which the Scottish Parliament will approve expenditure from the Fund.

The first of the above categories covers cases where it is provided that sums may be charged on the Scottish Consolidated Fund such that they can be paid out without the need for specific appropriation by the Parliament for that purpose (i.e. where they have been charged on that Fund by or under an Act of the UK Parliament including this Act and any existing Act modified by section 119 or by, or under, a later Act of the Scottish Parliament). This procedure is used for such expenditure as judicial salaries as well as payments to the Secretary of State in respect of loans (see sections 66 and 71).

The second category covers provisions in existing Acts of the UK Parliament which, by virtue of section 119, have effect as if they provided for the sums to be paid out of the Scottish Consolidated Fund without further approval of the Scottish Parliament. This is similar to a charge on the Fund.

The third category covers all other cases and is expected to cover the largest part of the expenditure met out of the SCF. As from 1 April 2001, the rules in accordance with which sums can be paid out of the SCF under section 65(1)(c) are provided for in sections 4-6 of the [Public Finance and Accountability \(Scotland\) Act 2000 \(asp 1\)](#) - see [S.S.I. 2000/10](#). Under that Act, in general, sums can only be paid out of the SCF in any financial year if they have been authorised by a Budget Act (apart from special provision for emergencies and contingencies) and in accordance with a credit granted on the SCF by the Auditor General for Scotland (see sections 69 and 70).

The position for the financial year 1999-2000 was governed by transitional orders under the Scotland Act - see [S.I. 1999/674](#), as amended by [S.S.I. 2000/69](#) and [175](#). The position for the financial year 2000-2001 was governed by the [Budget \(Scotland\) Act 2000 \(asp 2\)](#) and a transitional order under the Public Finance and Accountability (Scotland) Act 2000 - see [S.S.I. 2000/46](#).

Subsection (2) defines the purposes for which sums may be paid out of the Fund under subsection (1)(c), namely:

- (a) meeting expenditure of the Scottish Administration; or
- (b) meeting expenditure payable out of the Fund under any enactment.

Subsection (3) makes provision that a sum paid out of the Scottish Consolidated Fund must not be applied for any other purpose than that for which it was charged, or paid out. SECTION 66: Borrowing by the Scottish Ministers, etc.

### **Purpose and Effect**

This section enables Scottish Ministers to borrow from the Secretary of State sums that are required for meeting temporary shortfalls of cash, or for providing a working balance, in the Scottish Consolidated Fund. In addition, it provides that any sums borrowed from the Secretary of State under this section shall be repaid to him under such terms as the Treasury may from time to time determine. Amounts required for repayment (of principal and interest) are charged on the Scottish Consolidated Fund. The section also prohibits members of the Scottish Executive from borrowing except under this section or under any specific power in an Act of Parliament.

### **General**

This section, together with section 67, puts in place arrangements for short-term borrowing by the Scottish Executive to cover deficits or to provide a working balance in the Scottish Consolidated Fund. This section deals with the circumstances under which the Scottish Ministers may borrow from the Secretary of State and arrangements for repayments. Section 67 deals with lending by the Secretary of State for such sums as are required by him for making loans under section 66.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 12-Feb-98   | 643           |
| LC           | 30-Jul-98   | 1705          |
| LC           | 30-Jul-98   | 1706          |
| LR           | 28-Oct-98   | 2049          |

### **Details of Provisions**

Subsection (1) provides that the Scottish Ministers may borrow from the Secretary of State sums required by them for the purpose of:

- (a) meeting a temporary shortfall in the Scottish Consolidated Fund; or
- (b) providing a working balance in the Fund

Subsection (2) provides that amounts required for the repayment of, or the payment of interest on, sums borrowed under this section shall be charged on the Scottish Consolidated Fund. This broadly mirrors the arrangements in relation to the UK Consolidated Fund. The purpose of charging repayments, or the repayment of interest, on the Scottish Consolidated Fund is to allow the payments to be made without the need for any annual authorisation by the Scottish Parliament under its appropriation and supply procedure to be provided by the rules under section 65(1)(c).

Subsection (3) provides that sums borrowed under this section shall be repaid to the Secretary of State at such times and by such methods, and interest on them shall be paid to him at such rates and at such times, as the Treasury from time to time determine.

Subsection (4) provides that a member of the Scottish Executive may borrow money only under this section or under any power conferred by any other Act of Parliament. This has the effect of prohibiting borrowing by members of the Scottish Executive unless specifically provided for by an Act of the UK Parliament. The Scottish Parliament is not able to confer any additional borrowing power on the members of the Scottish Executive.

SECTION 67: Lending by the Secretary of State

### **Purpose and Effect**

The purpose of this section is to enable the Treasury to issue to the Secretary of State, out of the National Loans Fund, such sums as are required by him for making loans to the Scottish Ministers under section 66 (i.e. short term loans to meet shortfalls or to provide a working balance in the Scottish Consolidated Fund). The section also sets a limit on such short term borrowing of £500 million, but provides that the Secretary of State may, with the consent of Treasury, increase this amount by order. Repayments received by the Secretary of State under section 66 are to be paid into the National Loans Fund.

### **General**

This section, together with section 66 put in place arrangements for short-term borrowing by the Scottish Executive to cover deficits or to provide a working balance in the Scottish Consolidated Fund. Section 66 deals with the circumstances under which the Scottish Executive may borrow from the Secretary of State and arrangements for repayments. This section deals with lending by the Secretary of State of such sums as are required by him for making loans under section 66.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 12-Feb-98   | 643           |
| LC           | 30-Jul-98   | 1707          |

### **Details of Provisions**

Subsection (1) provides that the Treasury may issue to the Secretary of State, out of the National Loans Fund, the sums required by him for making loans under section 66. The Treasury alone can operate on the National Loans Fund. The effect of this subsection is to confer the power on Treasury to issue sums to cover the shortfall in funding or to provide a working balance in the Fund referred to at section 66. Such borrowing will be from the National Loans Fund only.

Subsection (2) provides that the aggregate outstanding of principal sums borrowed under section 66 must not exceed £500 million.

Subsection (3) provides that the Secretary of State may by order made with the consent of Treasury substitute for the amount specified in subsection (2) such increased amount as may be specified in the order. This will enable the Secretary of State to increase the amount from time to time, for example, to keep pace with inflation or to meet unforeseen circumstances. Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

Subsection (4) provides for sums received under subsection 66(3) by the Secretary of State to be paid into the National Loans Fund.

SECTION 68: Borrowing by public bodies

## **Purpose and Effect**

The purpose of this section is to ensure that if a member of the Scottish Executive lends money to a body established under any enactment, the rate of interest on the loan is not less than the lowest rate determined by the Treasury in respect of similar loans made out of the National Loans Fund on the day the loan is made. In addition, it provides that public bodies shall not borrow under a power conferred by virtue of an Act of the Scottish Parliament in a currency other than sterling without the consent of the Scottish Ministers given with the approval of the Treasury.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 12-Feb-98   | 643           |
| LC           | 30-Jul-98   | 1708          |
| LC           | 30-Jul-98   | 1709          |
| LR           | 28-Oct-98   | 2049          |

## **Details of Provisions**

Subsection (1) provides that if a member of the Scottish Executive lends money to a body established under any enactment (which includes an Act of Parliament or an Act of the Scottish Parliament or any subordinate legislation under such Acts), the rate of interest on the loan shall not be less than the lowest rate determined by the Treasury under section 5 of the National Loans Act 1968 in respect of similar loans made out of the National Loans Fund on the day the loan is made.

Subsection (2) provides that a body established under any enactment shall not, in pursuance of a power conferred by virtue of an Act of the Scottish Parliament, borrow money in a currency other than sterling except with the consent of the Scottish Ministers given with the approval of the Treasury.

SECTION 69: The Auditor General for Scotland

## **Purpose and Effect**

The section establishes the office of Auditor General for Scotland.

## **General**

Section 69 is one of three sections dealing with audit and accounting arrangements. Section 70 requires provision to be made by or under an Act of the Scottish Parliament for a number of matters relating to financial control, accounts and audit. Section 72 deals with accounts of sums received by the Secretary of State from Scottish Ministers under sections 66, 67 and 71.

The [Public Finance and Accountability \(Scotland\) Act 2000 \(asp 1\)](#) makes provision for the salary and terms of office of the Auditor General (section 13) and for his functions.

## **Details of Provisions**

Subsection (1) provides that there shall be an Auditor General for Scotland who shall be an independent person appointed by Her Majesty on the nomination of the Parliament. The Scottish Executive has no locus in the procedure. The procedures for nomination for appointment and for removal of the AGS are set out in the Standing Orders of the Parliament.

Subsection (2) provides that no recommendation shall be made to Her Majesty for the removal of the Auditor General for Scotland unless the Parliament so resolves. If the

resolution is passed on a division, two-thirds of the total number of members of the Parliament must vote in favour.

Subsection (3) provides that the validity of any act of the Auditor General for Scotland is not affected by any defect in his nomination by the Parliament.

Subsection (4) provides that the Auditor General for Scotland shall not, in the exercise of any of his functions, be subject to the direction or control of any member of the Scottish Executive or of the Parliament.

Subsection (5) ensures that the Parliament can place requirements on the Auditor General in relation to the preparation of his own accounts. Provision is made for this in sections 19(8) and 25 of the [Public Finance and Accountability \(Scotland\) Act 2000 \(asp 1\)](#).

SECTION 70: Financial control, accounts and audit

### **Purpose and Effect**

This section provides that provision shall be made by or under an Act of the Scottish Parliament (“Scottish legislation”) in relation to financial control, accounts and audit. The Scottish legislation must provide for:

preparation of accounts by the Scottish Ministers, the Lord Advocate and others to whom sums are paid out of the Scottish Consolidated Fund of their expenditure and receipts;

preparation by the Scottish Ministers of an account of the Scottish Consolidated Fund;

arrangements for audit and value for money studies by, or under the supervision of the Auditor General for Scotland;

access by auditors to such documents as may reasonably be required for the purposes of audit;

designated members of the staff of the Scottish Administration to be answerable to the Parliament (Accounting Officers);

the publication of accounts and reports on them in pursuance of the rules and for the laying of such accounts and reports before the Parliament.

### **General**

Section 70 is one of three sections dealing with audit and accounting arrangements. Section 69 provides for the appointment of the Auditor General for Scotland. Section 72 deals with accounts of sums received by the Secretary of State from Scottish Ministers under sections 66, 67 and 71.

The matters for which section 70 requires Scottish legislation to make provision are contained in or under the [Public Finance and Accountability \(Scotland\) Act 2000 \(asp 1\)](#).

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 12-Feb-98   | 613           |
| CR           | 19-May-98   | 764           |
| LC           | 30-Jul-98   | 1712          |
| LC           | 30-Jul-98   | 1714          |
| LC           | 30-Jul-98   | 1716          |



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

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 30-Jul-98   | 1718          |
| LC           | 30-Jul-98   | 1720          |
| LC           | 30-Jul-98   | 1721          |
| LC           | 6-Oct-98    | 262           |
| LR           | 28-Oct-98   | 2049          |
| LR           | 28-Oct-98   | 2053          |

### **Details of Provisions**

Subsection (1) requires “Scottish legislation” (defined in subsection (9)) to provide for:

- (a) proper accounts to be prepared by the Scottish Ministers, by the Lord Advocate and by others to whom sums are paid out of the Scottish Consolidated Fund, of their expenditure and receipts;
- (b) the Scottish Ministers to prepare an account of payments into and out of the Fund;
- (c) the Auditor General for Scotland (established by section 69) to exercise, or to ensure the exercise by other persons of the functions described in subsection (2);
- (d) access by persons exercising those functions to such documents as they may reasonably require;
- (e) designated members of the staff of the Scottish Administration to be answerable to the Parliament in respect of the expenditure and receipts of each part of the Scottish Administration (“Accounting Officers”); and
- (f) the publication of Parliamentary accounts (defined in subsection (9)) and reports on such accounts and for the laying of such accounts and reports before the Parliament.

Subsection (2) defines the functions that the Auditor General or auditors are to exercise as follows:

- (a) issuing credits for the payment of sums out of the Scottish Consolidated Fund;
- (b) examining, certifying and reporting on parliamentary accounts;
- (c) carrying out examinations into the economy, efficiency and effectiveness with which the Scottish Ministers and the Lord Advocate have used their resources in discharging their functions; and
- (d) carrying out examinations into the economy, efficiency and effectiveness with which other persons determined under Scottish legislation to whom sums are paid out of the Fund have used those sums in discharging their functions.

These functions broadly mirror those of the UK Comptroller and Auditor General in relation to UK expenditure.

Subsection (3) states that standing orders shall provide for the consideration by the Parliament of accounts and reports laid before it in pursuance of subsection (1)(f). The Standing Orders of the Parliament make provision for the Audit Committee to consider and report upon such accounts and reports.

Subsection (4) allows “Scottish legislation” to make further provision to ensure that those who receive money from the Scottish Consolidated Fund are accountable for its use. In particular it allows for accountability for those who receive sums indirectly from the SCF, such as bodies who receive grants from the Scottish Ministers.

Subsection (5) provides that where functions specified in subsection (2) are exercised by persons other than the Auditor General, then those persons are not to be subject to the direction or control of any member of the Scottish Executive or of the Parliament.

Subsection (6) provides that Scottish legislation may not require any cross-border public authority to prepare accounts if separate legislation requires the preparation of accounts and the examination etc. of these accounts by the Auditor General for Scotland, the Comptroller and Auditor General or a person appointed by either of them. This will apply in the case of bodies such as the Forestry Commission, where existing accounting and audit arrangements have been adapted by orders under section 89 ([S.I. 1999/1747](#) and [2000/746](#)).

Subsection (7) provides that Scottish legislation need not require the Auditor General for Scotland to examine his own accounts. It is open to the Parliament to specify alternative arrangements.

Subsection (8) provides that this section does not require Scottish legislation to impose any requirement which is imposed by any other legislation. For example, if an enactment already provides for preparation of accounts or for access to documents, it is not necessary for Scottish legislation to duplicate it. This is intended to avoid unnecessary, and potentially confusing, double legislation.

Subsection (9) defines the terms “Parliamentary accounts” and “Scottish legislation” for the purposes of this section.

SECTION 71: Existing debt

### **Purpose and Effect**

The purpose of this section is to make provision for the repayment to the Scottish Ministers of any outstanding loans made by the Secretary of State from the National Loans Fund before the passing of the Scotland Act. The section defines the loans caught.

In addition it provides that all amounts to be received by the Scottish Ministers in repayment of principal of outstanding loans covered by this section are to be treated as advances made by the Secretary of State to the Scottish Ministers on the commencement of this section.

It also enables provision to be made for outstanding National Loans Fund (NLF) debt owed by the Registers of Scotland Trading Fund to continue to be repaid after devolution.

It further states that all repayments of principal and interest to the Secretary of State will be a charge on the Scottish Consolidated Fund.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| L3           | 9-Nov-98    | 542           |

### **Details of Provisions**

Subsection (1) defines the categories of outstanding loans covered by subsections (2) to (4). It provides that the section applies where:

- (a) power to lend money under a provision of a pre-commencement enactment was exercised by the Secretary of State;
- (b) the sums required by him for the exercise of the power were issued by the Treasury out of the National Loans Fund; and

- (c) the power is exercisable by the Scottish Ministers or would have been so exercisable but for the repeal of the pre-commencement enactment.

The outstanding loans covered are only those referred to above, i.e. they are confined to sums lent to public bodies in relation to devolved matters, that were issued by Treasury out of the National Loans Fund. Loans made out of monies provided by Parliament (voted loans) are not covered.

Subsection (2) provides that any amount payable by way of repayment or interest on the loan shall be paid to the Scottish Ministers and into the Scottish Consolidated Fund (instead of to the Secretary of State and into the National Loans Fund).

Subsection (3) provides for amounts equal to those which are to be received by the Scottish Ministers in repayment of principal to be treated as being amounts of advances made on the commencement of this section to the Scottish Ministers by the Secretary of State. This is to ensure that whilst outstanding loans made under the powers described at subsection (1) will be repaid to the Scottish Ministers by virtue of subsection (2), the sums received by the Scottish Ministers will be treated as having been loans to them made by the Secretary of State so that the Scottish Ministers have to repay the sums to the Secretary of State.

Subsection (4) provides that such advances shall be repaid to the Secretary of State at such times and by such methods, and interest on them shall be paid to him at such rates and at such times, as the Treasury may from time to time determine. This has a similar effect to section 66 in respect of new borrowing by the Scottish Ministers and ensures existing debts are treated in the same way.

Subsections (5) and (6) enable provision to be made for outstanding National Loans Fund (NLF) debt owed by the Registers of Scotland Trading Fund to continue to be repaid after devolution. This, together with further transitional provision made under the Act in relation to the Registers of Scotland, will allow the existing financial arrangements under which the Register of Scotland operate to continue with as little disturbance as possible until the Parliament itself legislated on its permanent financial regime (as it has now done in the Public Finance and Accountability (Scotland) Act 2000). Express provision is made in the Act dealing with the NLF debt as NLF matters are dealt with expressly in primary legislation under an agreement with the Public Accounts Committee.

The effect of the subsections is to empower the Secretary of State, with the agreement of the Treasury, to make an Order providing that:

the outstanding amount deemed to be owed by the Registers of Scotland Trading Fund to the NLF will become a debt owed by the Scottish Ministers to the Secretary of State;

the Scottish Ministers shall repay the loan, with interest, on the same conditions as the Trading Fund would have been obliged to;

the amounts required to make these payments will be a charge on the Scottish Consolidated Fund; and

the sums so received will be paid into the NLF (by the Secretary of State).

Orders under this power are subject to negative resolution procedure in the House of Commons. This power was exercised in making the Scotland Act 1998 (Transfer of Borrowing of the Registers of Scotland Executive Agency Trading Fund) Order 1999 ([S.I. 1999/1596](#)).

Subsection (7) provides that sums required to be paid under subsections (4) or (6) shall be charged on the Scottish Consolidated Fund. The effect of this is to allow the payments to be made without the need for the approval of the Scottish Parliament under its appropriation and supply procedure to be provided by the rules under section 65(1) (c). This mirrors the arrangements for UK loans made from the NLF.

Subsection (6) provides that sums received by the Secretary of State under subsections (4) or (6) shall be paid into the National Loans Fund. This means that once repayments have been charged on the Scottish Consolidated Fund they are routed back to the National Loans Fund.

#### **SECTION 72: Accounts of loans to the Scottish Ministers**

##### **Purpose and Effect**

The purpose of this section is to provide for the accounting arrangements in respect of sums paid and received by the Secretary of State under sections 66, 67 and 71. It requires the Secretary of State to prepare an account of such sums, for each financial year, in a form and manner as the Treasury may direct.

It also provides for the audit arrangements. The account must be sent to the UK Comptroller and Auditor General within the prescribed timescale (see below) who shall examine, certify and report on the account. His report must be laid before each House of Parliament.

##### **General**

Section 72 is one of three sections dealing with audit and accounting arrangements. It deals with sums paid and received by the Secretary of State to and from the Scottish Ministers. Section 69 provides for the appointment of the Auditor General for Scotland. Section 69 requires provision to be made by or under an Act of the Scottish Parliament for a number of matters relating to financial control, accounts and audit.

##### **Details of Provisions**

The section provides that the Secretary of State must, for each financial year:

- (a) prepare, in such a form and manner as Treasury may direct, an account of sums paid and received by him under sections 66, 67 and 71; and
- (b) send the account to the UK Comptroller and Auditor General not later than the end of November in the following financial year.

In addition, the UK Comptroller and Auditor General must examine, certify and report on the account and must lay copies of it and his report before each House of Parliament.

#### **Part IV: the Tax Varying Power**

##### **SECTION 73: Power to fix basic rate for Scottish taxpayers**

##### **Purpose and Effect**

This section provides that the Scottish Parliament may pass a resolution providing for the basic rate of income tax to be increased or reduced for Scottish taxpayers - by not more than three pence in the pound - from that determined by the UK Parliament. The increased or reduced rate will not apply to income from savings and distributions.

##### **General**

This section is the first of a set of sections dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than three per cent. Section 74 makes further provisions with respect to tax-varying resolutions, and section 75 defines the term "Scottish taxpayer".

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income

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

tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 40            |
| CC           | 23-Feb-98   | 69            |
| CR           | 19-May-98   | 764           |
| LC           | 30-Jul-98   | 1721          |
| LC           | 6-Oct-98    | 261           |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| LC           | 6-Oct-98    | 262           |
| LC           | 6-Oct-98    | 273           |
| LC           | 6-Oct-98    | 274           |
| LR           | 28-Oct-98   | 2053          |

### **Details of Provisions**

Subsection (1) describes the circumstances in which this section will apply. It applies where income tax is charged for any tax year and the Scottish Parliament has passed a resolution varying the basic rate of income tax for Scottish taxpayers by no more than three pence in the pound. The variation must be by a whole number or half of a whole number. Subsection (1) further provides that the section is subject to the conditions attaching to such tax-varying resolutions set out in section 74.

Subsection (2) provides that where the section applies, the basic rate of income tax determined by the UK Parliament for any tax year as it applies to the income of Scottish taxpayers shall be varied by the amount specified in the resolution.

Subsection (3) states that income from Scottish taxpayers does not include income from savings and distributions.

Subsections (4) and (5) provide that the section will also have effect where the charging of income tax or the determination of the basic rate for any tax year is given effect to by means of a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968.

SECTION 74: Supplemental provision with respect to resolutions

### **Purpose and Effect**

This section is entirely supplementary to the provisions of section 73 and sets out certain conditions attaching to tax-varying resolutions. In particular it provides that a resolution shall relate only to a single tax year commencing on or after the year 2000-01, and sets out by when the resolution must be passed to have effect.

### **General**

The section forms part of the set dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than 3 per cent. Section 74 makes

further provisions with respect to tax-varying resolutions, and section 75 defines the term “Scottish taxpayer”.

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 40            |
| CC           | 23-Feb-98   | 41            |
| CC           | 23-Feb-98   | 82            |
| LR           | 28-Oct-98   | 2053          |

### **Details of Provisions**

Subsection (1) is introductory.

Subsection (2) provides that a tax-varying resolution must relate only to a single tax year, and generally must be passed before the start of the tax year to which it will apply. But it cannot be passed more than 12 months in advance of that tax year. The subsection also provides that a resolution of the Scottish Parliament will have effect in relation to any determination of the UK basic rate by Westminster irrespective of whether the determination had been made at the time of the passing of the resolution. Thus the resolution of the Scottish Parliament may be passed in advance of the determination by Westminster. The intention here is to cater for a situation where the Scottish Parliament is dissolved or is in recess at the time the basic rate is determined.

Subsection (3) gives an exception to the rule that a tax-varying resolution must be passed before the start of the relevant tax year. Where the UK Parliament itself has not determined the basic rate for that tax year before 6 March in the preceding tax year, then the Scottish Parliament will have one month to pass a tax-varying resolution from the date the basic rate is determined.

Subsection (4) provides that, in a case where a tax varying resolution is passed after the beginning of the tax year to which it relates by virtue of subsection (3) that resolution will have effect from the start of that tax year.

Subsection (5) provides that only a member of the Scottish Executive may propose a tax-varying resolution. This accords with the precedent of the UK Parliament in relation to tax proposals.

Subsection (6) provides that the first tax year in which a tax-varying resolution may have effect is the year commencing on 6 April 2000. That is the first full tax year in which the Scottish Parliament will be in existence.

Subsection (7) provides that this section will also have effect where the basic rate is determined by means of a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968.

SECTION 75: Scottish taxpayers

### **Purpose and Effect**

This section defines the term “Scottish taxpayer” for the purposes of the provisions in the Act concerned with the Scottish Parliament’s tax-varying power.

## **General**

The section forms part of the set dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than 3 per cent. Section 74 makes further provisions with respect to tax-varying resolutions, and section 75 defines the term “Scottish taxpayer”.

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 41            |
| CC           | 23-Feb-98   | 91            |
| CC           | 23-Feb-98   | 92            |
| LC           | 6-Oct-98    | 290           |
| LR           | 28-Oct-98   | 2053          |
| LR           | 28-Oct-98   | 2056          |
| LR           | 28-Oct-98   | 2059          |

## **Details of Provisions**

Subsection (1) provides that, for any tax year, a Scottish taxpayer is a person who is resident in the UK for income tax purposes where Scotland is the part of the UK with which that person has the closest connection during the year.

Subsection (2) defines “closest connection with Scotland”. There are three tests, only one of which need be satisfied. Broadly, a person is a Scottish taxpayer if:

subsection (3) of this section applies to him;

the number of days he spends in Scotland in the tax year equals or exceeds the number of days spent elsewhere in the UK (“day spent” is defined in subsection (4));

he is a Scottish MP, MEP or a member of the Scottish Parliament for the whole or any part of that year.

Subsection (3) sets out the circumstances in which that subsection will apply to an individual for a tax year. These are that the individual spends a part of that tax year in Scotland and, for at least part of that time, his principal UK home is located in Scotland and he makes use of that home as a place of residence. In addition, his principal UK home must be located in Scotland for at least as much of that year as the location of his principal UK home is not in Scotland.

Subsection (4) makes provision as to when a person spends a day in Scotland or spends a day elsewhere in the United Kingdom for the purposes of this section. In particular, a person spends a day in Scotland if, but only if, he is in Scotland at the end of that day. A person spends a day elsewhere in the United Kingdom if, but only if, he is in a part of the United Kingdom which is not Scotland at the end of that day and he does not spend that day in Scotland (i.e. he is not in Scotland at the end of that day).

Subsection (5) explains the circumstances in which a person's principal UK home will be in Scotland. These are that a person has a place of residence in Scotland which is his only or main place of residence in the UK.

Subsection (6) confirms that a "place" may include a place on a vessel or other means of transport.

#### **SECTION 76: Changes to income tax structure**

### **Purpose and Effect**

This section sets out circumstances in which the Treasury must consider whether the tax varying power of the Scottish Parliament ought to be amended. It applies where it appears to the Treasury that proposed changes to the UK income tax structure would affect significantly the practical extent for any year of the Scottish Parliament's tax-varying powers. The section requires the Treasury at certain times to indicate to the House of Commons whether an amendment to the Scottish Parliament's tax-varying power is necessary and, if so, to make defined and limited proposals for amending that power.

### **General**

The section forms part of the set dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than 3 per cent. Section 74 makes further provisions with respect to tax-varying resolutions, and section 75 defines the term "Scottish taxpayer".

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 41            |
| CC           | 23-Feb-98   | 92            |
| CC           | 23-Feb-98   | 110           |
| CR           | 19-May-98   | 765           |
| LC           | 6-Oct-98    | 308           |
| LC           | 6-Oct-98    | 309           |
| LC           | 6-Oct-98    | 310           |
| LC           | 6-Oct-98    | 312           |
| LC           | 6-Oct-98    | 314           |
| LC           | 6-Oct-98    | 316           |
| LC           | 6-Oct-98    | 320           |
| LR           | 28-Oct-98   | 2059          |



## **Details of Provisions**

Subsection (1) describes the circumstances in which the section will apply. There must be a proposal, which is either published by the Treasury or the Inland Revenue or which appears to the Treasury to be likely to be enacted, to modify any income tax provision. The proposal must significantly effect the practical extent for any year of the Scottish Parliament's tax varying powers (i.e. the amount of tax which could be raised or foregone by the Scottish Parliament under any tax varying resolution it is allowed to pass under the Act).

Subsection (2) imposes a duty on the Treasury to indicate to the House of Commons as soon as is reasonably practicable whether an amendment of the tax-varying power is required as a consequence of such a proposal; and if they think an amendment is required, to make appropriate proposals for amending that power.

Subsections (3), (4) and (5) impose certain restrictions on the substance of any Treasury proposals for amending the tax-varying power. The proposals must only apply to income tax; they must provide that any amended power is broadly of the same practical extent (i.e. is capable of raising or foregoing broadly the same amount of tax) as the existing power; the proposed revised powers must, if exercised, have broadly the same impact on the after-tax income levels of individual tax payers as the existing powers; and the proposals must not include proposals to enable the Parliament to vary the rate of tax applying to income from savings or distributions.

Subsections (6) and (7) give definitions.

**SECTION 77: Accounting for additional Scottish tax**

## **Purpose and Effect**

This section applies where the basic rate of income tax is increased for Scottish taxpayers. It requires the Inland Revenue to pay into the Scottish Consolidated Fund (SCF) an amount equal to the estimated yield from the additional tax to be paid by Scottish taxpayers, and requires the Inland Revenue to make and maintain appropriate arrangements to determine the amount and frequency of payments into the SCF.

## **General**

The section forms part of the set dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than 3 per cent. Section 74 makes further provisions with respect to tax-varying resolutions, and section 75 defines the term "Scottish taxpayer".

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 41            |
| CC           | 23-Feb-98   | 124           |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| LC           | 6-Oct-98    | 320           |

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 28-Oct-98   | 2059          |

### **Details of Provisions**

Subsection (1) provides that where the basic rate is increased by a resolution of the Scottish Parliament, the Inland Revenue must pay amounts into the Scottish Consolidated Fund (SCF).

Subsection (2) requires the Inland Revenue to determine and notify to the Scottish Ministers the amount to be paid over and the timing of such payments as soon as reasonably practicable after the resolution is passed.

Subsection (3) provides that any determination under subsection (2) above shall ensure that payments into the SCF properly represent the income tax receipts attributable to the resolution.

Subsections (4) and (5) provide for the Inland Revenue to make and maintain, and if necessary adjust, arrangements for estimating the total amount due to be paid into the SCF, and the amount and the frequency of individual payments in accordance with this section.

Subsection (6) requires the Inland Revenue to consult with the Scottish Ministers about those arrangements before making or modifying them.

Subsection (7) defines “income tax receipts” for the purposes of this section.

Subsection (8) provides that payments made under this section by the Inland Revenue shall be paid out of the gross revenues of that Department, and be deducted from the total amount of such revenues before they are paid into the Consolidated Fund.

SECTION 78: Effect of tax reduction for Scottish taxpayers

### **Purpose and Effect**

This section is complementary to section 77, and applies where the basic rate of income tax is decreased for Scottish taxpayers. It requires payments out of the Scottish Consolidated Fund reflecting the shortfall in the yield of income tax resulting from the reduced rate, and provides for these payments to be accounted for to the UK Consolidated Fund.

### **General**

The section forms part of the set dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than 3 per cent. Section 74 makes further provisions with respect to tax-varying resolutions, and section 75 defines the term “Scottish taxpayer”.

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 124           |

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 337           |
| LR           | 28-Oct-98   | 2059          |

### **Details of Provisions**

Subsection (1) provides that where the basic rate is decreased by a resolution of the Scottish Parliament, payments will be made out of the Scottish Consolidated Fund (SCF) to the Inland Revenue.

Subsection (2) requires the Inland Revenue to determine and notify to the Scottish Ministers the amount to be paid over and the timing of such payments as soon as reasonably practicable after the resolution is passed.

Subsection (3) provides that any determination under subsection (2) above shall ensure that payments out of the SCF properly represent the shortfall in income tax receipts attributable to the resolution.

Subsections (4) and (5) provide for the Inland Revenue to make and maintain, and if necessary adjust, arrangements for estimating the total amount due to be paid over, and the amount and the frequency of individual payments in accordance with this section.

Subsection (6) provides for consultation with the Scottish Ministers about those arrangements before they are made or modified.

Subsection (7) provides that “income tax receipts” for the purposes of this section has the same meaning as it has for section 77.

Subsection (8) provides that payments made under this section to the Inland Revenue shall be treated as part of the gross revenues of that Department and paid into the UK Consolidated Fund accordingly.

SECTION 79: Supplemental powers to modify enactments

### **Purpose and Effect**

This section is supplementary to the provisions of sections 73 and 74. It permits the Treasury by order to modify enactments to take account of the Scottish Parliament’s tax-varying power. In particular, such an order may exclude the effect of any tax-varying resolution in relation to certain enactments, or postpone the effect of such a resolution in relation to the operation of the PAYE system. Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

### **General**

The section forms part of the set dealing with the tax-varying power of the Scottish Parliament.

Section 73 allows the Scottish Parliament to pass a resolution varying the basic rate of income tax for Scottish taxpayers by no more than 3 per cent. Section 74 makes further provisions with respect to tax-varying resolutions, and section 75 defines the term “Scottish taxpayer”.

Section 76 makes provision to take account of future changes to the structure of UK income tax. Sections 77 and 78 describe the accounting arrangements where income tax is increased or decreased for Scottish taxpayers. Section 79 permits the Treasury to make consequential subordinate legislation.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 337           |
| LR           | 28-Oct-98   | 2053          |
| L3           | 9-Nov-98    | 545           |

## **Details of Provisions**

Subsection (1) provides that the Treasury may make an order modifying any enactment as they consider necessary or expedient to take account of the fact that the Scottish Parliament has, is to have, or has exercised its tax-varying power. “Enactment” is defined in section 126(1).

Subsection (2) provides that a Treasury order may exclude the effect of the tax-varying power in relation to certain enactments.

Subsection (3) provides power by order to postpone temporarily the effect of a resolution in relation to the operation of PAYE.

Subsection (4) provides that orders under this section may have limited retrospective effect.

Subsection (5) sets out definitions.

SECTION 80: Reimbursement of expenses

## **Purpose and Effect**

This section gives the Scottish Ministers the power to reimburse Ministers of the Crown or government departments for administrative expenses incurred by virtue of Part IV of the Act (the tax varying power). The existence of this power means that under the terms of section 65 reimbursements can be made out of the Scottish Consolidated Fund.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 337           |

## **Details of Provisions**

Before the Scottish Parliament is to be able to exercise its tax-varying power, certain mechanisms have to have been put in place and maintained. These mechanisms involve certain UK Government Departments (specifically Inland Revenue and DWP) incurring some set-up costs and some continuing maintenance costs. These costs will be incurred whether or not the Scottish Parliament makes use of the tax-varying power. Thus they are not attributable to any exercise by the Scottish Administration of its functions. Without this section these particular expenses could not be met by making payments out of the Scottish Consolidated Fund (because they would not count as “expenditure of the Scottish Administration” in terms of section 65(2)(a)). While these expenses could be met in other ways than payment out of the SCF (particularly through adjustment of the grant paid by the UK Government to the Scottish Administration), it is nevertheless desirable to have the SCF option available. The section achieves this by giving the Scottish Ministers a specific power to reimburse these administrative expenses.

## **Part V: Miscellaneous and General**

SECTION 81: Remuneration of members of the Parliament and Executive

## **Purpose and Effect**

This section requires the Parliament to make provision for the payment of salaries to members of the Parliament and members of the Scottish Executive, including junior Scottish Ministers. The amount of any salary is a matter for the Parliament to determine. Under this section the Parliament can also, if it so decides, make provision for the payment of allowances and pensions, gratuities and allowances to MSPs and members of the Scottish Executive. In respect of pensions the Parliament can provide for contributions or payments towards such pensions or for the establishment and administration, whether by the Scottish Parliamentary Corporate Body or otherwise of, a pension scheme or schemes.

## **Background**

This section is one of a series on remuneration. Section 82 deals with limits on salaries of MSPs who are also Members of the UK Parliament or the European Parliament and section 83 requires information as to salaries, allowances, pensions and gratuities paid under this section to be published each year and ensures that a person cannot receive a salary as an MSP or a member of the Scottish Executive unless he has taken the appropriate oath under section 84.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 127           |
| CR           | 12-May-98   | 230           |
| CR           | 19-May-98   | 765           |
| LC           | 6-Oct-98    | 337           |
| LC           | 6-Oct-98    | 339           |
| LC           | 6-Oct-98    | 342           |
| LC           | 6-Oct-98    | 343           |

## **Details of Provisions**

Subsection (1) places a duty on the Parliament to provide for the payment of salaries to Members of the Parliament and the members of the Scottish Executive including the junior Scottish Ministers.

Subsection (2) allows the Parliament to provide for the payment of allowances to members of the Parliament and members of the Scottish Executive including the junior Scottish Ministers. It is for the Parliament to determine what allowances if any are payable but it could provide, for example, for allowances for the provision of secretarial services etc.

Subsection (3) allows the Parliament to provide for the payment of pensions, gratuities or allowances to or in respect of any person who has ceased to be a member of the Parliament or a member of the Scottish Executive. It is for the Parliament to determine what provision is to be made but it could for example, include provision for payment of a gratuity similar to the resettlement grant paid at Westminster when an MP fails to be re-elected. The subsection also allows the Parliament to provide for a pension etc. to be payable to or in respect of any person who has ceased to hold an appointment in the Parliament or Scottish Executive but who continues to be a member of the Parliament or the Scottish Executive. There is, however, nothing to prevent an MSP contributing to a pension scheme under private arrangements.

Under subsection (4) the provision made by the Parliament under subsection (3) may include in particular provision for contributions or payments towards the provision of pensions, gratuities and allowances. The Parliament may also make arrangements for the establishment and administration of one or more pension schemes. It can do this through the Scottish Parliamentary Corporate Body (SPCB) or by such other means as the Parliament decides.

Subsection (5) provides that “provision” includes provision by an Act of the Scottish Parliament or by a resolution of the Parliament conferring functions on the SPCB. All references in this section to a member of the Scottish Executive include a junior Scottish Minister.

**SECTION 82: Limits on salaries of members of the Parliament**

### **Purpose and Effect**

This section requires the Scottish Parliament to abate the salary of any member of the Scottish Parliament who also receives a salary as a Member of Parliament or a Member of the European Parliament. The amount by which the salary is abated is a matter for the Parliament.

### **General**

This section is one of a series on remuneration. Section 81 deals with salaries, allowances, gratuities and pensions of MSPs and members of the Scottish Executive and section 83 requires details of salaries, allowances, pensions and gratuities paid under section 81 to be published each year and ensures that a person receiving a salary as an MSP or a member of the Scottish Executive must first have taken the appropriate oath under section 84.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 23-Feb-98   | 127           |
| LC           | 6-Oct-98    | 348           |
| LR           | 28-Oct-98   | 2063          |
| LR           | 28-Oct-98   | 2065          |

### **Details of Provisions**

Subsection (1) places a duty on the Parliament to ensure that the amount of salary payable to a member of the Scottish Parliament under section 81 is reduced if any salary is payable to him as a member of either House of Parliament or as a member of the European Parliament.

Subsection (2) places a duty on the Parliament to ensure that the salary is reduced to a particular proportion of what it would otherwise be or to a particular amount; or by the amount of any salary payable to the member of the Scottish Parliament as a member of Parliament or the European Parliament or by a particular proportion of that amount or by some other particular amount.

**SECTION 83: Remuneration: supplementary**

### **Purpose and Effect**

This section makes further provision as to the remuneration of members of the Scottish Parliament and members of the Scottish Executive. In particular, it provides for information concerning salaries, allowances, pensions or gratuities paid to them to be published each year. This section also requires members of the Scottish Parliament and

members of the Scottish Executive to have taken the appropriate oath before receiving payment of salaries or allowances. This section also allows certain persons to continue to receive remuneration as an MSP after a dissolution of the Parliament in certain specified circumstances.

### **General**

This section is one of a series on remuneration. Section 81 deals with salaries, allowances and pensions etc. of MSPs and members of the Scottish Executive and section 82 deals with limits on the salaries of MSPs who are also Members of Parliament or Members of the European Parliament.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 339           |
| LC           | 6-Oct-98    | 348           |

### **Details of Provisions**

Subsection (1) places a duty on the Parliament to publish information relating to salaries, allowances, pensions or gratuities paid each financial year. There is no restriction as to the vehicle used by the Parliament to make this information available. This covers the remuneration of members of the Parliament and members of the Scottish Executive.

Subsection (2) provides that no payment of salary or allowances shall be made to a member of the Scottish Parliament or a member of the Scottish Executive who has not taken the appropriate oath, as required by section 84.

Subsection (3) provides that a member's entitlement to a salary or allowance is not affected for the period prior to him taking the oath provided he does duly take the oath. Therefore, if a member delays in taking the oath, he will still be entitled to receive payment in respect of the period after he was elected and before he took the oath but not until he has taken the oath. This should be read in conjunction with section 84(3) which provides that if the oath is not taken within 2 months from the date of being returned as an MSP the seat will become vacant, although that section also provides that the Parliament could extend that period.

Subsection (4) provides for a person who was a member of the Scottish Parliament prior to a dissolution of the Parliament to continue to receive remuneration under section 81 in one of 2 circumstances. These are firstly if he continues to hold office as a member of the Scottish Parliamentary Corporate Body or as Presiding Officer or deputy Presiding Officer, in which case he is treated as an MSP until he ceases to hold office; and secondly, if he is nominated as a candidate at the subsequent election, he is treated as an MSP for the purposes of section 81 until the end of the day of that election.

Subsection (5) allows for different provisions to be made under sections 81 or 82 for different cases. This allows the Parliament to provide for different salaries to be paid to different descriptions of MSPs or members of the Scottish Executive according to any office or position which they may hold in the Parliament or the Scottish Executive. For example it allows the Parliament to make provision for the MSP who holds the office of Presiding Officer to be paid a higher salary.

SECTION 84: Oaths

### **Purpose and Effect**

This section requires all members of the Parliament to take the oath of allegiance provided by the Promissory Oaths Act 1868 or to make the corresponding affirmation.

If they do not do so within 2 months of the day they are returned, or such longer period as the Parliament may allow, then they shall cease to be a member and their seat will become vacant. It also requires the members of the Scottish Executive to take the official oath under the 1868 Act and to take the oath of allegiance, unless they have already taken it as a member of the Parliament.

## **General**

This section affects all members of the Scottish Parliament and members of the Scottish Executive (including junior Scottish Ministers). It parallels the arrangements in the UK Parliament. Significantly no payment of salary or allowances may be made under section 81 (Remuneration of members, etc.) to a member or Minister until the oath is taken. Nor may they participate in the proceedings of the Parliament until they have done so.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 29-Jan-98   | 572           |
| CC           | 4-Mar-98    | 1079          |
| CC           | 4-Mar-98    | 1095          |
| CR           | 12-May-98   | 241           |
| LC           | 6-Oct-98    | 348           |

## **Details of Provisions**

Subsection (1) requires all members of the Parliament to take the oath of allegiance each time they are returned irrespective of the fact that they may have taken it when they were previously returned as a member or on another occasion (e.g. on being returned as a member of the House of Commons). Under section 5 of the Oaths Act 1978 a member may make an affirmation instead of swearing the oath.

Subsection (2) requires members to take the oath at a meeting of the Parliament and prohibits them from taking part in any other proceedings (including proceedings in committees and sub-committees - see section 126) until they have done so.

Subsection (3) provides that, if a member has not taken the oath within two months after the date of being returned, he will cease to be a member of the Parliament and his seat will become vacant. The Parliament may extend the two month period, but can only do so before the 2 month period expires.

Subsection (4) requires the First Minister and the other Scottish Ministers including the Lord Advocate and the Solicitor General to take the official oath and the oath of allegiance on appointment. They may make a corresponding affirmation under the Oaths Act 1978. The official oath, as set out in section 3 of the Promissory Oaths Act 1868, is as follows:

“I do swear that I will well and truly serve Her Majesty Queen Elizabeth in the Office of . . . . so help me God.

This is the same oath as is sworn by Ministers in the UK Government.

Subsection (5) provides for members appointed as junior Scottish Ministers to take the oath of allegiance on appointment.

Subsection (6) dispenses with the need for the Scottish Ministers including the Lord Advocate, the Solicitor General and junior Scottish Ministers to take the oath of



allegiance when appointed as members of the Executive if they have already taken it as elected members of the Parliament under subsection (1). The Lord Advocate and Solicitor General must take the oath of allegiance if they are not members of the Parliament.

Subsection (7) provides that the oath of allegiance referred to in the section is that provided by the Promissory Oaths Act 1868. This is the same as that used in the UK Parliament namely:

“I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law. So help me God.

Procedures for the taking of the oath of allegiance in the Parliament are contained in the Standing Orders of the Parliament.

See also the provisions in section 287(6) of the Criminal Procedure (Scotland) Act 1995 (as amended by [S.I. 1999/1042](#)) in relation to the taking of the oath of office by the Lord Advocate and Solicitor General.

SECTION 85: Exemption from jury service

### **Purpose and Effect**

This section provides for members of the Parliament and the Scottish Executive to be exempt from jury service in Scotland and England and Wales.

### **General**

This section parallels arrangements which apply to members of the UK Parliament and UK Ministers to ensure that the performance of their public duties is not impaired by the need to serve on a jury.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 348           |

### **Details of Provisions**

Subsection (1) provides for members of the Parliament, members of the Scottish Executive and junior Scottish Ministers to be excused jury service as of right in England and Wales.

Subsection (2) provides for those listed above to be excused jury service as of right in Scotland.

Exemption from jury service in Northern Ireland has been provided for by making equivalent amendments to the Juries (Northern Ireland) Order 1996 ([S.I. 1996/1141](#)) in paragraph 23 of Schedule 1 to the Scotland Act 1998 (Consequential Modifications) (No. 1) Order 1999 ([S.I. 1999/1042](#)). Paragraphs 7, 9 and 23 also provide exemption from jury service for the Auditor General for Scotland.

While all those listed above are entitled as of right to be excused jury service they could serve if they so wished.

SECTION 86: Scottish representation at Westminster

### **Purpose and Effect**

This section removes the provision in the rules for the redistribution of seats by the Boundary Commission which requires a minimum number of Scottish seats in the House of Commons. This will take effect at the next general review by the Boundary

Commission for Scotland and will require that Commission then to adopt an electoral quota for Scotland in line with that for England at the time of that review. This will reduce the number of MPs for Scottish constituencies at Westminster. The section also prohibits the Commission from combining the Orkney Islands or the Shetland Islands in a constituency which includes another part of Scotland.

## **General**

The Parliamentary Constituencies Act 1986 provides that the constituencies of the UK Parliament into which each part of the United Kingdom is to be divided should be arrived at by means of a review undertaken by the Boundary Commission for that part of the United Kingdom. The 1986 Act provides for Boundary Commissions for England, Scotland, Wales and Northern Ireland and sets out the rules that the Commissions must follow when conducting a review of Parliamentary constituencies.

These functions of the Boundary Commission are due to be transferred to the Electoral Commission established under section 1 of the [Political Parties, Elections and Referendums Act 2000 \(c. 41\)](#) by virtue of section 16 and the amendments made by Schedule 3 to that Act. The function of carrying out reviews of the seats in Scotland will be carried out by the Boundary Committee for Scotland established by the Electoral Commission under section 14 of that Act. A date has not yet been appointed as to when these provisions of the 2000 Act will be brought into force. These notes therefore describe the position as it exists at present under section 86, as originally enacted.

Rule 1(1) of those rules provides that the number of constituencies in Great Britain shall not be substantially greater or less than 613. Sub-paragraphs (2) to (4) provide minimum numbers of constituencies for Scotland, Wales and Northern Ireland respectively. A maximum is also provided for Northern Ireland only. In particular, sub-paragraph (2) provides that the number of constituencies in Scotland shall not be less than 71. Since 1983 there have been 72 Scottish seats.

Rule 5 stipulates that, subject to certain other rules, the electorate of each constituency shall be as near the electoral quota as is practicable. The other rules the Commission may take into account include any special geographical considerations, in particular size, shape and accessibility. These considerations are also taken account of by the other Boundary Commissions.

Rule 8 of the 1986 Act defines electoral quota as “a number obtained by dividing the electorate for that part of the United Kingdom by the number of constituencies in it existing on the enumeration date”. The rules also provide that the “enumeration date” is the date on which the notice informing the Secretary of State of an intended report is published (in Scotland in the Edinburgh Gazette).

Section 3 of the 1986 Act provides that the Commission is required to submit a report to the Secretary of State showing the constituencies into which it recommends Scotland should be divided, not less than 8 or more than 12 years from the date of the submission of its last report. The Commission submitted its last report in December 1994. Its next mandatory report, therefore, is due to be submitted between December 2002 and December 2006.

The result of applying the current rules has been that the average number of electors per constituency in Scotland is lower than that for the rest of the United Kingdom. In 1997 Scotland had an average of 55,339 electors per constituency; Wales 55,563; Northern Ireland 66,122; and England 69,578. The average electorate per constituency in the United Kingdom as a whole was 67,077. The effect of this section will be to reduce the number of MPs at Westminster from Scottish constituencies and to bring Scotland's average electorate substantially into line with that for England.

The White Paper set out the intention that the constituencies of the Scottish Parliament would be the same as those for elections to Westminster except in the case of Orkney

and Shetland. Orkney and Shetland form one Westminster constituency but would be 2 constituencies, matching the local government areas, for the Scottish Parliament. Any changes made to the Westminster constituencies would subsequently be reflected in the constituencies for the Scottish Parliament. In order to maintain Orkney Islands and Shetland Islands as separate constituencies for elections to the Scottish Parliament, it is necessary to prevent the Boundary Commission from combining either of those local government areas with any other local government area in Scotland to create a constituency.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 10-Feb-98   | 160           |
| CC           | 4-Mar-98    | 1079          |
| LC           | 6-Oct-98    | 352           |
| LC           | 6-Oct-98    | 360           |
| LR           | 28-Oct-98   | 2065          |
| LR           | 28-Oct-98   | 2068          |
| L3           | 9-Nov-98    | 548           |
| L3           | 9-Nov-98    | 557           |
| L3           | 9-Nov-98    | 562           |
| L3           | 9-Nov-98    | 569           |

### **Details of Provisions**

Subsection (1) introduces the amendments made by the section to the Parliamentary Constituencies Act 1986.

Subsection (2) removes the requirement in the rules for a minimum number of Scottish constituencies.

Subsection (3) provides a new rule 3A to the effect that when undertaking a review of Westminster constituencies, the Parliamentary Boundary Commission for Scotland cannot, in any constituency containing the Orkney islands or Shetland Islands, include the whole or any other part of a local government area other than those 2 areas.

Subsection (4) provides that, for the Scottish Commission's next mandatory review only, the electoral quota to be used is the electoral quota for England on the enumeration date for the Scottish review. After the Commission's next mandatory review it would revert to using the Scottish quota as defined in rule 5.

Subsection (5) makes provision consequential on subsection (3), in particular making it clear that the Commission have to comply with the new rule 3A inserted by that subsection.

SECTION 87: The Advocate General for Scotland

### **Purpose and Effect**

This section makes such provision as is necessary for the establishment of the new Ministerial post of the Advocate General for Scotland, the Scottish Law Officer to the UK Government.

## **General**

The Scottish Law Officers to the UK Government prior to devolution were the Lord Advocate and the Solicitor General for Scotland. However, these offices became part of the Scottish Executive. Section 44 provides for the Lord Advocate and Solicitor General to be members of the Scottish Executive and section 48(6) has the effect of providing that their offices ceased to be part of the UK Government. This took place on 20th May 1999. Section 48 makes provision for their appointment and for the disengagement of their posts from the UK Government.

The Law Officer functions of the Lord Advocate which he had immediately before that date and which related to reserved matters were transferred to the Advocate General. In the case of statutory functions this was done by the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999 ([S.I. 1999/679](#)).

There are other references to the functions of the Advocate General in sections 32 and 33 (submission of Bills for Royal Assent and scrutiny of Bills by the Judicial Committee of the Privy Council); Schedule 6 (devolution issues); and the amendments to the Crown Suits (Scotland) Act 1857 and the Crown Proceedings Act 1947 made by Schedule 8.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 378           |

## **Details of Provisions**

Subsection (1) inserts a reference to the Advocate General for Scotland in the list of Ministerial offices in Schedule 2 of the House of Commons Disqualification Act 1975. Section 2 of that Act limits the number of holders of the offices listed who are entitled to sit in the House of Commons at any one time. Subsection (1) also inserts the same reference in Part III of Schedule 1 to the Ministerial and other Salaries Act 1975, which lists the Law Officers to the UK Government and specifies their salaries. (Similar references to the Lord Advocate and Solicitor General for Scotland were removed by section 48(6)).

Subsection (2) provides that a vacancy in the office should not affect the validity of anything done in relation to it. This will ensure that, for example, legal proceedings are not disrupted if the post falls vacant.

Subsection (3) provides for another Minister of the Crown, to be determined by the Prime Minister in writing, to exercise the functions of the Advocate General if his office is vacant or he is unable to act.

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           |
| CR           | 12-May-98   | 244           |
| LC           | 6-Oct-98    | 383           |
| LC           | 6-Oct-98    | 384           |
| LC           | 6-Oct-98    | 386           |
| LC           | 6-Oct-98    | 387           |
| LC           | 6-Oct-98    | 388           |

## **Details of Provisions**

Subsection (1) disappplies 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 disappplied 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.

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.

SECTION 89: Power to adapt etc. cross-border public authorities

## **Purpose and Effect**

This section enables an Order in Council to make such provision in relation to a cross-border public authority (as defined under section 88) as is considered necessary or expedient in consequence of the Act. It allows arrangements to be tailor-made for allocating accountability and control between the UK Government and the Scottish Executive, and between the UK and Scottish Parliaments.

## **General**

This is the second of the set of three sections dealing with "cross-border public authorities". Section 88 provides for such cross-border public authorities to be designated by Order in Council, and for certain requirements to apply unless and until alternative provision is made under the present section, including a requirement on Ministers of the Crown to consult the Scottish Ministers before exercising certain statutory functions in relation to them and for reports to be laid before the Scottish Parliament as well as Westminster. Section 90 enables the transfer by Order in Council of property and liabilities of such an authority where an Act of the Scottish Parliament has provided for any of its functions to be no longer exercisable in or as regards Scotland.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 4-Mar-98    | 1135          |
| CR           | 12-May-98   | 197           |
| LC           | 6-Oct-98    | 388           |
| LR           | 28-Oct-98   | 2071          |
| LR           | 28-Oct-98   | 2072          |

## **Details of Provisions**

Subsection (1) confers a power for Her Majesty, by Order in Council, to make such provision in relation to a cross-border public authority as She considers necessary or expedient in consequence of the Act.

Subsection (2) provides that the Order in Council under subsection (1) can, in particular, provide for:

modifying any function of a cross-border public authority or of a Minister of the Crown in relation to such an authority. This can be used, for example, to provide for an authority's functions to be separately exercisable in or as regards Scotland, so that it can be separately accountable to the Scottish Ministers and the Parliament;

conferring any function on a cross-border public authority or on a Minister of the Crown or the Scottish Ministers in relation to such an authority;

modifying the constitution of such an authority;

modifying the application of:

section 88(1), which disapplies sections 53 (transfer of functions) and 118 to 121(subordinate instruments; Consolidated Fund; Accounts & Audit; Laying of Reports) in relation to functions specifically exercisable in relation to a cross-border public authority, and disapplies section 118 in relation to any function of a cross-border public authority;

section 88(2), which requires consultation with the Scottish Ministers before the exercise of certain functions;

section 88(3), which provides for the laying of reports relating to a cross-border public authority before the Scottish Parliament; and

section 56(4), which allows a Minister of the Crown and the Scottish Ministers to exercise certain non-statutory powers jointly to establish, maintain or abolish bodies, offices and office-holders;



functions to be transferred from a Minister of the Crown to the Scottish Ministers, or by the one concurrently with the other, or by both jointly, or by either with the agreement of or after consultation with the other. This can be used, for example, to provide that appointment or decision-making powers are transferred to the Scottish Ministers;

apportioning assets or liabilities;

imposing or enabling the imposition of, new limits or restrictions (for example on the size of grants payable by a body); and

alteration of financial arrangements, by providing for sums to be charged on or payable out of, or paid into, the Scottish Consolidated Fund and requiring payments to a Minister of the Crown or into the Consolidated Fund or the National Loans Fund.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7. In particular, an Order in Council under section 89 is subject to procedure in both the Scottish and United Kingdom Parliaments. It is subject to negative procedure unless it contains provisions which amend the text of an Act, in which case it is subject to affirmative procedure.

Subsection (3) requires the cross-border public authority concerned to be consulted before a recommendation is made to Her Majesty in Council to make an Order under this section.

This power has been exercised up to September 2001 as follows:

The Scotland Act 1998 (Cross-Border Public Authorities)(Adaptation of Functions etc.) Order 1999 ([S.I. 1999/1747](#));

The Scotland Act 1998 (Cross-Border Public Authorities)(Forestry Commissioners) Order 12000 ([S.I. 2000/746](#));

The Scotland Act 1998 (Cross-Border Public Authorities)(Adaptation of Functions etc.) Order 2000 ([S.I. 2000/1102](#));

The Scotland Act 1998 (Cross-Border Public Authorities)(British Wool Marketing Board) Order 2000 ([S.I. 2000/1113](#));

The Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No.2) Order 2000 ([S.I. 2000/3251](#)).

## SECTION 90: Power to transfer property of cross-border public authorities

### **Purpose and Effect**

This section enables an Order in Council to provide for the transfer of property and liabilities of a cross-border public authority where an Act of the Scottish Parliament has provided for any of its functions to be no longer exercisable in or as regards Scotland.

### **General**

This is the third of three sections dealing with cross-border public authorities. Section 88 provides for such authorities to be designated by Order in Council. Section 89 enables arrangements for accountability and control to be tailor-made for particular cross-border authorities. The present section makes provision for the circumstance when the Scottish Parliament legislates to remove the devolved Scottish functions of a cross-border public authority. This is most likely to occur because of decision to set up a separate, Scottish, authority. It may be appropriate for some of the property or liabilities to be transferred. This section enables this to be done. Section 116(2)(c) makes clear that such an order can make provision about the tax treatment of such transfers.



## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 197           |
| CC           | 4-Mar-98    | 1135          |

## **Details of Provisions**

Subsection (1) defines the circumstances when the section is applicable. These are when an Act of the Scottish Parliament has provided for any of the functions of a cross-border public authority (an authority specified by an Order in Council made under section 88) to be no longer exercisable in or as regards Scotland.

Subsection (2) provides that an Order in Council can transfer any property (defined in section 126(1) as including rights and interests of any description) to which the section applies and can provide that any person will have rights and interests in relation to such property.

Subsection (3) defines the property to which the section applies - essentially that belonging to a cross-border public authority which appears to be used in relation to the functions which are no longer to be exercisable in or as regards Scotland (or which, when last used in connection with the exercise of any function, was used in relation to the functions no longer to be exercisable in or as regards Scotland).

Subsection (4) provides that an Order in Council can also transfer liabilities of a cross-border public authority which appear to have been incurred for or in connection with the exercise of functions which are no longer to be exercisable in or as regards Scotland.

Subsection (5) requires the cross-border public authority concerned to be consulted before a recommendation is made to Her Majesty in Council to make an Order under this section.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7. In particular, an Order under section 90 is subject to negative procedure in both the Scottish and United Kingdom Parliaments, unless it contains provisions which amend the text of an Act, in which case it is subject to affirmative procedure in both Parliaments.

Similar provision to section 90 is also made in section 33 of the [Food Standards Act 1999 \(c.28\)](#) in relation to the Food Standards Agency and in section 70 (2) of the [Care Standards Act 2000 \(c.14\)](#) in relation to the Central Council for Education and Training in Social Work.

SECTION 91: Maladministration

## **Purpose and Effect**

This section imposes a duty on the Scottish Parliament to provide for the investigation of certain complaints of maladministration in connection with action taken by or on behalf of members of the Scottish Administration. In making such provision, the Parliament is required to take account of the Parliamentary Commissioner Act 1967. It also provides that the Parliament may make provision for the investigation of complaints in respect of office-holders in the Scottish Administration, the Scottish Parliamentary Corporate Body, Scottish public authorities and action taken by cross-border public authorities in connection with devolved matters.

## **General**

This section imposes a duty on the Parliament to provide for the investigation of certain complaints of maladministration, and provides that the Parliament may make

further provision. Prior to the Parliament making its own provision, the office of Scottish Parliamentary Commissioner for Administration was created to investigate complaints made against members of the Scottish Administration, Scottish public authorities, cross-border public authorities (in connection with devolved matters), and the Scottish Parliamentary Corporate Body under the Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Order 1999 ([S.I. 1999/1351](#)), as amended by [S.I. 1999/1595](#).

As a consequence, devolved public authorities were removed from the jurisdiction of the Parliamentary Commissioner for Administration by amendments made to the Parliamentary Commissioner Act 1967 by [S.I. 1999/1820](#).

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 4-Mar-98    | 1140          |
| CR           | 19-May-98   | 774           |
| LC           | 6-Oct-98    | 397           |
| LR           | 2-Nov-98    | 11            |
| L3           | 9-Nov-98    | 586           |

### **Details of Provisions**

Subsection (1) requires the Parliament to make provision for the investigation of “relevant” complaints made to members about any action taken by or on behalf of a member of the Scottish Executive in the exercise of functions conferred on the Scottish Ministers, or by or on behalf of any other office-holder in the Scottish Administration.

Subsection (2) defines what is a “relevant complaint”. The Parliament’s duty extends to providing for the investigation of those kinds of complaints which could be investigated under the Parliamentary Commissioner Act 1967. This, for example, specifically excludes complaints relating to the commencement or conduct of civil or criminal proceedings before any court of law in the United Kingdom.

Subsection (3) provides that the Parliament may make provision for the investigation of complaints in respect of:

- (a) any action taken by or on behalf of an office-holder in the Scottish Administration;
- (b) any action taken by or on behalf of the Parliamentary corporation;
- (c) any action taken by or on behalf of a Scottish public authority with mixed functions or no reserved functions; and
- (d) any action concerning Scotland and not relating to reserved matters which is taken by or on behalf of a cross-border public authority.

Subsection (4) read together with subsection (6) requires the Parliament, in making provision under subsection (1), to have regard among other things to the provisions of the Parliamentary Commissioner Act 1967 as it has effect on the commencement of this section.

Subsection (5) provides that certain sections of the Act related to the transfer of functions to the Scottish Ministers will not apply to functions conferred by or under the Parliamentary Commissioner Act 1967. The relevant sections are:

|    |                                |
|----|--------------------------------|
| 53 | General transfer of functions; |
|----|--------------------------------|

|     |   |
|-----|---|
| 117 | Ministers of the Crown;                             |
| 118 | Subordinate legislation;                            |
| 119 | Consolidated Fund, etc.;                            |
| 121 | Requirements to lay reports etc. before Parliament. |

Subsection (6) defines “action” in this context as including failure to act, and defines “provision” in this context as provision by an Act of the Scottish Parliament.

#### SECTION 92: Queen’s Printer for Scotland

### **Purpose and Effect**

This section provides for the establishment of an office of Queen’s Printer for Scotland (QPS). The QPS will be responsible for exercising the functions of the Queen’s Printer in relation to Acts of the Scottish Parliament and subordinate legislation and any other statutory functions conferred on the QPS. The QPS also has the function of exercising all rights and privileges of Her Majesty in respect of copyright in Acts of the Scottish Parliament, devolved subordinate legislation and other “Scottish works” including works made by the Scottish Administration and existing works made in the exercise of functions which will be exercisable by the Scottish Administration. The QPS is part of the Scottish Administration..

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 2-Nov-98    | 11            |

### **Details of Provisions**

Subsection (1) provides for the establishment of an office of Queen’s Printer for Scotland (QPS). The QPS is responsible for exercising the functions of the Queen’s Printer in relation to Acts of the Scottish Parliament and subordinate legislation and any other statutory functions conferred on the QPS

The intention is to ensure that the Scottish Parliament and the Scottish Administration have an appropriate degree of policy control over the arrangements for publication and printing of Acts of the Scottish Parliament and material produced by the Scottish Administration.

The Queen’s Printer of Acts of Parliament is, by virtue of the Letters Patent by which she is appointed, responsible for exercising all of Her Majesty’s rights and privileges in respect of copyright. The Office of Queen’s Printer of Acts of Parliament is held by a civil servant in the UK Government, appointed on recommendation by the head of the Home Civil Service and effectively subject to policy directions given by the UK government. It was considered inappropriate for the question as to how “Scottish works” may be published to be subject to the control of the Queen’s Printer acting in accordance with policy arrangements laid down by the UK Government with expenditure being met from the Consolidated Fund and income being accountable to that Fund.

The functions of the QPS, as set out in subsection (3), are to be responsible for exercising printing functions in relation to ASPs and devolved subordinate legislation and to exercise all rights and privileges of Her Majesty in respect of copyright in “Scottish works” such as Acts of the Scottish Parliament, subordinate legislation and any other works copyright in which belongs to Her Majesty where Her Majesty has acquired that

copyright for the purposes of or in connection with the functions of any part of the Scottish Administration.

Subsection (5) provides that the QPS is to be the same person who holds office as the Queen's Printer. The Queen's Printer also holds the office of Government Printer for Northern Ireland. This will ensure a degree of consistency and coherence in the approach taken to the publication of statute law in the UK and the administration of the rules of Crown copyright.

As a Scottish public authority and part of the Scottish Administration, the Parliament will have competence in relation to the funding and receipts of the QPS and so any expenditure in connection with the QPS functions could be met out of the Scottish Consolidated Fund (SCF) and any receipts paid into the SCF. The Scottish Parliament is able to legislate to confer functions on QPS in addition to those conferred by the Act and could provide for the Scottish Ministers to give directions in connection with the exercise of those functions. This enables the Parliament to make provision as to the numbering and citation of Acts of the Scottish Parliament. The Parliament will also be able to summon the QPS.

Further functions in connection with the printing of Acts of the Scottish Parliament and the numbering and printing etc. of Scottish Statutory Instruments are conferred on the Queen's Printer for Scotland by the Scotland Act 1998 (Transitory and Transitional Provisions)(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 ([S.I. 1999/1379](#)) and the Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999 ([S.I. 1999/1096](#)).

SECTION 93: Agency arrangements

### **Purpose and Effect**

This section enables a UK Minister and the Scottish Ministers to make arrangements to exercise functions on behalf of each other, on the basis that Ministerial responsibility for the exercise of a function is not affected by such an arrangement. The function concerned must be specified in an Order in Council, subject to procedure in both the United Kingdom and Scottish Parliaments, and cannot include any function of making, confirming or approving subordinate legislation.

### **General**

From time to time, it may make sense for Ministers of one administration, often in practice through their officials, to exercise the functions of Ministers of the other. This section enables that to happen. For example, it permits a department of the UK Government to administer a scheme of licensing on behalf of the Scottish Ministers.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 398           |
| LC           | 6-Oct-98    | 398           |

### **Details of Provisions**

Subsection (1) provides that arrangements may be made between the Scottish Ministers and a Minister of the Crown for the agent to exercise certain functions on behalf of the principal.

Subsection (2) provides that such an arrangement does not affect a person's responsibility for the exercise of his functions.

Subsection (3) provides that the functions concerned are those specified in an Order in Council made under this sub-section, and do not include functions of making, confirming or approving subordinate legislation. It also provides that “Minister of the Crown” includes government department, and that the section applies to the Lord Advocate as it applies to the Scottish Ministers.

This power has been exercised up to September 2001 in making:

The Scotland Act 1998 (Agency Arrangements)(Specification) Order 1999 ([S.I. 1999/1512](#));

The Scotland Act 1998 (Agency Arrangements)(Specification) (No. 2) Order 1999 ([S.I. 1999/3320](#));

The Scotland Act 1998 (Agency Arrangements)(Specification) Order 2000 ([S.I. 2000/745](#));

The Scotland Act 1998 (Agency Arrangements) (Specification) (No.2) Order 2000 ([S.I. 2000/3250](#)).

## SECTION 94: Private legislation

### Purpose and Effect

The purpose of this section is to modify pre-commencement enactments, which require any provisional order to be subject to an Act of Parliament or any special procedure order to special parliamentary procedure, where the power to make, confirm or approve that order is exercisable by the Scottish Ministers by virtue of section 53. These are special kinds of private legislation. The modifications require such orders to be confirmed by an Act of the Scottish Parliament or, as the case may be, to be subject to special procedures in the Scottish Parliament rather than the UK Parliament.

### General

This section should be read with:

- (a) section 36(3) which provides that the standing orders may, in relation to different types of Bill (including Private bills), modify the provisions made by the standing orders in pursuance of section 36(1) as to the stages of Bill procedure. Private Bill procedure is now provided for in of the Standing Orders of the Parliament;
- (b) section 53 which deals with the general transfer of functions to the Scottish Ministers and which defines “pre-commencement enactment”;
- (c) section 118 in relation to the exercise by a member of the Scottish Executive of a function to make, confirm or approve subordinate legislation;
- (d) Schedule 4, paragraph 1(2)(b) which provides that an Act of the Scottish Parliament cannot modify (or confer power to modify) the Private Legislation Procedure (Scotland) Act 1936; and
- (e) Schedule 8, paragraph 5, which amends the Private Legislation Procedure (Scotland) Act 1936, so that it does not apply where the conferral of the parliamentary powers sought is wholly within the legislative competence of the Scottish Parliament. Further amendments to the Private Legislation Procedure (Scotland) General Orders 1946 were made by paragraph 135 of Schedule 2 to [S.I. 1999/1820](#).

### Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 21-Jul-98   | 818           |

## **Details of Provisions**

Subsection (1) specifies the provisions to which the modifications in subsection (2) apply. These are provisional orders (which require to be confirmed by Act of Parliament) and special procedure orders (within the meaning of the Statutory Orders (Special Procedure) Act 1945 and which require to be subject to special parliamentary procedure) under any pre-commencement enactment where the power to make, confirm or approve such an order is exercisable by the Scottish Ministers by virtue of section 53.

Subsection (2) makes modifications to ensure that such provisional orders become subject to confirmation by an Act of the Scottish Parliament rather than an Act of the UK Parliament and for such special procedure orders to be subject to such special procedure as may be provided for by the Scottish Parliament rather than the special parliamentary procedure provided by the UK Parliament in the 1945 Act.

Transitional arrangements for special procedure orders were provided by the Scotland Act 1998 (Orders subject to Special Parliamentary Procedure) Order 1999 ([S.I. 1999/1593](#)) prior to the Scottish Parliament making its own provisions.

SECTION 95: Appointment and removal of judges

## **Purpose and Effect**

This section sets out the roles of the Prime Minister and the First Minister in the appointment and removal of members of the Scottish Judiciary. It provides that the Prime Minister will continue to exercise the role of recommending the appointment by Her Majesty of the Lord President of the Court of Session and the Lord Justice Clerk but on the basis of nominations from the First Minister following consultation with the Lord President and the Lord Justice Clerk. Other judges of the Court of Session, sheriffs and sheriffs principal are appointed by Her Majesty on the recommendation of the First Minister, after consultation with the Lord President.

This section also sets out a statutory framework for the removal of judges. It provides that a judge of the Court of Session and the Chairman of the Scottish Land Court may be removed from office only by Her Majesty on the recommendation of the First Minister. The First Minister may make such a recommendation only if a tribunal constituted for these purposes resolves that a judge is unfit for office by reason of inability, neglect of duty or misbehaviour and if the Parliament resolves, on a motion made by the First Minister, that a recommendation should be made.

## **General**

This section is one of a number of provisions which implement the White Paper proposals in relation to the judiciary and provide safeguards for their independence. Section 23(7) exempts judges from the Scottish Parliament's power to call witnesses or require the production of documents. Under Section L1 of Schedule 5 the determination of senior judicial salaries and pensions are reserved matters. This will allow pay awards to continue to be based on recommendations of the Senior Salaries Review Body.

The provisions in the present section for the removal of a judge of the Court of Session rectified the anomaly that, unlike in the rest of the UK, there were no powers to remove such a judge from office. Powers already exist for the removal from office of sheriffs principal and sheriffs (section 12 of the Sheriff Courts (Scotland) Act 1971) and the relevant functions in the 1971 Act transferred to the Scottish Ministers and Scottish Parliament. The arrangements for the removal of judges are based on the model already used for sheriffs.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CC           | 4-Mar-98    | 1150          |
| CC           | 4-Mar-98    | 1151          |
| CR           | 19-May-98   | 775           |
| LC           | 6-Oct-98    | 398           |
| LC           | 6-Oct-98    | 399           |
| LC           | 6-Oct-98    | 400           |
| LC           | 6-Oct-98    | 409           |
| LC           | 6-Oct-98    | 415           |
| LC           | 6-Oct-98    | 416           |
| LR           | 2-Nov-98    | 17            |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| LR           | 2-Nov-98    | 41            |
| L3           | 9-Nov-98    | 586           |
| L3           | 9-Nov-98    | 590           |
| LCCLA        | 17-Nov-98   | 1176          |

## **Details of Provisions**

Subsection (1) provides that it will continue to be for the Prime Minister to recommend to Her Majesty the appointment of a person as Lord President of the Court of Session or Lord Justice Clerk.

Subsection (2) provides that the candidates for these two senior judicial posts put forward by the Prime Minister require to have been nominated by the First Minister.

Subsection (3) provides that, before making such a nomination, the First Minister shall consult the Lord President and the Lord Justice Clerk (unless, in either case, the office is vacant).

Subsection (4) provides that it is for the First Minister, after consulting the Lord President, to recommend candidates to Her Majesty for appointment as judges of the Court of Session (other than the Lord President or the Lord Justice Clerk) or as sheriffs or sheriffs principal.

Subsection (5) provides that the First Minister shall comply with any requirement imposed by virtue of any enactment in relation to a nomination for the appointment of a person as Lord President or Lord Justice Clerk, or a recommendation for the appointment of a person as a judge of the Court of Session, sheriff principal or sheriff. This will allow the Parliament to impose further requirements on the First Minister in relation to nominations and recommendations.

Subsection (6) provides that a judge of the Court of Session and the Chairman of the Scottish Land Court can only be removed from office by Her Majesty on the recommendation of the First Minister. Paragraph 29 of Schedule 8 amends the Scottish Land Court Act 1993 in connection with the appointment of members of the Scottish Land Court.



Subsection (7) requires that the First Minister shall make a recommendation for the removal of such a judge if (and only if) the Parliament, on a motion made by the First Minister passes a resolution that the judge should be removed. The Standing Orders of the Parliament make further provision in this regard.

Subsection (8) requires provision to be made for a tribunal constituted by the First Minister to investigate and report on whether a judge of the Court of Session or the Chairman of the Scottish Land Court is unfit for office by reason of inability, neglect of duty or misbehaviour and the report to be laid before the Parliament. This provision is to be made by or under an Act of the Scottish Parliament.

Subsection (9) requires the provision made for the tribunal to include provision for the constitution of the tribunal by the First Minister when requested by the Lord President as well as in such other circumstances as the First Minister thinks fit. It also provides that the tribunal should be chaired by a member of the Judicial Committee of the Privy Council (limited to the same composition of the Committee as provided for in section 103(2) in relation to devolution cases). Provision may be made for a judge to be suspended from office.

Subsection (10) provides the circumstances in which the First Minister can make a motion recommending the removal of a judge. Such a motion can only be made if the First Minister has received a written report from the tribunal concluding that the judge is unfit for office by reason of inability, neglect of duty or misbehaviour. If the motion concerns the Lord President or the Lord Justice Clerk, the First Minister must consult the Prime Minister. The subsection also provides that the First Minister should comply with any other requirement imposed by virtue of any enactment (including an Act of the Scottish Parliament).

Subsection (11) defines provision for the purposes of section 95 as meaning a provision by or under an Act of the Scottish Parliament. It defines tribunal for the purposes of this section as a tribunal of at least three persons.

Until the Parliament made its own provision for a tribunal, transitional arrangements were put in place by the Scotland Act 1998 (Transitory and Transitional Provisions) (Removal of Judges) Order 1999 ([S.I. 1999/1017](#)).

SECTION 96: Provision of information to the Treasury

### **Purpose and Effect**

The purpose of this section is to enable the Treasury to obtain such information from the Scottish Ministers as it may reasonably require. If the information is not within the possession or control of the Scottish Ministers, they are required to take all reasonable steps to comply with the requirement.

### **Details of Provisions**

Subsection (1) provides that the Treasury may require the Scottish Ministers to provide such information, within such period and in such a form and manner, as the Treasury may reasonably specify. This is necessary so as to enable the Treasury to obtain such information as it may require to, for example, monitor expenditure or compile other macroeconomic information on a UK basis.

Subsection (2) provides that if the information is not in their possession or under their control, the duty of the Scottish Ministers under subsection (1) is to take all reasonable steps to comply with the requirement.

SECTION 97: Assistance for opposition parties

### **Purpose and Effect**

This section confers a power on Her Majesty, by Order in Council, to make provision for the Scottish Parliamentary Corporate Body to make payments, out of the Scottish



Consolidated Fund, to any opposition registered political party represented in the Scottish Parliament to assist their MSPs in performing their parliamentary duties.

The power is intended to make provision similar to that made in the House of Commons for the payment of “Short Money”. Short money is generally applied to the opposition parties to obtain research and support facilities for Opposition Front Bench spokesmen, assistance in the Opposition Whips Office and other staff for the Leader of the Opposition. It is intended to counterbalance the facilities available to the Government through the Civil Service.

The power conferred by this section was exercised in making the Scottish Parliament (Assistance for Registered Political Parties) Order 1999 ([S.I. 1999/1745](#)).

Paragraph 6 of Part 1 of Schedule 5 reserves the registration and funding of political parties. However, that paragraph was modified by the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 ([S.I. 1999/1749](#)) so that “making payments to any political party for the purpose of assisting members of the Parliament who are connected with the party to perform their Parliamentary duties” is excepted from the reservation. That order also provided that section 97 is not to be among the provisions of the Scotland Act which is protected by paragraph 4 of Schedule 4 from modification by the Scottish Parliament.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 2-Nov-98    | 72            |

### **Details of Provisions**

Subsection (1) provides that Her Majesty may by Order in Council provide for the Scottish Parliamentary Corporate Body to make payments to registered political parties to assist their MSPs in performing their parliamentary duties. These payments would be made out of the Scottish Consolidated Fund.

Subsections (2) and (3) restrict the power of the SPCB to make payments in pursuance of an order under subsection (1). Under subsection (2) payment is restricted to those parties who do not have one or more of its members as a member of the Scottish Executive or junior Scottish Ministers. However subsection (3) provides that the Order in Council under subsection (1) may provide for the fact that an MSP is a member of the Scottish Executive or a junior Scottish Minister to be disregarded in any circumstances which may be specified in the Order.

Subsection (4) provides the Order may determine the circumstances in which a member of the Parliament and a party are regarded as connected for the purposes of this section. This is intended to deal with situations such as where a member ceases to be associated with a party but remains a member of the Parliament.

SECTION 98: Devolution issues

### **Purpose and Effect**

This section gives effect to Schedule 6 to the Act, which defines devolution issues and makes provision for the special procedures to apply where they arise in legal proceedings.

### **General**

This section forms part of the set of provisions which deal with the power of the Judicial Committee of the Privy Council and the other courts in Scotland, England and Wales and Northern Ireland to deal with disputes about the *vires* (or legal competence) of Acts

of the Scottish Parliament; secondary legislation made under its auspices; and actions of members of the Scottish Executive.

Section 102 provides for a court or tribunal to limit the retrospective effect, or suspend the effect, of a finding of *ultra vires*. Section 103 provides for the membership of the Judicial Committee in devolution cases and for the conferring of certain powers on the Judicial Committee in relation to such proceedings.

### **Details of Provisions**

Section 98 simply introduces Schedule 6. See the separate note on Schedule 6 for further information.

SECTION 99: Rights and liabilities of the Crown in different capacities

### **Purpose and Effect**

Section 99 provides for legal relations to arise between the Crown in right of Her Majesty's Government in the UK and the Crown in right of the Scottish Administration. It provides that rights and liabilities may arise between the Crown in such different capacities by virtue of a contract, by operation of law or by virtue of an enactment and that property and liabilities can be transferred between them as if they were subjects. It also provides that the Crown can sue each other in such different capacities in respect of such property and liabilities or in respect of the exercise of, or failure to exercise, any function exercisable by an office holder of the Crown in one of those capacities. This will enable the Scottish Ministers, in appropriate cases, to sue a Minister in the UK Government (or vice versa) in contract or in delict or to seek judicial review of the exercise, or failure to exercise, of some function by that Minister.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 2-Nov-98    | 74            |

### **General**

Section 99 ensures that the two manifestations of the Crown, as the UK Government and as the Scottish Administration, are placed in the same relationship to each other as they would be if they were not the Crown but two subjects. Legal relationships can be created between them and they are able to enforce any rights or obligations created. Without this provision, the doctrine of Crown indivisibility would have meant that it would not be possible to create legally enforceable obligations, as the two would have been regarded as parts of the same body.

The Crown Suits (Scotland) Act 1857, as amended by paragraph 2 of Schedule 8, provides for the Lord Advocate to represent the Scottish Administration (or any part of it) and for the Advocate General for Scotland to represent the UK Government in Scottish legal proceedings. Amendments are also made to the Crown Proceedings Act 1947 by paragraph 7 of Schedule 8 to differentiate between Crown proceedings where the proceedings are by or against any part of the Scottish Administration and where they are by or against the UK Government.

### **Details of Provisions**

Subsection (1) provides that rights and liabilities may arise between the Crown in right of Her Majesty's Government in the UK and the Crown in right of the Scottish Administration by virtue of a contract, by operation of law, or by virtue of enactment as they may arise between subjects.

Subsection (2) provides that property and liabilities may be transferred between the Crown in such different capacities as between subjects and that they may create, vary or extinguish any property or liability as subjects may.

Subsection (3) provides that judicial proceedings in respect of property or liabilities of the Crown or the exercise of functions of office-holders of the Crown may be instituted by the Crown in either capacity and the Crown in the other capacity may be a party to the proceedings. In appropriate cases, the Advocate General, as representing the Secretary of State, could for example institute proceedings in contract or delict against the Lord Advocate, as representing Scottish Ministers or seek judicial review of some decision taken by Scottish Ministers, such as to appoint staff in breach of the provisions referred to in section 51(3).

Subsection (4) provides that section 99 applies to a unilateral obligation as it applies to a contract. This is because, under Scots law, legal obligations can arise, in certain cases, as a result of a promise or undertaking.

Subsection (5) defines an “office-holder” in relation to the Crown in right of Her Majesty’s Government in the United Kingdom as any Minister of the Crown or other office-holder under the Crown in that capacity and, in relation to the Crown in right of the Scottish Administration, as any office-holder in the Scottish Administration. It defines “subject” as a person not acting on behalf of the Crown.

SECTION 100: Human rights

### **Purpose and Effect**

The purpose of this section is to ensure that, so far as possible, there is compatibility between the Scotland Act and the Human Rights Act 1998 with regard to who would have title and interest to bring proceedings on the ground that an act of a member of the Scottish Executive is incompatible with the Convention rights and the amount of damages which may be awarded if such an act is incompatible.

### **General**

The Scotland Act has various devices which ensure that a member of the Scottish Executive would be acting *ultra vires* if he made any subordinate legislation or did any other act which is incompatible with any of the Convention rights - see, for example, section 57(2). The question whether an act by a member of the Scottish Executive is incompatible with Convention rights is a devolution issue and proceedings raising such questions attract the special procedures set out in Schedule 6.

This section provides that the only persons, apart from the Law Officers, who can bring proceedings on the ground that an act of a member of the Scottish Executive is incompatible with Convention rights or rely on Convention rights in proceedings are victims for the purposes of Article 34 of the Convention. This is similar to what is provided by section 7(1) of the Human Rights Act 1998. Article 34 requires applications to the European Court of Human Rights to be from “any person, non-governmental organisation or groups of individuals claiming to be a victim of a violation of a Convention right”.

This section also restricts the amount of damages which a court or tribunal may award in respect of such an act which is incompatible with Convention rights to the damages which could be awarded if section 8(3) and (4) of the Human Rights Act applied. Section 8(3) provides, in effect, that no award of damages should be made unless, taking account of all the circumstances of the case, the court is satisfied that “the award is necessary to afford just satisfaction to the person in whose favour it is made”. Section 8(4) provides that, in determining whether to award damages or the amount of the award, the court must take into account the principles applied by the European Court of Human Rights under Article 41 of the Convention.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 6-Oct-98    | 427           |
| LR           | 2-Nov-98    | 77            |
| L3           | 9-Nov-98    | 592           |

## **Details of Provisions**

Subsection (1) provides that the Scotland Act does not enable a person to bring proceedings in a court or tribunal on the grounds that an act is incompatible with the Convention rights or to rely on Convention rights in such proceedings unless he would be a “victim” for the purposes of Article 34 of the Convention (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights.

Subsection (2) provides that subsection (1) does not apply to the Law Officers (the Lord Advocate, the Advocate General, the Attorney General or the Attorney General for Northern Ireland). They will be able to bring such proceedings even although they are not victims.

Subsection (3) provides that the Scotland Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act 1998 applied.

Subsection (4) defines act for the purposes of this section. “Act” means (a) making any legislation and (b) any other act, or failure to act, of a member of the Scottish Executive.  
[Section 101](#): Interpretation of Acts of the Scottish Parliament

## **Purpose and Effect**

This section makes provision for the interpretation of an Act or a Bill of the Scottish Parliament, or of subordinate legislation made, confirmed or approved or purporting to be made confirmed or approved by a member of the Scottish Executive. The purpose of the section is to enable the courts to give effect to such legislation, wherever possible, rather than to invalidate it. It is intended to ensure that the courts will not invalidate such legislation merely because it could be read in such a way as to make it outside competence, such as outside the legislative competence of the Parliament or the competence of Scottish Ministers. It provides that, in that case, such legislation is to be read as narrowly as is required for it to be considered to be within competence, if such a reading is possible.

## **General**

This section is intended to assist the courts by providing a statutory interpretative rule when they are construing such Scottish legislation. Arguably, it does no more than replicate the normal common law rule of construction which the courts should apply when construing legislation which might be *ultra vires*, namely to seek, so far as it is possible to do so, to give effect to that legislation rather than invalidate it. This is sometimes called the principle of efficacy.

For example an ASP which purports to confer a power on the Scottish Ministers to hold a referendum on any matter could be read as enabling the Ministers to hold a referendum on independence or the Monarchy. Those are reserved matters and the ASP might therefore be read as relating to those reserved matters and therefore outside the legislative competence of the Parliament under section 29(2)(b). Rather than invalidating the ASP (or invalidating it to the extent that it could be so read), this section would require the ASP to be read, if it is possible to do so, as conferring a power to

hold a referendum only on matters within the competence of the Parliament. However, if a provision clearly cannot be read to be within competence, for example an ASP providing only for a referendum on independence, then the section will not allow it to be read as being within competence.

The section also provides that the interpretative provision should apply to the interpretation of the provisions of a Bill before the Scottish Parliament as well as to those of an ASP. It will therefore apply in any case where the Judicial Committee of the Privy Council are considering any reference to them of a Bill or of a devolution issue in connection with an ASP.

There are other statutory interpretative rules which the courts are required to apply when construing such Scottish legislation. For example:

- (a) section 2(4) of the European Communities Act 1972 would require such legislation to “be construed and have effect subject to the foregoing provisions of this section” - see the gloss on the meaning of enactment in that section by paragraph 15(2)(b) of Schedule 8 to the Scotland Act; and
- (b) section 3(1) of the Human Rights Act 1998 would require such legislation “so far as it is possible to do so, to be read and given effect in a way which is compatible with the Convention rights” because ASPs and instruments under ASPs are subordinate legislation for the purposes of that Act.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LR           | 28-Oct-98   | 1952          |

## **SECTION 102: Powers of courts or tribunals to vary retrospective decisions**

### **Purpose and Effect**

This section provides for a court or tribunal to remove, or limit any retrospective effect, or suspend any such effect, of a decision by it that an Act of the Scottish Parliament or a provision of it is *ultra vires* or that a member of the Scottish Executive did not have the power to make subordinate legislation that he has purported to make.

It also provides that one of the criteria the court or tribunal must take into account when determining whether to use this power is the extent to which third parties would otherwise be adversely affected. The section also provides that if a court or tribunal is considering using this power it must in certain circumstances intimate that fact to the Lord Advocate and the appropriate law officer who may then become a party to the proceedings so far as they relate to the possible exercise of the power.

### **General**

The courts may find that an ASP, or a provision in an ASP, is outside the legislative competence of the Parliament. Such an ASP or provision would be “not law” as is stated in section 29(1). In other words, the effect of that decision would be that such an ASP or provision would be void *ab initio* i.e. it would never have had legal effect from the date of its enactment or commencement.

Similarly, the courts may find that some subordinate legislation made by Scottish Ministers is *ultra vires* because, for example, the power to make the legislation did not transfer to Scottish Ministers under section 53 because it was not exercised within devolved competence (section 54) or simply because the power was exercised beyond the limits of the delegated power. Again, the effect of that decision would be that such subordinate legislation would be void *ab initio*.

Such decisions could cause difficulty particularly if they are made some years after the ASP or the subordinate legislation has purported to come into force. It is doubtful whether the courts have the power, at common law, to vary the retrospective effect of their decisions, such as to provide that the decision should only have effect from the date of the decision or from some date other than the date when the defective provision purported to come into force.

This section confers such a power. Such a power is thought to be necessary since the court or tribunal will, in this situation, be declaring invalid legislation (whether primary or secondary) that had, until that point, been considered to be perfectly valid. This power affords the courts and tribunals the power to protect those who had been acting on that basis. A court may, for example, limit any retrospective effect which its decision may have by providing that it should only take effect from the date of its decision or from some other time. It would also allow the court to preserve the legal effects of anything already done in reliance on the erroneous provision.

This section also empowers the court to suspend the effect of its decision for any period to allow the defect to be corrected. This would be appropriate where, for example, it was likely that the defect would be corrected by an ASP or by a remedial order under section 12 of the [Convention Rights \(Compliance\) \(Scotland\) Act 2001 \(asp 7\)](#) or by the UK Government in a Westminster Act or an order under section 30(2) or 107 of the Scotland Act.

In framing this section, account was taken of the similar provision in Article 172(1) of the Constitution of South Africa 1996.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 19-May-98   | 783           |
| LC           | 8-Oct-98    | 588           |
| LC           | 8-Oct-98    | 595           |
| LC           | 8-Oct-98    | 598           |
| LC           | 8-Oct-98    | 606           |
| <b>Stage</b> | <b>Date</b> | <b>Column</b> |
| LC           | 8-Oct-98    | 608           |
| LC           | 8-Oct-98    | 611           |

### **Details of Provisions**

Subsection (1) defines the circumstances in which the section will apply. It will apply where a court or tribunal decides that an Act of the Scottish Parliament or any provision in such an Act is not within the legislative competence of the Parliament or that a member of the Scottish Executive has purported to make, confirm or approve subordinate legislation when he had no power to do that.

The power itself is defined in subsection (2). If the court or tribunal makes such a decision, it may make an order to remove or limit any retrospective effect of that decision. It may also suspend the effect of the decision for any length of time and on any conditions to allow the defect in the Act or the subordinate legislation to be corrected.

Subsection (3) requires the court or tribunal, in deciding whether to make such an order, to have regard (amongst other things) to the extent to which third parties (i.e. those not a party to the proceedings in which the decision is made) would be adversely affected if

the power were not exercised. The court or tribunal may however also take into account other relevant criteria as it sees fit.

Subsection (4) provides that if a court or tribunal is considering using the power conferred by this section it must intimate that to the Lord Advocate and the appropriate law officer (where the decision relates to a devolution issue) if that person is not already a party to the proceedings. This ensures that, where a Law Officer has already been given intimation that the proceedings raise a devolution issue but he has chosen not to become a party to those proceedings, the Law Officer will be given intimation of the fact that the court intends to make an order under section 102 as it relates to a devolution issue. “Appropriate law officer” is defined in subsection (7). Rules of court which provide for the giving of notice are [S.I. 1999/1345](#) (Rule of Court 25A.12), [S.I. 1999/1346](#) (Rule 40.12) and [S.I. 1999/1347](#) (Rules 8.9).

Subsection (5) provides that when a person is given intimation in terms of subsection (4) he may participate in the proceedings so far as they relate to the making of the order.

Subsection (6) provides that paragraphs 36 and 37 of Schedule 6 apply, with necessary modifications, for the purposes of subsections (4) and (5) as they apply for the purposes of that Schedule. This, in effect, enables the courts, in deciding any question of costs or expenses, to take into account the fact that the Lord Advocate has taken part in the proceedings in consequence of this section; and makes clear that general powers to regulate the procedures before any court or tribunal include power to make provisions for the purposes of subsections (4) and (5).

Subsection (7) is a technical provision that defines “intimation” in this section as including notice. It also provides that the “appropriate law officer” is to be the Advocate General in relation to proceedings in Scotland, the Attorney General in relation to proceedings in England and Wales or the Attorney General for Northern Ireland in relation to proceedings in Northern Ireland.

SECTION 103: The Judicial Committee

### **Purpose and Effect**

This section provides for the membership of the Judicial Committee of the Privy Council in proceedings under the Scotland Act and enables certain powers to be conferred on the Judicial Committee in relation to such proceedings. It also provides that decisions of the Judicial Committee in these proceedings will be binding on all other courts.

### **General**

The White Paper on Scotland’s Parliament proposed in Chapter 4 that the Judicial Committee of the Privy Council should become the ultimate court of last resort on matters concerning the competence of the Parliament and the Executive.

This is reflected in:

- (a) section 33 which provides for scrutiny of Bills by the Judicial Committee following a reference by the Advocate General, Lord Advocate or the Attorney General within four weeks after its passing by the Parliament; and
- (b) Schedule 6 to the Act which defines devolution issues and provides for special procedures for proceedings raising such issues, including references of, or appeals upon, such issues to the Judicial Committee.

Section 103 provides for the membership of the Judicial Committee in proceedings under the Act and for the conferring of certain powers on the Judicial Committee in relation to such proceedings.



## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 204           |
| LC           | 8-Oct-98    | 614           |
| LC           | 8-Oct-98    | 620           |
| LR           | 2-Nov-98    | 108           |
| L3           | 9-Nov-98    | 592           |

## **Details of Provisions**

Subsection (1) provides that any decision of the Judicial Committee in proceedings under this Act shall be stated in open court. It also states that any such decision will be binding in all legal proceedings except proceedings before the Committee itself. This effectively means that the Judicial Committee's decisions will be binding on all other courts and tribunals but not binding on itself.

Subsection (2) provides for the membership of the Judicial Committee in proceedings under the Act.

Membership of the Judicial Committee normally includes the Lords of Appeal in Ordinary (Law Lords), the Lord Chancellor, the Lord Justices of Appeal and members of the Privy Council who have been judges in the higher courts of Commonwealth states.

Paragraph 4.17 of the White Paper proposed that membership of the Judicial Committee for the purposes of the Scotland Act should be restricted to the Law Lords and that at least 5 Law Lords should sit. However, this section extends membership to include those members of the Judicial Committee who are either serving or retired Law Lords or who hold or have held "high judicial office" as defined in section 25 of the Appellate Jurisdiction Act 1876. This will include serving and retired Lord Chancellor, judges of the Court of Session and judges of the English ( or Northern Irish) High Court or Court of Appeal.

Section 5 of the Appellate Jurisdiction Act 1887 is disapplied because this extends the definition of "high judicial office" to include members of the Judicial Committee (and Lords of Appeal in Ordinary). This would, therefore, undermine the intended restriction of membership for Scotland Act purposes.

Subsection (3) provides that Her Majesty may by Order in Council, in relation to proceedings under this Act, confer such powers upon the Judicial Committee as She considers necessary or expedient, make rules for regulating the procedure before the Judicial Committee and apply the Judicial Committee Act 1833 with exceptions or modifications.

This power has been exercised in making the Judicial Committee (Devolution Issues) Rules 1999 ([S.I. 1999/665](#)) and the Judicial Committee (Powers in Devolution Cases) Order 1999 ([S.I. 1999/1320](#)).

Subsection (4) defines "proceedings under this Act" which is used throughout this section. Effectively, the provisions of section 103 apply to cases where the competence of a Bill, or any provision of a Bill, have been referred to the Judicial Committee for decision (section 33) or where the Judicial Committee is considering a "devolution issue" as defined in Schedule 6.



**SECTION 104: Power to make provision consequential on legislation of, or scrutinised by, the Parliament**

This section enables Her Majesty or a Minister of the Crown by subordinate legislation, subject to procedure at Westminster, to make provision which is considered necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament or by various classes of subordinate legislation.

**General**

To be effective, an ASP may require consequential provision to be made to the law relating to reserved matters or the law elsewhere in the UK, such as, for example, to make cross-border provisions for prisoners. It may also be necessary to provide for the enforcement of provisions of an ASP in the rest of the UK where this may be necessary or desirable to maintain a coherent scheme of enforcement throughout the UK. An example might be legislation making the conditions of Scottish fishing licences enforceable as a matter of English law.

However, the legislative competence of the Parliament to make such consequential provision is extremely limited. It may be able to make certain consequential amendments of the law on reserved matters by virtue of paragraph 3 of Schedule 4 but this power is very limited and, in any event, it does not enable the Parliament to legislate otherwise than as a matter of Scots law. Many consequential provisions require to take effect in the law of England.

Similar problems also apply to subordinate legislation made under an ASP and certain other classes of subordinate legislation made under a Westminster Act, such as a statutory instrument made by Scottish Ministers under powers transferred under section 53 and which is subject to supervision by the Scottish Parliament.

Accordingly, this section enables the UK Government to make subordinate legislation to deal with the consequences of provision made by or under an Act of the Scottish Parliament or by such subordinate legislation.

**Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 8-Oct-98    | 624           |
| LR           | 2-Nov-98    | 96            |
| LR           | 2-Nov-98    | 98            |
| LR           | 2-Nov-98    | 109           |

**Details of Provisions**

Subsection (1) provides that subordinate legislation may make any provision considered necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament or made by certain subordinate legislation under a Westminster Act as mentioned in subsection (2).

Further provision about the making of such subordinate legislation is to be found in sections 112 to 115 and Schedule 7. It may take the form of an Order in Council or an order made by a Minister of the Crown. It is subject to negative procedure at Westminster unless it modifies an Act, in which case it is subject to affirmative procedure. An example of its exercise is the Public Finance and Accountability (Scotland) Act 2000 (Transfer of NAO Staff etc.) Order 2000 ([S.I. 2000/935](#)).

Subsection (2) specifies the classes of subordinate legislation under a Westminster Act to which subsection (1) applies. They are subordinate legislation made under a Westminster Act by:

- (a) a member of the Scottish Executive. This could be in the exercise of powers transferred by section 53 or by an executive devolution order under section 63;
- (b) Scottish public authority with mixed functions or no reserved functions. These expressions are defined in section 126(1) and paragraphs 1 and 2 of Part III of Schedule 5;
- (c) any other person (other than a Minister of the Crown) if the function of making the legislation is exercisable within devolved competence. This would include Orders in Council made by Her Majesty within devolved competence.

Such subordinate legislation will come under the control of the Scottish Parliament - see the note on section 118.

SECTION 105 - Power to make provision consequential on this Act

### **Purpose and Effect**

This section enables Her Majesty or a Minister of the Crown to make subordinate legislation, subject to procedure at Westminster, modifying any pre-commencement enactment, prerogative instrument or other instrument or document as is considered necessary or expedient in consequence of the Scotland Act.

### **General**

Given the wide implications of devolution, it would be impractical for the present Act to make provision for every modification of a pre-commencement enactment, prerogative instrument or other instrument or document which may be necessary as a consequence of the Act. Some modifications are, however, made in sections 117-123 and in Schedule 8.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 244           |
| LC           | 8-Oct-98    | 624           |
| L3           | 9-Nov-98    | 598           |

### **Details of Provisions**

The section provides that subordinate legislation may such make modifications of any pre-commencement enactment, prerogative instrument or other instrument or document as are considered necessary or expedient in consequence of the Scotland Act.

For the definition of “pre-commencement enactment”, see section 53(3).

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7. It may take the form of an Order in Council or an order made by a Minister of the Crown. It is subject to the negative procedure at Westminster unless it modifies primary legislation, in which case it is subject to the affirmative procedure.

This power has been exercised up to September 2001 in making:

The Scotland Act 1998 (Consequential Modifications) (No. 1) Order 1999 ([S.I. 1999/1042](#));

The Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 ([S.I. 1999/1820](#));

The Scotland Act 1998 (Consequential Modifications) Order 2000 ( [S.I. 2000/2040](#));

The Scotland Act 1998 (Consequential Modifications) Order 2001 ([S.I. 2001/1400](#)).  
SECTION 106: Power to adapt functions

### **Purpose and Effect**

This section confers power upon Her Majesty or a Minister of the Crown, by subordinate legislation, to make provision enabling or otherwise facilitating the transfer of a function to the Scottish Ministers (or its sharing with the Scottish Ministers or its other adaptation). Such subordinate legislation may, in particular, provide that certain functions can be exercised separately in or as regards Scotland or within devolved competence.

The section also provides that the Secretary of State's powers of intervention for international obligations under Section 58 apply to the Scottish share of an international obligation expressed in quantitative terms and not to the international obligation itself.

### **General**

This section complements:

section 53, which makes provision for the transfer to the Scottish Ministers of functions exercisable within devolved competence; and

section 63, which enables the "executive devolution" to the Scottish Ministers of additional functions so far as they are exercisable in or as regards Scotland, or their adaptation so that they are exercisable only after consultation, or agreement, with the Scottish Ministers.

Some functions require amendment before they can transfer to the Scottish Ministers under section 53 or in an executive devolution order under section 63 so as to make them exercisable separately in or as regards Scotland or before they can transfer under section 53 by making them otherwise separately exercisable within devolved competence. This would be the case, for example, where a function is expressly or impliedly confined by its terms to a UK or GB-wide exercise. The present section enables the functions to be split, or otherwise adapted, by means of subordinate legislation at the instance of the UK Government and with the approval of Westminster so that they can be transferred to the Scottish Ministers by virtue of section 53 or 63.

The section makes particular provision for European Community or international obligations expressed in quantitative terms. Where the subordinate legislation is to be used to split such an obligation so that part of the Ministerial function of observing and implementing it can be transferred to the Scottish Ministers, the order cannot be made unless they have been consulted. The section further provides that the Secretary of State's powers of intervention under section 58 can be used to ensure that the Scottish Ministers' share of such an obligation is met.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| CR           | 12-May-98   | 244           |
| LC           | 8-Oct-98    | 624           |
| LC           | 8-Oct-98    | 626           |
| LR           | 2-Nov-98    | 110           |

### **Details of Provisions**

Subsection (1) enables subordinate legislation to make provision to enable or facilitate the transfer of a function to the Scottish Ministers by virtue of section 53 or 63. Such provision may, in particular, include modifying that function.

Subsection (2) provides that such subordinate legislation may, in particular, provide that a function will be:

- (a) exercisable separately in or as regards Scotland; or
- (b) exercisable separately within devolved competence (as defined in section 54).

Subsection (3) provides that subsection (1) may also enable functions to be shared with the Scottish Ministers (thus enabling the UK Minister to continue to hold the function concurrently), or otherwise adapted (under section 63, for example, so that it can be exercised in or as regards Scotland only with the consent of the Scottish Ministers).

Subsection (4) provides that no recommendation shall be made to Her Majesty in Council to make, and no Minister of the Crown shall make, an order under this section if it modifies a function of observing or implementing an obligation mentioned in subsection (5) unless the Scottish Ministers have been consulted about the modification.

Subsection (5) provides that the obligations referred to subsection (4) are international obligations, or obligations under European Community Law, to achieve a result defined by reference to a quantity where the quantity relates to the UK or part of it.

Subsection (6) provides that references in section 58 (powers of intervention of the Secretary of State) to the international obligation are to be read as references to the requirement to achieve the Scottish Ministers' share of an obligation apportioned under subsection (4).

Subsection (7) provides that references to "Community Law" in sections 29(2)(d) (which provides that it is outwith the competence of the Scottish Parliament to legislate to make a provision which is incompatible with Community law), 57(2) (which provide that 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 Community law) and paragraph 1 of Schedule 6 (which defines "devolution issues") are to be read as including references to the Scottish Ministers' share of a Community obligation which has been apportioned under sub-section (4). The effect is that where the Scottish share of a quantitative EC obligation is transferred to the Scottish Ministers, it would be regarded as a matter of Community law and can be enforced on the same basis as any other function of the Scottish Ministers of observing and implementing a Community obligation.

Further provision about the making of subordinate legislation is to be found in sections 112-115 and Schedule 7. In particular, legislation under the present section can take the form either of an order made by a UK Minister or an Order in Council. It is subject to procedures in both Houses of the Westminster Parliament. Under Schedule 7, it may be subject either to negative or affirmative procedure except if it contains provisions which textually amend an Act, in which case it requires affirmative resolution in both Houses.

This power has been exercised up to September 2001 in making:

The Scotland Act 1998 (Modification of Functions) Order 1999 ([S.I. 1999/1756](#));

The Scotland Act 1998 (Modification of Functions) Order 2000 ([S.I. 2000/1458](#)).

#### SECTION 107: Legislative power to remedy ultra vires acts

##### **Purpose and Effect**

This section enables provision to be made by subordinate legislation to remedy a provision of an Act of the Scottish Parliament or an exercise of a function by a member of the Scottish Executive which is, or is suspected to be, outwith the competence of the Parliament/Executive. The power to make such subordinate legislation is exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order.

## General

This section forms part of the set of provisions which deal with the handling of *ultra vires* acts by the Scottish Parliament or the Scottish Executive; the power of the Judicial Committee of the Privy Council and the other courts in Scotland, England and Wales and Northern Ireland to deal with disputes about the *vires* of Acts of the Scottish Parliament; and actions of members of the Scottish Executive.

## Parliamentary Consideration

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 8-Oct-98    | 592           |
| LC           | 8-Oct-98    | 594           |
| LR           | 28-Oct-98   | 1952          |
| LR           | 2-Nov-98    | 96            |
| L3           | 9-Nov-98    | 598           |

## Details of Provisions

Section 107 provides a means by which problems resulting from *ultra vires* provisions of Acts of the Scottish Parliament or actions of a member of the Scottish Executive may be remedied.

It allows the UK Government, by subordinate legislation to make such provision as is considered necessary or expedient in consequence of any Act of the Scottish Parliament (or provision thereof) which is not, or may not be, within the legislative competence of the Parliament or any purported exercise by member of the Scottish Executive of a function which is, or is suspected to be, *ultra vires*.

The situations in which this power may be used would include a situation where, after judicial deliberation, it was determined that a provision of an Act of the Scottish Parliament, was *ultra vires*. This power would allow the ASP to be amended and enable provision to be made to remedy any consequential problems, for example, concerning rights purportedly accrued or liabilities purportedly incurred by virtue of the Act. Such provision could be given retrospective effect thus putting third parties in the position they thought they were in before the flaw was discovered. In that sense this power is complementary to the power given to the courts in section 102 to limit or suspend the effect of a determination of *ultra vires*.

However, a determination by the courts that a provision or action is *ultra vires* is not a prerequisite for the use of this power. It could be used to remedy a defect, or suspected defect, before judicial proceedings were commenced thereby avoiding the necessity for them.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

The only occasion where this power has been used was to repeal a provision in an ASP which was discovered to relate to a reserved matter during the 4 week period after its passing. Instead of referring it to the JCPC under section 33, it was agreed between the UK Government and the Executive that it should be repealed as soon as the ASP had received the Royal Assent - see The Scotland Act 1998 (Regulation of Care (Scotland) Act 2001) Order 2001 ([S.I. 2001/12478](#)).

SECTION 108: Agreed redistribution of functions exercisable by the Scottish Ministers etc.

## **Purpose and Effect**

This section enables Her Majesty, by Order in Council, subject to the agreement of both the Westminster and the Scottish Parliament, to provide for functions exercisable by a member of the Scottish Executive to be transferred to a Minister of the Crown. It also enables such functions to be made exercisable concurrently with a Minister of the Crown or subject to special requirements

## **General**

There are two main circumstances in which it is envisaged that an Order is likely to be made under this provision, namely where it is desired:

- (a) to re-transfer functions back to a Minister of the Crown which have been executively devolved to the Scottish Ministers by an order under section 63; and
- (b) to transfer functions of the Scottish Ministers to a Minister of the Crown as a consequence of an Order under section 30(2) adding a new reserved matter into Schedule 5.

The provision could also be used to enable UK Ministers to exercise certain functions on a UK-wide basis, for example, in relation to the collection of certain statistics.

Section 56 provided an alternative mechanism for UK Ministers to retain concurrent powers in devolved areas, but that mechanism cannot be used after the function in question has transferred to the Scottish Ministers. Most of the functions under section 53 transferred on 1 July 1999.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 8-Oct-98    | 631           |
| LC           | 8-Oct-98    | 634           |
| LR           | 2-Nov-98    | 112           |

## **Details of Provisions**

Subsection (1) provides for Her Majesty, by Order in Council, to provide for the transfer of functions exercisable by a member of the Scottish Executive to a Minister of the Crown, or for such functions to be exercisable by a member of the Scottish Executive concurrently with, or with the agreement of, or after consultation with a Minister of the Crown.

Subsection (2) provides that where such an Order transfers to a Minister of the Crown a function which is exercisable only with the agreement of, or after consultation with, the Scottish Ministers, the First Minister or the Lord Advocate, that requirement is disapplied unless the Order provides otherwise. Requirements for consultation or agreement with other persons are not affected.

Subsection (3) provides that where an Order provides for a function to be transferred to a Minister of the Crown or to be exercisable by a Minister of the Crown concurrently with a member of the Scottish Executive, it may provide for it to be exercisable with the agreement of, or after consultation with, another person.

Subsection (4) provides that the section does not apply to those retained functions of the Lord Advocate which were exercisable by him immediately before he ceased to be a Minister of the Crown. Retained functions are defined in section 52(6).

SECTION 109: Agreed redistribution of property and liabilities

## **Purpose and Effect**

This section provides for the transfer of property, rights or interests from the Scottish Ministers or the Lord Advocate to a Minister of the Crown or a government department. It is to be used primarily in connection with the transfer of functions from the Scottish Ministers, First Minister or Lord Advocate to the UK Government under section 108.

## **General**

The power is similar to that in sections 60 and 62 (which provide for transfers of property to the Scottish Ministers and Lord Advocate), except that it may only be exercised by Her Majesty in Council and is subject to annulment by either Parliament.

## **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 8-Oct-98    | 624           |

## **SECTION 110: Scottish taxpayers for social security purposes**

## **Purpose and Effect**

This section provides 2 order-making powers to enable the Secretary of State to take account of the implications of varied Scottish rates of income tax for social security, child support, pension and war pension purposes. They allow him, for those purposes, to determine whether a person is or is not to be treated as a Scottish taxpayer, and to specify what shall be treated as the Scottish rate of tax in any year of assessment.

The intention of the provisions is to ensure that benefit decisions can be made promptly without uncertainty over the appropriate tax rate to apply, where tax is relevant to benefit entitlement. In the great majority of cases, the powers will have no effect on benefit entitlement. They will reduce administrative costs which would otherwise arise, and prevent inconvenience to claimants both in Scotland and in the rest of the UK.

## **General**

This section is necessary because of the provisions in Part IV of the Act which enable the Scottish Parliament to vary the basic rate of income tax in respect of Scottish taxpayers, and in some circumstances to do so after the start of the tax year. It ensures that the Parliament's exercise of its powers can be accommodated without disruption to the reserved social security, child support and pension systems.

The order-making powers are applicable for all reserved matters under Head F of Part II of Schedule 5, although it is expected that their main use will be in relation to social security benefits and child support.

Entitlement to many social security benefits, including the main income-related benefits of Jobseeker's Allowance, Income Support, Family Credit and Housing/Council Tax Benefit, is assessed on income net of tax and National Insurance contributions. Where the Scottish Parliament exercises its power to vary the basic rate of income tax, it is necessary to determine whether a benefit claimant should be treated as a Scottish taxpayer in order to pay the right amount of benefit. The criteria set out in section 75 to decide whether or not a person is a Scottish taxpayer are (like other tax matters) designed to apply over a full year. But in order to make a clear decision for benefit purposes, it is necessary to know whether a person is a Scottish taxpayer or not at the point of claim.

Section 75 provides, in certain circumstances, for changes in the Scottish rate of tax at short notice and after the start of the tax year. It would present operational difficulties



for the social security system to reflect changes at very short notice, and could mean that large numbers of benefit claims decided before a tax change might need to be re-examined.

The section provides powers to put the benefit position beyond doubt in both these cases, by specifying who is regarded as a Scottish taxpayer for benefit purposes and what the relevant rate of tax should be.

### **Details of Provisions**

Subsection (1) provides an enabling power to allow the Secretary of State to treat individuals of any description specified in the order as - or as not - a Scottish taxpayer for the purpose of any reserved matter set out in Head F of Part II of Schedule 5 (social security, child support, pensions - including public service pensions - and war pensions). Its main purpose is to remove uncertainty and the risk of delay in the assessment process, and to preclude the need to ask all benefit claimants, including claimants in England, about connections in Scotland. It is intended to exercise the power so that for benefit and child support purposes a person's address at the time of assessment will normally be the determining factor in deciding whether or not the Scottish tax rate should apply. In the overwhelming majority of cases, this administrative easement will have no effect on the amount of benefit.

Subsection (2) provides an enabling power to allow the Secretary of State to specify what shall be treated as the Scottish rate of tax for the purposes of social security, child support and pensions. The intention is to remove uncertainty over the relevant rate of tax, particularly for claims assessed in any part of a year before the Parliament passes a tax resolution.

Subsection (3) provides that orders under this section can apply to individuals irrespective of whether they are more closely connected with Scotland or another part of the United Kingdom for the purposes of Part IV.

Subsection (4) defines "Scottish taxpayer" by reference to in Part IV.

SECTION 111: Regulation of Tweed and Esk fisheries

### **Purpose and Effect**

This section provides for the making of an Order in Council for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Rivers Tweed and Esk - thus enabling continuation of whole river fisheries management, following the devolution of fisheries matters in Scotland.

### **General**

This section provides a means to ensure continuation of a coherent legislative framework for the two Border rivers, applying consistently on both sides of the border. This is considered necessary in order to ensure effective fisheries management for the river systems, including their tributaries.

Salmon and freshwater fisheries management on the Tweed is governed by the Tweed Fisheries Acts 1857-1969, which provide for a River Tweed Council, drawn from the Tweed Commissioners, with rules particular to the Tweed governing fishing and applicable throughout the whole Tweed river system, including the Tweed Box (an area of inshore sea at the mouth of the Tweed at Berwick). In addition, certain provisions of Scottish public legislation governing salmon and freshwater fisheries also apply throughout the Tweed, even in England, and English fisheries legislation is disapplied.

For the Border Esk, fisheries management is governed in accordance with English legislation and Scottish legislation is disapplied, except for one provision (section 21 of the Salmon and Freshwater Fisheries (Protection)(Scotland) Act 1951) which makes it



an offence in Scots law to take salmon illegally from the Esk in Scotland. Management of the Esk fisheries is a function of the Environment Agency.

The Scottish Parliament is able to exercise jurisdiction over the matters covered by this section but only within Scotland: the Scottish Parliament is restricted by virtue of section 29(2)(a) from making laws which would form part of the law of England. An Order in Council made under the present section enables common provisions to be made for the length of the Tweed and Esk Fisheries and to perpetuate the single fisheries regime which existed for these rivers before devolution.

Fisheries management applies to all freshwater species, and also to salmon, migratory trout and eels, which are not solely freshwater fish.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

### **Parliamentary Consideration**

| <i>Stage</i> | <i>Date</i> | <i>Column</i> |
|--------------|-------------|---------------|
| LC           | 8-Oct-98    | 634           |
| LC           | 8-Oct-98    | 640           |
| LR           | 2-Nov-98    | 113           |
| L3           | 9-Nov-98    | 545           |

### **Details**

Subsection (1) provides for provision to be made by Order in Council for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Border rivers (as defined in subsection (4)). This extends to fishing for all species commonly found in freshwater, including notably the two species of most commercial importance in these rivers (i.e. salmon and trout). It is intended that such an Order in Council would include provision to establish management structures and procedures for such bodies; to establish rules applying directly to fishing activity (e.g. permitted fishing gear, close seasons); to levy charges to recover the costs of fisheries management; to create offences and empower enforcement authorities for the river and its catchment area; and to regulate such activities as may impact on fishing (e.g. dams and offtakes).

Subsection (2) provides that an Order in Council under subsection (1) may exclude the application of section 53 in relation to any Border rivers function, and may confer power to make subordinate legislation. Section 53 would otherwise transfer to the Scottish Ministers any function of a Minister of the Crown so far as it is exercisable within devolved competence.

Subsection (3) provides that an Order in Council under subsection (1) may confer functions on a Minister of the Crown, the Scottish Ministers or a public body in relation to the Border rivers, provide for existing functions to be exercisable by some other person, and provide for functions to be exercisable concurrently or jointly with, with the agreement of, or after consultation with, some other person.

Subsection (4) contains definitions particular to this section. Definitions of the fish species rely on the Salmon and Freshwater Fisheries Act 1975. In that Act:

*Eels* includes elvers and the fry of eels.

*Freshwater fish* means any fish living in fresh water exclusive of salmon and trout and of any kinds of fish which migrate to and from tidal waters, and of eels.

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

*Salmon* means all fish of the salmon species and includes parts of salmon.

*Trout* means any fish of the salmon family commonly known as trout, including migratory trout and char, and also includes part of a trout.

This provides a comprehensive definition of fish species to be subject to management regulations made by Order in Council.

“The River Tweed” is defined by reference to section 39 of the Salmon and Freshwater Fisheries Act 1975, which in turn refers to the definition contained in the Tweed Fisheries (Amendment) Act 1859, as itself amended by any bye-laws amending that definition. Section II of the 1859 Act defines the Tweed to include “every river, brook or stream which flows into the said river, and also the mouth or entrance of the said river, as described and defined in the Act”. Section IV of that Act (as amended by a Byelaw dated 30 September 1863) made under the Salmon Fisheries (Scotland) Act 1863 defines the mouth or entrance of the Tweed (commonly known as the Tweed Box) to include an area extending 5 miles out to sea and from the Scottish border to a point 7 miles south of the Queen Elizabeth pier in Berwick.

“The River Esk” is not otherwise defined in statute, and is therefore defined as being the river which, for part of its length, constitutes the border between England and Scotland; including its tributary streams (including the River Sark and its tributary streams) and such waters on the landward side of its estuary limits as are determined by an Order under subsection (1), together with its banks.

Subsection (5) provides that an Order under subsection (1) may modify the definition of the rivers Tweed and Esk contained in subsection (4) above.

This power has been exercised in making the Scotland Act 1998 (Border Rivers) Order 1999 ([S.I. 1999/1746](#)).

## **Part VI: Supplementary**

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

#### **General**

The Scotland Act 1998 contains nearly 40 separate powers to make subordinate legislation. These powers vary widely in scope and importance, with some intended for single use and others forming part of the mechanism for the long-term management of the devolution arrangements. The powers are to be exercised by the UK Government, the Scottish Ministers or by Her Majesty in Council, and are generally subject to parliamentary scrutiny in the United Kingdom Parliament, the Scottish Parliament or both.

Sections 112 to 115 and Schedule 7 draw together the provisions relating to the extent of these powers, to the procedure required in the Westminster and/or Scottish Parliaments, and to the person by whom each power is exercisable. This approach avoids the need to specify these matters in each section, thus simplifying the overall structure of the Act.

Section 113, and 114 contains standard provisions commonly accorded to powers to make subordinate legislation, such as an ability to make supplementary provision, to delegate functions and to charge sums on the Consolidated Fund. In certain cases, particularly where the UK Government is empowered to take action as a result of action of the Scottish Parliament or Executive, subordinate legislation may make provision having retrospective effect.

Each of the powers conferred elsewhere in the Act require to be read together with these sections.

The table at the end of this note shows the effect of sections 112 to 115 and Schedule 7 for each power.

## **Details of Provisions**

Subsection (1) provides that where no other provision is made as to the person by whom a power is exercisable, then it is to be exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order. Subsection (3) provides that such powers are to be referred to as "open powers".

Such powers are generally expressed in the form "Subordinate legislation may ..." and are to be found in sections:

|        |  |
|--------|--|
| 56(2)  | concurrent exercise of functions;  |
| 60     | transfer of property etc. to the Scottish Ministers;                                 |
| 62     | transfer of property etc. to the Lord Advocate;                                      |
| 60     | transfer of property etc. in connection with functions transferred under section 63; |
| 107    | power to remedy <i>ultra vires</i> acts;   |
| 104    | power to make provision consequential on Acts of the Scottish Parliament;            |
| 105    | power to make provision consequential on the Scotland Act;                           |
| 106    | power to adapt certain Ministerial and other functions;                              |
| 116(9) | determination of disputes over compensation relating to transfer of property;        |
| 115(3) | power to make transitory and transitional provision;                                 |
| 124(1) | modification of sections 94 and 117-122;   |
| 129(1) | transitional provisions etc.   |

It is also found in paragraph 2 of Schedule 2 relating to the transfer of property etc. to the Scottish Parliamentary Corporate Body.

These open powers are similar to the power in section 1 of the European Communities Act 1972, which may be exercised by either a Minister of the Crown by order or by Her Majesty by Order in Council.

Powers to make subordinate legislation are normally conferred on either a Minister of the Crown (or the Treasury) by order, or on Her Majesty by Order in Council. The Act contains examples where powers are allocated in this way. For example, the powers in section 103 in connection with the Judicial Committee of the Privy Council are to be exercised by Her Majesty by Order in Council. Powers connected with the finance provisions and the tax-varying powers are generally exercisable by the Treasury. Powers which are subject only to proceedings in the Scottish Parliament are exercisable by Her Majesty by Order in Council (except section 18(5)). Powers in relation to the conduct of elections are exercisable by the Secretary of State (section 12).

This section provides a novel power for subordinate legislation to be made either by a Minister of the Crown by order or by Her Majesty by Order in Council where there is no other provision in the Act as to the person by whom the power is exercisable. This is known as an "open power". This reflects in part the wide scope of some of the powers and the fact that different uses of any power may have very different levels

of importance. For example, a minor consequential provision could be made by order made by a Minister of the Crown under section 105 whereas it might be more desirable for a significant amendment of primary legislation to be made by Order in Council under that section. The section also enables affirmative resolution procedure to be used in the Parliament or Parliaments concerned in the case of the exercise of an open power, unless the Act provides expressly that subordinate legislation under a particular provision must be an affirmative instrument, and permits a statutory instrument under an open power to be combined with another order or Order in Council as appropriate. These provisions are similar to those in section 2(2) of and paragraph 2(2) of Schedule 2 to the European Communities Act 1972, which permits Community rights and obligations to be incorporated in UK law by Order in Council or in regulations made by a designated Minister, with the option of using affirmative or negative resolution procedure.

Any statutory instrument made in exercise of an open power is only subject to procedure in the Westminster Parliament.

Subsection (2) provides for an exception from the general rule about the exercise of open powers by requiring that the power under section 129(1) (transitory or transitional provision in connection with the coming into force of the Scotland Act) is to be exercisable only by Her Majesty by Order in Council where it is used to provide for appropriation of sums forming part of the Scottish Consolidated Fund or for appropriations in aid. Also of relevance in these circumstances is paragraph 4 of Schedule 7, which requires such orders to be subject to a different type of parliamentary procedure (affirmative rather than negative). Subsection (3) also provides that references to an open power include section 129 when used in this way, even though specific provision has been made as to the person who may exercise it.

The power in section 129(1) was exercised in this way in making the Scotland Act 1998 (Transitory and Transitional Provisions) (Appropriations) Order 1999 ([S.I. 1999/674](#)) which provided for appropriations and appropriations in aid for the financial year 1999-2000, for which also see [S.S.I. 1999/175](#) and [2000/69](#)).

Subsection (4) provides that an Order in Council under an open power may revoke, amend or re-enact an order, as well as an Order in Council, already made under that power (and vice versa). This complements section 14 of the Interpretation Act 1978, which provides for the revocation etc. of orders. This provision is necessary to ensure that the exercise of a power is not constrained by any earlier exercise of it.

Subsection (5) provides that any power to make subordinate legislation, in relation to its exercise by a Minister of the Crown or a member of the Scottish Executive, is to be exercisable by statutory instrument. This attracts provisions of enactments such as the Statutory Instruments Act 1946, which make general provision about the making of subordinate legislation.