

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

SCOTLAND ACT 1998

EXPLANATORY NOTES

POWERS TO MAKE SUBORDINATE LEGISLATION

SECTION 113: Subordinate legislation: scope of powers

Details of provisions

Subsection (1) effectively provides that the rest of the provisions of the section apply to any power under the Act to make subordinate legislation which is exercisable by Her Majesty by Order in Council or by a Minister of the Crown by order (whether the power is expressed to be exercisable by these persons or it is an open power, in which case section 112(1) applies).

The only power to make subordinate legislation under the Act which is thereby excluded is the power under section 18(5) which is exercisable by the Scottish Ministers, and for which none of the remainder of this section would be relevant.

Subsection (2) permits subordinate legislation to make different provision for different purposes.

Subsection (3) provides that, as well as being exercised in relation to all cases to which it extends, a power may be exercised in relation to any particular case or class of case, or to all cases subject to exceptions. This power is likely to be of relevance to the power in section 110 to treat individuals as being, or as not being, Scottish taxpayers.

Subsection (4) provides that subordinate legislation may make such supplementary, incidental or consequential provision and such transitory, transitional or saving provision as the person making it considers necessary or expedient.

Subsections (5) and (6) provide that subordinate legislation may modify any enactment or prerogative instrument or other instrument or document, provided that the instrument is subject to one of the forms of parliamentary procedure provided in Schedule 7. This therefore excludes powers such as that in section 103(3)(c) to make rules of procedure for the Judicial Committee of the Privy Council, which are not subject to parliamentary procedure.

Subsection (6) provides that this power does not extend to modifying the Scotland Act itself or subordinate legislation made under it. Section 114, however, permits certain subordinate legislation to make such modifications.

"Modify" is defined by section 126(1) as including amendment and repeal. Where this power is used to modify primary legislation, the special provisions in paragraph 3 of Schedule 7 affect the parliamentary procedure to which the instrument is to be subject.

Section 30(4) makes its own provision about modification of enactments etc. including the Scotland Act and subordinate legislation under it.

Subsection (7) permits subordinate legislation under the Act to make provision for the delegation of functions. This makes clear that the rule against sub-delegation does not apply.

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

Subsection (8) provides that subordinate legislation under the Act may make provision for sums to be payable out of, or charged on, the Scottish Consolidated Fund.

Subsection (9) provides that subordinate legislation under the Act may provide for sums to be paid out of money provided by Parliament or to be charged on and paid out of the Consolidated Fund.

Subsection (10) restricts the punishment which can be imposed for criminal offences created in subordinate legislation made under the Act. The power to create offences does not need to be expressly conferred, but this provision limits its extent. The approach is similar to that in the European Communities Act 1972.

Subsection (11) ensures that powers to make subordinate legislation under the Act are not exclusive, i.e. the fact that a particular thing can be done under one power does not mean that the same thing cannot be done under another power.